

THE NEW CHALLENGES OF OSH REGARDING THE MODIFIED ROLE OF LABOUR LAW¹

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ABSTRACT: *In the past decades the type of employment has changed, wider range of workers has appeared in the labour market protected by labour law. Thus, the classical framework of OSH gives no longer enough protection for all types of workers, especially for the ageing workforce. In this context, the legislator has to create a legal environment, with which elderly workers get protection for their medical status. As a starting point, this settlement raises questions especially in the field of equal treatment. According to this principle the employer is obliged to consider equal treatment in employment relationships. Our hypothesis is that the present principle of equal treatment cannot be held in next decades because of the ageing labour force, therefore a new legal solution must be developed to deal with the different challenges of the different types of workers.*

KEYWORDS: *occupational safety and health; equal treatment; ageing society; labour law*
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1. INTRODUCTION

Every economic system requires a customized legal basis, with which the legal frames of operation can be presented. This demand generated many modifications in the labour market in the past decades, and the classical solutions of labour law have changed. In the legal literature noticeable papers can be found in which the authors try to re-define the concept of labour law (e.g. Davidov, Langille (eds) 2011), but a widely accepted result has not been presented yet. As a common denominator the scholars accept, that there are some fundamental rights, which are typically a characteristic in labour law and must be present in every work-related legal relationship. In this context another question can be also raised: does the right to work mean a lifelong protection for the workers, namely do people have the right to work in their older ages as well?

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On the other hand, the complexity and diversity of the legal relationships indicates that in some cases we can observe the “struggle of rights” where in special forms of employment special rights are more presented; in other relationships other tones are stronger. Therefore, some points of view creating employment relationship generate a choice of values as well. At this point we have to observe that there are some kinds of rights, which must appear in all legal relationships, thus the question whether a “core of rights” exists arises. For this question the legal literature gives a positive answer, and notable scholars think that there must be some basic rights, which must be applied in all labour-related relationships (Lynk, 2006).

Accepting this idea, it must be also examined which rights are so important and fundamental, so that their presence is needed. We think, that the basic rights are those cited in the Charter of Fundamental Rights of the European Union.² Therefore the starting point of this paper is the principle, according to which no matter in what kind of legal relationship a person is employed, the rights written in the Charter must prevail.

This principle is also accepted and applied by the CJEU³. In the mentioned decision the Court declared, that EU law is to be interpreted as a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78/EC, when applying provisions of national law in order to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to set aside, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation. As a result of this decision it can be accepted, that some fundamental rights of the employee (stated in the Charter) must be applied without any exclusion and – in some cases – *against* the national law.

2. EQUAL TREATMENT: AN ISSUE IN THE LIGHT OF AGEING

Another important issue in the labour market is how these general principles work in practice. It is widely accepted, that the main rights of workers must be ensured by the employer, and during this, the principle of equal treatment must be also guaranteed. According to this, EU law states in many legal sources, that two principles, namely the equal treatment and health and safety at work are the most protected ones, therefore these two rights must prevail in all legal relationships (Bercusson, 2009). Thus, a big challenge of labour law of the future is to create a legal framework, in which these rights can both predominate.

In addition, according to the database of EU⁴ ageing is one of the greatest social and economic challenges of the 21st century for European societies. It will affect all EU

² case 2000/C 364/01

³ case C- 441/14

⁴ Population structure and ageing, source: http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_structure_and_ageing

countries and most policy areas, therefore the needs of the employee will be miscellaneous, and there will be collision between the demand of the younger and older workers. In this context not only the types of working forms, but the need of the worker will be shifted, so the legislator has to create the legal solutions with which a customised legal protection can be attained.

The CJEU offered a possible solution for this issue in the above mentioned decision: expanding the scope of direct effect can result, that no matter in which legal environment a worker is employed, the main (basic) principles are presented and accepted. The problem is how practice will deal with this idea, will it be accepted that with this new approach the provisions of Article 288⁵ of the Treaty on the Functioning of the European Union will eliminate. We think, that this decision is a breakthrough for the practice, because the clear and stated principles can be enforced in a wider range of legal relationships, therefore more types of working forms will be included. Accepting this we can state, that principle of equal treatment will approach a standard level in different forms of contracts and it must be considered in more legal relationships.

Equal employment first of all means the equality between certain employees or groups of employees that should be fulfilled and ensured. Namely, the employer – neither the legislator nor the judicature in wider sense – should not differentiate between persons illegally, without cause, disproportionately or arbitrarily (Zaccaria, 2015). In connection to the ageing issue it can be accepted, that workers with different ages have different demands during their work. This means the employer has to customise the treatment of the worker by drawing distinction between them on the basis of their age. Until nowadays this problem has not been in evidence because the retirements at relative young age has not been created considerable differences between the medical statuses of the workers. But keeping in mind that according to the ageing tendencies and the economical challenges of the future the retirement age will be expanded, labour law has to prepare for the forthcoming challenges of employing older people especially in the light of OSH requirements and equal treatment.

EU law states the common standards of OSH, according to which the employer shall adapt the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health.⁶ This requirement means that during the work, the employer has to customise the working conditions for every worker in order to adapt the provisions of the OSH framework Directive. During this process the personal circumstances of the individual must be taken into consideration, namely age, medical status, etc. This examination can result direct or indirect discrimination,⁷ against which the employer has to exculpate themselves in a legal dispute. This results an ambiguous situation which can be handled very hard. Thus, we suggest, that the principle of equal treatment must be reconsidered.

⁵A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

⁶ Art. 6. 2 (d) of Directive 89/391/EEC

⁷ Council Directive 2000/78/EC Article 2.,2 (a) (b)

3. THE ROLE OF THE STATE

In connection to this problem, we can observe a big debate on the role of the state, namely, should the tools of labour law be regulated with instruments of public law or private law. It is hardly imaginable that the OSH requirements could be based on the private agreement of the parties except the situation in which the employer itself creates a regulation inside its field of operation in order to achieve better status for the employees. Thus, the regulating role of the state cannot be passed over because a well-designed and properly enforced employment legislation can have a very significant effect on the sustainability of work (Eurofund, 2015).

In addition the state must ensure not only the framework for the working conditions but the possibility for these people to work in their older ages. This can be derived from the obligation to protect the opportunity of every worker to earn his living in an occupation freely entered upon (Hepple, 1981). It is obvious that this obligation does not result a positive claim-right (Collins, 2015), but there is a valid expectation towards states to achieve this goal. From this point of view, the right to work must contain a higher level of protection for the older workers where the working conditions and the opportunities are customised for the worker's current medical and health status. This approach results, that the employer must always monitor the employee's mental and physical suitability for a given job especially in the older period, which may put a strain on both parties. During this process the classical frames of equal treatment must be broken through, for this group an extra attention must be paid, which must be well handled by the law, too.

According to the above mentioned question, the regulating and controlling tools of the state should be extended to the field of OSH requirements to fit into this situation. In addition, special aspects adjusted to the target-group should be worked out in order to adjust to this special challenge. During this legislation it must be taken into consideration that in this relation equal treatment can prevail only in a different way, namely the elder workers must be preferred to make them be able to stay in the labour market.

This latter goal will become important in the near future because in the ageing society the presence of the elder workers will be more and more common. Many people continue to work in the formal labour market in later life or will choose to do so if the opportunity exists.⁸ This will result the requirement of a special age-based risk-assessment in which this new aspect must be underlined because of the growing average age of the workers. We admit that this approach can be deduced from several legal sources of the Member States, but this clear distinction is not present in the whole labour market.

In addition the WHO issued an idea of "new paradigm" according to which people should be allowed to enter or leave the labour market in order to assume care giving roles at different times over the life course. This approach supports intergenerational solidarity and provides increased security for children, parents and people in their old age.⁹

In addition, the problem of the ageing workforce is an important research target of the European Agency for Safety and Health at Work as well. As a result it is stated that working ability is the first demand of work, but having an illness does not necessarily mean that an employee's work is no longer needed. In this situation the employer has to

⁸Active ageing – A policy framework, WHO, Geneva, 2002, 43. p

⁹Active ageing – A policy framework, WHO, Geneva, 2002, 44. p.

find the best solution suiting both of them to sustain the labour relation with the employer. This must result that the employer creates such working conditions for the employee in which it's medical status and health issues are fully considered but on the other hand its workforce is exploited.

In connection to this EU Strategic Framework on Health and Safety at Work 2014-2020 states the following: *“Changing technologies, new products and the marketing of new chemicals make it necessary to gather and evaluate sound scientific evidence, to identify how emerging new risks can best be addressed. The EU institutions, particularly the Commission, should mobilise the highest quality expertise available to work on this. In addition, risks affecting particular age groups, disabled workers and women deserve particular attention and require targeted action. The pilot project on OSH for older workers will identify ways to promote the physical and psychological health of older workers. It will also provide examples of good practice and facilitate the exchange of information.”*

Thus, the idea of equal treatment must be reconsidered in the light of ageing.

4. RECONSIDERATION OF THE IDEA OF EQUAL TREATMENT

To avoid the above mentioned situation we suggest that the basic principle of equal treatment should be re-examined. The legislator should make distinction between the “general” discrimination and the discrimination based on OSH or health challenges, and create a legal solution with which the employer can modify the contract unilaterally without breaching the mentioned principle. With this re-regulation, the employer gets the chance to customize the frames of the employment relationship of the elder workers in order to fulfil its obligation on OSH. Additionally, this approach also results demand for co-operation between the parties where the employee must inform the employer about all important information they must know to find the best upshot for both of them.

Thus, the employer should get the chance to modify the employment contract unilaterally if they notice that the actual circumstances do not fit for a person. In this situation the need to sustain the employment relationship is much stronger than the dogma of the freedom of contract, so because the above mentioned reasons this situation should be an exception.

Furthermore, the range of application should be extended in order to ensure the protection in all kinds of working forms. With this new approach the safety of workers could be guaranteed without creating stress in the labour market and labour law could fulfil its main purposes: run labour market and protect workers at the same time.

5. CONCLUSION

As a result it can be stated that because of the changes and challenges of labour law, the classical approach of employment relationships cannot be upheld in the future. The economical and social deviations resulted that labour law must give an urgent and clear answer for the further employment of the elderly workers where the classical legal values are still present.

Our suggestion is to think over the basis of OSH equal treatment principles and modify them to fulfil their reason of existence. This also results that the new point of view could be used in wider range of working types, essentially all forms of working contracts. With this the merit and the future of labour law will not be questionable.

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