CONSIDERATIONS ON THE EFFICIENCY OF PROCEDURES ESTABLISHED BY GO NO. 137/2000 CONCERNING THE PREVENTION AND SANCTIONING OF ALL FORMS OF DISCRIMINATION IN THE FIELD LABOUR RELATIONS

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Abstract

As emphasized by the doctrine, Government's Ordinance no. 137/2000 concerning the prevention and sanctioning of all forms of discrimination represents the common law in the matter of forbidding discrimination. The ordinance is thus equally applicable to all discriminatory situations arising in a working environment. To emphasize the seriousness of discrimination, the legislator made more procedural options available to discrimination victims, some of which also include the control of the institution in charge (CNCD). However, in the context of special legal provisions of labor jurisdiction, there is the risk of multiplying and mutually impairing simultaneous legal actions concerning the same decision of the employer. In order to reconcile the necessity to avoid parallel lawsuits with the legislator's intention to adequately and efficiently sanction discrimination, the article aims to offer a few suggestions for adjusting such inadvertencies.

Key-words: *discrimination, procedure, claims, litispendence, labour courts*

As emphasized by the doctrine[1], Government's Ordinance no. 137/2000 concerning the prevention and sanctioning of all forms of discrimination represents the common law in the matter of forbidding discrimination, given the very wide field of enforcement, as delimited by Art. 1 para 2 1nd Art. 3 of the above-mentioned Ordinance. The legislator delimited this field of enforcement based on two criteria, namely: a) by enumerating (in Art.1 para 2) the *rights* that guarantee the principle of equal treatment (a very wide range of rights, basically civil and political rights, economic, social and cultural rights) and b) by identifying the situations in which the legal act applies (Art. 3), which are "*the conditions of employment, the criteria and conditions for recruitment, selection and promotion, access to all forms and levels of professional orientation, training and refreshment; social security and welfare; public services and other services, access to goods and facilities; educational system; ensuring the freedom of movement; ensuring peace and public order*, as well as *other domains of social life.*"

1. Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii,* Ed. Universul Juridic, București, 2012 p. 700

The discrimination victim may address the National Council for Fighting Discrimination (CNCD) for one year since the act has been committed or since the date on which they may have been informed about such act (Art 20 para 1), but the Council may also investigate deeds or acts of discrimination *ex officio* (Art. 21). Following an investigation based on summoning the parties involved (Art. 20 para 4), the Council (its Governing Board, to be more specific – Art. 20 para 2), issues a decision to find the existence of a discriminatory act, as the case may be, and, upon the victim's request, it may also order the removal of the consequences and the return to the initial situation, as prior to discrimination (Art. 20 para 3). The Council is also legally entitled to apply a fine, whose amount is stipulated by Art. 26, and to force the guilty party to publish in the media a summary of the decision to find existence of discrimination (Art. 26 para 2). The penalties are also applicable to legal entities (Art. 26 para 3).

According to Art. 20 para 9, "*the decision of the Governing Board may be contested before an administrative court, according to the law*", while Art. 20 para 10 stipulates that "*decisions* (…) *that are not contested within 15 days are legally enforceable*."

As it can be seen, the decisional prerogatives of CNCD in solving the petitions or notifications *ex officio* are limited to **finding that the act has been committed, taking the legal steps to remove the consequences of the act and returning to prior situation, forcing the author to publish the decision and pay the fine**; hence, the prerogatives **do not include the payment of either material or moral damages**.

Art. 27 of GO no. 137/2000 establishes an alternative procedure the benefits the discrimination victim: based on this procedure, the victim may go to court and demand "*to be paid damages and to return to the situation prior to discrimination or cancel the situation created by discrimination, according to common law.*" Art. 27 further stipulates that the request is exempt from the payment of judicial stamp duty, it is not conditioned by the notification of the Council and the limitation period is 3 years, starting from the date when the act was committed or when the person involved could become aware of it. The court also has the power to force the guilty party to publish in the media a summary of the decision to find existence of discrimination (similarly to CNCD). The trial may take place only if the Council has been summoned (Art. 27 para 3).

The procedural means made available by GO no. 137/2000 (namely the power that both CNCD and the common court have to cancel the discriminatory acts and return to a prior situation) raise some questions when applied to decisions of the employer, which are connected to the labour contract and are also discriminatory by nature. Thus, the following issue may arise: to what extent do either the CNCD or the court (Art. 27 of the Ordinance) have the legal competence (in connection with the special provisions of Art. 252 para. 5 and 266 and the following concerning labour jurisdiction in the Labour Code) to cancel the employer's unilateral decisions that created the discrimination? In other words, the text of the Ordinance does not make it clear if the alternative procedures it establishes (notifying the CNCD within 1 year

since the act has been committed and/or the common court within at most 3 years since the same date) are *derogations* from the special procedure established by Art. 266 and the following in the Labour Code or just *alternatives*.

We consider that the above-mentioned procedure may not in any way be substituted for the procedure based on the provisions of the Labour Code, given the fact that the administrative court that contests the CNCD decision has no legal competence to award damages, but only to return to a prior situation; in other words, the best it can do is to award *damnum emergens*, but no moral damages. The same things can be said about the second procedure stipulated by the Ordinance (under Art. 27), which takes place before common (civil) law courts and may refer to awarding full damages; this is because, unlike the specific procedure of the employment law, the procedure established by Art. 27 does not specify that courts must grant the request promptly, as stipulated by Art. 271 in the Labour Code. This means that, if the employees were forced to stick to the procedures stipulated by the Ordinance, they would lose a series of legal benefits guaranteed by the Labour Code – which is, obviously, not possible. Most importantly, both procedures established by the Ordinance set forth limitation periods (1 year and 3 years, respectively), utterly incompatible with the matter of the employment law, in order to enable the employee to contest a discriminatory decision (e.g. a dismissal decision) for 1 year since its issue. This is obviously inadequate and it leaves room for abuse of law committed by the employee.

On the other hand, the Ordinance does not mention anything about the enforcement domain of the Labour Code provisions. The text of the Ordinance gets even more confusing as it allows the CNCD to order "*the removal of the consequences of discrimination and the return to the situation prior to discrimination*" (Art. 20 para. 3) and, if the common law courts are duly notified within 3 years, they are also legally competent to order "*the return to the situation prior to discrimination or the cancellation of the discriminatory situation, according to common law*" (Art. 27 para. 1). Can one infer from all the above that both CNCD and the common law courts are legally competent to cancel a possible decision of the employer and hence that the Ordinance legally empowers the CNCD and the common law courts to try a case, which is, in fact, an individual labour conflict (and it should therefore be solved by the specialized courts of law)? If this is indeed the case, may the employee still contest the possible discriminatory decisions based on the provisions of the Labour Code without the inevitable risk of simultaneous legal claims – namely those regarding *lis pendens* or *res judicata* authority? If this is not the case, does the employee not run the risk of exceeding the 30 days' term stipulated by the Labour Code in case either the CNCD or the common law court may find that there has been no discrimination and the decision could have been contested on the grounds of unlawfulness?

At the same time, limiting these options to the procedure set forth by the Labour Code is not a desirable solution either, as the legislator's obvious intention is to emphasize the seriousness of discrimination by providing the employee with several legal options and submitting the employer to the control of the institution in charge (CNCD). Another intention is to enable victims of, for example, harassment, to prove

its repeated character by setting a relatively generous term (1 year) for complaining to the CNCD. Nevertheless, in this both complicated and ambiguous context, there is a high risk of multiplying and mutually impairing simultaneous actions referring to the same decision of the employer, with the possible outcome of turning this wide range of options into a false advantage.

The reason underlying all these ambiguities and inadvertencies is that, unlike Act no. 202/2002, Ordinance no. 137/2000 does not make any distinction regarding the procedures derived from labour relations. Both acts have a general domain of enforcement, they do not apply solely to labour relations. But, while Act no. 202/2002 has considered the necessity of referring to the special provisions concerning labour jurisdiction in the case of discrimination at work, the Ordinance established common procedures, ignoring the procedurally distinct regime of labour relations.

In this context, we consider that, in order to reconcile the necessity to avoid parallel lawsuits with the legislator's intention to adequately and efficiently sanction discrimination, two solutions appear as imperative: on the one hand, establishing distinct procedures for the case of discrimination at work and, on the other hand, making a clear-cut division of the legal competences between the law courts and the institutions involved.

To this end, we consider that a clear distinction must be made between discriminatory *deeds* (such as, for instance, harassment) and discriminatory *acts*, exemplified by employer's *decisions*. In the latter case, we consider that it is imperative to comply with the special terms and procedures of employment law (and, in the case of public servants, also with the provisions of Act no. 188/1999 and Act no. 544/2004 of administrative courts), while *at the same time* notifying the CNCD (within the same 30 days' term) in order to find if there is a real case of discrimination or not and to sanction the employer accordingly. However, the CNCD should not be empowered to cancel the employer's decision. This possibility should be left to the law court. This is necessary in order to avoid any risks[1], but also any possible abuse of law committed by the employee[2].

Moreover, given the natural right to contest a CNCD decision by any of the parties involved, we deem necessary that the law court which is to solve the request should also be a labour court (and an administrative court only in the case of public servants). It is, after all, a in order to sole labour conflict (the solution of involving only labour courts in sanctioning discrimination at workplace is also given by Act no. 202/2002 – which is more pragmatic in this respect).

Furthermore, once the employee has already notified the labour court in order to cancel the employer's decision (under the provisions of the Labour Code) and a new file has been put together to contest the CNCD solution, it is only natural that these files should be linked – since it is, essentially, the same decision of the employer which is under judicial supervision. If, in the meantime, the main file has been solved,

1. For example, the employee loses the 30 days' term established by the Labour Code, on the grounds that the contested decision, though unlawful under other aspects, does not have a discriminatory character, thus the 1 year term is not justified.

2. For example, contesting a dismissal decision 1 year after being issued.

the court in charge with solving the challenge of the CNCD decision will not be held by the solution given in the main file, as the two files have different goals: the main file is about cancelling the employer's decision (for any unlawful aspect) and the other file is about cancelling a legal penalty (fine). Moreover, the *res judicata* authority refers only to the final solution of a decision, not to the grounds it was based on, as these are more related to any judge's options of conscience. On the other hand, any of the panels of judges may use the already existing proofs from the other file in order to corroborate evidence of the discriminatory deeds (as these are the common element of the linked files).

We consider that, if the employer has addressed a labour court directly, following the Labour Code, without also notifying the CNCD, it is necessary to summon CNCD in order to express an authorized viewpoint in the discrimination issue, when discrimination is accused by the employee (a mandatory summon of CNCD is also the solution stipulated by Art. 27 para 3 of the Ordinance).

We also consider that the employer's decisions must follow the special procedural regime of the employment law with respect to the damages as well. The damages should be requested either in the main file or in a separate one, but no later than 3 years after the deed has been committed (according to the provisions of Art. 268 para 1, letter c) in the Labour Code).

Consequently, the alternative solution of notifying common law courts is not justified in this case, since the damages resulted from decisions based on labour relations and such relations are for a good reason subject to the judicial control of specialized law courts.

As for the discriminatory *deeds* committed as part of labour relations, we consider that they exclusively call for the involvement of the CNCD and the employment (labour) courts, but with the possibility of prolonging the limitation periods, according to the provisions of the Ordinance. Thus, the employee may notify the CNCD within 1 year and the CNCD solution may be contested, but, just like in the previous case, only in a labour court (and in an administrative court only in the case of public servants).

As for the damages, they are to be requested either upon contesting the CNCD decision or separately, but no later than 3 years since the deed has been committed. However, in the latter case, since these deeds injure the employee's dignity, but they are not decisions that might affect the employment contract, we consider that the courts entitled to set the amount of such damages (either material or/and moral) should be civil courts.

We also consider that, in all these cases, both the CNCD and the law courts involved must have the legal power to force the employer to publish in the media the decision regarding the existence of discrimination and the sanction. They must also have the power to suspend or cancel the employer's operating license.

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