

Multiple Discrimination in Employment Relationships

Dragoş Lucian Rădulescu

Lecturer, PhD, Petroleum Gas University of Ploiesti, Romania, dragosradulescu@hotmail.com

ABSTRACT: Discrimination in legal employment relationships involves the existence of differential treatment applied by the employer in violation of protected criteria established in the states' national legislation to restrain or eliminate the use or exercise of employees' rights. Discrimination involves the imposition of differentiation between employees, usually in comparable situations, and the application of identical treatment, even though they have different duties in the work process, with similar effects of excluding their rights. The article analyses multiple discrimination concerning the relevant European and national legislation, with reference to international and European regulations and relevant case law.

KEYWORDS: discrimination, multiple, rights, criteria, regulations

JEL Classification: K31

Introduction

“Discrimination is a frequently encountered issue in legal employment relationships, first identified at the level of the international community” (Marinescu 2019, 59- 68), which has led to the continuous evolution of regulations, particularly in terms of limiting measures and highlighting protected criteria. Specific regulations on equal treatment (Marinescu 2020, 490-494) in the labor market were initially imposed internationally (Popescu 2008, 340-341), European (Fuerea 2006, 26) and later at national level, and their evolution was related to case law. In this respect, multiple discrimination is characterized by the violation by the employer of several protected criteria, which leads to an amplification of the restriction of the employee's rights, and the role of the court in analyzing the unlawful conduct is established, proportionate to the exponential impact caused by the accumulation of these criteria. As a result, the employer can commit multiple discrimination by cumulatively failing to recognize different protected criteria found in non-discrimination legislation, such as religion, racial or ethnic origin, nationality, gender, etc., by applying differential treatment.

Cases of multiple discrimination in legal employment relationships imply unlawful conduct since the principles of economic freedom, the employer's right to property, or the subordination of the employee in the employment process do not exclude the employer's obligation to recognize the fundamental rights (Vartolomei 2016, 320) of employees.

We can appreciate the decisive role of the courts in protecting employees against multiple discrimination, all the more so since, at the European level, some countries have not defined this concept in their national legislation. In this respect, some national laws still protect the individual only against discrimination by the employer's violation of a single protected criterion. For example, in the United Kingdom, only exceptionally two criteria are accepted in the case of complaints of multiple discrimination.

As far as the Romanian legal system is concerned, it does not contain a definition of multiple discrimination, but it confers the character of an aggravating circumstance to the violation of two or more protected criteria, through the single conduct of the employer (Art. 2 para (6) of The Ordinance no. 137/2000 regarding the prevention and sanctioning of all discrimination forms: “Any distinction, exclusion, restriction or preference based on two or more of the criteria set out in paragraph 1 shall constitute an aggravating circumstance in establishing criminal liability if one or more of its components is not covered by criminal law”).

Law No 202/2002 promotes the necessary measures to guarantee equal opportunities and treatment between women and men and regulates the case of multiple discrimination.

On the other hand, multiple discrimination can also be analyzed with reference to the recognition of group rights, as the group was previously subject to an accepted system of inequality and discrimination not only from others who did not belong to it, but also from within. In this respect, in the Roma community, women are discriminated against by other male members, so in employment relations, Roma women employees become victims of the conduct not only of the employer but also of the Roma male employees, implying unequal treatment on the basis of ethnicity and gender.

As a result, multiple discrimination may involve the cumulative violation of different protected criteria: ethnic origin and religion, ethnic origin and gender, ethnic origin and social status, and ethnic origin and language are commonly observed in employment relationships. On the other hand, the cumulative analysis of the criteria of nationality, religion and ethnicity, rather than a separate one, in the case of differential treatment of employees by an employer, is a matter for interpretation by the courts based on the existence of a definition of the concept of multiple discrimination.

The acknowledgment of multiple discrimination is also necessary in the context of the existence of disadvantaged minority groups (Muscalu 2015, 223), not integrated into the labor market, as a form of non-discrimination extended beyond that recognized only at the individual level, in the process of implementing policies against unequal treatment of a new kind. In this respect, the novelty lies in the fact that it acknowledges people who simultaneously possess characteristics that are assimilated to several protected criteria, in that an employee may be a woman, belong to a minority or minorities, and have a disability, etc., all of which together determine an increased risk of social marginalization.

It may be considered necessary to recognize this specific form of multiple discrimination, based on an aggravated form of guilt on the part of an employer, as a distinct form of discrimination, in order to apply sanctions which are real and proportionate to the harm caused to the victim.

The concept of multiple discrimination

The concept of multiple discrimination has been found in the US since 1980, introduced by researcher Kimberlé Crenshaw as an analysis of the interaction between race and gender, with reference to black women belonging to disadvantaged groups. Subsequently, the 2001 UN World Conference against Racism in Durban brought multiple discrimination to the attention of the international community.

In this respect, several forms of discrimination have been identified through the violation of several criteria. Thus, compound discrimination is a situation where a person is treated differently on the basis of two criteria, but one criterion is aggravated by a breach of the second, or intersectional discrimination (Australia through the Human Rights and Equal Opportunity Commission (HREOC) has had an approach based on the interlinking of criteria, as set out in rules derived from the Equal Opportunities Commission Act 1986, the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 or the Disability Discrimination Act 1992), which is considered to be particularly valid in the USA, Canada or the United Kingdom, where several interacting criteria become almost inseparable and non-autonomous.

Multiple discrimination, on the other hand, implies an analysis of the criteria involved in absolute autonomy, usually evidenced by the interaction (Browne and Misra 2003, 487) of criteria of language, religion and culture with those relating to racial, ethnic or gender origin, where in practice a single thesis is used to address certain criteria such as race, religion or gender as naturally individual, emerging as a result of social movements. This recognizes (McCall 2005, 1771) the application of differential treatment by the employer, for example, based on

interacting criteria of language, religion, culture, racial origin, ethnicity and gender (Browne and Misra 2003, 487).

With reference to the employer's will, multiple discrimination may involve several forms, such as the employer's indirect intention when it promotes a female employee who has a disability, although it knew that the new position would involve business mobility duties, with the ulterior aim of having the position taken over by another male. We also consider the case of additive multiple discrimination, where the requirements for access to a job, if interpreted separately, do not become discriminatory, but cumulatively imply an impossibility to fulfil them. Conversely, it may also be the case where the violation of the protected criteria involves a degree of interaction that does not allow for separate analysis, as well as the case where only the criteria can be analyzed separately, leading to a more complicated interpretation of the cause of differential treatment.

On the other hand, the lack of conclusive definitions of the facts of multiple discrimination (Bahl v Law Society, 2004) leads to limits on the protection of employees' rights in the courts, and complaints based on a single protected criterion cannot always be held against the employer's conduct (Hannett 2003, 77).

It can be appreciated that, although multiple discrimination may have different ways of working, the effects of the employer's unlawful conduct are the same. For example, a female employee with a different sexual orientation may be discriminated against through sexual harassment, just as another employee who does not have the same orientation. Likewise, gay men can be discriminated against on the basis of race just like heterosexual men, and women of a certain ethnicity can be sexually harassed just like white lesbian or heterosexual women.

An interpretation of multiple discrimination also involves empirical studies, with the Joint Equality and Human Rights Forum (JEHRF) and the Advisory, Conciliation and Arbitration Service - ACAS (Hudson 2012) looking at intersectional identity and the effects on legal employment relationships.

The ACAS research on Multiple Discrimination, an independent public body in the UK, found that women are more likely to be discriminated against in access to employment, mainly on the cumulative grounds of age, sex, gender, race or disability (Solanke 2009, 732), with employers' conduct based mainly on negative stereotyping (Jones and Shorter-Gooden 2004).

Thus, the role of negative stereotypes in stimulating the onset of discriminatory behavior has been noted in the case of the African American Women's Voices Project, linked to the existence of sexism and racism in the United States. In this regard, evidence of the application of negative stereotypes is also highlighted in the American Bar Association's 1994 study (American Bar Association, Commission on Women in the Profession and Commission on Minority Opportunities in the Profession, "The Burdens of Both, the Privileges of neither Report on Intersectionality from the Task Force on Gender Equity, American Bar Association, 1994) on the role of African American women lawyers who were perceived as unfeminine and aggressive compared to male lawyers or white women lawyers, and who were subject to cumulative stereotypes based on ethnicity or gender.

In this regard, the Irish Human Rights Commission's analysis of multiple discrimination, with reference to race/gender, disability/sexual orientation (Brothers in Zappone (ed.) 2003, 54) and race/disability, considered that protection measures must go beyond traditional (Zappone 2003, 132) anti-discrimination policies. For example, it was found that women with disabilities are subject to a high degree of stigma in the workplace (Breslin in Zappone (ed.) 2003, 80), being preferred to unskilled work compared to male employees with the same degree of disability.

The issue of multiple discrimination was initially encountered most often in the case of women with disabilities who were exposed to violence, sexual harassment, and inequality of status, age, religion, belief or race. Basically, it questioned whether race, status, disability and sexual orientation were simply incidental to sex discrimination (Aylward 2008, 39).

Procedurally, with regard to multiple discrimination, combining several protected criteria, in terms of the motivation of a complaint based on discrimination, with a stronger emphasis on the criterion that would have been easier to prove, may make it easier for the potential victim to obtain a favorable solution.

International regulations. Relevant case law

The concept of multiple discrimination has been recognized at international level through the United Nations Convention (A normative act based on the principles of the United Nations Charter, on the Universal Declaration of Human Rights, in the sense of recognizing the rights and freedoms of individuals and combating all forms of discrimination) on the Rights of Persons with Disabilities (CRPD) of 3 May 2008 (The subject matter of the Convention relates to non-discrimination, equal opportunities and equality between men and women in the context of the application of Article 3(b), (e) and (g)), an issue related to women's rights and based on the existence of gender and age bias.

At the European level, multiple discrimination has previously been recognized in Directive 2000/43/EC (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) and is linked to the principle of respect for human rights, fundamental freedoms and the rule of law. The Directive refers to legal employment relationships, relations between employees and employers regardless of the level of professional hierarchy or the public or private domain, containing mechanisms for imposing measures to eliminate inequalities between men and women, except for differences in treatment based on nationality or rules of entry and residence, access to the labor force and occupation, to eliminate inequalities and multiple discrimination.

The Commission Report (Report from the Commission to the European Parliament and the Council - Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive)) on the application of Directive 2000/43/EC and Directive 2000/78/EC concerning multiple discrimination refers to the specific situation of women as potential victims of this form of discrimination, indicating the possibility of cumulating several protected criteria.

In this respect, Directive 2000/78/EC (Directive of 27 November 2000 establishing a general framework for equal treatment in matters of employment and labor market) provides rules on forms of multiple discrimination, with indirect reference mainly to employment relationships involving women. The rules prohibiting discrimination on grounds of religion may also cover multiple discrimination, where racial or ethnic origin may overlap with religion and nationality as forms of indirect multiple discrimination.

In terms of case law on the subject, the case of *Perera v. Civil Service Commission* (*Perera vs. Civil Service Commission* [1983] IRLR 166, analyzed in *Equality and Diversity Forum, "Memorandum submitted by the Equality and Diversity Forum (E 09)"*, June 2009) (1983) dealt with discrimination on the grounds of nationality, age and language with the prevention of freedom of access to the legal employment relationship, involving access progressively limited (Moon 2006, 89) by each criterion. The case was based on the applicant's lack of access to posts in the UK civil service, where he was successively rejected on the grounds of his color or national origin, age and language, i.e. his command of English, with recognition of a form of indirect multiple discrimination.

Prior to 2004, multiple discrimination was considered in the cases of *Nwoke v Government Legal Service* (IT/43021/94) and *Mackie v G & N Car Sales n/a Britannia Motor Co* (ET no 1806128/03) concerning direct multiple discrimination on grounds of gender and

race, *Ali v. North East Centre for Diversity & Racial Equality & Bux* (ET case no 2504529/03), concerning indirect multiple discrimination on grounds of gender and race, *Acharee v. Chubb Guarding Services t/a Chubb Security Personnel* (ET [2000] DCLD 43), involving harassment on grounds of race and sex, and *Bhal v. Law Society* - 2004.

After 2004, the cases of *Bloomfield v Hampshire Police Force* - 2006, dealing with indirect multiple discrimination on grounds of gender and sexual orientation, *Azmi v Kirklees Metropolitan Borough Council* (IRLR 484) - 2007 and *Noah v Desrosiers t/a Wedge* (ET2201867/2007) - 2007, dealing with indirect multiple discrimination on grounds of gender and religion were considered. In practice, multiple discrimination is based on a composite issue, consisting of the violation of different criteria, which must be analyzed simultaneously (Yuval-Davies 2006, 197) and provided for in equal treatment legislation (Monaghan 2013, para. 5.12).

We believe that non-discrimination regulations must also involve the relationship between discrimination and society (Phillips 2010, 49) in terms of the potential disadvantages created in the labor market by permanent political competition (Butler 2011, 168), without the introduction of positive measures to protect disadvantaged minority groups leading to the emergence of new forms of discrimination against the majority (Fredman 2005, 14).

Conclusions

As far as multiple discrimination is concerned, this form represents an interaction of several protected criteria, which leads to the need for a unitary definition of the concept, which also has objectives linked to the political sphere, in order to promote equality and social inclusion.

It thus becomes clear that enforcing non-discrimination measures is mainly of interest to the labor market, as accepting inequality primarily means marginalizing employees from minority groups and reducing overall productivity. In the same sense, non-discrimination also relates to the development of globalization, leading to the resolution of demographic problems, the elimination of labor differences between countries and the acceptance of multiculturalism, the conceptualization of race, ethnicity or religion.

Non-discrimination allows people from groups considered disadvantaged, mainly women and migrants, to be integrated into employment relationships, the concept of diversity implying the willingness of employers to recruit employees from this category. However, multiple discrimination requires clarifications, including sociological ones, on the underlying hypotheses of the phenomenon and the intertwining of the protected criteria, as well as on the stereotypes linked to immigration and the ethnic groups on which it is based, with an analysis of the inequalities in the case of people considered vulnerable.

As a result, recognizing group rights, oppressions, and socioeconomic status inequalities would make it easier to analyze multiple discrimination, as national statistics of the states do not contain conclusive data on the cases of cumulation of the protected criteria, which may lead potential victims to refrain from filing complaints. In this respect, the proof of multiple discrimination will require the interpretation of issues related to historical, social and political disadvantages especially of groups considered disadvantaged and vulnerable, in a context where human rights do not allow for a full protection regime.

References

- Aylward, C. A. 2008. "Intersectionality: Crossing the Theoretical and Praxis Divide." *Journal of Critical Race Theory* 1(1): 1-48.
- Breslin, N. 2003. "Situation, Experience and Identity of Disabled Women in Northern Ireland." In Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRF.
- Brothers, M. 2003. "It's Not Just About Ramps and Braille: Disability and Sexual Orientation." In Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRF.
- Browne, I., and J. Misra. 2003. "The Intersection of Gender and Race in the Labor Market." *Annual Review of Sociology* 29: 487-513. <https://www.annualreviews.org/doi/abs/10.1146/annurev.soc.29.010202.100016>.

- Butler, J. 2011. *Bodies That Matter: On the Discursive Limits of Sex*. Taylor & Francis, Routledge.
- Fredman, S. 2005. "Double Trouble: Multiple discrimination and EU Law." In *European Anti-Discrimination Law Review*, Vol. 2.
- Fuerea A. 2006. *Drept comunitar al afacerilor*. Bucharest: Universul Juridic Publishing House.
- Hannett, S. 2003. "Equality at the intersections: the legislative and judicial failure to tackle multiple discrimination." *Oxford Journal of Legal Studies* 23(1): 65-86.
- Hudson, M. 2012. "The experience of discrimination on multiple grounds." *ACAS Research Paper* 01/12: 2012, http://www.acas.org.uk/media/pdf/0/3/0112_Multidiscrim_Hudson-accessible-version-Apr-2012.pdf.
- Jones, C., and K. Shorter-Gooden. 2004. *Shifting: The Double Lives of African American Women: Based on the African-American Women's Voices*. Project, Harper Perennial.
- Marinescu, D-M. 2019. "The Discrimination - A Risk Factor for Social Security in the European Union." In *Proceedings of The 15th International Scientific Conference Strategies XXI. "Strategic Changes in Security and International Relations."* Volume XV, Part 1, pp. 59- 68, Bucharest, April 11-12, "Carol I" National Defense University, Security and Defense Faculty.
- Marinescu, D-M. 2020. "The Evolution of The Concepts of Equal Opportunities and Migration in The Legislation of The European Union." In *Proceeding of the Scientific International Conference "Global Security and National Defense,"* pp. 490-494, "Carol I" National Defense University, Doctoral School, June 25-26.
- McCall, L. 2005. "The complexity of intersectionality." In *Signs: Journal of Women in Culture and Society* 30(3): 1771-1800.
- Monaghan, K. 2013. *Monaghan on Equality Law*. Oxford University Press, para. 5.12.
- Moon, G. 2006. "Multiple discrimination – problems compounded or solutions found?" In *Justice Journal*, Vol. 3.
- Muscalu, M.L. 2015. *Discriminarea în relațiile de muncă*. Bucharest: Hamangiu Publishing House.
- Phillips, A. 2010. "What's wrong with essentialism?" In *Distinktion: Scandinavian journal of social theory* 11 (1): 47-60. DOI: 10.1080/1600910X.2010.9672755.
- Popescu, A. 2008. *Dreptul internațional și European al muncii*, Second Edition. Bucharest: C.H. Beck Publishing House.
- Solanke, I. 2009. "Putting Race and Gender Together: A New Approach to Intersectionality." *Modern Law Review* 72(5): 723-749.
- Vartolomei, B. 2016. *Dreptul muncii. Curs universitar*. Bucharest: Universul Juridic Publishing House.
- Yuval-Davies, N. 2006. "Intersectionality and Feminist Politics." *European Journal of Women's Studies* 13(3): 193-209.
- Zappone, K. 2003. *Rethinking identity: the challenge of diversity*. Joint Equality and Human Rights Forum. (JEHRF).