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TACKLING EMPLOYMENT DISCRIMINATION IN UKRAINE: EUROPEAN STANDARDS AND UKRAINIAN LAW

The article contains the main approaches to legal regulation for preventing and counteracting employment discrimination based on comparative study of this problem. The author gives analysis of some academic approaches to the problem of discrimination in wide sense and employment discrimination especially, spoken out by European, including Ukrainian, scholars in different publications. The relevant conclusions and recommendations on improving of anti-discrimination law in Ukraine, in particular regarding protection from discrimination, have been made.

Keywords: *discrimination, employment, right to work, comparative labour law*

Яцкевич І. І. Протидія трудовій дискримінації в Україні: європейські стандарти та українське законодавство

У статті викладено основні підходи до правового регулювання запобігання та протидії дискримінації у трудових відносинах у порівняльному аспекті цієї проблеми. Автором проаналізовано основні наукові позиції щодо проблеми дискримінації взагалі та власне дискримінації у працевлаштуванні, висловлені в європейській, в тому числі вітчизняній, правовій науці. Зроблено висновки та рекомендації щодо вдосконалення антидискримінаційного законодавства України, зокрема щодо захисту прав людини у справах про дискримінацію.

Ключові слова: *дискримінація, працевлаштування, право на працю, порівняльне трудове право*

Яцкевич И. И. Противодействие трудовой дискриминации в Украине: европейские стандарты и украинское законодательство

В данной статье изложены основные подходы к правовому регулированию предотвращения и противодействия дискриминации в трудовых правоотношениях в сравнительном аспекте указанной проблемы. Автором проведен анализ основных научных позиции относительно проблемы дискриминации, в том числе дискриминации в трудоустройстве, высказанных в европейской, в том числе украинской, юридической науке. Сделаны выводы и рекомендации по усовершенствованию антидискриминационного законодательства Украины, в частности по защите прав человека в делах о дискриминации.

Introduction. Having undertaken a number of obligations in connection with the Association Agreement, Ukraine should bring the national legislation closer to EU law, standards and practice. Employment, social

policy and equal opportunities spheres need to be harmonised with EU laws. Social standards, as well as principles of rule of law, human rights protection, and non-discrimination legislation are some of criteria for real approaching and sharing best European practices and policies.

According to the article 24 of the Constitution of Ukraine [1] everyone is equal before the law in his or her rights and no privileges should be grounded on specified characteristics, like gender, origin, race, religion or political position etc. Recently the anti-discrimination legislation of Ukraine has significantly developed. One of the factors for further improvement of current legislation, as well as increasing role of application of national laws and European international instruments for combating discrimination, is association with EU and approximation of legislation of Ukraine to EU regulative acts. In our opinion, it is quite important to study experience of some EU member-states' implementation of EU directives into their national law. But before commencing the comparative analysis, it is equally important to define the meaning of employment discrimination, its understanding by law-makers and judges.

According to results of discrimination study presented in Eurobarometer survey (2012), the most significant employment discrimination is associated with aging, disability and ethnic origin. In 2012 the majority of questioned Europeans (54 %) consider age over 55 years as a disadvantage factor at employment. Disability (40 %) and ethnic origin or skin colour (39 %) are seen to be disadvantage at employment as well in 2012. Approximately the same percentage was given for 2015. Thus discrimination is still a serious problem for EU.

Literature Review. The interest toresearches on employment discrimination issues is growing in Ukraine, but situation with protection and real guaranteeing of equality at employment is not satisfactory yet. We would like to pick out several significant publications (in Ukrainian) on this topic, as follows. First of all, there is a collective monograph published in 2013 and fully dedicated to prohibition of discrimination at work [2]. There are some shorter publications on the subject of discrimination, like articles by S. Vyshnovetska [4], A. Babenko [6], I. Zhigalkin [8], I. Sakharuk [9] et al. Current situation can be explained with relatively new antidiscrimination laws in Ukraine, and this legislation is still under development and further

improvement. But issues of equality at employment relationships, some aspects of other guarantees at employment are studied widely.

In contrast to Ukrainian legislation, the discrimination in general as well as employment discrimination is even more broadly researched at European and American discourse of legal studies. There are many publications on this topic based on international and national antidiscrimination law, social rights as human rights. In our opinion, it is caused by longer history and practice of anti-discrimination law application, on one hand, and by quite significant rewards on employment discrimination disputes judged by courts. So there is more wide judicial practice in Western Europe and US legal areas.

We would like to outline the following publications on discrimination at work issues. First of all, it is worth to start with the book by Evelyn Ellis and Philipp Watson titled as" EU Anti-discrimination Law "(2012) [10], which is dedicated to European Union anti-discrimination issues, while the Handbook on European Non-discrimination Law (2011, 2013) [11], published by Council of Europe authorized bodies, covers wider range of non-discrimination issues on European context, which is applicable to Ukrainian antidiscrimination law, due to membership of Ukraine at Council of Europe, as well as obligatory status of decisions and practice of ECtHR. This Handbook examines European non-discrimination law stemming from EU non-discrimination directives, and Article 14 of and Protocol 12 to the European Convention on Human Rights as complementary systems, drawing on them interchangeably to the extent that they overlap, while highlighting differences where they exist.

Speaking about comparative study of discrimination at employment issues, one should refer to the book by Marie Mercan-Bruns titled as "Discrimination at Work: Comparing European, French, and American Law "(2016) [12]. This publication combines analysis of court decisions, laws and opinions of experts in the sphere of non-discrimination law. The author explains via comparative method the difference and similarity between common law and continental law regulation, and dispute resolution of discrimination at work cases.

Of course, there are multiple publications on EU Employment Law and particular European states, which include discrimination issues discussion and argumentation. We are not going to give analysis of many of those mentioned above, but just for demonstration of the importance of antidiscrimination law provisions at employment relations, we would pick out the following: the book Beginning Employment Law (2014) by James Marson [13, p. 61-78] and

Key Aspects of German Employment and Labour Law (2010), edited by Jens Kirchner, Pascal R. Kremp, Michael Magotsch [14, p. 99-109], and Employment Law (2010) by Malcolm Sergeant and Devis Lewis [12, p. 140–220]. Some international aspects of employment law are highlighted in International Employment Law (1999) by C. T. Campbel [13].

Thus, there is a growing interest among scholars from all over the world to the subject of discrimination or nondiscrimination in general and at employment relationships in particular.

The Goals and Topics. This publication is dedicated to some theoretical and practical aspects of employment discrimination in Ukraine in comparison with anti-discrimination discourse and laws on international and European levels. Bearing the ideas of European integration intentions and obligations of Ukraine, we are going to outline some short research results on European and international anti-discrimination legal regulation, which will be compared to Ukrainian law implementation.

Discussion and Arguments. The definition of employment discrimination notion is necessary for anti-discrimination law studies which are based on analysis of correspondent legal regulations. As per Handbook on European Non-discrimination Law, the goal of non-discrimination law is to allow every individual equal and fair access opportunities in society [14, p. 21]. The EU labour law main directive in the sphere of non-discrimination at employment and working under employment contract is Employment Equality Framework Directive 2000/78/EC. It aims to combat discrimination on grounds of age, belief, disability, religion and sexual orientation as regards employment and occupation, with a view to putting into effect the principle of equal treatment in the workplace. In its turn, the principle of equal treatment means that there shall be no discrimination, neither direct nor indirect at employment relationships. Direct discrimination, according to article 2 of the Directive 2000/78/EC, means a situation when a person is treated less favourably than another is, has been or would be treated in comparable situation, on any ground of mentioned in the article 1 of the Directive. The indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless it

objectively justified, or employer is obliged to take appropriate measures to eliminate such disadvantages (in regards for persons with disabilities).

As Professor James Marson states, the indirect discrimination can occur deliberately, without any intention from employer's side, for example, it could happen by mistake, or it can be disguised as lawful activity, or can be on some misguided assumption taken by perpetrator against victim [15, p. 63].

The comparative study of discrimination at work states that "grounds of discrimination can be understood in two ways: rigid, unchanging sources of discrimination to be suffered, as they are traditionally seen, or the consequences of the choices made by individuals with protected characteristics regarding the way that they express those characteristics" [12, p. 246].

The analysis of anti-discrimination literature shows that it is misleading to study discrimination on a single cause, because discrimination appears on several grounds in multiple combinations of discrimination attributes [7, p. 156]. There are three main approaches to be explored in the intersectional perspective: understanding common ground in analyses of multiple discrimination in its various forms; identifying the limitations of the logic of anti-discrimination law, as revealed by the theory; and bringing out certain issues relating to identity, which are often the sources of the discrimination [12, p. 241-242]. After identifying prohibited ground of discrimination at work or their combination it becomes possible to determine applicable legal sanctions. Of course, an employer may explain misconduct in question by some reason justifying taken actions or decisions, adding legitimate reasons to the discriminatory ground. And in case of multiple protected characteristics discrimination, it is important to decide whether one ground merges another, or multiple discrimination misconduct aggravates employer's responsibility.

Besides that, there are some difficulties and different approaches to understanding and distinguishing direct and indirect discrimination. The analysis of researchers' approaches to differentiation between them reveals a kind of evolution from attributing direct discrimination with overt conduct, while indirect discrimination with disguised, to understanding that any kind of discrimination can occur either covertly or obviously. The indirect discrimination is more difficult for definition and thus counteracting. Some serious issues appear in the relation to classifying some adverse actions (apparently neutral) as indirect discrimination depending on such forbidden impact must indeed have occurred or it would be sufficient for its anticipation only.

Professor J. Kirchner et al. in the course-book of German employment law referring to the General Equal Treatment Act (2006) state that discrimination is illegal, if it is (1) based on eight grounds directly listed at the General Equal Treatment Act, (2) the person falls within the scope of the Act, (3) the discrimination is not justified [11, p. 99–100]. Those grounds for discrimination are some of the following (one or their combination) especially race or ethnic origin, religion or belief, gender, disability, age or sexual identity. Deriving from the General Equal Treatment Act, Professor J. Kirchner gives definition of the discrimination as unequal treatment on one or more of the grounds of discrimination in the Act, which cannot be justified [11, p. 102].

There three remedies, as per Prof. J. Marson, that a tribunal is empowered to award, in case of successful finding of employment discrimination, in particular: (1) to declare the rights of the complainant, (2) to award damages (including damages to claimant's feeling), (3) to make a recommendation that employer eliminates effect of discrimination for other employees [15, p. 69–70].

According to report issued by the European Union Agency for Fundamental Rights (update 2015), despite rising awareness of discrimination problem of minorities, the problem of employment discrimination remains. Especially, the number of reported discrimination cases is not corresponding to actual quantity. In the mean time, the key development of combating discrimination legislation is that the EU Member States have taken measures to fully implement the Employment Equality Directive, such as including sexual orientation in the list of protected grounds and shifting the burden of proof in discrimination cases. But underreporting of cases of discrimination based on sexual orientation remains a problem [19, p. 37–38].

Discrimination is forbidden under Ukrainian law as well. The provisions on employment discrimination are dispersed through several laws. Following mentioned above constitutional principle of equality, the Labour Code of Ukraine (1971) in the article 22 states, that any direct or indirect limitation of rights or establishment of direct or indirect advantages when entering into, making alterations and termination of labour contract depending on origin, social and property position, race and nationality, sex, language, political convictions, religious beliefs, membership in trade union or other association of citizens, kind and character of activity, place of residence shall

not be allowed [3]. In the mean time, requirements to age, level of education, state of health of the employee may be established by legislation of Ukraine.

The latest anti-discrimination amendments to the current Labour Code of Ukraine were controversially accepted by Ukrainian society [20]. The list of characteristics on the Labour Code of Ukraine of the grounds on which discrimination is prohibited was updated with sexual orientation and gender identity among other things. The same amendments struggle is held concerning draft of the Labour Code of Ukraine, adopted by the Parliament of Ukraine in first reading. But antidiscrimination at employment relations is one of the aspects EU pays attention on. Thus, efficient anti-discrimination law in Ukraine contributes to strengthening cooperation with EU.

The Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine" (2012) gives definitions of different sorts of discrimination, as well as a list of characteristics which a person may be discriminated on. According to provisions of the article 4 of Ukrainian antidiscrimination law, it covers labour relationships among other subjects to regulation [5]. The antidiscrimination law contains some provisions on preventing discrimination (like anti-discrimination expertise of the draft laws), as well as reference to liability for discriminative actions. But having listed different kinds of legal responsibility (compensation of damages, injuries to feelings, as well as civil, administrative and criminal liability), the law does not provide more or less precise penalties for breach of anti-discrimination law.

There is sanction in amount of two minimal wages penalty for unreasonable rejection to employ a person of those entitled additional guarantees for employment according to the Law of Ukraine "On Employment of Population" (article 14 and 53). But there is a problem on proving this kind of discriminative refusals to employ a person, because of quite uncertain situation with burden of proof in disputes of discrimination.

The strictest penalty for violation of antidiscrimination law is provided by the Criminal Code of Ukraine. Conform to the article 161 of the Criminal Code of Ukraine [21], among other punishable misconduct, the direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, colour of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics, shall be punishable by a fine of 200 to 500 tax-free minimum incomes, or restraint of liberty for a term up to five years, with or without the

deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

In the mean time, criminal prosecution of employment discrimination is very rare to happen. Due to difficult investigation, as well as quite complicated for proving by compliant party in the court, these kind disputes are not often to be judged at Ukrainian courts. This is one of the reasons why there is this small number of courts' decisions on discrimination disputes. Mostly, employment discrimination is to be proved through comparing employees working in similar situations [7, p. 103], but courts are quite critical to this indirect proofs. Besides that, there is a problem with burden of proof and balance of power in disputes on employment discrimination. Unlikely to US courts, and ECtHR, national courts in Ukraine do not award significant enough sum of compensation for damages, especially in claims for discrimination. As a result, there is very small motivation for protecting against employment discrimination in court. But final decision of ECHR, as shows its practice, may be more rewarding.

Probably, this situation could be improved by adopting a new Labour Code of Ukraine with quite clear and effective regulation of claiming, proving and preventing employment discrimination. Hopefully, judicial reform in Ukraine will bring more efficiency into judicial system and let principle of rule of law prevails in Ukraine.

Conclusion. The given above comparative analysis of anti-discrimination law in Europe and Ukraine leads to the following conclusions: (1) both European and Ukrainian experience of judicial protection from discrimination, particularly employment discrimination, shows underreporting of violations based on discrimination; (2) national anti-discrimination legislation in Ukraine is relatively new and there is not broad practice of anti-discrimination law application; (3) the burden of proof in claims on discrimination should be put on employer as more powerful party of employment relation, but the claimant should be able to demonstrate reasonable ground for being suffered or would be suffered from employment discrimination; (4) in our opinion, employment discrimination issues as well as non-discrimination provisions regarding labour relationships should be clearly stated at a new Labour Code of Ukraine; (5) due to fear of social condemnation and mistreating persons with protected from discrimination characteristics, the law should provide additional guaranties for those persons,

who claimed on discrimination against them or other person; (6) to prevent abuse or misuse right to protection from employment discrimination, the courts or other bodies of jurisdiction should have taken to account situations when a person willingly exposes himself or herself or shows misconduct to provoke discrimination, or insulting other persons' moral principles and culture.

The issue of employment discrimination doesn`t fit one journal article, not only because of difficult situation with non-discrimination law, but as well due to a range of characteristics an employee may be subject to. Usually protected from discrimination persons are vulnerable and not able not only to protect efficiently their rights for equality and non discrimination, but even report their rights violation. This is why academics, lawyers, NGO and authorities should pay more attention to the problem of discrimination, and employment discrimination in particular, disregard to country or influence in the world, because everyone is equal in his rights (especially human rights) before the law.

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