



PILLAR III HUMAN RIGHTS

The Principle of Non-Discrimination on Grounds of Gender in the Workplace – Assessing Albanian Law through EU Standards

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I. ABSTRACT

This is an analysis aiming to examine the extent to which the Albanian legislation is aligned with the EU *acquis* with regard to the women's labour rights, with a special focus on the non-discrimination on grounds of gender. Paragraph II of the paper will provide a detailed overview of the various aspects of the non-discrimination principle and specifically: A) the burden of proof; B) evidence; C) sanctions and remedies and D) retirement age. While analysing these aspects from the viewpoint of EU law the comparative analysis of the Albanian legislation is provided as well. Finally conclusions and recommendations regarding improvements of the Albanian legislation are provided in Paragraph III of this paper.

KEY WORDS: *Non-discrimination, Discrimination on grounds of gender, Equal treatment, Burden of proof, Remedies, Lawful Evidences, Labour rights, Work*

ABBREVIATIONS:

Commissioner

Commissioner for protection against discrimination

Directive 2006/54/EC or Equal Treatment Directive

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

Labour Code

Law 7961/1995 "Labour Code of the Republic of Albania", as amended

Law on protection against discrimination

Law 10 221/2010 "On protection against discrimination", as amended

Law on social insurances

Law 7703/1993 "On social insurances", as amended

II. PROTECTION AGAINST DISCRIMINATION ON GROUNDS OF GENDER

The effective enforcement of the non-discrimination principle is closely related to the following aspects: (A) the national rules on the burden of proof; (B) the types of evidence that is admitted



for the purposes of establishing a presumption of discrimination; (C) the sanctions that are imposed on individuals and on entities that have acted in breach of the principle of equal treatment as well as the damages that are awarded to the victims of gender discrimination. Another key aspect of the equality between women and men at work is the national legislation regulating (D) the retirement age. Each of these aspects will be analysed in detail in the below paragraphs:

A. The Reverse Burden of Proof

Article 19.1 of Directive 2006/54/EC lays down that “*member states shall take such measures as are necessary, (...) to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment*”.

Upon multiple recommendations of the European Commission¹, of the European Committee of Social Rights and of the Albanian Commissioner for Protection against Discrimination², Albanian Parliament has recently adopted some amendments to the Labour Code³ by introducing, *inter alia*, some changes to the prohibition of discrimination on grounds of gender in employment and profession. The anti-discrimination related articles of the Labour Code have transposed in Albania the provisions of the Equal Treatment Directive pertaining to the shift of the burden of proof in discrimination cases from the complainant to the respondent; such reverse burden of proof applies to both judicial proceedings and proceedings before the national specialised anti-discrimination body (*i.e. Commissioner for Protection against Discrimination*).

In European Union, some legislators such as the Spanish one have gone beyond the requirement of article 19.1 of the Equal Treatment Directive. While in the cases of discrimination on grounds other than sex, there is a requirement for the claimant to present facts, in the cases of discrimination on grounds of sex in order for a shift in the burden of proof to be produced, the standard requires only that the claimant’s claims are based on discriminatory actions based on sex⁴; hence it appears from a literal interpretation of the law that the courts should always apply a shift in the burden of proof. It seems that the adoption of such an approach by the Albanian legislator, as well, would encourage the victims of discrimination to bring the respective claims before the courts and/or before the specialised anti-discrimination bodies.

¹ European Commission in the 2014 Progress Report on Albania recommended the alignment of the Labour Code with the *acquis* (point 4.19)

https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-albania-progress-report_en.pdf

² In the 2012, 2013 and 2014 Annual Reports, the Commissioner has proposed the amendment of the burden of proof - related provision, in both the Labour Code and the Code of Civil Procedure.

³ The recent amendments of Labour Code on anti – discrimination have entered into force on June 22nd, 2016.

⁴ “(...) in proceedings in which the plaintiff’s claims are based on discriminatory actions based on sex, it is for the defendant to prove the absence of discrimination in the measures adopted and their proportionality” (*article 13 of Organic Law 3/2007 for the effective equality between women and men, dated March, 22nd*).



Prior to the entry into force of the amendment of the Albanian Labour Code, the rules on the reverse burden of proof applied only in one form of discrimination, i.e. in the field of salary discrimination on grounds of gender, while the application of the respective rules on the burden of proof was subject to the fulfilment of a stricter requirement than the one set out by the EU legislation; more specifically, in order for the *onus* to shift to the employer who would have to prove that there was no infringement of the principle of the equal treatment, the employee should have submitted to the Court “serious facts” from which it could be presumed that there had been an unlawful discrimination.

In practice, women were deprived of the opportunity to successfully defend their cases because they were unable to have access to the facts required (*i.e. facts qualified by the Courts as serious*) for raising a presumption for unlawful discrimination in the remuneration. Pursuant to the available information, there is no successful gender discrimination court case in the field of compensation. Taking into account that the amendments of the Albanian Labour Code in relation to the equal treatment in employment and occupation have entered into force only recently, the national Courts have not rendered yet any decision that would allow us to examine whether the rules requiring a shift in the burden of proof in a discrimination case related to the profession/occupation are operating in accordance with their aim, which is to make it easier for a discrimination claim to succeed.

B. Evidence

In the absence of any specific provision⁵ as to the nature of the evidence that should accompany a discrimination claim, it results that the evidence that is submitted by the claimant should comply with the criteria set out by the national procedural law (*i.e. the Code of Civil Procedure*). However, the practical effectiveness of the shift of the burden of proof would be jeopardized in case that the competent authorities while examining the existence of a *prima facie* discriminatory treatment, would subject the evidence submitted by the claimant to the strict requirements set out by the Code of Civil Procedure.

As of today there is no solid case-law in Albania as to the admissibility in court proceedings of evidence that is not expressly provided for in the Code of Civil Procedure. The most common and controversial issue in employment related proceedings is the case of the (non) admissibility of e-mails as evidence in court proceedings⁶.

⁵ Law on Protection against Discrimination provides that the claimant should submit lawful evidence, while Labour Code has not introduced any special rule as to the types of evidence that can be admitted in a discrimination case.

⁶Decision of Tirana District Court with No. 9714, dated 01.10.2013, in the case E.K. v the company “Primo Communications” Sh.p.k. The Court ruled on the non-admissibility of the e-mails as evidence “(...) since they are not expressly provided in the Code of Civil Procedure (...)”. The defendant who presented the e-mails in the quality of evidence failed to prove that the e-mails constitute the entirety of e-mails exchanged between the parties; hence the Court was not fully convinced about their authenticity and the absence of the selective and unilateral character (...).



In EU countries, courts accept a broad range of evidence from which it may be presumed that there has been direct or indirect discrimination, including statistics, situation testing⁷ (*Sweden, Slovakia, the Netherlands, Belgium, Hungary and Montenegro*), audio or video recording (*Slovakia*), expert opinions or inferences drawn from circumstantial evidence (*France*)⁸.

Starting from November 6th, 2017, the date on which the last amendment of the Albanian Code of Civil Procedure entered into force, Albanian legislation has moved towards a change consisting in the formal admission of a broader range of evidence than those admitted under the previous rules of the Code. More specifically, article 11 of the Code of Civil Procedure provides that the Courts should accept as admissible evidence all the evidence that is obtained in accordance not only with the Code of Civil Procedure but with other laws, as well.

Notwithstanding the expansion of the circuit of the evidence admitted for establishing a presumption of discrimination, it is important to underline that Albania has not yet reflected the shift in the burden of proof into the respective provisions of the Code of Civil Procedure (*please see article 12*). It continues to be a fundamental principle of the Albanian judicial process the one according to which the burden of proof rests with the person that brings claims for alleged discrimination before the court.

C. Sanctions and Remedies

Equal Treatment Directive requires that the sanctions applicable to infringements of anti-discrimination laws should be “effective, proportionate and dissuasive”. In Albania, the Commissioner for Protection against Discrimination, in case of grounded claims, is entitled to impose financial sanctions amounting up to ALL 600,000 (approx. Euros 4,500), while the Labour Inspectorate, in cases that it finds that the employer has acted in breach of the equal treatment of the right to employment and occupation, is entitled to impose a fine amounting up to ALL 1,200,000 (approx. Euros 9,000). The dissuasiveness of financial sanctions is questionable, in particular with regard to the issue of whether such sums will deter larger employers.

An interesting approach that could serve as a “best practice” for Albania is the one followed by the Spanish and Portuguese legislation according to which the level of the fine in some cases is calculated based on the turnover of the company/employer having acted in breach of the principle of non-discrimination. In Albania, there is an inclination of the public employers to pay the imposed fines rather than implementing the respective orders of the Commissioner. In practice, the party having acted in breach of the principle of equal treatment in relation to the employment issues avoids to implement the decision of the Commissioner especially when such decision rules on the return to work.

⁷The situation testing is defined by M. Bendick in his book *Situation testing for employment discrimination in the United States of America as “a systematic research procedure for creating controlled experiments analysing employers’ candid responses to employee’s personal characteristics”*.

⁸ The Court of Cassation in the case *Airbus SAS No. K10 – 15873* inferred discrimination from the list of surnames of the company’s staff.



As in the cases of fines, the compensation being paid to the victim should fulfil the criteria laid down in the Equal Treatment Directive; thus it should be proportionate, effective and dissuasive. In practice, likewise their European colleagues, the Albanian judges are still reluctant to award substantial amounts when calculating pecuniary loss and amounts awarded remain rather low. This coupled with the length of time it can take to obtain a decision, throws doubt on the effectiveness of the Albanian remedies.

D. Retirement Age

Contrary to many EU countries where there is a universal state pension age⁹, in Albania, the pension age for women is different from the pension age for men. More specifically, as a general principle¹⁰ the pensionable age for men is 65, while for women is 60 years and 6 months¹¹.

The differentiation as to the retirement age between women and men results in clear sex discrimination. This is the case of Law 152/2013 “On Civil Servant” with regard to the provisions pertaining to the causes of removal from the civil service. Although, *in prima facie*, the law does not contain any discriminatory element on grounds of sex, the fact that the law makes compulsory the removal from the service, because the civil service employee reaches a certain age (*65 for men and 60 years and 6 months for women*), results in clear discrimination. In practice a woman’s career prospects in the civil service may be seriously hindered as long as she is discharged a couple of years before a man. Considering that in Albania the civil service is one of the principal employers that ensure the employment of women, the extent of the sex discrimination in this sector becomes even more considerable.

Albanian legislation requires from the public institutions to proceed with the dismissals at the aforementioned nationally-set age, and at the same time withdraws unfair dismissal protection after the retirement age. The Albanian Supreme Court¹² has ruled that people having reached a certain age, can no longer remain in the public sector; the state authorities acting in the quality of the employer, in case of attainment of the retirement age by the public sector employee, should proceed with the termination of the employment contract. In the private sector, an employee having attained the retirement age, is entitled to continue the employment relationship even upon the completion of the retirement age, provided that has reached an agreement in relation thereto with the employer. However, the Supreme Court has ruled that the continuation of the employment relationship in the private sector should not be deemed as a right of the employee and at the same time an obligation for the employer; on the contrary it should be considered as a

⁹ It is important to distinguish between the age at which people become entitled to receive pensions (“**pensionable age**”) and the age at which they are required to cease employment (“**retirement age**”). In this analysis the terms retirement age and pensionable age shall be used interchangeably for Albania.

¹⁰ Law on social insurances provides for early retirement rights for women having given birth to 6 or more children that are more than 8 years old. Moreover, the aforementioned Law provides for different retirement ages for specific categories of people (e.g. miners).

¹¹ From 1.1.2015 the age required increases by 2 months on the first day of each calendar year for women, aiming to have an age of 67 for both the male and female employees by 2056, and the required sum of the length of service will increase by 4 months until it reaches 40 years.

¹² Administrative College of Supreme Court, Mehmet Paja v Educational Directory of Berat, dated 03.04.2014



right for both the employer and the employee who shall decide together on whether the relationship shall continue or not.

In addition, lower age of retirement reduces the chances of promotion to senior positions in the civil service; as a result, women are being prevented from getting to the highest grade in the salary scale and being awarded a pension equal to those of their male colleagues. The above-mentioned gender related differentiated rules could give rise to the breach of the principle of equal pay for equal work¹³. Since the Albanian pension scheme is partially based on an employment record¹⁴ (*length of service and received salary*) it may be regarded as pay. Based on above, the differences between male and female workers with regard to the pensionable age could be considered as being contrary to the principle of equal treatment.

By abolishing the mandatory retirement age (*i.e. the age at which people are required to cease employment*), Albanian women would be given the possibility to continue their work and be given the same rights for advancement in their career as their male colleagues. This is the case of the United Kingdom where the Employment Equality Regulations 2011 removed the possibility for employers to enforce compulsory retirements ages without risk of unfair dismissal claims.

III. CONCLUSIONS AND RECOMMENDATIONS

Although it results that the Albanian legal framework regulating the protection against discrimination on grounds of gender is broadly in line with the EU legislation, much remains to be done to address more effectively the rights of women in the employment sector.

It is important that all draft laws and the by-laws that are adopted for the implementation thereof are reviewed thoroughly from a gender based perspective before submission to Parliament for approval. Such review shall, not only eliminate the risk of having any gender discriminatory provisions in the Albanian legislation but also, the risk of having conflictual provisions as to the discrimination - related issues, such as the case of the burden of proof. More specifically, in order to ensure a coherent approach towards the burden of proof and eliminate the existence of conflictual provisions in the national legal system, it is necessary that the shift of the burden of proof from the complainant to the respondent is stipulated not only in the Labour Code but in the Albanian Code of Civil Procedure, as well.

Moreover, it is important to adopt measures aiming to strengthen the role of the Commissioner for the Protection against Discrimination, particularly through financial and human resources. In addition to that, the intensification of the collaboration between the Commissioner and the Non-Governmental Organisations whose scope of activity is the promotion of women's labour rights, would lead to the increase of the number of the gender discrimination cases that are reviewed by the Commissioner and a subsequent reduction of the phenomenon of discrimination.

¹³ The principle of equal pay for equal work and for work of equal value, *inter alia*, between women and men is provided for in article 115 of Albanian Labour Code.

¹⁴ Please refer to the ECJ case: Commission v Greece (Case C-559/07), dated 26 March 2009.