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PROTECTION OF PERSONS WITH DISABILITIES FROM EMPLOYMENT DISCRIMINATION, WITH A FOCUS ON SERBIAN LEGISLATION AND PRACTICE

Abstract: Like so many European countries, the Republic of Serbia is facing high rates of unemployment among persons with disabilities. This can be explained by various factors, including indirect discrimination of persons with disabilities within the school system and employment procedures, as well as their fear of forfeiture of social benefits upon entering into an employment contract. Law on vocational rehabilitation and employment of persons with disabilities (2009) is promoting employment of such persons in the open market, in accordance with the general conditions or by reasonably adjusting the workplace to their needs, while 'sheltered' employment is, as a rule, reserved for persons who, due to the grade of their disability, are unable to fulfil their need for economic security as initially described above. Based on international standards and comparative experience, the legislator prescribed multiple measures, including employment quotas, for equal participation of persons with disabilities in the labour market as well as increase in their employment. Although the rate of employment of persons with disabilities has risen slightly since the Law came into force, many of these people are still without work, mainly because employers sought to 'bypass' their designated employment obligations any way they could, even pressuring the (existing) staff to register as persons with disabilities. On the other hand, judges are faced with the challange of 'honing down' reasonable adjustments standard, especially as the corresponding obligation of the employer exceeds the ban for indirect discrimination, and yet differs from positive discrimination. Therefore, the paper shall reasses the limits of the obligation for reasonable adjustments, as well as the circle of protected persons, since comparative law recognizes the practise of reserving employment quotas exclusively for people with severe disabilities. Especially so, because limiting the designated employment obligation to persons with severe disabilities is justified when the purpose of the quota system is to facilitate employment for people facing the biggest problems on the labour market. Conversely, the need to reduce the number of users of social benefits speaks in favour of establishing a general obligation for employment of persons with disabilities.

Keywords: *persons with disabilities; right to work; reasonable adjustments in the workplace; quota system; positive discrimination.*

INTRODUCTION

One of the basic principles of contemporary law is reaffirmed in the Universal Declaration of Human Rights: "[a]ll human beings are born free and equal in dignity and rights".[1]This provision, based on a grand humanistic notion of inherent dignity and equality of all members of the human family, reaffirms that everyone is entitled to inalienable and inviolable rights, with the obligation of the State to make those rights available to all, under equal conditions. The principle of non-discrimination represents the modern and „improved" version of the principle of equality.[2] These principles are applied in a number of areas, including employment and labour relations. Moreover, they represent the *fundamental principles of Labour law*, together with the freedom of work and the principle of tripartism. At the same time, equal employment opportunity is a key element of freedom of work and right to work (in addition to free choice of profession and employment as well as prohibition of forced labour), while equal conditions of work and equal career advancement opportunities represent an integral part of the right to fair and just conditions of work. Equality at work was added to the list of the most important employment and social policy issues (objectives, in fact), mainly because of the social changes from the past few decades (changes in demographic structure, acceleration of globalisation, changes in production and organisation methods etc.) that helped widen the gap between the proclaimed equality in employment and labour relations (formal equality) on the one hand, and the actual ability and willingness to effectively apply this principle in practice, on the other hand. In addition, intense activities of international organisations (International Labour Organization, Council of Europe, European Union), aimed at creating conditions for equal opportunities and equal treatment at work, represent an important reason that the fight against discrimination was made a priority in the contemporary labour law and public policy.

At its essence, an employment relationship is characterized by inequality between the subjects. This is because an employer, in addition to his factual power, manifested through his economic dominance, has the legal prerogatives to organise, manage and control the work of his employees, to lay down their rights, obligations and responsibilities, as well as to punish employees for breach of employment obligations.[3] Labour legislation aims to correct these inequalities and put the subjects of employment relationship in balance, which is why Alain Supiot rightly states that „the entire labour law was built as a reflection of the efforts to fit the principle of *de facto* equality into the legal framework ruled by the principle of formal equality".[4] This goal can be achieved in several ways, primarily by limiting an employer's (managerial, normative and disciplinary) prerogatives and by protecting the dignity and wellbeing of employees.

Given the requirement for equal distribution of burden and opportunity, implementation of the equality principle shall entail the requirement for all workers to have the same rights, obligations and responsibilities regarding employment. Therefore, this represents a request for *formal equality*, which corresponds to the constitutional principle of equality before the law and equality of rights (as well as obligations and responsibilities).[5] The legislators therefore have the task

1 Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 (III) of 10 December 1948, article 1.

2 Frédéric Sudre, *Droit international et européen des droits de l'homme*, 5e édition, Presses Universitaires de France, Paris, 2001, p. 332.

3 For more on legal subordination as a key element of employment relations see: Ljubinka Kovačević, *Pravna subordinacija u radnom odnosu i njene granice*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013.

4 Alain Supiot, *Critique du droit du travail*, 2e édition, Presses Universitaires de France, Paris, 2007, p. 134.

5 Patrice Adam, *L'individualisation du droit du travail: Essai sur la réhabilitation juridique du salarié-individu*, L.G.D.J., Paris, 2005, p. 222.

to regulate the same (or similar) situations in the same manner, to regulate different situations differently and to avoid creating (new) differences with their norms. This further means that the principle of equality before the law is a matter of attitude towards the law, or rather that it requires the law not to differentiate between the workers on forbidden grounds. However, reaffirming the equality principle is not enough to eliminate all instances of inequality in employment and labour relations, so the State has to intervene in order to establish a *de facto equality*. That intervention will particularly include measures to facilitate employment or provide some kind of advantage to the groups of people who have traditionally faced unfavourable treatment in the labour market. These measures will include special protection, assistance or another form of preferential treatment aimed at establishing, in practice, a complete and real equality for persons who were put, due to certain attributes, in an unfavourable position or are suffering from any past or current discrimination.

Persons with disabilities belong to a group of people who are facing significant obstacles in exercising and enjoying their right to work. Many countries are facing high rates of unemployment of persons with disabilities,[6] which can be explained by employment discrimination as well as their lack of education, caused, to a large extent, by discrimination in the education system. In addition, the cause of high unemployment rates amongst the disabled can be found in a reduced demand for unskilled labour, as well as their fear of forfeiture of social benefits upon entering into employment.[7] The same problem exists in The Republic of Serbia, where there are between 700.000 and 800.000 persons with disabilities; around 300.000 of them are older than 15 and younger than 65, and only 13% of them are employed.[8] Such low rate of employment of persons with disabilities in Serbia can be explained by various factors, including their lack of education (more than 50% of persons with disabilities have completed only primary school), indirect discrimination in the education system, as well as their fear of forfeiture of social benefits upon entering into an employment contract. A particularly important reason for mass unemployment of persons with disabilities is the employment discrimination.

1. RISK OF DISCRIMINATION OF PERSONS WITH DISABILITIES IN THE FIELD OF EMPLOYMENT

When considering the risk of discrimination of persons with disabilities in the field of employment, one should keep in mind that the equality principle in a broader sense means the demand for *equal opportunity and equal treatment*, i.e. it's an obligation to treat all workers in accordance with *identical, objective, constant and appropriate criteria*.[9] This, however, doesn't exclude the possibility of treating workers differently, meaning that the equality principle will not be violated if persons with disabilities receive certain benefits, provided that the conditions have already been created so that all workers with disabilities can obtain certain benefits under the same terms, and that those terms have been established in advance and know to all.[10] This, further,

6 United Nations, *From exclusion to equality: Realizing the rights of persons with disabilities*, Geneva, 2007, p. 2.

7 Arthur O'Reilly, *The right to decent work of persons with disabilities*, International Labour Office, Geneva, 2007, p. 66.

8 Government of the Republic of Serbia, Strategy for improving the situation of persons with disabilities in the Republic of Serbia (Strategija unapređenja položaja osoba sa invaliditetom u Republici Srbiji, *Službeni glasnik RS*, broj 1/07).

9 Gilles Auzero, „L'application du principe d'égalité de traitement dans l'entreprise", *Droit social*, No. 9–10/2006, p. 825.

10 *Ibid*., p. 822.

means that an employer may treat employees differently, as long as that treatment stems from the objective criteria prescribed in advance. Conversely, the equality principle is violated when an employer subjectively evaluates the skills of employees and arbitrarily decides on giving out certain benefits.

Implementation of the equality principle does not exclude all differentiation between candidates for employment. A different solution would call into question one of the key characteristics of a contract of employment, one that implies that the contract is entered into *intuitu personae*, i.e. that the personality of an employment candidate is essential for entering into a contract.[11] Especially since the responsibility of personal performance of the contractual obligation represents an essential element of an employment relationship (as well as a contract of employment). This characteristic of an employment contract doesn't mean that an employer has the right to make decisions based on disability or health status of the candidates for employment. Instead, an employer is obliged to respect the personal dignity of the candidates and treat them in accordance with their skills, instead of stereotypes and prejudices related to their personal traits. In spite of this, persons with disabilities often face the risk of employers treating them based on stereotypes and prejudices that they are not as productive, that they are more likely to abstain from work and that adapting the workplace to their needs will be costly.

The risk of discrimination of persons with disabilities is also apparent when establishing the *special terms and conditions of employment*. Terms and conditions have to be predetermined and employers will have to comply when advertising job vacancies and hiring new staff, thereby ensuring equal employment opportunities for all candidates. The first limitation in establishing special terms and conditions of employment is the prohibition of *direct discrimination* that exists when a job seeker is put in an unfavourable position, because of disability, compared with other people who are in the same (or similar) situation. This form of discrimination is rarely seen in legislation, unlike *indirect discrimination*, which is created by provisions that put persons with disabilities in an unfavourable position compared to other people, even though they form the same requirements for everyone. This is because the disposition of the relevant norms is only seemingly neutral; the norms set the terms and conditions of employment that persons with disabilities are unable to meet or that are harder for them to meet, compared to the other candidates. For example, indirect discrimination can be instituted via the employment terms that specify certain physical abilities, strength and endurance, as they unjustifiably restrict employment of persons with disabilities (as well as old people, minors and women), if such abilities are unnecessary for the successful performance of the job. Similarly, indirect discrimination of persons with disabilities can occur when a driver's license is unjustifiably required for employment, since people with a significantly impaired vision or other forms of disability are unable to meet such a requirement.[12]

11 Unlike an employee, an employer may transfer his rights and obligations from an employment relationship onto a third person, unless an employer's personality is considered indispensable for fulfilment of the existing employment relationship. Hence, the death of an employer, as a natural person, may result in the termination of an employment contract only if the content of the contract was closely linked to the employer's personality, as it would be the case if a person with disability (employer) died after having hired a personal assistant (employee).

12 There will be no discrimination if having a driver's license is necessary to do the job, however the dilemma remains if the reasons of professional necessity can justify a driver's license as an employment requirement for jobs where driving is rare and the task can be fulfilled by using public transportation or by delegation to another employee. In this case, introducing a driver's license as a job requirement can be qualified as indirect discrimination on grounds of disability, since driving is reserved for rare situations and specific needs of the employer can easily be met in other ways. Brian Doyle, „Employment rights, equal opportunities and disabled persons: The ingredients of reform", *Industrial Law Journal*, Vol. 22, No. 2/1993, p. 94.

Besides employment, the risk of discrimination of persons with disabilities exists in terms of *exercising the rights and assuming obligations and responsibilities from employment relations*. Measures for ensuring equality at work differ from one legal system to the next, and they depend on the impact of specific economic, social and cultural factors. However, despite those differences, equality at work, in contemporary labour legislation, can be ensured in at least two ways: 1) *by prohibiting arbitrary decision making regarding rights, obligations and responsibilities of employees*, while promoting work skills as the main criterion in decision making; 2) *by providing (special) protection of the disabled employees*. Discrimination of employees on grounds of disability is prohibited under the threat of nullity of employment contracts, collective agreements or employer's acts that are not in compliance. Second group of protective measures is aimed at improving the position of the disabled employees, as they have traditionally faced unfavourable treatment in the workplace.[13] In addition to the aforementioned measures, some countries are promoting another approach to ensure equality at work – employee diversity recognition i.e. adapting the work conditions to the different needs of different groups of people, which means a greater differentiation of measures to combat discrimination.[14]

2. LEGAL FRAMEWORK FOR EMPLOYMENT OF PERSONS WITH DISABILITIES IN THE REPUBLIC OF SERBIA

In Serbian legislation, the legal framework for employment of persons with disabilities has been set by the Labour law. It prohibits direct and indirect discrimination of employees and persons seeking employment on grounds of disability, guarantees special protection of the disabled and stipulates that they are "entering into employment under the terms and conditions specified in this law, unless otherwise established by a special law".[15] In 2009, the Serbian National Assembly adopted a law that regulates employment of persons with disabilities under general and special conditions – the Law on vocational rehabilitation and employment of persons with disabilities,[16] which takes a new, significantly different approach to regulating employment of persons with disabilities. This new approach includes employment of persons with disabilities in the open market, under general conditions or by adapting the workplace to their needs, while „sheltered" employment is, as a rule, reserved for persons who, due to the level of their disability, cannot fulfil their need for economic security as formerly described.[17]

13 *Cf.* Manuela Tomei, „Discrimination and equality at work: A review of the concepts", *International Labour Review,* No. 4/2003, pp. 411–413.

14 *Ibid*., pp. 413–415. *Cf.* Mark Bell, „The right to equality and non-discrimination", in: Tamara K. Hervey, Jeff Kenner (eds), *Economic and social rights under the EU Charter of Fundamental Rights – A legal perspective*, Hart Publishing, Oxford/Portland Oregon, 2003, pp. 96–97, 109–110.

15 Labour law (Zakon o radu, *Službeni glasnik RS*, br. 24/05, 61/05, 54/2009, 32/13), art. 12, 18, 28 and 101-102. Direct and indirect discrimination on grounds of physical and psychological disability is prohibited by the Constitution of the Republic of Serbia (article 21, paragraph 3). This prohibition (as it relates to employment and labour relations) is reaffirmed in article 16 of the Non-discrimination law (Zakon o zabrani diskriminacije, *Službeni glasnik RS*, br. 22/09) and art. 21-26 of the Law on prevention of discrimination of the disabled (Zakon o sprečavanju diskriminacije osoba sa invaliditetom, *Službeni glasnik RS*, br. 33/06).

16 Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom (*Službeni glasnik RS*, br. 36/2009, 32/2013).

17 This was a break from a traditional concept of employment of persons with disabilities, on which the Law on vocational training and employment of the disabled (Zakon o radnom osposobljavanju i zapošljavanju invalidâ, *Službeni glasnik RS*, br. 25/96 i 101/05) was based. The said law was primarily focused on regulating the establishment and operation of companies for employment of persons with disabilities, which in practice resulted in their professional isolation. In this sense, the Law on vocational rehabilitation and

Based on the standards of the United Nations,[18] International Labour Organization[19] and the Council of Europe[20] as well as relevant comparative experience, Serbian legislators envisaged multiple measures to ensure equal participation of persons with disabilities in the labour market and to increase their employment, such as: vocational rehabilitation, obligation to reasonably adjust the workplace to the needs of persons with disabilities, active employment policy and quotas for employment of persons with disabilities. Although the rate of employment of persons with disabilities has risen slightly since the Law on vocational rehabilitation and employment of persons with disabilities came into force, a significant number of these people are still without jobs.[21] This is because, amongst other things, employers sought to „bypass“ their designated employment obligations any way they could, even pressuring the (existing) staff to register as persons with disabilities. Also, problems emerged concerning practical implementation of certain

employment of persons with disabilities can be characterized as a *new* law on employment of persons with disabilities, which carries a substantive as well as temporal and chronological meaning.

18 Although their rights are incorporated into „general“ human rights, guaranteed by constitutions of modern countries and international conventions on human rights, persons with disabilities often face significant obstacles in achieving and enjoying their formally recognized rights and freedoms. The United Nations (UN), therefore, pay special attention to the protection of the disabled, although their activities were initially based on the *medical model of disability*, which was primarily focused on treatment, rehabilitation and social protection of the disabled. At the beginning of the 1970's, a new approach to standardization of the status of persons with disabilities was taken. It was based on the *social model of disability* and it included the widest possible integration of persons with disabilities as well as enjoyment of all human rights and freedoms. This was reaffirmed in a series of UN soft laws, including the Declaration on the Rights of Disabled Persons (1975) and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993). The last step and a significant turning point in an effort to ensure full enjoyment of all human rights for the disabled as well as fundamental freedoms without discrimination, was the adoption of the Convention on the Rights of Persons with Disabilities, ratified by the Republic of Serbia in 2009. This Convention is the first international instrument that is binding for the contracting countries, asking them to ensure and protect the rights of the largest „minority“ in the world, one that has more than 650 million „members“. The convention identifies employment as one area with a need to (reasonably) adjust the conditions for exercising the rights to the specific needs of the disabled, as well as one area where the disabled regularly encounter obstacles and are in need of special protection. Therefore, the contracting parties shall recognize to the persons with disabilities „the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities“ (article 27, paragraph 1). For more on the (dis)continuity in standardization of the legal status of persons with disabilities at the international level see: Rosemary Kayess, Phillip French, „Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities“, *Human Rights Law Review*, Vol. 8, No. 1/2008, pp. 1-34.

19 Universal standards for employment of persons with disabilities are enshrined in the sources of law of the International Labour Organization, most notably in the Convention No. 159 concerning Vocational Rehabilitation and Employment (Disabled Persons), which was ratified by Serbia. This Convention requires the contracting parties to formulate, implement and periodically re-evaluate national policies on vocational rehabilitation and employment of persons with disabilities, while being guided by twofold objectives. The first objective includes the availability of vocational rehabilitation measures to all categories of persons with disabilities, while the second objective consists of improving the opportunities for the disabled to get a job in the open market.

20 Serbian legislator also follow the standards set out by Council of Europe, to which they are particularly obliged by the ratified European Social Charter (Revised), which recognizes the rights of the disabled to independence, social integration and participation in the community. In order to effectively exercise these rights, the disabled have to have a better access to employment, hence, Serbia and other contracting parties have committed to undertake „all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability" (article 15, point 2). The legal text was inspired by a series of Council of Europe soft laws, including the Recommendation No. R (92)6 on a coherent policy for people with disabilities, Resolution AP (95)3 on a Charter on the vocational assessment of people with disabilities and Recommendation Rec (2006)5 on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015.

21 Since the introduction of this Law, more than 7.000 persons with disabilities found employment, while prior to its introduction, somewhere between 200 and 300 persons with disabilities found employment annually. For example, in 2011, there were 18.555 persons with disabilities registered at the National Employment Service, and 4.370 found employment.

provisions of the Law, which lead to its amendment in mid 2013. This Amendment is primarily aimed at achieving the balance between various ways to fulfil the obligation of employment of persons with disabilities, because, without balance, any other way would be deemed more profitable than entering into a contract. Besides, the Amendment was necessary because provisions of the Law needed to be aligned with the Rules on allocation of State aid[22] as well as with the Strategy of Development of Official Statistics of the Republic of Serbia. Unlike employment quotas, employers' obligation to adapt the workplace to the needs of the disabled was not the subject of the amendment, which is why the judges were faced with the challenge of "honing down" standards for reasonable adjustment to the workplace, especially as this particular obligation of the employer exceeds the prohibition on indirect discrimination, and yet differs from positive discrimination. Therefore, this paper reassesses the limits of the obligation for reasonable adjustment, as well as the issue of (in) effective quotas for employment of persons with disabilities in international, comparative and Serbian labour legislation.

3. POSITIVE DISCRIMINATION: OBLIGATION OF EMPLOYMENT OF PERSONS WITH DISABILITIES

Measures of positive discrimination may seem discriminatory, considering that they provide priority of employment to certain people.[23] This first impression is removed however by the fact that the measures are undertaken in order to eliminate or reduce actual instances of inequality that occur in practice. Besides, positive discrimination is a temporary measure. Compared to the other forms of discrimination, positive discrimination is, in many ways, reminiscent of indirect discrimination, since in both cases, different treatment of a person is related to the actual impact that a specific legislation or practice make in relation to the group to which the person in question belongs.[24] This further means that positive discrimination, just like the prohibition of indirect discrimination, is aimed at ensuring a *de facto* equality, with a focus on protection of certain groups of people. This conceptual similarity does not mean, however, that the prohibition of indirect discrimination against certain categories of people automatically implies their positive discrimination.[25] No such automatism exists, all the more so because in select cases, different treatment of job candidates or employees – can be justified.

One important measure of positive discrimination is to establish *quotas for employment* of certain categories of people, which means that an employer is legally obliged to hire a certain number of people from that category. Historically, the first employment quotas were established in accordance with the idea that a country is obliged to indemnify persons who have had

22 For analysis of control and allocation of state aid for employment of persons with disabilities in EU Member States, see: Delia Ferri, Mel Marquis, „Inroads to social inclusion in Europe's social market economy: The case of state aid supporting employment of workers with disabilities“, *European Journal of Legal Studies*, Vol. 4, No. 2/2011, pp. 44–73, *http://hdl.handle.net/1814/20177*, 27. 4. 2014.

23 Synonyms to the term *positive discrimination* that are used in the literature are „positive action“, as per Community law, as well as „affirmative action“, as per American and Canadian law. Still, these terms shouldn't be used lightly as synonyms, considering that they denote different concepts and reflect peculiarities of the legal and social contexts in which they were developed. Marc De Vos, *Beyond formal equality: Positive action under Directives 2000/43/EC and 2000/78/EC*, European Commission, Luxembourg, 2007, p. 12.

24 *Ibid*., p. 14.

25 *Ibid*.

to endure hardships while other members of the society had been spared.[26] This is why after the First World War, Germany, Austria, Italy, Poland and France instituted a legal obligation for employers to hire a percentage of the disabled war veterans. After the Second World War, the quota-levy system was extended to include other categories of persons with disabilities, having been accepted in a number of European countries as an important measure of employment. There are, however, countries in which the quota-levy system never took hold (e.g. Denmark, Finland, Sweden, Portugal) or was abandoned, due to modest results, in favour of the legislation banning discrimination. The quota system can take one of the following forms: a) legal obligation of employment, with the threat of sanctions; b) legal recommendation of employment; v) legal obligation of employment, without the threat of sanctions.[27]

When it comes to Serbia, the obligation to employ persons with disabilities was foreseen by the Law on disabled persons from 1929, which required the companies with more than 50 employees and over 100 hectares of agricultural land to hire „idle disabled persons from groups VI-IX, in proportion with the economic power of the company or the size of their land, but no more than 5% of the total number of their permanent staff".[28] Eighty years later, the Law on vocational rehabilitation and employment of persons with disabilities instituted an obligation for all employers with at least 20 employees to hire a certain number of people with disabilities.[29] In addition to direct employment, this obligation can be met in the following two ways: a) if an employer participates in the financing of salaries of persons with disabilities who work in a social enterprise or an enterprise for vocational rehabilitation and employment of persons with disabilities; b) if an employer carries out financial obligations from various contracts entered into by these enterprises.[30] If an employer, for whatever reason, does not hire the required number of persons with disabilities, he will be obliged to, in addition to the fines defined by the Law, pay the penalty in the triple amount of the minimum salary for each person he didn't hire. Implementation of the aforementioned provisions was met with certain ambiguities regarding *various ways to fulfil the designated employment obligation*. If employers failed to fulfil their designated employment obligation, they would have the option to pay the penalties by the 30th day of the month, while the employment obligation had to be performed by the 5th day of the month, so it wasn't clear in practice at which moment would employers fall into arrears. From that point on, the Tax Laws

26 For more on this idea, see: Đorđe Tasić, *Odgovornost države: po principu jednakosti tereta*, Štamparija "Mirotočivi", Beograd, 1921.

27 First form of the quota-levy system included the obligation of an employer with a certain number of employees (which varied from 20 in Hungary and Germany to 50 in Spain) to hire a minimum number of persons with disabilities, which was, by rule, 1% for employers with more than 35 employees, 2% for employers with 36 to 50 employees and 7% for employers with over 50 employees. In most countries, violation of the employment obligation carries a fine, and the collected funds are exclusively used to improve the position of persons with disabilities. In addition, the quota-levy system can come in the form of a legal recommendation for employment of people with disabilities (Holland) or in the form of a legal obligation without enforceable sanctions (*lex imperfecta*). The latter system was implemented in the Great Britain from 1944 to 1995, since the Disabled Persons Employment Act didn't envisage sanctions for employers who don't hire the required minimum of the registered disabled persons. Employers could instead be punished only if they hired unregistered persons, assuming they don't have a sufficient number of disabled persons on staff, or if, by hiring unregistered persons, they violated the prescribed share of employees with disabilities in the total number of employees. Acc. to: Lisa Waddington, „Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws", *Comparative Labor Law & Policy Journal*, Vol. 18, 1996, pp. 62–101; Heinz-Dietrich Steinmeyer, *Legislation to counter discrimination against persons with disabilities*, 2nd edition, Council of Europe Publishing, Strasbourg, 2003, pp. 89–90.

28 Law on disabled persons from 4 July 1929 (Zakon o invalidima od 4. jula 1929. godine, *Službene novine Kraljevine SHS*, 161/LXVI), § 26. Stojan Bajič, *Osnovi radnog prava: Opšti deo*, Izdavačko i knjižarsko preduzeće „Geca Kon", Beograd, 1937, p. 106.

29 An employer with 20 to 49 employees is obliged to hire at least one person with disabilities, while an employer with 50 or more employees is obliged to hire at least 2 persons with disabilities, as well as another person with disabilities for every 50 additional employees.

30 Law on vocational rehabilitation and employment of persons with disabilities, art. 26–27.

were enforced, meaning that, upon inspection, the Tax Administration would collect penalties as well as fines from the employers. This is why the Amendment to the Law from 2013, abolished the provision referring to the payment of penalties,[31] while at the same time introducing the obligation of employers, who didn't hire the required number of persons with disabilities, to pay 50% of an average salary in the Republic of Serbia, per employee.

3.1. Advantages of the quota-levy system and challenges of implementation

The main advantage of the quota-levy system is its (direct and indirect) contribution to employment of persons with disabilities, ranging from entering into employment relations, assisting with the work of enterprises for employment and vocational rehabilitation of persons with disabilities as well as social enterprises, to raising awareness (of employers, employees and the public) on problems encountered in the labour market.[32] However, opponents of the quota-levy system maintain that the mandatory nature of the quota does not facilitate integration of the disabled into a regular work environment, but rather serves to engrain the stereotype that the disabled are not as productive and can only be integrated into the labour market when employers are obliged to hire them. At the same time, introduction of the quota-levy system is accompanied by a dilemma regarding its *actual impact on employment of persons with disabilities*, since payments are regularly provided as an alternative to the employment obligation or as a sanction for non-compliance.[33] Besides, it's evident that employers are using every possible way to avoid the employment obligation, as well as payment of actual fines.

The aforementioned dilemma has re-emerged in relation to the implementation of the Law on vocational rehabilitation and employment of persons with disabilities, mainly due to the fear that employers in Serbia will try to use every possible way to avoid the employment obligation. This means that, in addition to pressuring their staff to register as persons with disabilities, some employers, who haven't met their employment quota, tried to avoid paying the penalties, which just adds to a chronic problem related to collection of taxes and social insurance contributions from employers in Serbia. In addition, the basis for unfavourable forecasts of the quota system can be recognised in the experiences of countries that share a common legal tradition with the Republic of Serbia (Croatia, Bosnia and Herzegovina),[34] as well as in the experiences of several EU Member States, where the quota system hasn't made a significant or lasting impact.[35]

31 It is estimated that this amendment won't have a significant impact on the financial resources of the Budget for vocational rehabilitation and stimulation of employment of persons with disabilities, because penalties make up only 1% of overall revenue; as explained on page 3 of the Proposal of Amendment to the Law on vocational rehabilitation and employment of persons with disabilities.

32 Council of Europe Committee on the Rehabilitation and Integration of People with Disabilities, *Employment strategies to promote equal opportunities for persons with disabilities on the labour market*, Council of Europe Publishing, Strasbourg, 2000, p. 16.

33 M. De Vos, *op. cit.*, p. 47.

34 Mihail Arandarenko, „Novi zakoni o zapošljavanju", *Fokus*, jul 2009, p. 19.

35 A. O'Reilly, *op. cit.*, p. 96. European countries share a negative experience in the application of the quota-levy system regarding employment of women, as evidenced by the famous judgements by the European Court of Justice from the *Kalanke* and *Badeck* cases. In the first case, the Court decided on restrictive interpretation of the positive discrimination rules, finding the measures of positive discrimination that *automatically and unconditionally* give priority in hiring and promotion to women (when compared to men with the same skills), when they are under-represented in certain work environments, to be unlawful. In the opinion of the Court, such a measure exceeds the permitted instruments for promotion of equal opportunities, because an objective (promoting equal opportunity) is being replaced with a result (equal representation) that should've come from equal opportunities for men and women (Judgement in case C-450/93 /*Eckhard Kalanke* v. *Freie Hansestadt Bremen*/, October 17 1995 /*European Court Reports*, 1995, p.

This is especially true during economic crisis because employers, due to economic problems and relatively low fines, prefer to pay a fine than to hire a person with disabilities.[36] Although comparative experience says that increasing the amount of the penalty is not necessarily accompanied by a higher percentage of employment of persons with disabilities, there is a belief that the large-scale employment of this category of workers can be expected only if the level of the penalty reaches the amount where it becomes cheaper for employers to hire a person with disability than to pay the fine.[37] Therefore, there is a prevailing trend in comparative law to have stricter sanctions for failing to meet the quota for employment of persons with disabilities,[38] which is contrary to the legislation of the Republic of Serbia, where such sanctions have been abolished.

In addition, comparative legal solutions show that increased effectiveness of employment quotas can come from establishing a number of alternative employer obligations (in addition to direct employment obligation and penalties), such as: providing training for the disabled, introducing a plan for employment and training of persons with disabilities or adaptation of their workplace.[39] Finally, the effectiveness of employment quotas is affected by the scope of workers to which they are applied, since comparative law recognizes the practise of reserving positive discrimination measures for people with severe disabilities.[40] This solution seems acceptable, since the designated employment of persons with any level of disability, in practise, usually comes down to hiring of persons with minor limitations, who wouldn't have significant difficulties with finding and keeping a job even without this measure of positive discrimination. Therefore, we can draw a conclusion that restricting the employment obligation to persons with severe disabilities is justified when the purpose of the quota system is to facilitate employment for people facing the biggest problems in the labour market.[41] Conversely, the need to reduce the number of users of social benefits speaks in favour of setting up a general obligation for employment of persons with disabilities.[42]

I-03051/, paras 22–23/). The stated position of the Court was later nuanced so that the quotas can be applied in work environments where women are under-represented, under the following conditions: a) that female candidates have the same skills as the male candidates; b) that an employer carries out an objective assessment of the candidates' skills, which will enable him to take into account specific circumstances for each of the candidates (Judgement in case C-158/97 /*Georg Badeck et al.* v. *Landesanwalt beim Sttatsgerichtshof des Landes Hessen*/, 28 March 2000 /*European Court Reports*, 2000, p. I-1875/, paragraph 23). It should be noted that the second condition represents the *saving clause* that allows deviation from the favourable treatment of women in the selection process, if there are reasons of greater „legal weight" (e.g. if the candidate is a male war veteran).

36 Lisa Waddington, „Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws", *op. cit.*, p. 69.

37 *Ibid*.

38 One recent example of this solution can be found in the Russian Federation, where the penalties for failure to hire the established number of persons with disabilities were tripled (Федеральный закон от 23 февраля 2013 г. N 11-ФЗ „О внесении изменений в отдельные законодательные акты Российской Федерации по вопросу квотирования рабочих мест для инвалидов", Собрание законодательства Российской Федерации, 2013, N 8, ст. 717). Elena Serebriakova, „Actualités juridiques internationales – Fédération de Russie", *Revue de droit comparé du travail et de la sécurité sociale*, No. 1/2013, p. 113.

39 International Labour Organization, *Achieving equal employment opportunities for people with disabilities through legislation: Guidelines*, Revised Edition, International Labour Office, Geneva, 2007, p. 38.

40 *Ibid*., p. 41.

41 Ljubinka Kovačević, „Radno i socijalno pravo – Novelirani pravni okvir za zapošljavanje licâ sa invaliditetom", *Pravo i privreda*, vol. XLX, No. 10–12/2013, p. 177.

42 *Ibid.*

4. OBLIGATION OF REASONABLE ADJUSTMENT OF THE WORKPLACE TO THE NEEDS OF PERSONS WITH DISABILITIES

In accordance with the Law on vocational rehabilitation and employment of persons with disabilities, such persons can gain employment in two ways: under general conditions or special conditions, depending on whether or not employment is accompanied by adjustments to jobs and the workplace to their abilities and needs. In this sense, *employment under special conditions* represents employment of persons with disabilities, accompanied by adjustments to jobs (work process and work assignments) and the workplace (technical and technological outfitting of the workplace, tools, facilities and equipment).[43] Refusal of the employer to carry out reasonable adjustments to jobs and the workplace to the abilities and needs of persons with disabilities does not only represent poor practice, but also qualifies as a *special form of discrimination,* since it is harder for persons with disabilities, in comparison to other employees, to get a job and work under regular (normal) conditions.[44] The Convention on the rights of persons with disabilities reaffirms the right of persons with disabilities to ask for „necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".[45] In the field of labour relations and employment, this guarantee represents a request to adjust the job design, work process, tasks, schedule and organisation of the working hours, workplace, machines and other equipment - to the abilities and needs of persons with disabilities (e.g. adjusting the chair to the needs of an employee with a damaged spine, getting a Braille reading computer for the partially sighted employee or providing an assistant to an employee with mental problems)[46]. As stated in the Re-

43 Adjustment to jobs and the workplace also includes providing technical assistance to persons with disabilities during the induction period (e.g. advice, assistance, support), supervising their work as well as developing personal work methods and performance appraisal.

44 In international and comparative law, this form of discrimination is directly prohibited only when it's based on disability, and the option to extend the ban to other basis of discrimination is currently being considered in the literature. This particularly applies to *religious discrimination*, where the request for adjustment is related to (un)justifiability of the request to adjust the work conditions to the needs of employees so they can fulfil their religious duties, e.g. adjusting the work schedule according to prayer time (which can be binding for an employee as a member of a certain religious community). In the practice of the European Court of Human Rights, the prevalent view is that disregarding a request to stop work for prayer does not represent a violation of the guaranteed freedom of religion (*Refah Partisi* et al. vs. Turkey, 13 February 2003, applications no. 41340/98, 41342/98, 41343/98 and 41344/98). Request to adjust work to the religious needs of employees can also be viewed in relation to an employee refusing to carry out his/her tasks due to his/her religious duties, which, on the basis of international standards (e.g. ILO Recommendation concerning Employment and Conditions of Work and Life of Nursing Personnel), Serbian and foreign legislation, was allowed only for certain professions. For example, this is the case with health care workers, who have the right of conscientious objection, whether in the form of a general clause or in relation to their participation in voluntary termination of pregnancy. Regardless of this exception, the main question to be answered is this: does the prohibition of discrimination include the obligation of an employer to meet the requests of employees to adjust how the job is done due to religious reasons? The answer to this question depends on a number of factors, mainly the type of company and its business activity, is the stated religious activity compulsary and what would be the effect of the adjustment on other employees. Most authors agree that, except in exceptional cases involving conscientious objection for members of certain professions, religious beliefs cannot be a reason to reject the entrusted working duties. However, this does not prevent employers to try, in accordance with their own capabilities, and adjust the working conditions to the needs of employees. For more on these issues see: François Gaudu, „La religion dans l'entreprise", *Droit social*, No. 1/2010, p. 69; Georges Dole, *La liberté d'opinion et de conscience en droit comparé du travail*, L.G.D.J., Paris, 1997, pp. 83, 231–232; Chantal Mathieu, Cécile Nicod, „L'individu confronté à l'organisation collective du travail", in: Jean-Marc Béraud, Antoine Jeammaud (sous la direction de), *Le singulier en droit du travail*, Dalloz, Paris, 2006, p. 57.

45 United Nations Convention on the Rights of Persons with Disabilities, adopted by General Assembly Resolution A/RES/61/106 of 13 December 2006, article 2, paragraph 4.

46 Examples according to: International Labour Organization, *Achieving equal employment opportunities for people with disabilities*

commendation no. 168 of the International Labour Organization, countries need to be reminded that „reasonable adaptations to workplaces, job design, tools, machinery and work organisation" represent an important measure in facilitating the employment of persons with disabilities,[47] while provisions of the Council Directive 2000/78/EC state that „employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer".[48] Based on international standards, Serbian legislator defines as discrimination „refusal to perform technical adaptations to the workplace, which would enable a person with disability to perform efficiently, assuming the cost of adaptation is not borne by the employer and is not disproportionate in relation to the profit the employer made by hiring a person with disability".[49]

4.1. Delineation between necessary adjustment, positive discrimination and prohibition of indirect discrimination

At first glance, a request for adjustment resembles the aforementioned example of prohibition of indirect discrimination, since it can be argued that regular working conditions only appear to be neutral, especially if they put persons with disabilities into an unfavourable position, compared to the other candidates or employees. However, the request for adjustment *exceeds the prohibition of indirect discrimination*, because it represents an obligation to take necessary measures in order to satisfy special needs of persons with disabilities.[50] Thus, the request seems closer to positive discrimination, although it shouldn't be qualified as a form of positive discrimination either. Doing so would be wrong because the goal of adjustment is not to create opportunities where there are none, but rather to remove the obstacles that are preventing persons with the necessary skills to participate in the labour market.[51] In this sense, adjustment *does not represent a permissible exception to the prohibition of discrimination* (as is the case with positive discrimination), but rather an example of the equality principle at work (and the demand to treat different things differently). Finally, reasonable adjustment should be distinguished from positive discrimination, because of the *focus on the individual*. This is because the obligation for reasonable adjustment does not only mean a specific, exceptionally sensitive, category of workers is protected, but also means that specific needs and abilities of an individual from that category will be taken into account. Focus on the individual means that adjustment will only be used when necessary, depending on the individual needs and abilities of a person as well as specific features of the job, and that's why the legislators do not establish an exhaustive list of (in)appropriate and (un)necessary adjustments.

4.2. Limits of the adjustment obligation

Requests for adjustment cannot be limitless; an employer can refuse all requests that are considered unreasonable. It's not easy to answer the question – which requests can be considered (un)reasonable. Most authors believe that a request for reasonable adjustment includes *taking action that won't create excessive costs, difficulties or problems for the employer*.[52] However, this is not the only interpretation of the adjustment obligation. In Dutch, Irish and French legislation it is defined as a request for *effective adjustment*, i.e. adjustment that *really* enables a person with disabilities to carry out work for an employer.[53] This criterion precedes the request that adjustment does not create excessive difficulties, but it also supplements it and makes the complex procedure of determining the (non) existence of an adjustment obligation clearer in each specific case.[54] The most important advantage of the effectiveness criteria is the fact that a request for adjustment is associated with a real possibility of employment of persons with disabilities. Only when such an adjustment is possible, is it justified to ask what specific changes to jobs or working conditions may mean for an employer. To answer this question, certain facts need to be taken into account, such as type of business, financial situation and size of an employer, possibility of refunding the costs of adjustment, impact of an adjustment on the production process, length of contract between an employer and a person with disabilities and the total number of persons with disabilities who work for an employer. An adjustment will not be deemed reasonable if the assessment shows that it creates a disproportionate burden. Therefore, an employer's refusal of unreasonable adjustment will not be qualified as discrimination. If the required adjustment is irrelevant to the performance of the job, it won't be qualified as discrimination, even if it requires only an inconsiderable commitment for an employer and produces minimal costs. Conversely, a request for adjustment will be considered reasonable if it is necessary for the performance of the job and really enables the person with disabilities to perform the tasks, and does not put an undue burden on the employer.

CONCLUSION

The right to work is one of the basic human rights and it includes the right of everyone to earn a living by work which was freely chosen or accepted. In addition to providing the means for existence worthy of human dignity, this right allows an individual to develop and enrich his personality and his life through work.[55] This is because effective exercise of the right to work contributes not only to the survival of the individual and to that of his/her family, but also to his/her development and recognition within the community.[56] This further means that the right to work is „inseparable and inherent part of human dignity", especially because many other human rights, such as the right to life, health, housing and education depend on its effective implementation.[57] The right to work is guaranteed by the constitution as well as many international instruments for protection of human rights, whose contracting parties, by accepting the obligation to protect this right, assume the obligation to refrain from waiving or limiting equal access to de-

through legislation: Guidelines, Revised edition, International Labour Office, Geneva, 2007, p. 30.

47 Recommendation concerning Vocational Rehabilitation and Employment (Disabled Persons), paragraph 11, a).

48 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (*Official Journal* L 303, 2/12/2000, p. 16–22), article 5.

49 Law on prevention of discrimination of persons with disabilities, article 22.

50 Simon Deakin, Gillian S Morris, *Labour law*, Fourth edition, Hart Publishing, Oxford, 2005, p. 717.

51 Jeff Kenner, *EU employment law: From Rome to Amsterdam and beyond*, Hart Publishing, Oxford/ Portland, Oregon, 2003, p. 412.

52 Lisa Waddington, Anna Lawson, *Disability and non-discrimination law in the European Union. An analysis of disability discrimination law within and beyond the employment field*, Publications Office of the European Union, Luxembourg, 2009, p. 26.

53 *Ibid*.

54 Lisa Waddington, „When it is reasonable for Europeans to be confused: Understanding when a disability accommodations is 'reasonable' from a comparative perspective", *Comparative Labor Law & Policy Journal*, Vol. 29, 2007–2008, pp. 330–334.

55 Norman Acton, „Employment of disabled persons: where are we going?", *International Labour Review*, Vol. 120, No. 1/1981, p. 3.

56 Committee on Economic, Social and Cultural Rights, *The right to work: General comment No. 18*, adopted on 24 November 2005, UN Doc E/C.12/GC/18, paragraph 1.

57 *Ibid*.

cent work for all people.[58] Therefore, discrimination of the disabled in the field of employment limits their freedom of choice of employment and their opportunity to develop their skills and contributes to their marginalisation, exclusion and poverty.[59]

Although there has been significant progress in Serbian legislation, in recent years, regarding regulation of the key aspects of employment of persons with disabilities, mainly due to the effect of internationalisation of their rights, the struggle against their discrimination in the Serbian labour market is not yet finished. Especially if one takes into account the serious effects of the economic crisis and unfavourable demographic trends on the position of job seekers and employees in general, which is even more pronounced for the vulnerable categories of workers. It seems that there are several measures that could help in the fight against discrimination of persons with disabilities in the field of employment. First measure would be to establish a *wide array of alternative employer obligations*, such as: training for the disabled, hiring disabled probationers, introducing a plan for their employment, and thus indirectly fulfil the obligation of employment of persons with disabilities. Besides, the effectiveness of employment quotas is affected by the *scope of workers* to which they are applied, which is why it seems acceptable to consider the possibility of reserving this positive discrimination measure for people with severe disabilities. Especially since the designated employment of persons with any grade of disability, in practice, usually comes down to hiring of persons with minor limitations, who wouldn't have had significant difficulties with finding and keeping a job even without the quotas.

On the other hand, there is a need in Serbian court jurisprudence, as well as in the practice of the Commissioner for Protection of Equality, to draw clearer lines regarding the obligation of reasonable adjustment of jobs and working conditions for the needs of the disabled, since the "reasonable adjustment" standard has a dual role. First role is related to the assessment of the candidate's capability to do the job, bearing in mind that a person will be deemed capable of doing the job if he/she has the ability, skills and knowledge for the job, with or without the adjustment of the tasks or working conditions to his/her needs and abilities.[60] On the other hand, failure to comply to the reasonable adjustment obligation will be deemed a special form of discrimination, which is why it is useful to have knowledge of the comparative legal practice which promotes the view that the obligation of reasonable adjustment includes a *request for effective adjustment*, i.e. an adjustment that really enables a person with disabilities to carry out the work for an employer. This criterion precedes the request that adjustment does not create excessive difficulties costs or problems for the employer, but it also supplements it and makes the complex procedure of determining the (non) existence of an adjustment obligation clearer in each specific case.

In addition to improving the legal framework for employment of persons with disabilities, there is a need in the Republic of Serbia to ensure a consistent application of the adopted regulations, as well as a need to design *effective programs of vocational rehabilitation* and to ensure a widespread support for their implementation. This is because vocational rehabilitation will significantly improve the ability of the disabled to find and maintain employment in the open mar-

58 *Ibid.*, paragraph 23.

59 More on ethical dilemmas that accompany promotion of employment as the main postulate of social inclusion see: Darja Zaviršek, "The ideology of work and the limits of its emancipatory potential in the lives of people with disabilities in Eastern Europe: A comparative perspective", *Socijalna politika*, Vol. 48, No. 1/2013, pp. 79-100.

60 B. Doyle, *op. cit.*, p. 98.

ket, as well as achieve higher salary levels, which means the benefits significantly outweigh the costs of vocational rehabilitation program.[61] It can also be noted that in Serbia, in the field of employment of persons with disabilities, there is a lack of *comprehensive cooperation between the social partners*, particularly in relation to the design of measures to preserve employment of persons with disabilities, since their employment is only the first step in their professional and social integration. Finally, improving and adopting the *Proposal of the Law on social entrepreneurship and employment in social enterprises*, whose goal, amongst other things, is to create new opportunities to resolve social, economic and other problems of persons with disabilities, could help in resolving the problem of discrimination of persons with disabilities in the field of employment.[62] To achieve this goal, it is necessary to establish social enterprises in order to employ persons with disabilities and allow them to do their jobs, which will help fulfil their needs and the needs of other people who need help and support in overcoming social, material and existential difficulties. Especially because the profit made by a social enterprise has to be invested in preserving and increasing the number of jobs, improving the working conditions and training and development of their staff.[63]

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61 Predrag Bejaković *et al.*, „Iskustva odabranih zemalja u profesionalnoj (radnoj) rehabilitaciji“, *Revija za socijalnu politiku*, Vol. 20, No. 1/2013, pp. 75-87.

62 Draft proposal by the Government of the Republic of Serbia from 24 April 2013 is available at the following web address: *http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/1688-13.pdf*.

63 It should be noted that there is no common understanding of the *social enterprise* in neither theory nor legislation, although some key elements of that legal term can be identified in all European countries, regardless of their differing regulations. Thus, we can say that the role of a social enterprise is not exclusively or primarily focused on making profit, which is why any surplus is not distributed to the owners, but rather invested back into the social enterprise. In addition to the predominantly *social objectives*, a social enterprise is characterized by the *diversity of legal modes* in which it can be established (cooperatives, mutual insurance companies, foundations, companies etc.), since a social enterprise doesn't represent a new, separate legal form, or a new, special type of organization, but rather a *legal category* that includes various organizations, irrespective of their organisational structure. And finally, an important feature of social enterprises is their production of goods and services that primarily serve a public interest or fulfil the needs of their clients, as well as *intense participation of employees and clients*, least of all in terms of issues directly related to working conditions and quality of goods and services provided by the social enterprise. European Economic and Social Committee, *Opinion on social entrepreneurship and social enterprise*, Brussels, 26 October 2011, paragraph 3.1.2. On problems with defining social enterprise and possible definitions see: Jacques Defourny, Marthe Nyssen, „Defining social enterprise“, in: Marthe Nyssen (ed.), *Social enterprise: At the crossroads of market, public policies and civil society*, Routledge, London/New York, 2006, pp. 3-13.

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ZAŠTITAOSOBASINVALIDITETOMODDISKRIMINACIJEUPODRUČJU ZAPOŠLJAVANJA S NAGLASKOM NA SRPSKO ZAKONODAVSTVO I PRAKSU

Sažetak:

Poput mnogih europskih država, i Republika Srbija suočena je s visokom stopom nezaposlenosti osoba sa invaliditetom. To se može objasniti različitim činiteljima, uključujući posrednu diskriminaciju osoba s invaliditetom u oblasti obrazovanja i zapošljavanja, ali i njihov strah od gubitka socijalnih povlastica zbog zaključenja ugovora o radu. Zakonom o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom (2009) afirmirano je zapošljavanje ovih osoba na otvorenom tržištu, pod općim uvjetima ili uz razumno prilagođavanje radnog mjesta njihovim potrebama, dok je „zaštićeno“ zapošljavanje, po pravilu, rezervirano za osobe koje, zbog težine invaliditeta, ne mogu zadovoljiti svoju potrebu za ekonomskom sigurnošću na prvi način. Po uzoru na međunarodne standarde i poredbena iskustva, zakonodavac je predvidio i više mjera za ravnopravno sudjelovanje osoba s invaliditetom u tržištu rada i povećanje njihove zaposlenosti, uključujući kvote za zapošljavanje. Iako je od stupanja Zakona na snagu neznatno povećana zaposlenost ovih osoba, značajan broj njih je i dalje bez posla, između ostalog i stoga što su poslodavci težili na svaki način 'zaobići' obavezu zapošljavanja, čak i uz pritisak na (postojeće) zaposlene da se prijavljuju kao osobe s invaliditetom. S druge strane, suci su suočeni s izazovom 'brušenja' standarda razumne prilagodbe radnog mjesta, posebno stoga što odgovarajuća obveza poslodavca nadrasta zabranu posredne diskriminacije, a razlikuje se i od pozitivne diskriminacije.

Zbog toga su u radu preispitane granice sadržaja obveze razumnog prilagođavanja, a, zatim, i krug zaštićenih osoba, budući da poredbeno pravo poznaje i primjere rezerviranja kvota za zapošljavanje samo za osobe s težim invaliditetom. Ovo stoga što se ograničavanje obaveze zapošljavanja samo na osobe s težim invaliditetom čini opravdanim u slučajevima kada kvotni sustav ima za cilj lakše zapošljavanje osoba koje se suočavaju s najvećim problemima na tržištu rada. I suprotno, potreba da se smanji broj korisnika socijalnih povlastica govori u prilog utvrđivanja općte obveze zapošljavanja osoba sa invaliditetom.

Ključne riječi: osobe sa invaliditetom; pravo na rad; razumno prilagođavanje radnog mesta; kvote za zapošljavanje; pozitivna diskriminacija.

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SCHUTZ DER BEHINDERTEN PERSONEN VOR ARBEITSDIKRIMINIERUNG MIT DEM FOKUS AUF SERBISCHE GESETZGEBUNG UND PRAXIS

Zusammenfassung:

Wie andere europäische Staaten, so ist auch die Republik Serbien mit der hohen Quote der arbeitslosen behinderten Personen konfrontiert. Dies kann durch verschiedene Faktoren erklärt werden, einschließlich der mittelbaren Diskriminierung von Behinderten bei der Ausbildung und Beschäftigung, aber auch ihrer Angst, durch Abschluss des Arbeitsvertrags ihre Sozialrechte zu verlieren. Durch das Gesetz über die berufliche Rehabilitation und Beschäftigung von Menschen mit Behinderungen (2009) wurde die Beschäftigung dieser Personen auf dem offenen Arbeitsmarkt unter allgemein geltenden Bedingungen oder auch einschließlich einer vernünftigen Anpassung des Arbeitsplatzes an ihre Bedürfnisse unterstützt, während die sogenannte „geschützte Beschäftigung" in der Regel für die Personen reserviert ist, welche wegen der Schwere der Behinderung ihre Bedürfnisse an der ökonomischen Sicherheit nicht befriedigen können. Im Vorbild nach internationalen Standards und durch Vergleich mit Erfahrungen anderer Staaten, hat der Gesetzgeber mehrere Maßnahmen zur gleichberechtigten Teilnahme der behinderten Personen am Arbeitsmarkt und zur Förderung ihrer Arbeitstätigkeit vorgesehen, einschließlich deren Beschäftigungsquoten. Obwohl nach dem Inkrafttreten des Gesetzes die Beschäftigung dieser Personen leicht angestiegen ist, ist eine große Anzahl der Behinderten auch weiter arbeitslos, unter Anderem auch dadurch, dass die Arbeitgeber Alles versucht haben, um die Beschäftigungspflicht solcher Personen auszumeiden – sogar auch durch einen Druck auf eigene Arbeitnehmer, sich als behinderte Personen zu registrieren. Auf der anderen Seite sind die Richter mit der Heruasforderung auseinandergesetzt, die Standards der vernünftigen Anpassung des Arbeitsplatzes auszuarbeiten, insbesondere weil die entsprechende Pflicht des Arbeitgebers das Verbot der mittelbaren Diskriminierung übertrifft, gleichzeitig aber von der positiven Diskriminierung zu unterscheiden ist.

Aus den oben angeführten Gründen wurden in dieser Arbeit die Inhaltsgrenzen der Pflicht zur vernünftigen Anpassung des Arbeitsplatzes, sowie der Umfang der geschützten Personen überprüft, da im Vergleichsrecht auch Beispiele der Reservierung von Beschäftigungsquoten nur für schwerbehinderte Personen bekannt sind. Die Beschränkung der Beschäftigungspflicht nur auf die Schwerbehinderten scheint nämlich gerechtfertigt in den Fällen, wenn das Quotensystem mit dem Ziel eingeführt wurde, die Personen mit größten Beschäftigungsproblemen auf dem Arbeitsmarkt leichter zu beschäftigen. Und umgekehrt, Anstrengungen um Verringerung der Anzahl von Benutzern der Sozialrechte sprechen für die Festsetzung der allgemeinen Verpflichtung der Beschäftigung von Behinderten.

Schlagwörter: behinderte Personen, Recht auf Arbeit, vernünftige Anpassung des Arbeitsplatzes, Beschäftigungsquoten, positive Diskriminierung.

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PROBLEM RAZLIKOVANJA DISKRIMINACIJE I ZLOSTAVLJANJA NA RADU U PRAVNOJ TEORIJI I PRAKSI REPUBLIKE SRBIJE

Apstrakt: Diskiminacija i zlostavljanje na radu nedvosmisleno predstavljaju negaciju zajamčenih ljudskih prava i osnovnih sloboda, opšteprihvaćenog načela dostojanstva na radu, te vladavine prava na kojima počiva svako demokratski orijentisano društvo. Kako bi se na jedan delotvorniji način obezbedila sveobuhvatna zaštita ličnosti zaposlenog, a pre svega njegovog psihičkog i moralnog integriteta, srpski pravni sistem je u proteklој deceniji, između ostalih, obogaćen za još dva zakona, Zakon o zabrani diskriminacije i Zakon o sprečavanju zlostavljanja na radu. Usvajanjem ovih zakona pojam diskriminacije i pojam zlostavljanja na radu jasno su definisani i razgraničeni, ali ono što i dalje predstavlja poseban problem kako u pravnoj teoriji, tako i u sudskoj praksi jeste njihov nedovoljno određen međusobni odnos. Kao jedan od mogućih razloga možemo uzeti brojne sličnosti, ali i preklapanja ovih instituta u praksi. Rad se bavi analizom sličnosti, a posebno razlika između diskriminacije i zlostavljanja na radu, ali i faktičkim stanjem u ovim oblastima u Republici Srbiji koje odlikuje pre svega konfuzija u primeni prava, ali i neujednačena sudska praksa. I pored toga što su diskriminacija i zlostavljanje na radu dve različite pojave čije je nastupanje inicirano različitim motivima i uz to su i uređene posebnim zakonima, jedan deo stručne javnosti i dalje pogrešno uzima da je diskriminacija način izvršenja zlostavljanja, ili suprotno - da je zlostavljanje oblik diskriminacije, što ne samo da otežava primenu prava već i dodatno komplikuje položaj žrtve koja traži zaštitu svojih prava pred sudom ili u drugom zakonom određenom postupku.

Ključne reči: Dostojanstvo ličnosti, diskriminacija na radu, zlostavljanje na radu, Poverenik za zaštitu ravnopravnosti, medijacija, radni spor, sudska praksa.