

ELIMINATION OF EMPLOYMENT DISCRIMINATION OF THE PERSONS WITH DISABILITIES: INTERNATIONAL STANDARDS AND UKRAINIAN LEGISLATION

Employment discrimination is one of the factors resulting in a high rate of the unemployed the the persons with disabilities who would like to get a job. This is not only a social problem but economic as well. The paper aims to analyze the existing international and Ukrainian legal regulations for the persons' with disabilities employment, particularly the issues of discrimination in employment, possible positive discrimination, and the economic and social effect of an increasing number of the employed persons with disabilities.

Keywords: employment of the persons with disabilities, discrimination in employment, social security, right to work.

Introduction

According to statistics there are over 2.6 million persons with disabilities in Ukraine. But only 11912 persons were employed in 2015, statistical data reads. High rate of unemployment among persons with disability is common problem for many European countries. Ukraine has post-soviet social, legal and still economic background, which combines quite different aspects of persons with disabilities social protection and employment, ranging from neglecting problem of disabled persons' unemployment to leading paternalistic policy of social security towards them, which does not include employment as priority for rehabilitation and social self-realization of persons with disabilities. There are many factors explaining low employment percentage of disabled persons in Europe and in Ukraine particularly. One of those factors is discrimination of persons with disability through all their life long period of social development, including general and professional education, access and involvement in social life of community, employment and social security. Of course, there are other factors as well, such as psychological and economic reasons for preferring social protection benefits to employment wages, fear to forfeiture of social benefits after entering into employment contract. There are some means aimed to promote persons' with disability employment under Ukrainian laws providing both economic and administrative tools.

The Law of Ukraine On the Basis of Social Protection of Persons with Disabilities in Ukraine provides obligation for employers to employ persons

with disabilities in quantity over 4 % of average yearly quantity of employees. If an employer disregarding the reasons does not meet requirements of the law concerning persons with disability employment, there are relatively high financial sanctions applicable to employer. On the other hand, there some economic tools stimulating employer to hire persons with additional guarantees for their employment. For instance, there are some privileges in taxation, partial compensation of wages, provided by Law of Ukraine On Employment (2012).

So, according to international standards, implemented in national legislation, the legislator in Ukraine prescribes a number of measures to increase employment rates of persons with disabilities and secure equal opportunities on labour market for those people, such as quotas, privileges in taxation, non-discrimination in employment legal provisions. Never the less, there are many of persons with disability unemployed, and discrimination is one of the reasons why. Some employers prefer rather to pay financial sanctions than hire persons with disabilities; others try to bypass the law formally fulfilling their obligation, employing persons with disability just to meet legal requirements and without real employment relationship exercising.

Thus, one of the reasons of low employment of persons with disabilities is employment discrimination.

1. Discrimination in the field of employment on the grounds of disability

Equality is one of the fundamental principles declared and internationally recognized. The Universal Declaration on Human Rights in article 1 proclaims

all human beings are born free and equal in dignity and rights [1, p. 4]. It means the principle of equality is applicable to all humans and is obligatory for implementation and secured by State. Everyone is equal in his or her dignity and rights by birth, and this principle is applicable because of human nature regardless any features of difference between humans. The principle of equality is a core of non-discrimination as modern tenet in human rights law.

The principles of equality and non-discrimination are applied in many areas, and they are especially important at the employment and labour law. Moreover, the principle of non-discrimination belongs to a list of Fundamental Principles and Rights at Work, proclaimed within Declaration of International Labour Organization in 1998 [2]. Thus, the Declaration commits Member States to respect and promote four categories of rights and principles, such as freedom of association and the effective recognition of the right to collective bargaining, the abolition of child labour, the elimination of forced or compulsory labour, and the elimination of discrimination in respect of employment and occupation. Those principles and rights are universal and apply to all people in all States regardless economic development and participation in international conventions.

Due to accelerating pace of development, globalization and integration process, the gap between declared and actual equality became more evident, exposing situation with discrimination worldwide. In the mean time, increasing number of persons with disabilities and uneven development in the world make problem of persons with disability discrimination more painful and demanding its elimination with proper and effective means.

As per information by ILO, the people with disabilities make up an estimated one billion persons over the world, 785 million of which are of working age, but the majority do not work. There are many employees with disabilities working in all sectors of economy, and in all types of roles, making their contribution to the world of work. The same time, having those persons employed means better living conditions for them, steady income and active social life. And in the contrary, excluding persons with disabilities from labour force results in GDP losses, as per study done by ILO [4]. Low employment rate of persons with disability may be explained by little opportunities or abilities for education. But there are multiple means for adjustment of working place and including children with

disabilities into education, which would make their future entering into labour market easier.

Actually, employment relationship is based on inequality of the parties, since employment contract presupposes employee subordinating to employer, which is in charge to arrange conditions necessary for employment performance. Therefore employer is empowered to develop employment relationship without discrimination. In addition to economic dominance, employer has authority to manage his relationship with employee. The employer has legal prerogatives to control the work of his employees, as apply liability measures to employees for breach of the employment contract or local official rules. But precondition for employment subordination is equal right to work exercised without compulsion. This is why non-discrimination labour laws are built to secure equal rights even before commencing of employment relationship and till termination of the employment contract.

The persons with disabilities are very vulnerable in employment relationship. They are facing multiple barriers or impediments on the way to employment literally and figuratively. They need protection or some measures to facilitate their employment. The State has to provide necessary legal advantage or privileges to compensate persons' with disabilities impediments.

As per statement of Kamal Lemichhane, the major difficulty faced by persons with disabilities in their attempt to enter labour market, is that employers mistakenly consider these people not able to perform their function good enough. Besides that, many employers are not willing to hire persons with disabilities because of existing physical obstacles on the working place, and it would require unwarranted investment to provide facilities for employees with disabilities [5, p. 30].

The situation with employment discrimination is more difficult regarding women with disabilities who are subject to discrimination based on multiple characteristics, particularly disability and sex. Again employers are unlikely to hire women with disability due to possible future unstable employment relationship, possible maternity long leave and likely further termination of the contract. As per publication of psychological study of patterns of discrimination in hiring job applicants with disabilities in the USA, the stereotyping and discrimination in employment decisions apparently persist, more than 10 years after the An Americans with Disabilities Act [6, p. 180-181]. So this is not only Ukrainian problem. Similar problems exist in the USA and European countries.

2. International legal framework for counteracting discrimination of persons with disability in employment

As we have stated above, the problem of discrimination and persons' with disabilities rights protection needs comprehensive legal regulation. Since equality and non-discrimination are undisputable and widely recognized principles, international legal framework includes universal international documents, regional and bilateral agreements between States. Having quoted Universal Declaration on Human Rights and ILO Declaration on Fundamental Principles and Rights at Work earlier in this publication, it is worth to add reference to article 7 of the Universal Declaration on Human Rights, which reads "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination" [1, p. 4]. The Declaration directly prohibits discrimination in employment proclaiming in article 23 right of everyone to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; as well as right to equal pay for equal work without any discrimination [1, p. 6]. Let us move to other international conventions and covenants committed to elimination of discrimination of persons with disabilities in general and in employment particularly.

The International Covenant on Economic, Social and Cultural Rights (1966) in article 2 reflects obligation of States Parties to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind. Particularly, according to the Covenant, States are obliged to safeguard right to work of everyone (article 6), to provide "fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work" and equal opportunity in promotion at work (article 7) [7].

The UN Convention on the Rights of Persons with Disabilities (2006, hereinafter CRPD) became the most significant event in international protection of persons with disabilities against discrimination. Under article 5 of the CRPD "States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law" [8]. In order to promote equality and eliminate discrimination, Parties of the CRPD shall take all ap-

propriate steps to ensure that reasonable accommodation is provided, to accelerate or achieve actual equality of persons with disabilities, and such measures should not be considered discriminatory under the terms of this Convention.

The right of persons with disabilities on equal basis with other persons is recognized and affirmed by the CRDP. Moreover, the article 27 of the CRDP directly prohibits "discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions". Ukraine has ratified CRDP in 2009, so provisions of this Convention are obligatory to Ukraine as to other 172 Parties. Equal right to work of persons with disabilities means opportunity to earn for living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. It is important to emphasize that persons' with disabilities right to employment without any discrimination includes self-employment, as well as employment in private and public sector.

According to article 1 of ILO Convention 111, employment discrimination includes "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" [9]. In the mean time, such distinction, exclusion or preference shall not be deemed discrimination if based on inherent requirements of particular job.

The European Convention on Human Rights contains prohibition of slavery and forced labour (article 4) as well discrimination on any ground regarding enjoyment of rights and freedoms set forth by Convention (article 14) [10]. The European Social Charter (Revised) is more dedicated to the issues of employment discrimination of persons with disabilities. Especially, the article 15 of the Charter constitutes the right of persons with disabilities to independence, social integration and participation in the life of community irrespective to age, nature and origin of disability [11, p. 8]. It is important to highlight that Parties of the Charter undertake, in particular, promotion access of the persons with disabilities to employment through all measures of encouraging employers to hire such persons. With a view to social integration of persons with disabilities, employment in the ordinary working environment is preferable, where it is possible.

So, the main idea of international regulation on employment discrimination of persons with disabilities is protection of right to work of those persons and inclusion them into community on equal basis provided necessary adaptation had been made. It is very important to create accessible and barriers free environment allowing persons with disabilities to develop their personal and professional abilities.

3. Ukrainian legal regulation and exercising of right to work of persons with disabilities in Ukraine

It is worth to underline that Ukraine develops national legislation for protection of social and economic rights of persons with disabilities in accordance to international standards and fundamental conventions in this sphere. Never the less, more detailed analysis of laws regulating rights of persons with disabilities as well as non-discrimination laws shows some weak points in regulation, which reflects in non-satisfactory real safeguarding employment rights of disabled persons. There is some misperception of persons with disabilities in society as well. It is still not usual to see those persons equally and widely represented both in public and private sectors of economy. Actually, there is a gap existing between desirable and real situation with employment of persons with disabilities. Let's start from legal regulation in this sphere.

According to article 3 of the Constitution of Ukraine, "Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State" [3, p. 2]. The Constitution clearly and comprehensively stipulates on equality in dignity and rights of all people, as well as on inalienable and inviolable of human rights (article 21). The freedom of development of every person's personality (but not to the extent of other persons' rights and freedoms violation) is guaranteed by Article 23 of the Constitution of Ukraine. In the mean time, the right to free development of personality means fulfilling duties before the society, where one's personality develops.

Regarding non-discrimination Ukrainian Constitution proclaims citizens equal in their constitutional rights and freedoms before the law (article 24). Besides that, the Constitution provides not exhaustive number of characteristics, which shall not be a ground for any privileges or restrictions. Those characteristics are race, colour of skin, beliefs, sex,

origin etc. Unfortunately, disability as possible ground for discrimination is not listed in article 24 of Constitution of Ukraine, in contrary for instance to gender equality issue, which is clearly stipulated in paragraph 3 of the referred article. But conform to article 43, the Constitution declares obligation of the State to create conditions for equal opportunities in the choice of profession, as well as labour activity. It means Ukraine takes necessary measures to equal opportunities for persons with disabilities compared to opportunities of person without disabilities.

Basically, the Law of Ukraine On the Basis of Social Protection of Persons with Disabilities in Ukraine (1991, hereinafter BSPPDU) is the core normative act in the system of legal regulation for non-discrimination of persons with disabilities. According to the named Law, any discrimination of persons with disability is forbidden. The Law establishes the basis of social protection of persons with disabilities and guarantees equal to other citizens' opportunities for participation in economic, political and social spheres of life. The right to work of persons with disabilities is clearly stated in article 17 of the Law BSPPDU as right to employment and entrepreneurship and other not forbidden by law business. When it is necessary, the employers may create special working places for persons with disability, financed by Fund for Social Security of Persons with Disabilities, by local authorities or by businesses themselves. The article 17 of the Law BSPPDU provides, that the refusal to hire a person with disability (as well as to give promotion), and termination of employment contract by incentive of employer, on the ground of disability, is not allowed (unless health condition does not meet professional duties).

So there are some active (e.g. creation of specialized working places for persons with disabilities) and passive (withholding form abusing right to work of a person with disability) measures for protection of right to work of persons with disabilities.

Similar to widespread policy of using quotas for employment of disabled persons, there is quotation according to Ukrainian regulations. There are some pros and contras on quota-levy system implementation. For instance, Assistant Prof. Ljubinka Kovacevic draws attention to advantages of quota-levy system for employment of persons with disabilities, particularly contribution to the employment of persons with disabilities. In the mean time, the author pays attention to threatening principle of integration of disabled person into society due to mandatory

nature of quota system. Since alternative to employment of persons with disability is paying penalty as a sanction or avoiding any liability, the effectiveness of quota-levy system is quite dubious [12, p. 65-66].

We should acknowledge, there are some European states (e.g. Denmark, Sweden) which do not apply quotas for employment of persons with disabilities, but set up an effective system of non-discrimination on the ground of disability. Ukrainian social law system provides combination of quota-levy and anti-discrimination at employment to secure persons with disability exercising their right to work.

The aforementioned Law BSPPDU provides different quotas for employment of persons with disabilities depending on average staff quantity and financing sources. First of all, the employers with average yearly number of employees under 8 persons are not obliged to hire a person with disability according to the Law. The mandatory quota for employment of one person with disabilities is provided by Law for employers having staff from 8 to 25 employees in average yearly quantity. The quota for employment of disabled persons by the employer with average yearly quantity of employees over 25 persons makes 4 per cent of total staff quantity.

It is worth to mention, that employers not fulfilling given quotas of working places dedicated to persons with disabilities are subject to financial sanctions. The amount of fine is half of yearly average on the enterprise salary (for employers with average staff ranging 8 to 25 employees) or whole amount of yearly average salary (for employers hiring over 25 persons). In the mean time, the mandatory quotas are not spread upon employers financed from state budget (article 20 Law BSPPDU), and this is discriminatory regulation towards private owned employers, in our opinion. Moreover, public sector must demonstrate the standards and best practices of employment persons with disability. We are expecting employers to act as social oriented business representatives, to treat vulnerable categories of employees, who are not able to compete on equal basis with persons without any impairment, without any discrimination. But public sector enterprises and organizations, which are financed from state or local budgets, are taken away from mandatory tools for employment persons with disabilities.

On the other hand, there are some employers doing business in hazardous or heavy industry, where employment of persons with disabilities is forbidden or not suitable conform to a medical conclusion for rehabilitation. So those employers acting on

their good faith are not able to hire persons with disabilities, unless they create extra working place which are not necessary for business carried out. Thus, the penalty for working places not occupied by disabled persons will become a kind of levy.

There is one more discrimination related problem in the field of employment. The law in Ukraine rules to do working place adjustment to accommodate it for work of person with disability. Of course, it demands extra human, administrative and financial investment to do adjustment. In the periods of economic crisis, shrinking of business this topic would be quite difficult to do.

As per article 2 of CRPD "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

Law of Ukraine on Principles of Prevention and Combating Discrimination in Ukraine (2012) gives definitions of discrimination *per se*, direct discrimination and indirect discrimination. This situation is confusing and may lead to misinterpretation. But the employment relations are subject to anti-discrimination law, as well as disability is listed among other characteristics, one may be discriminated on. In our opinion, multiple definition of discrimination is unnecessary.

Conclusion

According to given above, we would suggest developing anti-discrimination provisions of national legislation of Ukraine to meet best foreign practices and international standards in this sphere. It is very important to create really competitive and quite professional oriented system of persons' with disabilities employment. It is not the best solution to force employers to hire disabled persons. Much better, but the same time more difficult and time-consuming, way out is to help children or adult persons with disabilities in their education, getting professional knowledge and first working experience. The positive effect of employment without any discrimination will be multiple. The very important in this situation would be real and natural inclusion of persons with disability in social life of a community as independent and equal to other persons.

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ПРОТИДІЯ ДИСКРИМІНАЦІЇ У ПРАЦЕВЛАШТУВАННІ ОСІБ З ІНВАЛІДНІСТЮ: МІЖНАРОДНІ СТАНДАРТИ ТА УКРАЇНСЬКЕ ЗАКОНОДАВСТВО

Дискримінація осіб з інвалідністю у сфері працевлаштування – це один із факторів, які спричиняють високий рівень безробіття серед осіб з інвалідністю. У статті наголошено, що це не лише соціальна проблема, а й економічна. Метою цієї публікації є науковий аналіз міжнародного та національного українського правового регулювання працевлаштування осіб з інвалідністю, зокрема питань щодо дискримінації у працевлаштуванні, можливих позитивних дій, а також економічного та соціального ефекту від збільшення рівня трудової зайнятості осіб з інвалідністю.

У статті окрему увагу звернуто не лише на нормативне регулювання відносин працевлаштування осіб з інвалідністю, а й на адміністративно-правові важелі забезпечення обов'язкового працевлаштування таких осіб. Наголошено на доцільності поширення встановлених квот на усіх роботодавців, незалежно від джерел фінансування. Тому норму про незастосування положення статті 20 Закону України «Про основи соціальної захищеності інвалідів в Україні» щодо встановлення квоти робочих місць для працевлаштування потрібно удосконалити і забезпечити рівність роботодавців щодо обов'язкового працевлаштування осіб з інвалідністю.

Ця публікація також містить тезу про те, що основною метою працевлаштування осіб з інвалідністю є не обов'язкова праця таких людей, а залучення їх до суспільного життя, повне включення їх у суспільство на рівних з іншими людьми засадах. До того ж гідна праця дає можливість гідного життя, тобто має позитивний економічний ефект. Однак примушування роботодавців працевлаштувати у себе людей з інвалідністю часто призводить, навпаки, до відторнення таких працівників від соціуму. Вважаємо, що рівне ставлення до осіб з інвалідністю потрібно формуватися рівними можливостями. Тому акцент у правовому регулюванні варто робити саме на недискримінації у працевлаштуванні, яка забезпечуватиметься, в першу чергу, конкурентною професійною освітою осіб з інвалідністю та економічними методами стимулювання отримання першого робочого місця особою з інвалідністю.

Ключові слова: працевлаштування осіб з інвалідністю, дискримінація у працевлаштуванні, соціальний захист, право на працю.

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