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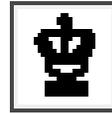
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**DISCRIMINATION AGAINST TEMPORARY WORKERS AND EMPLOYEES
UNDER THE BULGARIAN LABOR LAW**

**DISCRIMINACIÓN SOBRE TRABAJADORES DE TRABAJO TEMPORAL Y EMPLEADOS EN LA
LEGISLACIÓN LABORAL BÚLGARA**

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Abstract

With amendments and supplements to the Labor Code of June 2004, the Bulgarian legislator has taken steps in the direction of establishing common rights and obligations of workers and employees in an employment relationship arising from a contract of employment of any kind. Despite the desire to settle the maximum anti-discrimination protection to employees employed on fixed-term contracts, the existing labor legislation continues to contain provisions that could be classified as discriminatory. What is specific in these cases is that the discriminating subject is not the employer – it is the legislator. The article is an analysis of the provisions that have a discriminatory effect on employees and workers working under fixed-term contracts. The author makes relevant proposals *de lege ferenda*, aimed at overcoming shortcomings in labor laws that would lead to ensuring the application of the principle of non-discrimination.

Keywords

Fixed-term contract – Discriminatory criteria – Benefits - Discrimination

Resumen

Con las adiciones y modificaciones al Código del Trabajo de junio de 2004, el legislador búlgaro ha dado pasos en rumbo de establecer los derechos y obligaciones comunes de los empleados, en relación de dependencia derivada de un contrato de trabajo de cualquier tipo. A pesar del empeño por arreglar la protección máxima contra la discriminación a los empleados de trabajo temporal y con contratos de duración determinada, la legislación laboral vigente sigue conteniendo disposiciones que podrían ser calificadas como discriminatorias. El específico en estos casos es que el sujeto discriminador no es el empleador, sino el legislador. El artículo esta analizando las disposiciones que tienen un efecto discriminatorio sobre los empleados que trabajan con contratos de duración determinada. El autor hace propuestas en respecto *de lege ferenda*, con fin de solucionar deficiencias en la ley laboral, que conducen hacia garantizar la aplicación del principio de no discriminación.

Palabras Claves

Contrato de duración determinada – Criterios de discriminación daños y perjuicios
Compensaciones – Discriminación

With amendments and supplements to the Labor Code of June 2004, the Bulgarian legislator has taken steps in the direction of establishing common rights and obligations of workers and employees in an employment relationship arising from a contract of employment of any kind.¹ The legislative idea was to legally prohibit the conduct of differences between workers and employees based on the presence of the clause “term” in the content of the employment contract. Despite the desire to settle the maximum anti-discrimination protection for workers and employees employed on fixed-term contracts, the existing labor legislation continues to contain provisions that could be classified as discriminatory. They are discriminatory because they allow different unfavorable treatment of workers and employees working under a fixed-term contract, compared with those on a permanent contract, which affects their subjective labor rights and obligations. What is specific in these cases is that the discriminating subject is not the employer – it is the legislator.

In order to ensure the principle of equality in relation to workers and employees on permanent and fixed-term contracts, the legislator has taken the following measures²: - Expand the provision of art. 8, para. 3 LC with new discriminatory criteria, one of which is precisely the duration of the employment contract³. The introduction of “term” in the catalog of discriminatory criteria under art. 8, para. 3 LC sparked controversy in the employment law literature. According to some authors, the inclusion of “term” in the catalog of discriminatory criteria is not necessary, since the Bulgarian labor legislation has traditionally established common rights and obligations for workers and employees under an employment relationship arising from a contract of employment, regardless of the term for which it is concluded⁴. I think that including the “term” as a discriminatory criterion in the provision of art. 8, para. 3 of the Labor Code, the legislator took account of the specifics of the temporary employment relationship, which does not always provide the necessary stability and security of workers and employees. It is the timeliness of the employment relationship that makes these workers or employees more socially vulnerable and dependent, which creates prerequisites for more unfavorable treatment by employers⁵.

¹The legislative changes of 2004 were incurred in connection with the application of the Directive № 1999/70/EC, which aims to set common principles and minimum requirements for the conclusion of fixed-term contracts, and improve the quality of the fixed-term work by ensuring the application the principle of non-discrimination.

² On the difference between the concept of “equality” and “equal treatment” as the basic principles of labor law, see **Ат. Василев**, Трудово право. Бургас, БСУ, 1997, с. 43-45.

³ With the provision of art. 8, para. 3 LC there is governed the equality in relation to workers or employees in exercising their rights and performing their duties under an employment relationship. There is excluded any discrimination, privileges or restrictions on the rights and obligations based on criteria that are not related to the nature of work and the necessary qualifications, and with reason, standing outside the employment relationship.

The definition of the concept of “discrimination” is in art. 4, para. 2 and par. 3 of the Law on Protection against Discrimination. The discrimination in employment relationships is manifested in different, less favorable treatment of workers or employees on the grounds set out in art. 8, para. 3 of the Labor Code, which distorts or threatens their labor rights and legitimate interests. See the possible discriminatory acts in employment relationships: **Ив. Стайков**, Понятие за дискриминация в трудовите отношения – Правен преглед, бр. 1, 2005, с. 22- 24.

⁴ **В. Мръчков**, Коментар на Кодекса на труда, СИБИ, София, 2013 г., стр. 101.

⁵ In §1, p. 7 of the Additional Provisions of the Law on Protection against Discrimination the term “unfavorable treatment” is defined. The “unfavorable treatment” means any act, action or inaction that directly or indirectly affects the rights and legitimate interests.

In the Bulgarian reality there are increasingly observed similar acts of less favorable treatment of the temporary workers or employees, such as the conclusion of “Life” insurance by employers only for

- As an extension of the idea of non-discrimination of the “fixed-term” workers or employees, with amendments and supplements to the Labour Code of 2006, there was also added a provision of art. 68, para. 2 LC, which provides equal volume of rights and obligations of workers or employees on fixed-term contracts and indefinite-term contracts⁶. The aim of the legislator was to interrupt the possibility of discrimination against workers or employees engaged in a temporary employment relationship and to ensure equal treatment of workers or employees engaged in indefinite-term contracts⁷. Despite the measures taken, the legislator did not consider the availability of existing discriminatory provisions in the Labor Code and the need for legislative changes, which put them in the role of being discriminating regarding the relevant category of workers and employees.

One of the norms that has a discriminatory effect is the provision of art. 326, paragraph 1 of the Labor Code, which provides the worker or employee with the right to unilaterally terminate their employment relationship by submitting a written notice to the employer. With the expiry of the notice the employment contract shall be automatically terminated pursuant to art. 335, para. 2 p. 1 LC. The provision of art. 326, para. 1 of the Labor Code provides the legal possibility of the termination of the employment contracts unilaterally by the worker or employee, regardless of the existence of the clause “term” in the contents of the employment contract. The differences in the termination of the employment contract via a notice appear in determining the period of notice. According to art. 326, para. 2 of the Labor Code, the period of notice is defined upon the existence of the clause “term” in the contents of the employment contract. The period of notice in the termination of the employment contracts for an indefinite period of time is 30 days, unless the parties have agreed upon a longer period not exceeding three months. The Labor Code establishes a mandatory minimum and maximum notice period in terms of employment contracts for an indefinite time, as within these limits, the parties are free to agree on the term best suited to meet their mutual interest.

The legal framework of the notice period under fixed-term contracts is more different. To them applies the overriding rule that the period of notice is 3 months but not more than the remaining of the contract term. *De lege lata* three-month period is fixed and the parties have no legal possibility to arrange something different. If the parties still agree upon a different period of notice, this clause would be invalid as being contrary to the mandatory provision of art. 326, para. 2 LC. Instead of the invalid stipulation there should be applied the imperative provision of art. 326, para. 2 LC, respectively the fixed three-month period. I believe that the intended period of notice in these cases is unreasonably long and puts workers and employers on fixed-term contracts at a greater disadvantage compared with those who work under an indefinite-term contract. The provision of art. 326, art. 2 LC would prevent fixed-term workers or employees to have in due time a new job because of their

the benefit of workers or employees under labor contract for an indefinite time; partial payment or non-payment of additional benefits under art. 294 and art. 296 LC for workers and employees employed on fixed-term contracts; reluctance of employers to provide an opportunity for additional training of this category of workers and employees and others.

⁶ The provision of para. 2 of art. 68 Labor Code states that workers and employees on fixed-term contracts under par. 1 have the same rights and obligations as workers and employees under indefinite-time employment contracts. They cannot be placed at a disadvantage only because of the term nature of their employment relationship compared to workers or employees on indefinite-time contracts that perform the same or similar work in the enterprise, unless the law puts the use of certain rights depending of the qualification or acquired skills.

⁷ On this subject, see **В. Мръчков**, Коментар на Кодекса на труда, Цит. Съч. с. 256-257.

obligation to comply with the lengthy notice period. Should a worker or employee on fixed-term contracts be offered a job for an indefinite period of time, they have the ability to terminate their employment relationship without a notice according to art. 327, para. 1, p. 7 of the Labor Code. However, if the worker or employee decides to do a new job, in a temporary employment relationship, they will be obliged to comply with the three-month period of notice. Compliance with the notice means the worker or employee stays at the job and at the employer's disposal until the term expiration date.

Of course, the worker or employee may not render the three-month period in reality, taking advantage of the alternative possibility that is provided by the provision of art. 220, para. 1 LC. In these cases, the worker or employee has the option to terminate the employment contract before the expiration date of the notice, paying the employer a compensation for the unobserved time limit. The problem in such a case occurs when calculating the amount of compensation under art. 220, para. 1 of the Labor Code, which the worker or employee owes the employer in case they choose not to stay on the job until the expiration date of the notice. The compensation due will be weighed against the gross salary of the worker or employee for the unobserved notice period. This is where the discriminatory effect of the provision of art. 220, para. 1 LC is evident. A worker or employee employed under an employment contract of indefinite duration will be liable for compensation in the amount of a gross salary for the period of notice, which will be the established by law 30 days or agreed upon by the parties longer term, but not more than 3 months. It is possible in this case, the period of notice to be the maximum - 3 months, but it will be the result of an agreement reached according to the mutual intention of the parties. What will be different and less favorable will be the legal status of fixed-term workers and employees who will be required to comply with the legislative imperative. Therefore, when there is a termination of fixed-term employment relationships, the worker or employee benefits from the alternative "payment in lieu of notice", the amount owed will be weighed against the fixed 3-month notice period, but no more than the remaining term of the contract.

In the examined hypothesis the worker or employee on temporary contracts will be placed at a greater disadvantage compared with workers or employees employed under a contract for an indefinite period due to several reasons. First, the presence of a fixed-term derogates the free will of the parties to agree upon a different notice period by mutual agreement that best meets the common interest. Second, the adverse treatment has a property impact on the legal sphere of workers or employees on fixed-term contracts in the cases under art. 220, para. 1 LC. Last but not least, in such cases, the temporary workers or employees are prevented from seeking protection under a claim procedure as the discriminating person is the legislator, not the employer. Because of those reasons, I consider that art. 326, para. 2 LC, counters the provisions of art. 68, para. 2 of the Labor Code, which provides for equal rights and obligations to workers or employees, notwithstanding the existence of the clause "term" in their employment contract. The basic principle of non-discrimination of workers and employees employed under fixed-term contracts laid down in Art. 8, para. 3 LC is breached as well. Proceeding from these considerations, I think that it is socially justified and fair *de lege ferenda* for fixed-term contracts also to be provided a minimum notice period of 30 days, similar to contracts of indefinite duration, as the parties will have the right to negotiate a mutual will and a longer period of time until three months but not more than the term of the contract. Such a decision would put workers or employees on fixed-term contracts and contracts of indefinite duration on an equal footing, not only in terms of a termination of employment relationships, but in the exercise of their subjective rights and obligations under art. 220, para. 1 LC.

Again in relation to the principle of non-discrimination set out in art. 8, para. 3 and art. 68, para. 2 of the Labor Code there will be discussed the issue of the amount of compensation under art. 221, para. 2 of the Labor Code and the compensatable loss. Pursuant to art. 221, para. 2 of the Labor Code in case of a dismissal for breach in discipline the worker or employee owes compensation to the employer. In these cases, the legislator assigns a worker or employee the duty to “compensate” the employer for the damage that occurred as a result of the disciplinary dismissal. The guilty behavior of the worker or employee, which results in a serious violation of labor discipline is the reason for the termination of the employment relationship. Therefore, for the worker or employee there will arise a civil (property) responsibility to redress from the employer⁸.

The recoverable damage varies, depending on whether with the disciplinary dismissal there is suspended a fixed-term or indefinite-term employment relationship. When the dismissal terminates an indefinite-term employment relationship, the recoverable damage amounts to the gross salary of the worker or employee for the period of notice. In this hypothesis, the law fixes the compensatable damage and links it with the period of notice under art. 326, para. 2 LC. It does not depend on the actual damage that the employer has suffered as a result of the sudden termination of the employment relationship.

Compared with the disciplinary dismissals of workers or employees employed under temporary contracts, the legislator has established a different regime in determining the damage that is subject to redress, and respectively the amount of compensation under art. 221, para. 2 LC. In a fixed-term contract what is subject to indemnification is the actual damage suffered by the employer. Through the provision of Art. 221, para. 4 p. 2 of the LC the legislator gives a legal definition of the term “actual damage”. “The actual damage” is the employer being left without a worker or employee to carry out specific work. The damage is calculated according to the gross salary of the worker or employee for the period during which the employer is left without a worker or employee doing the same job, but for no longer than the remaining term of the employment contract. Remaining without a worker or employee must be in a causal connection with the termination of the employment relationship. If the same job after the disciplinary dismissal is done by a new worker or employee, the employer is not entitled to this benefit, because there is no longer any damage within the meaning of Art. 221, para. 4, p. 2 LC. The worker or employee must pay a compensation to the employer until the moment when the latter one hires a new worker or employee, but not longer than the duration of the employment contract. It is unclear how long it will take for the employer to hire a new worker or employee. Moreover, the law does not make the determination of the amount of the “actual damage” depending on whether or not certain actions will be done by the employer to find and hire a new worker or employee to do the same job. It is possible that the employer may not make the necessary efforts to find a new worker or employee or not look for one at all. Despite the unconscientious behavior on behalf of the employer, the dismissed worker or employee will be required to indemnify them.

The question that arises is whether the dismissed worker or employee against whom the employer has filed a claim for redress should make an objection that after the dismissal the employer has not made the necessary efforts to find another worker or employee. In this case there will be a labor dispute under art. 357, para. 1 LC on payment

⁸ **Ат. Василев**, Обезщетения по трудово правоотношение. С.: Сиби, 2007, 157- 158.

of compensation under art. 221, para. 2 LC⁹. During the claims procedure the worker or employee can object to the claimed by the employer amount of compensation, arguing that the employer was not conscientious i.e. did not make enough efforts to hire a new worker or employee. What will be the outcome of such an objection, we can only assume, given the fact that the law does not provide an explicit obligation of the employer to perform certain actions in that sense. Besides a lack of commitment regulated by the employer during the trial, the worker or employee is also to prove that the employer was able to avoid such damages, or at least some of them, but in practice this is difficult to prove.

I think that in the reviewed hypotheses of art. 221, para. 2 LC there is again a more unfavorable treatment of persons working under a temporary employment relationship. In these cases, the disciplinary dismissed worker or employee will be obliged to pay a compensation for a period which is not defined precisely and largely is made subject to the conscientious behavior of the employer. The provision of art. 221, para. 2 of the Labor Code establishes a different treatment of workers or employees under the indication of – “term” of the employment contract¹⁰. This will result in a breach of the prohibition on discrimination set out in art. 8, para. 3 LC and art. 68, para. 2 LC. Based on what has been said up to here, I think the amount of compensation the workers or employees on fixed-term contracts owe should not be determined by the “actual damage”, which the employer has suffered. *De lege ferenda*, I suggest that the provision of art. 221, para. 2 of the Labor Code be amended as the amount of compensation is fixed in the amount of the gross salary of the worker or employee for the period of notice under art. 326, para. 2 LC. Such a decision would ensure equal treatment of workers or employees, not only in exercising their labor rights, but also in the performance of their employment obligations, regardless of the presence of a “term” as a modality of the employment contract.

The acting labor law regulation must fully comply with the principle of equal treatment towards workers and employees in the exercise of their rights and fulfilling their obligations under the employment relationship. On the basis of the analysis, one can conclude that the Bulgarian labor legislation still comprises discriminatory provisions in respect of workers and employees on fixed-term contracts. The problem deserves attention. The proposals *de lege ferenda* aim at overcoming the relevant imperfections in the labor legislation, which could lead to ensuring the application of the principle of non-discrimination.

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⁹More on individual labor disputes see in detail **В. Лазарова**, Видове искиове по индивидуалните трудови спорове - in: сп. Търговско право, 2006, бр. 1.; **В. Лазарова**, Особени правила по Кодекса на труда във връзка с производствата по индивидуални трудови спорове - in: Сборник доклади. УИ, Москва, Московская государственная юридическа академия, 2006; **В. Лазарова**, Актуални въпроси на трудовото правораздаване и необходимостта от създаване на специализирани трудови съдилища - in: Сборник: Актуални проблеми на трудовото и осигурителното право, Том I, УИ „Св. Климент Охридски“, 2004.

¹⁰ More on the discrimination of workers and employees on the termination of their employment relationship, see **Ив. Стайков**, Дискриминация при прекратяване на трудово правоотношение – in: Съвременно право, 2003, № 6, с. 16-32.

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