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## PREVENTION AND PROTECTION AGAINST WORKPLACE DISCRIMINATION IN THE REPUBLIC OF SERBIA

By ratifying a number of international conventions, the Republic of Serbia undertook to provide everyone on its territory with all the necessary protection in the event of discrimination, so that the right to equality could truly be effectively exercised<sup>1</sup>. Furthermore, the process of harmonizing Serbian legislation and practice with the Directives 2000/43/EC, 2000/78/EC and 2006/54/EC is under way, in accordance with the commitment of the Republic of Serbia to become a member of the European Union, and because certain issues in this area haven't been regulated - at all, to a sufficient extent, or properly. For example, the Labour Law lacks elaboration of the principle of equal wages for men and women. Also, it is necessary to improve job protection for employees who use maternity leave and leave for childcare, so that it includes, not only the prohibition of dismissal for using one of the aforementioned, but the positively confirmed right of an employee to return to the same job or an equivalent job with the same pay after the leave ends. Furthermore, when establishing the exception to the prohibition of discrimination against job seekers and employees based on personal characteristics, there's no requirement that these conditions be proportionate to the legitimate goal to be achieved, or mandatory and suitable for achieving the goal that justifies the establishment of such conditions. Finally, the Labour Law and the Law on the Prohibition of Discrimination need to be amended by adding a rule that the prohibition of direct discrimination based on religion can be derogated from for jobs with the employers whose activities are guided or inspired by certain religious and moral concepts, which is why employees are expected to share the values and religious beliefs of the employer<sup>2</sup>.

Although two decades have passed since the adoption of the first anti-discrimination laws and since the regulation of protection against discrimination by the Labour Law, there are still numerous challenges and problems related to the protection against workplace discrimination in the Republic of Serbia. Some of these problems were pointed out in the *Strategy for Prevention and Protection against*

1 V. V. Vodinelić, « Građanskopravna zaštita od diskriminacije », in N. Petrušić (dir.), *Sudska građanskopravna zaštita od diskriminacije*, Belgrade, Poverenik za zaštitu ravnopravnosti / Pravosudna akademija, 2012, p. 220.

2 L. Kovačević, *Zasnivanje radnog odnosa*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 1026.

*Discrimination for the Period from 2022 to 2030*<sup>3</sup>. This document announced the determination of the Republic of Serbia to improve the mechanisms for combating discrimination, including workplace discrimination. Although the Strategy represents an umbrella document in this field, it relies on many other documents dedicated to groups of people who are particularly at risk of discrimination, such as the Strategy for Improving the Position of Persons with Disabilities (2020-2024), the Strategy for the Social Inclusion of Roma Men and Women (2016-2025), National Youth Strategy (2015-2025), Strategy for Preventing and Combating Gender-Based Violence against Women and Domestic Violence (2021-2025) and Employment Strategy (2021-2026). In the Strategy for Prevention and Protection against Discrimination, the problem of discrimination hasn't been considered by analyzing the position of groups of people who are at a greater risk of discrimination, as the Strategy relies on analysis in priority areas, including the area of work and employment<sup>4</sup>.

A special place in the Strategy is dedicated to legal protection against workplace discrimination. In principle, procedures have been established that ensure immediate protection against discrimination. Above all, this applies to the submission of complaints to the Commissioner for the Protection of Equality, since the number of complaints submitted to the Commissioner is extremely high, and complaints about workplace discrimination make up a third of the total number of complaints received since 2009 to the present day<sup>5</sup>. Nevertheless, it seems that the number of complaints to the Commissioner does not reflect, or at least not to the full extent, the real scale of the challenges that job seekers and employees face when exercising their rights. Several different studies have indicated a disproportion between people's perception of workplace discrimination and the number of reported discrimination cases, and a disproportion between the number of reported discrimination cases and cases in which discrimination was established, either in a special administrative procedure before the Commissioner, or in court proceedings<sup>6</sup>.

In practice, workplace discrimination cases are not always dealt with in accordance with the principle of urgency. Namely, it takes more than three years on average to obtain civil judicial protection against discrimination, which also has a negative impact on the effectiveness of the imposed sanctions<sup>7</sup>. This problem becomes even bigger if we take into account the rather modest number of initiated

3 *Official Gazette of the RS*, no. 12/2022.

4 The Strategy analyzes the following areas: public administration and judiciary; defence, internal affairs and security; education, vocational training and science; work and employment; social protection; housing; healthcare; sports, culture and media.

5 *Special report of the Commissioner for the Protection of Equality on discrimination in the field of work and employment*, Belgrade, 2019, p. 284.

6 The results of the survey « Discrimination in the labour market » of 2019 show that 92 percent of employers, 84 percent of employees and 86 percent of the unemployed believe that workplace discrimination is widespread in Serbia, while as many as a third of the respondents - both employed and unemployed say that they experienced discrimination at work. *Special report of the Commissioner for the Protection of Equality on discrimination in the field of work and employment*, Belgrade, 2019, p. 284.

7 I. Krstic, « Serbia - Country report "Non-discrimination": Transposition and implementation at national level of Council Directives 2000/43 and 2000/78 », *Publications Office of the European Union*, 2021, p. 70.

court proceedings for protection against discrimination: although Serbia doesn't have a centralized data collection system on court proceedings for protection against discrimination, it is estimated that in the first eight years of the implementation of the Law on Prohibition of Discrimination, about 150 such procedures were initiated<sup>8</sup>. The latter can be explained with the fact that the legal framework for protection against discrimination is rather vague. This is primarily because different anti-discrimination laws introduce different discrimination procedures, with some overlap. Protection against discrimination based on disability, sex and gender can be achieved both on the basis of the Law on Prohibition of Discrimination and on the basis of special anti-discrimination laws, while in practice, the Law on Prohibition of Discrimination is regularly used as a legal basis for the protection of sex and gender-based discrimination, even though this issue is regulated by the Law on Gender Equality (formerly the Law on Equality of Sexes). On the other hand, protection against disability discrimination is most often sought based on the Law on Prevention of Discrimination of Persons with Disabilities, although certain procedural provisions of this law are less favourable compared to the provisions of the Law on Prohibition of Discrimination (there is no rule on shifting the burden of proof and there is no possibility for the trade unions and non-governmental organizations to initiate legal proceedings on behalf of workers who believe that they have been discriminated against).

The aforementioned anti-discrimination laws can also serve as a basis for protection against workplace discrimination, even though the Labour Law stipulates that in cases of workplace discrimination « a person seeking employment, as well as an employee, can initiate proceedings for compensation of damages before the competent court, in accordance with the law »<sup>9</sup>. A person who believes they've been discriminated against in the workplace may, therefore, choose whether to initiate a labour dispute or a discrimination dispute. An employee who decides to seek protection against discrimination in a labour dispute can do so within a preclusion period; on the other hand, if he/she seeks protection via a discrimination lawsuit, he/

8 M. Reljanović, *Studija o primeni Zakona o zabrani diskriminacije u Srbiji*, Belgrade, YUCOM, 2017, p. 5. Court judgements on workplace discrimination are not registered as such. Instead, many are registered as labour dispute judgements (due to the confusion about the legal nature of the workplace discrimination dispute, or rather because judicial protection against workplace discrimination can be exercised both within the framework of an anti-discrimination dispute or within a labour dispute), or even as judgements made in harassment disputes (due to the lack of understanding of the differences between workplace discrimination and harassment). It is, therefore, significant that the amendment to the Law on Prohibition of Discrimination included the obligation of the Commissioner for Protection of Equality to keep records of court judgements and decisions made in anti-discrimination disputes, and the obligation of the Courts to keep records of these decisions and submit them to the Commissioner. Court judgements in Serbia will be made available to the public, only if published by the courts on their websites or in case law databases (which can be searched only by commercial users), or if required in accordance with the Law on Free Access to Information of Public Importance. I. Krstić, « Serbia - Country report "Non-discrimination": Transposition and implementation at national level of Council Directives 2000/43 and 2000/78 », *op. cit.*, p. 65.

9 Labour Law (*Official Gazette of the RS*, Nos. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17, 113/17 and 95/18), art. 23, § 1.

she will not have the option to submit a request for reinstatement in the event of a discriminatory dismissal. This violates the unity of legal order and puts the victims of discriminatory dismissal in an unfavourable position.

Another problem is that the judges were not sensitized and trained for dealing with these types of disputes, until recently. Also, the concepts of indirect discrimination, harassment and sexual harassment, as well as the standard of reasonable accommodation, should be fine-tuned in case law. The same applies to overcoming the challenges of proving indirect discrimination, making a clear distinction between workplace discrimination and moral harassment at work, and in cases of multiple and intersectional workplace discrimination, not observing the seriousness of their consequences, and searching for the main or predominant grounds of discrimination. Judges were also faced with the need to resolve other legal doubts arising from vague legal provisions, in relation to the disputes for protection against workplace discrimination. For this reason, every court decision made regarding the requests of employees and job candidates who believe that they have been discriminated against represents a significant contribution to the development of protection against discrimination. Especially because these judgments serve as guidelines or templates for other judges in their decision making, they contribute to the fine-tuning of institutions and principles that the legislator did not regulate clearly or sufficiently, and, depending on the protection provided to victims of discrimination - encourage workers to claim protection or to give it up<sup>10</sup>.

On the other hand, we should bear in mind that there is no maximum amount set for compensation that can be awarded to a victim of discrimination in Serbia, and it's at the discretion of the judges to determine the amount. Judges routinely award modest amounts, especially when compared to the awarded compensation for damages in other areas. This is especially true for non-patrimonial damages, as compensation for damages in Serbia was and remains exceedingly low, and judges, by awarding low compensation, « show that they do not understand the harmful consequences of discrimination »<sup>11</sup>. The Law on Contracts and Torts is quite rigid in terms of regulating the function of compensation for non-patrimonial damages. Its primary function is to ensure satisfaction, while the functions concerning prevention and deterrence of employers from discrimination are not mentioned in the legal text, nor are they recognized in case law. Despite this, it can be considered that Serbian law is, in principle, harmonized with EU law, because the requirement to provide effective, proportionate and dissuasive compensation for damages implies full compensation for patrimonial and non-patrimonial damages, provided in accordance with the applicable laws.

Finally, the problem is that the Serbian legislation consistently applies the subjective concept of non-patrimonial damage, according to which non-patrimonial damage is linked only to mental and physical pain and to fear of sufficient duration and intensity. This means that non-patrimonial damages are not included in the

10 A. Tasić, « Naknada nematerijalne štete u antidiskriminacionim parnicama - komentar sudske odluke », *Zbornik radova Pravnog fakulteta u Nišu*, no. 66/2014, p. 296.

11 *Ibid.*, p. 298 ; I. Krstić, « Serbia - Country report "Non-discrimination": Transposition and implementation at national level of Council Directives 2000/43 and 2000/78 », *op. cit.*, p. 63.

violation of the right to protection against discrimination, i.e. non-patrimonial damages are not caused by injury to the personal good, but by pain and fear, or rather by the violation of the intimate sphere that disrupts the psychological and emotional balance of the worker. This is particularly unfavourable for workers who feel that they have been discriminated against, since the mention of pain and fear before the court, which is inevitable when applying the subjective concept, may further injure the already violated dignity of the worker. Especially since the few workers who would be willing to seek judicial protection against discrimination, would likely reconsider their decision to initiate proceedings against the employer, not only because of the difficulty of making it likely that some of their personal characteristics were the real reason for unfavourable treatment, but because of the desire to avoid a detailed public description of the mental pain caused to them by the employer's discriminatory treatment.

When it comes to protection against workplace discrimination in misdemeanour proceedings, the inertness of judges in the proceedings is a noteworthy problem, often leading to the suspension of proceedings due to the statute of limitations<sup>12</sup>. On the other hand, we can deduce from the proceedings that have been legally concluded that the judges often give out low fines, which were already prescribed as fines in a lower bracket than the fines for offenses prescribed by other laws. It also shows that there is still a lack of proper understanding of the harmful consequences of discriminatory treatment among some of the judges<sup>13</sup>.

Finally, let's mention the amicable settlement of disputes regarding workplace discrimination, which is rarely used in practice, despite its numerous advantages. The legal restrictions on the use of the various capacities that mediation has, as a method for resolving these types of disputes, represent another significant problem. This is because only licensed mediators who are registered in the Register of Mediators can act as mediators in cases of workplace discrimination. We should also bear in mind that a mediator can only be a person with a university degree. This narrows the possibility of the parties to choose a mediator that suits their needs, especially when it comes to minorities and marginalized social groups, who often won't be in a position to choose a member of their own group as a mediator (e.g. people with disabilities or Roma people)<sup>14</sup>. This is problematic as only a little over 10 % of

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12 I. Krstić, *Zabrana diskriminacije u međunarodnom i domaćem pravu*, Pravni fakultet Univerziteta u Beogradu, 2018, p. 304.

13 *Ibid.*, p. 63.

14 N. Petrušić, I. Krstić and T. Marinković, *Komentar Zakona o zabrani diskriminacije*, Belgrade, Službeni glasnik, 2016, p. 278. This is a serious problem for persons with disabilities, because they are often deprived of adequate help from the trade unions. This is because people with disabilities are either not members of a trade union, due to the problems they face in their efforts to find and maintain employment, and to advance in their careers, or they cannot establish the representative trade union in the open market, due to their low representation in the working population (the employment rate of people with disabilities in Serbia is about 13 percent). L. Kovačević, « Intersectional discrimination of women with disabilities in the world of work: Advantages and challenges of applying an intersectional approach », in L. Kovačević, D. Vujadinović, M. Evola (dir.), *Intersectional discrimination of women and girls with disabilities and means of their empowerment*, Belgrade, University of Belgrade, Faculty of Law, 2022, p. 362.

the population in Serbia has a university degree, and for the success of mediation, having the experiential knowledge of certain situations is much more important than the formal education of mediators<sup>15</sup>.

There remains hope that the implementation of the Strategy for Prevention and Protection against Discrimination will help to overcome some of the aforementioned problems, especially when it comes to the improvement of legal regulations and practice.

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15 Opinion of the Commissioner for Protection of Equality on certain provisions of the Draft Law on Mediation in settlement of disputes, no. 011-00-49/2013-02, of 15 September 2013.