

# APPLICATION OF DISCRIMINATION PROHIBITION IN THE LABOUR LAW OF THE SLOVAK REPUBLIC<sup>19</sup>

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## Abstract

In the first part of the submitted paper the author briefly describes antidiscrimination legislation in the Slovak Republic and its mutual correlation with the norms of the labour law. Simultaneously, the author points out the material nature of the prohibition of discrimination, the expression of which is the regulation of temporary positive action measures. In the second part of the article, the author contemplates the reasons for the absence of a case law of general courts in dealing with discriminatory conduct in employment relations, especially in regard to the tendencies of decision-making on claims from discriminatory conduct.

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**Keywords:** Labour rights, Labour Code, anti-discriminatory Act, adequate satisfaction

## Introduction

The principle of equal treatment represents one of the basic pillars of every democratic society, including the Slovak Republic, and we can find its establishment in many international sources of law, undoubtedly in the law of the European Union, and last but not least, the prohibition of discrimination is also an integral part of the domestic law.

No matter how precise the legal establishment is, it is no less important whether the law enforcement authorities actually transform the intent of constitution makers and legislators into real life. From the point of view of the European Union law, the principle of equal treatment belongs to those areas of legal regulation that links to the most frequent case-law of the Court of Justice of the European Union, whereby the most significant decisions have been reflected to the subsequent legal regulation of the Union

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<sup>19</sup>The article was drafted as part of the solution of the Vega grant project no. 1/0805/13, Optimization of the model arrangement of employment relations in the labour market of the Slovak Republic.

law. However, this does not apply to Slovak practice; proceedings, the subject of which is objecting the infringement of the equal treatment principle, rarely occur.

In the submitted article, the author briefly describes the anti-discriminatory legislation in the Slovak Republic and subsequently contemplates reasons for the absence of a broader case-law of general courts towards the discriminatory conduct in employment relations, especially in regard to the tendencies of the decision making on claims from discriminatory conduct.

### **Relation of anti-discriminatory law and labour law**

The principle of equal treatment, established in all basic international human rights documents, is the basic right that belongs to all without distinction and by its nature creates an insuperable framework for the application and realization of all other basic rights, including the social rights. One cannot speak of a just application and realization of any right, unless the antidiscrimination requirement is not adhered. From the universal point of view, the prohibition of discrimination specifies and completes basic rights and liberties, including the basic social rights.

With regard to the national regulation, **the general prohibition of discriminatory conduct** is codified in the Act No. 365/2004 Coll. on Equal treatment in some areas and on protection against discrimination as amended (**antidiscrimination Act**), which creates a common legal basis for maintaining the principle of equal treatment **throughout the legal system** of the Slovak Republic, including the area of employment relations.

However, the antidiscrimination law is not the sole regulation, which establishes the prohibition of discrimination in employment relations, some aspects of the principle of equal treatment are processed in detail also directly in the basic Code of the labour law, in Act No. 311/2001 Coll. of the Labour Code as amended (hereinafter referred to as “the Labour Code”).

Antidiscrimination legal regulation of the Labour Code may be divided, with respect to the individual articles and paragraph wordings, into three fundamental areas:

- a) general prohibition of discrimination (established in Art. 1 of the Labour code in conjunction with § 13 of the Labour Code),
- b) specifically emphasized prohibition of discrimination based on sex (Art. 6 of the Labour Code and § 119a of the Labour Code),
- c) alternative treatment in regard to individual categories of disadvantaged persons (Art. 6 of the Labour Code and especially provisions of the seventh part of the Labour Code – Employer’s social policy).

The suggested theoretical-legal division is only a basic generalization or a rough draft, the ambition of which is definitely not to set exact

boundaries of selected areas of the anti-discriminatory legal regulation in employment relations, because this is not even possible.

It is necessary to apply the prohibition of discrimination **generally to all employment relations and as a general principle**, it should be reflected in all measures, decisions and instructions of the employer, not only in with performances, which have a claim-like character, but it can also be the facultative performances on the part of the employer and in relation to the employer's social policy (Barancová, Schronk 2009, Žul'ová, 2014). From this division, one may essentially deduce only that the legislator has correctly established the prohibition of discrimination into the Labour code, especially by a broadly general prohibition, (which can be observed e.g. also during listing of differentiating characters in Art. 1 of the Labour Code), whereby the law individually stresses the principle of equal treatment of men and women, ( one may object the unnecessary duplicity of the regulation hereto).

For completeness, we remark that the prohibition of discrimination is explicitly expressed in other employment regulations as well, e.g. Act No. 5/2004 Coll. on Employment services (right to have access to employment), Act No. 552/2003 Coll. on Performing work in general interest (selective procedure for the position of a head employee), Act No. 400/2009 Coll. on the State service (general prohibition of discrimination) and others.

### **Material concept of the prohibition of discrimination**

The prohibition of discrimination cannot be viewed only as a formal observation of identical behaviour under any circumstances, but in accordance with the material understanding of the non-discrimination principle as the equality of opportunities or the equality of prospects.

The fundamental contentual basis for the principle of non-discrimination is the requirement for state authorities to treat the entitled bearers of human rights

- i) equally in equal situations and
- ii) unequally in unequal situations.

This fulfils the material concept of the prohibition of discrimination. While the first principle was totally obvious from the offset of the protection of basic rights and liberties, the second developed gradually, namely under the influence of decision-making practice of Strasbourg authorities, which stated that the discrimination may also occur in the event the countries, without an objective and reasonable excuse, do not treat people in obviously unequal situations unequally, (Svák, 2006, Kmec, Kosař, Kratochvíl, Bobek, 2012).

In the concept of material equality, as opposed to the formal understanding of non-discrimination, it is assumed that certain (objectifiable) disadvantages exist, which can impede the bearer's access to exercising

rights or certain social benefits (education, access to market, etc.). In practice, this disadvantage then acts as a barrier to fair competition with other actors, not suffering from this disadvantage, and who are also competing for attaining the given rights or social goods. The concept of material equality, performed by usage of positive measures does not mean that each person belonging to the disadvantaged groups is automatically provided with the social benefit at the expense of majority. The purpose is rather to improve the inequality and thus create real conditions so that the disadvantaged person could seek given goods or the execution of rights from the same starting position (Bihariová, 2013).

Material equality, the essence of which is the equality of opportunities is inherent to several international contracts guaranteeing basic rights and liberties, such as the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Protection against All Forms of Racial Discrimination.

### **Temporary positive measures as an expression of material equality**

In accordance with the material understanding of the prohibition of discrimination, to secure the equality of opportunities in practice and adherence to the principle of equal treatment, the antidiscrimination Act introduced the possibility to adopt **individual positive measures** to prohibit disadvantages related to the **racial or ethnic origin**. However, shortly after adopting the antidiscrimination Act, these provisions were assessed by the Constitutional Court of the Slovak Republic at the request of the government and with finding PL. 8/04 the Court expressed the incompatibility of at that time valid legal regulation on positive measures with Art. 1 Sec. 12. and with Art. 12 Sec. 1 first sentence and Sec. 2 of the Constitution of the Slovak Republic.

However, even after the finding of the Constitutional Court of the Slovak Republic, the legislator rightfully did not refrain from material understanding of the principle of equal treatment and related possibility of adopting temporary positive measures of equal treatment and altered the affected regulation into constitutionally compliant form by an amendment to the anti-discriminatory Act. He expanded the scope of differentiating criteria, when he determined that the temporary positive measures can be applied for the removal of disadvantages resulting not only on the grounds of racial or ethnic origin, association with ethnic minority or ethnic group, but also **on the grounds of sex and gender, age or disability**.

Nowadays, according to the valid legal regulation (§ 8a Sec. 2 of the anti-discriminatory Act) temporary positive measures are especially measures:

- a) focused on the removal of social and economic disadvantages, which disproportionately affect members of the disadvantaged groups,
- b) supporting the interest of members of the disadvantaged groups in employment, education, culture, healthcare and services,
- c) aimed at creating equality in approach to employment, education, healthcare and accommodation, especially by using targeted preparation programs for members of the disadvantaged group or by dissemination of information on these programs or possibility to apply for job positions or positions in the educational system.

Listed temporary positive measures may be adopted should

- a) there be provable inequality,
- b) the objective of the measures be the reduction or elimination of this inequality,
- c) they are appropriate and necessary to achieve set objective.

Except for these characteristics, or conditions of adoption, an inherent feature of the positive measures is their **temporary nature**; these measures can last only up to the time when the inequality, which caused their adoption, has been removed. Public administration authorities are obliged to terminate the execution of these measures after achieving a set objective (§ 8a Sec. 3 of the antidiscrimination Act).

In the end, in the broader context we note that the temporary positive measures are a natural part of legal systems and are also present in other countries (in USA they are referred to as “affirmative action“, in the union law as “positive action“.) Based on the working definition of Special Rapporteur of the UN sub-committee for the protection of human rights, Marc Bossuyt, temporary positive measures represent a “coherent package of measures of temporary character, specifically focused on correction of the position of the target group in one or several aspects of their social life, necessary to achieve the equality in practice.” Such measures are aimed at the removal of economic and social inequalities through a more equitable redistribution of positions, especially in the labour market and education (Bossuyt, 2002).

### **Claims from discriminatory conduct**

A number of substantive regulations, including the Labour Code, establish the non-discrimination principle in various extents. However, in questions related to **claims from discriminatory conduct**, all equally refer to a specific regulation, which is the mentioned antidiscrimination Act. The claims from discriminatory conduct are rarely regulated directly in the substantive regulation; in the Labour Code, this regulation is established on one hand in relation to the possibility to submit a complaint to the employer for breach of the prohibition of discrimination (§ 13 Sec. 5 LC) and on the

other hand, in case of breach of obligation during the realization of pre-contractual relations (§ 41 sec. 9 LC). However, this is supportive regulation; the essence of legal protection within the proceeding concerning issues related to the breach of the equal treatment principle can be found primarily in the antidiscrimination Act.

According to § 9 of the antidiscrimination Act, everyone has the right to equal treatment and protection against discrimination. An individual who believes that his rights, legally protected interests or liberties were infringed or are being infringed, may seek remedies in court, so that the one who did not uphold the principle of equal treatment shall:

- i) refrain from his conduct,
- ii) remedy the illegal status,
- iii) offer appropriate satisfaction or eventually compensate non-pecuniary detriment in money ,
- iv) compensate the damage.

Thus, the antidiscrimination Act lists three specific means of protection, namely by means of a) negatory claim – on refraining from illegal intervention to law, if the discriminatory intervention persists, b) restorative claim – on the correction of the illegal state and removal of consequences of illegal conduct and c) satisfaction claim – on providing adequate satisfaction.<sup>20</sup> The claim for damages is not affected by this.

### **Application issues in enforcing claims from discriminatory conduct The possibility of expressing civil “judgment of conviction“**

The question, whether the claims from anti-discriminatory conduct, as is regulated by the regulation § 9 of the antidiscrimination Act, can be understood as the **exhaustive list** or vice versa, or whether it is only a **demonstrative list**, has arisen in the decisive activity of general courts. This question was not a direct subject of court proceedings, however, the courts had to react to it, if a party to the proceedings, in the procedural status of the plaintiff, was demanding a judgment of conviction<sup>21</sup>, i.e. statement, which would state discriminatory conduct on the part of the defending party of the proceedings. Part of the decision making practice<sup>22</sup> was of the opinion that there is no legal basis, in § 9 of the antidiscrimination Act, for the

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<sup>20</sup>Compare also the reasoning of the declaration of the Supreme Court of the Slovak Republic dos. mk. 5Cdo 257/2010 of 22. February 2012.

<sup>21</sup>Of course in this context we do not mean judgments of conviction of general courts in criminal proceedings. However, we believe that this term is adequate and fitting also in case of discriminatory conduct, when the victim of discrimination demands the finding of discriminatory conduct in the judgment within the civil proceedings.

<sup>22</sup>Judgment of the County Court in Prešov dos. mk. 11Co/90/2008 of 25. August 2009 and Judgment of the County Court in Prešov dos. mk. 12Co/36/2009 of 29. September 2009.

judgment of conviction, or they demanded from the plaintiff the proof of urgent legal interest pursuant to § 80 letter c) of the Code of Civil Procedures, i.e. they were proceeding exactly like with other “standard „declaratory claims. However, in practice of the courts, there was also another opinion being used,<sup>23</sup> where the judgment of conviction in relation to the discriminatory claim was not viewed as a classic statement of declaratory claim, but as one of the forms of adequate satisfaction pursuant to § 9 of the antidiscrimination Act.

The Supreme court removed this application inconsistency and stated in its judgment<sup>24</sup> that *„claim the prosecutors used to demand for the court to determine that the principle of equal treatment has been breached is acceptable and is an adequate and effective means of expressing the breach of the principle of equal treatment, since the antidiscrimination Act provides only a demonstrative list of means for protection, the participating party can claim in court. In stating the breach of the principle of equal treatment it is not necessary to prove an urgent legal interest pursuant to § 80 let. c) C. c. p., since the court in this action does not determine whether the legal relation or law is or is not here. The infringement of these rights (principle of equal treatment) implies directly from the law. “(Durbáková, Holubová, Ivančo, Liptáková).*

### **The amount of adequate satisfaction**

Another important question is the amount of adequate satisfaction. In this point, we will try to compare the view of the European Union and the Slovak application practice on the amount of satisfaction expressed in money.

Regarding the sanctions for the breach of prohibition of discrimination, the secondary union law has stipulated for a long time that the sanctions have to be **effective, adequate and deterring**. Newer directive 2006/54ES further adds that it is suitable to exclude in advance the setting of any upper limit for such compensation, except for cases when the employer can prove that the damage occurred to the applicant as a consequence of discrimination pursuant to this directive is only based on the fact that his application for employment has not been taken into account.

Likewise, request for effective, adequate and deterring sanctions for discriminatory action is reflected in the practice of the Court of Justice of the European Union (formerly European Court of Justice). Already, in an older

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<sup>23</sup>Compare judgment of County Court in Košice dos. mk. 1Co/334/2008 of 18. March 2010.

<sup>24</sup>Judgment of the Supreme Court of the Slovak Republic, dos. mk. 5Cdo 257/2010 of 22. February 2012.

case of Colson<sup>25</sup>, the Court of Justice stated that measures, which the member state chooses in cases of discrimination, have to lead towards actual and effective legal protection and also have to represent a truly deterring effect for the discriminating person. Except for previously stated, the Court of Justice in this case, in relation to determination of adequate satisfaction, also judged that domestic courts are obliged to interpret and apply legal regulations adopted for the purpose of implementing directives completely in accordance with the requirements of the European Union (European Communities at that time).

Based on the requirements of the union law supported by relevant court practice, adequate satisfaction, (which first corresponds to sanctions based on the antidiscrimination directives of the Union) can be attributed not only the basic **satisfaction function**, but also a **sanction function**. The sanction function of compensation means that the objective should not only be the compensation of the discriminated person, but also more importantly the punishment of the discriminating person for illegal conduct, which he has performed and which caused harm to the discriminated person and further to deter him or any other third party from repeating such a behaviour in the future (Behr, 2003). Sanction compensation (of adequate satisfaction or also damage) thus punishes and at the same time acts preventively. The language of European regulations and case-law accentuates especially the second functional element of the sanction compensation, i.e. the preventive function (“detering sanctions“). Therefore, especially the institute of financial compensation of non-pecuniary damages can be the means of protection and can create preventive effects against discrimination (Straka, 2012).

If we focus on Slovak domestic regulation, according to § 9 of the antidiscrimination Act, the injured party can claim compensation of non-pecuniary damages in money if the adequate satisfaction would not be sufficient, especially if the inability to uphold the principle of equal treatment caused **significant impairment of dignity, social authority or social application of the injured person**, this party may also claim the compensation of non-pecuniary damages in money. The sum of compensation of non-pecuniary damages will be determined by the court with respect to the severity of the instance of non-pecuniary damages and all circumstances, under which it occurred.

When deciding on adequate satisfaction, the general courts frequently point out the need to prove the impairment of dignity in a severe manner and in case this fact is not proven in their point of view, in numerous instances,

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<sup>25</sup>Decision of the European Court of Justice no. 14/83 of 10. April 1984 in the case of Sabine von Colson and Elisabeth Kamann vs. Land Nordrhein-Westfalen. Compare also the judgment of the European Court of Justice C-271/91 of 3. August 1993 in case of M. Helen Marshall vs. Southampton and South-West Hampshire Area Health Authority.

they award only an apology without compensation of non-pecuniary damages in money as an adequate satisfaction. We cannot agree with these conclusions. Understandably, the discriminatory conduct in employment relations does not occur in public, on the contrary, the conduct of discriminating person against the discriminated one is known only to a small circle of persons (e.g. colleagues of the victim of the discrimination), often, the conduct happens without public. These facts result from the nature of the matter and from circumstances of individual cases. However, this certainly cannot reduce the severity of discriminatory conduct. We express the belief that general courts, when identifying the extent or severity of impairment of dignity or social application should, in case of discriminatory action, place lower requirements than in the case of protection of personality.

### **Court fee as a barrier of submitting a discriminatory claim**

As another reason for the lower number of submissions due to alleged discrimination seems to be a higher court fee, which according to item 7b of the tariff of the Act No. 71/1992 S. on court fees and fees for abstracts from the criminal register is set in the amount of 66 Euro and 3% of the amount of awarded non-pecuniary detriment. We respect and understand the purpose of the court fee, i.e. to protect against illegitimate claims to court; on the other hand, the legislator should consider the individual nature of the discrimination action, the undesired target of which, (as opposed to conduct for protection of personality), are “weaker“ people or people of the minority representation. At the same time, one has to also consider the fact that the amount of awarded non-pecuniary amounts is also exclusively at the discretion of the court. Stated could then indicate the conclusion on setting the court fee at a flat rate irrespective of the amount of the non-pecuniary damages awarded.

### **Conclusion**

We conclude that the legal regulation of prohibition of discrimination in the Labour Code of the Slovak republic is sufficient in comprehensive understanding with the international law, especially the human rights frameworks and the law of the European Union. It represents a sufficient legal basis for its real application.

The fact that antidiscrimination claims are not numerous is certainly caused by several factors. Some of the conflicts are settled out of court, but at the same time, one has to consider that the people who are discriminated are usually not interested to enter into conflict with a person or an organization, which is based on their weaker position. In this direction, the situation could be improved by education, support of relevant non-governmental organizations, and at the same time, alteration of application

practice in the direction that the compensation should not only repair the occurred state, but simultaneously deter the discriminating person from further discrimination, eventually punishing the person for the conduct, and on the other hand, encourage people who feel discriminated to file suits to the court.

### References:

Barancová, Helena and Schronk, Robert. Labour Law. Bratislava: Sprint two, p. 144 and subs., 2009.

Svák, Ján. Protection of Human Rights(from the point of view of practice of the courts and the doctrine of Strasbourg bodies for protection of law). II. Expanded edition. Bratislava, p. 973, 2006.

Kmec, Jiří, Kosař, David, Kratochvíl, Jan, Bobek, Michal. European Convention on Human Rights. Commentary. 1. edition. Prague : C. H. Beck, p. 1212 and subs., .2012.

Bihariova, Ivana. Social-economic disadvantage vs. Ethnic origin as reasons for use of temporary positive measures. In: Legal aspects of equal treatment in Slovak reality. Bratislava: EQUILIBRIA s.r.o.,p. 99 and subs.,2012,

Bossuyt, Marc. Prevention of discrimination: The Concept and Practice of Affirmative Action(Final report).In: Commission on Human Rights, Sub-Commission on Human Rights, E/CN.4/Sub.2/2002/21. Cited from Lajčáková, Jana. Temporary positive measures: International and constitutional frame work with the proposal for legislative amendment – analysis. Bratislava: Milan Šimeček Foundation, 2008. Available at <http://www.nadaciamilanasimecku.sk>.

Durbáková, Vanda, Holubová, Barbora, Ivanco, Štefan, Liptáková, Stanislava. Discrimination in Slovakia. Looking for barriers for access to effective legal protection against discrimination. Košice : Center for civil and human rights, p. 96 and subs., 2012.

Behr, Volker. Punitive Damages in American and German Law – Tendencies towards Approximation of Apparently Irreconcilable Concepts, Chicago: Law Review 105, p. 139 – 145, 2003.

Straka, Peter. Adequate financial satisfaction. In: Legal aspects of equal treatment in Slovak reality. EQUILIBRIA, s.r.o., Bratislava,p. 59 and subs. 2012.

Žul'ová, Jana. Diversification of family forms in the reflection of employment relations. In: *Labour Ipse Voluptas: Honnoring Helena Barancova*.Krakow. Slovak Association in Poland. 2014.