

SEEKING EFFECTIVENESS: REMEDIES AND SANCTIONS IN GENDER DISCRIMINATION CASES

(ANALYSIS ON EFFECTIVENESS OF REMEDIES AND SANCTIONS IN GENDER DISCRIMINATION CASES)

The standard of “effectiveness of remedies” can be found both at Art. 13 of the European Convention on Human Rights and at Art. 35 of the European Convention on Human Rights.

Art. 13 of the European Convention on Human Rights is the expression of the principle of subsidiarity. To the extent that “an effective remedy” is regulated at a domestic level, one needs to exhaust all the domestic means of appeal as a requirement for admissibility of an application referred to the to the European Court for Human Rights, the rule of exhausting all internal means of appeal being at the same time a mark of the principle of subsidiarity.

From the perspective of consecration of human rights, subsidiarity consists of the fact that the international human rights law represents a minimum standard, to which member states can add higher safeguards. From the perspective of safeguard of the human rights, subsidiarity means that member states must secure the observance of human rights and the remedy of any potential infringements, while international courts intervene only when the states are unable or unwilling to intervene.

Effectiveness of a remedy varies depending on the concerned right.

A remedy must be effective both in theory, in law, and in practice.

Effectiveness of a remedy should not be understood as guaranteeing a favorable decision when one resorts to a domestic remedy. Also, effectiveness of a remedy should be assessed both based on the completed proceedings and on the *pending* ones.

The effective nature of a remedy is assessed cumulatively, in terms of its affordability (a remedy should be affordable to the party) and of its potential capacity to produce a useful effect (a remedy should be able to remedy the violation of rights).

Under Art. 20 of the Romanian Constitution, corroborated with Art. 11 of the Romanian Constitution, Art. 14 of the European Convention on Human Rights is directly applicable in the domestic law.

Art. 14 of the European Convention on Human Rights (Prohibition of discrimination) provides for a right that does not have an independent existence. Art. 14 of the European Convention on Human Rights prohibits discrimination, but not in an absolute manner, in general, but only in a relative manner, in relation to the rights stipulated by it (“exercise of the rights and freedoms recognized by this Convention”). If we deal with a right stipulated by the domestic law, but not stipulated by the European Convention on Human Rights, then Art. 14 of the European Convention on Human Rights is not applicable.

Additional Protocol no. 12 to the European Convention on Human Rights introduces the prohibition of discrimination in general, not only in respect of the rights and freedoms guaranteed by the European Convention on Human Rights and by its Additional Protocols (“exercise of any right set forth by law”).

Prohibition of discrimination concerns the application of equal treatment to individuals who are in similar situations. A difference of treatment can lead to discrimination. Yet, in some cases, a difference of treatment is not discrimination, when authorities resorting to such difference of treatment offer an adequate justification for such difference, and such difference of treatment is proportional. Therefore, those differences of treatment that do not have a legitimate purpose and are not proportional to the legitimate purpose sought after are contrary to Art. 14 of the European Convention on Human Rights. A difference of treatment is discriminating to the extent that it has no objective and reasonable justification.

In principle, the reliance on the direct applicability of the European Convention on Human Rights does not offer reasonable possibilities for success in practice. Given that this remedy is affordable, but is not susceptible to produce a useful effect, meaning that it is not able to remedy the infringement of rights, such domestic remedy appears as void of effectiveness.

Starting from the fact that substantive rights must be accompanied by procedure fundamental safeguards, we will take into account this two-fold perspective. As a result, the consecration of rights should be doubled by their guarantee.

The Charter of Fundamental Rights of the European Union stipulates at Art. 21 the general prohibition of discrimination, including that based on sex criteria. Art. 23 of the Charter of Fundamental Rights of the European Union consecrates equality between women and men in all areas, including in the employment area, in that of performance of work and of its remuneration. Referring to the scope of application of the Charter of Fundamental Rights of the European Union, its provisions are intended to institutions, bodies, offices and agencies of the European Union, while observing the principle of subsidiarity, as well as to member states, only in situations where these apply the European Union's law. As a result, the Charter of Fundamental Rights of the European Union is not applicable in domestic litigation in which only domestic legal provisions are applicable. Yet, it is applicable when such domestic law provisions are the result of implementation of a document of the European Union's law.

Sex discrimination may appear in one of the following forms: direct discrimination, indirect discrimination, sexual harassment, moral harassment and victimization.

Referring to gender discrimination, we will analyze the domestic legislation of Romania from the perspective of remedies, sanctions and their effectiveness.

Government Order no. 137/2000 on Preventing and Sanctioning All Discrimination Forms has transposed the Racial Directive (Council Directive 2000/43/EC) and the Directive on Equal Treatment in Employment and Occupation (Council Directive 2000/78/EC). These directives have been transposed also in the Labor Code (*Law no. 53/2003*).

Also, *Law no. 202/2002 on Equal Opportunities and Treatment for Women and Men* represents a partial transposition of 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 and of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity/

According to *Government Order no. 137/2000 on Preventing and Sanctioning All Discrimination Forms*, gender discrimination represents a misdemeanor in the following situations: “conditioning of a person’s participation in an economic activity or of the free choice or practice of a profession” (Art. 6); “in an employment and social protection relation” (Art. 7); “the refusal of a natural person or legal entity to hire” (Art. 8 para. 1); “conditioning the filling of a position based on an announcement or contest issued by an employer or by its representative” (Art. 8 para. 2); “the discrimination of employees by employers in terms of the granted social benefits” (Art. 9). Also, according to the same normative act, gender discrimination represents a misdemeanor in the following cases: denial of access to administrative, legal and health public services and to other services, goods and facilities; denial of access to education; violation of the freedom of movement, of the right of free choice of the domicile and of access to public places and prejudice caused to personal dignity.

The misdemeanors listed above are sanctioned by a fine between RON 1,000 (approximately EUR 200) and RON 30,000 (approximately EUR 6,000), if discrimination concerns a natural person, and by a fine between RON 2,000 (approximately EUR 400) and RON 100,000 (approximately EUR 20,000), if discrimination concerns a group of persons or a community.

On 10 August 2020, a new paragraph was introduced in Law no. 167/2020: “Moral harassment at the workplace perpetrated by an employee by harming the rights or dignity of another employee represents a misdemeanor and is sanctioned by a fine between RON 10,000 (approximately EUR 2,000) and RON 15,000 (approximately EUR 3,000)”.

Based on complaints from natural persons or legal entities or *sua sponte*, the National Council for Combating Discrimination establishes discrimination acts and may sanction them. A resolution of the Managing Board of the Council may be appealed with the court for administrative litigation. The procedure before the National Council for Combating Discrimination does not represent a preliminary stage that must be compulsorily consumed before the notification of ordinary law courts. Therefore, the court can be notified directly with an application requesting the court to award compensations and to bring the party back to the situation prior to the discrimination or to cancel the situation created by discrimination.

In *Government Order no. 137/2000 on Preventing and Sanctioning All Discrimination Forms*, “the sex criterion” is expressly included in the category of discrimination criteria. Yet, at a domestic level, a special law has been regulated in the gender discrimination area, i.e., *Law no. 202/2002 on Equal Opportunities and Treatment for Women and Men*. This law defines gender discrimination as “direct discrimination, indirect discrimination, harassment and sexual harassment of a person by another person at the workplace or in another place where he/she performs his/her activities, as well as any less favorable treatment caused by the rejection of such behaviors by that person or by his/her submission to them”. Also, Law no. 167/2020 has introduced the concept of “moral harassment at the workplace based on sex criteria”.

Law no. 202/2002 on Equal Opportunities and Treatment for Women and Men consecrates equal opportunities and treatment in terms of access to education, health, culture and information; and equal opportunities for women and men in terms of participation in the decision-making process.

The National Agency for Equal Opportunities for Women and Men operates under the supervision of the Ministry of Labor, Family, Social Protection and Elderly People, and promotes the principle of equal opportunities and treatment for women and men, seeking to eliminate all forms of gender discrimination.

Persons who deem themselves discriminated on sex criteria may address the courts with applications whereby they request the court to award moral or/and material damages and/or to order the person who perpetrated discriminating acts to eliminate their consequences. The statement of claim in such cases is exempted from stamp duty fees¹, as an expression of the right of access to justice.

Misdemeanors regulated by *Law no. 202/2002 on Equal Opportunities and Treatment for Women and Men* are sanctioned by an administrative fine between RON 3,000 (approximately EUR 600) and RON 10,000 (approximately EUR 2,000), and such misdemeanors are established and sanctioned by the Labor Inspection, the National Council for Combating Discrimination, and

¹ Art. 31 para. 2 of Law no. 202/2002:

Applications of persons who deem themselves discriminated based on sex criteria filed with the courts of jurisdiction are exempted from the stamp duty fee.

the Ministry of Home Affairs, in case of misdemeanors involving harassment, sexual harassment or psychological harassment.

Law no. 53/2003 on the Labor Code stipulates at Art. 5 that any form of gender discrimination in work relationships is prohibited. Also, Art. 59 of the Labor Code stipulates that the dismissal of employees based on sex criteria is prohibited. In cases where any of the misdemeanors mentioned above is applicable, labor inspectors may apply a fine between RON 1,000 (approximately EUR 200) and RON 20,000 (approximately EUR 4,000).

In case of unfounded or unlawful dismissal, the court may order its nullification and may order the employer to pay damages equal to the indexed, increased or re-updated salaries and to the other rights from which the employee should have benefitted. Also, an employee may request to be brought back in the situation prior to the issuance of the dismissal document.

Also, in a work relationship, discriminating behavior based on sex criteria can also trigger criminal liability, based on the criminalization by the *Romanian Criminal Code* of the sexual harassment act² as an offence. Moreover, in criminal proceedings, the prejudiced party can file a civil action, which is exempted from the stamp duty fee, such exemption being the expression of the right of access to justice. A civil action brought in criminal proceedings represents a procedure mean, which seeks to remedy the damages caused by the perpetration of an offence.

Referring to the cumulative requirements for assessing the effectiveness of a remedy, i.e. its affordability and its possibility to produce a useful effect, the domestic remedies subject to review meet the first condition, as such remedies are available to the parties, but not all of them are able to remedy the violation of rights. In principle, the alternative of filing an application with the ordinary law court for the award of damages and for restoring the situation prior to the discrimination or for the cancellation of the situation created by discrimination meets both cumulative requirements and, as a result, can represent an “effective remedy”. Also, in employment disputes, we believe that an application having as subject matter the cancellation of

² Art. 223. Sexual harassment

- (1) Repeated claim for sexual favors in a work or similar relationship, if due to this the victim has been intimidated or placed in a humiliating position, will be sanctioned by an imprisonment term between 3 months and one year or by a fine.
- (2) A criminal action is initiated based on a prior complaint filed by the prejudiced party.

a dismissal decision based on sex criteria filed with the court represents an “effective remedy,” because it is affordable and is able to remedy the violation of rights.