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DISCRIMINATION UNDER POLITICAL OR OTHER OPINIONS IN PRE-CONTRACTUAL LABOR RELATIONSHIP

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Abstract: The legislative changes implemented in the Labor Code of Georgia fundamentally changed the regulations governing the prohibition of discrimination. In order to bring them closer to the law of the European Union, a number of important issues were identified that require scientific processing and comparative legal research. One of the current and problematic types of discrimination in Georgian reality is not hiring a person and/or dismissing him/her due to political or other opinions. Case law regarding these topics practically does not exist. The present article deals with the existing regulation related to discrimination due to political or other opinions in pre-contractual relationships. The present paper examines whether Georgian legislation complies with acts of ILO and European law.

Keywords: Discrimination; Pre-contractual Labor Relationship; Political or Other Opinion.

1. Introduction

In 2014, the Republic of Georgia (hereinafter – Georgia) signed an Association Agreement [1] with the European Union and undertook to bring its legal base as close as possible to the standards established by the European Union law. According to the mentioned obligations, fundamental legislative changes were made in the Labor Code of Georgia in 2020.

The legislative changes implemented in the Labor Code fundamentally changed the regulations governing the prohibition of discrimination. After the mentioned changes, in order to bring them closer to the law of the European Union, a number of important issues were identified that require scientific processing and comparative legal research. One of the current and problematic types of discrimination in Georgian reality is not hiring a person and/or dismissing him/her due to political or other opinions. Case law regarding these topics practically does not exist.

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The purpose of the present article is to analyze from a scientific point of view the regulations established by the Labor Code of Georgia regarding the prohibition of discrimination, and primarily to evaluate the content and legal consequences of discrimination in pre-contractual labor relations due to political or other opinions. From this point of view, the present article deals with the regulations established by Georgian law and it evaluates the approaches and legal acts of the ILO and the compliance of the Georgian law with the standards established by the European law. The comparison with EU standards became even more relevant after Georgia was granted candidate status, which led to relevant legal consequences.

2. The essence of the pre-contractual labor relationship and the importance of the prohibition of discrimination

2.1. Pre-contractual Labor Relationship

The pre-contractual stage is one of the most important in labor relations. The pre-contractual relationship includes an application for a vacancy (vacancy announcement), the interview stage, and familiarization with the special work requirements established by the employer [2] and the start of work. When determining the rights and obligations of the parties in pre-contractual relations, the issue of the employer's request for information and the candidate's provision of information is essential [3]. Accordingly, at the pre-contractual stage, the parties inform each other of the conditions, discuss and agree on the issues to be included in the content of the contract, which, as the previous history of the contract, remains outside the contract concluded in the future [4].

According to the first paragraph of Article 11 of the Labor Code of Georgia, an employer may obtain information about a job candidate. However, the Code prohibits requesting non-related information from the candidate. At the same time, the information received during the relationship between the future employer and the candidate in the pre-contractual period should be based on the objective and proportional principle [5]. In addition, in the pre-contractual labor relationship, the parties have rights and obligations that arise from the relationship based on pre-contractual trust. [6]. Accordingly, even at this stage of the labor relationship, the parties have already incurred certain obligations, and this applies especially to the employer as the dominant party of the relationship.

2.2. Signs of discrimination and scope of prohibition

2.2.1. General principles

Fundamental human rights have long occupied an important place in the international labor law framework [7]. Discrimination, as distinguishing, restricting or giving preference in order to deny equal rights and their protection, is a violation of the principle of equality and a violation of human dignity [8].

In order to qualify unequal treatment (difference) as a discriminatory act, it is necessary to compare persons (or groups of persons) in the same situation, with the same professional abilities, in the same position, in order to determine the difference, which is most likely due to the prohibited signs specified by the person, until the defendant (employer) proves otherwise [9].
At the same time, according to Article 6 of the Code, the necessity of differentiating a person, which derives from the essence or specificity of work or the conditions of its performance, serves to achieve a legal goal [10] or is a necessary and proportionate means to achieve it and it is not considered discrimination. ECJ in the *Glatzel* case [11] affirmed that "a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned" [12].

2.2.2. Prohibition of discrimination in pre-contractual relations

The most important issue in pre-contractual labor relations is the prohibition of discrimination. Exactly at the pre-contractual stage the employer may show a discriminatory approach to the candidate and does not sign an employment contract with him/her.
Accordingly, taking into account that the principle of prohibition of discrimination in pre-contractual relations is very relevant, the rule of prohibition of this is given in the European Council Directive 76/207/EEC of February 9, 1976. In particular, according to the first paragraph of Article 3 of the Directive, the principle of equal treatment means that there shall be no discrimination on any grounds, including selection criteria. The directive leaves the possibility of giving preference to a specific gender in recruitment only in the presence of the necessary conditions of employment, when the specific gender, depending on the nature of the work, is of decisive importance, that is, when the gender, depending on the specifics of the work to be performed [13], is of decisive importance. According to Article 5 of the Labor Code of Georgia, discrimination in labor relations and pre-contractual relations (including discrimination during the announcement of a vacancy and at the selection stage), employment and professional activity are prohibited. Thus, the Code prohibits discrimination in pre-contractual labor relations.
The ECHR expressly lists "political or other opinion" as a protected ground, however, EU non-discrimination directives do not expressly state the mentioned grounds among the grounds protected [14]. In the *Handyside v. United Kingdom* case the ECtHR established that political opinion had been given privileged status and accordingly, restrictions on political expression or debate on questions of public interest were very limited [15].

The 1958 ILO Discrimination Convention [16] prohibits discrimination in employment relations. The convention deals with both direct and indirect discrimination [17]. It defines the concept of discrimination and states that discrimination among other signs implies political opinion too, which affects equal treatment towards the employer or the candidate.
Thus, in pre-contractual relations, discrimination at the stage of vacancy and interview is prohibited and not allowed. The present article deals with the discrimination due to political and other opinions revealed exactly at this stage. Typically, employees and candidates are not protected from employer discrimination on grounds of political opinion [18]. Any discrimination based on political opinion might be deemed as discrimination on other grounds. Discrimination on grounds of political opinion may also be related to prohibiting being involved in professional unions [19]. Protection against discrimination based on political opinion generally covers people in respect of their activities opposing established political principles, or simply demonstrating a different opinion [20].

2.2.3. Political or other opinion as a form of discrimination

2.2.3.1. Political View

According to the European Convention on Human Rights [21], discrimination based on political opinion is prohibited [22]. Discrimination based on political opinion includes membership in a political party, expressed political, socio-political, or moral attitudes, or civic commitment. Workers should be protected against discrimination in employment based on activities expressing their political views [23]. Political opinion should influence admission only to certain senior positions that imply special trust or greater discretion [24].
According to the opinion expressed in the legal literature, „Discrimination based upon political or other opinion is closely related to the issues that arise with respect to freedom of expression under article 10 of the Convention. It is also associated with the profoundly democratic orientation of the Convention, a requirement of the pluralism, tolerance, and broadmindedness 'without which there is no "democratic society "'. Because of the word 'other ', the prohibition on discrimination applies to any form of opinion whatsoever. Indeed, it might be said that the adjective 'political' is entirely superfluous. Nevertheless, its presence confirms the special place reserved in the Convention for the protection of political opinion. It seems this was indeed the intention when the words 'political or other opinion' were first proposed during drafting of the Universal Declaration of Human Rights within the Sub-Commission on Prevention of Discrimination and Protection of Minorities" [25].
The 1958 ILO Discrimination Convention is one of those programmatic conventions that oblige the states to implement a specific policy, set goals and endeavor to meet them by taking various economic and administrative measures [26] recognizes political opinion as one of the grounds of discrimination, like the Georgian

legislation. Here, it should also be noted that the convention does not single out any other opinion that may be the basis of discrimination. At the same time, the broad definition given by the Convention includes all forms of discrimination affecting employment and equality of activity [27].

In addition, the European Social Charter's [28] part 5, Article E, stipulates that discrimination is prohibited on basis of the political or other opinions. This charter is a complex human rights instrument [29]. As it is indicated in the legal literature the rights set out in the charter are recognized to be fundamental [30]. Accordingly, international acts undoubtedly play an important role in prohibiting discrimination based on political or other opinions.

If the employer is interested in the candidate's political views at the interview stage, which is not important for the performance of a specific type of work and does not represent a legitimate interest, there will be discrimination on the basis of political views. There is a possibility that the employer will act at his own discretion, put the candidate in unequal conditions and subjectively refuse to hire him/her based on references that are not directly related to the job [31]. Any provision allowing employers to ask job applicants regarding their political, religious, or cultural views when such views are not relevant to their performance of certain jobs, is not in compliance with the Convention No. 111 [32].

Thus, a question about party affiliation will not be considered discriminatory only if it justifies the legitimate purpose of the employer, for example, if the candidate is to be appointed to a position of leadership, executive, or control of a particular political party, and in other similar cases [33]. Therefore, all types of differentiation do not constitute discrimination, and if the actual or legal difference is based on reasonable and objective criteria, it can be justified [34]. This is also confirmed by the Labor Code of Georgia [35].

2.2.3.2. Other Opinion

As for the concept of "or other opinion" given in Georgian and foreign legislation, including international acts, the mentioned term is general. Another opinion is given in Article 21 of the Charter of Fundamental Rights of the European Union [36]. Political or other opinions are also considered forms of discrimination according to the European Convention on Human Rights as well. Article 14 of the Convention protects individuals in similar situations from being treated differently without justification in the enjoyment of their Convention rights and freedoms. This provision has no independent existence since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols [37].

According to the Law of Georgia on the Elimination of All Forms of Discrimination [38] depending on the purpose of the law, along with the political one, other opinion

is considered one of the forms of discrimination and is therefore prohibited. It is interesting what the legislator implied in another opinion [39]. According to the view expressed in the legal literature, the prohibition of discrimination on the grounds of the word "other" applies to any kind of opinion. Accordingly, from the content, the other opinion refers to the employee's ideological, professional, or personal and also moral view on this or that issue [40].

As it was mentioned above, discrimination on grounds of political or other opinion is closely related to freedom of expression. Freedom of expression is said to constitute 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment [41]'. Freedom of expression is one of the main ways of ensuring the effective enjoyment of freedom of assembly and association, and is of special importance to the activities of trade unions [42].

Thus, if any point of view of the employment candidate is unacceptable to the employer, it should not become a basis for discriminatory treatment towards the employee, and this principle is reinforced by the Labor Code of Georgia and other legal acts.

3. Means of Protecting the Rights of the Discriminated Person at the Pre-contractual Stage

3.1. Address to the Public Defender

Georgian legislation recognizes address to the public defender as one of the means to protect the rights of a person who may be discriminated against due to political or other opinion in pre-contractual labor relations. In particular, according to Article 6 of the Law "On Elimination of All Forms of Discrimination", the Public Defender of Georgia supervises the elimination of discrimination and ensures equality. At the same time, in order to exercise the powers granted by the legislation of Georgia, the Public Defender of Georgia examines the statement and complaint of the individual or legal person or group of persons who consider themselves a victim of discrimination. The Public Defender of Georgia will also study the fact of discrimination both in the presence of a statement or complaint, as well as on his own initiative, and issue a corresponding recommendation.

The recommendation issued by the public defender is important from the point of view that if discrimination against a person due to political or other opinions is determined at the stage of the pre-contractual employment relationship, the discriminated person will have solid evidence on the basis of which he/she can demand compensation for the damages in court. This also affects the burden of proof. In particular, the burden of proof in discrimination-related disputes generally rests with the employer. He must prove the absence of discrimination, and the person discriminated against must only create the presumption that discrimination has

occurred [43]. Accordingly, in the presence of the Public Defender's recommendation, the burden of proof is lightened for the discriminated person, because he will less have to prove the unequal treatment committed against him due to political or another opinion in pre-contractual relations in contrast to a normal dispute in court. In addition, according to the Law of Georgia "On the Public Defender of Georgia" [44], the public defender is entitled, as a claimant, by the Code of Civil Procedure of Georgia, to file a lawsuit with the court, if a legal entity, other organizational formation, or association of persons without creating a legal entity or an entrepreneurial entity did not respond to his recommendation or this recommendation is not shared and there is sufficient evidence to support discrimination [45]. Granting similar powers to the Public Defender once again confirms the state's strict approach to the prohibition of discrimination [46].

3.2. Address to the court and claims of the plaintiff according to the standards of the European Union and Georgian law

Due to the discrimination in the pre-contractual relations, applying to the court in order to exercise the rights and set demands by the candidate can be considered the most traditional method. The candidate's request by the court regarding the employer's obligation to employ the discriminated candidate is characterized by a non-uniform approach in legal literature and practice [47]. In pre-contractual relations, the issue of discrimination is important when determining the rules for compensation of damages [48], during which attention is paid to the nature of the discrimination and the personal feelings of the candidate for employment.

The burden of proof is regulated differently in discrimination cases. Antidiscrimination directives [49] imply a mechanism that without eliminating diminishes the burden for the victim: the victim has to state the facts on which basis discrimination can be presumed to have taken place. When the presumption is outlined, the burden of proof is placed on the employer and it has to prove that he has not violated the principle of non-discrimination [50]. Therefore, EU law introduces the reversal of the burden of proof in favor of the candidates who consider themselves denied on the discrimination grounds [51].

In accordance with the Labor Code, the employer is not obligated to provide justification for why an employment contract was not concluded with a candidate. However, another provision of the Code stipulates the same standard as it is envisaged in EU law. More precisely, the burden of proof in labor discrimination disputes is on the employer [52]. Thus, under Georgian legislation, it is unclear if discrimination under political or other opinion occurs who is in charge of proving the fact of discrimination.

Unlike in the US, a discriminated candidate in European countries does not have the right to file a lawsuit for compulsory employment [53]. The mentioned requirement

contradicts the autonomy of free will, in particular, the employer's will to hire a particular candidate is his/her freedom, and the state's interference in it equals to restriction of freedom to choose marriage or religion [54]. In addition, the fate of the candidate employed instead of the discriminated candidate under conditions of forced employment is unclear: should he be fired or while protecting the rights of the already employed person, the employer should establish labor relations with more employees than it is in his business goals [55].

In general equitable relief is presumptively available to any proven victim of discrimination [56]. Accordingly, the discriminated candidate has the right to various claims for damages: Reimbursement of costs incurred for concluding the contract, compensation for material damages, compensation for non-material (moral) damages [57]. In addition, the discriminated person may demand the amount that he would have received if, for example, a 1-year employment contract was signed with him. The claimant has the right to claim the aforementioned in the form of lost profit [58], however, it will be up to the claimant to prove that he met all other criteria and that the employment contract was not concluded with him only because of political or other opinion [59].

As a rule, the costs incurred for signing the contract consist of postage or transportation costs and in most cases represent a symbolic sanction [60]. In case of discrimination shown by the employer, the candidate is entitled to claim compensation for material damages not only for actual damages but also for lost profit, which, in turn, should be determined taking into account the interest of the candidate, the nature of the work, the probationary period and compensation [61]. As for non-material damage, the candidate has the right to claim compensation for non-material damage if the employer has damaged the candidate's values or health, and to calculate, the severity and scope of the damage, which was included by the employer's unequal treatment, are taken into account [62]. Thus, as a result of discrimination against a person due to political or other opinion, the discriminated person is entitled to claim compensation for both non-material and material damages, although the burden of proving both damages will be on the claimant (the discriminated person). Material damage is easier to prove, although moral damage is uniquely assessed by the court.

As for the method of calculating moral damages, unfortunately, in Georgia, during the pre-contractual relationship, due to political or other opinions, there are actually no cases of moral damages being claimed by the employment candidate. The Supreme Court of Georgia does not have any kind of clarification on this matter, although in general, the established practice on the compensation of moral damages is that the determination of the amount of moral damages belongs to the judicial discretion. While assessing the damages the court should take into account both the subjective attitude of the victims towards the severity of such damage, as well as the

objective circumstances. It is important that the amount of compensation be fair and reasonable in order to satisfy the victim, to affect the person who caused the harm, and to prevent the violation of personal rights by others [63]. Accordingly, in each specific case, the amount of moral damage caused by discrimination due to the candidate's political or other opinion in pre-contractual relations should be assessed. Thus, in each specific case, in accordance with the principle of justice, equality, proportionality and good faith, the judge should receive the result corresponding to the goal set by Article 2 of Convention No. 111 of the International Labor Organization and Article 2.3 of the Labor Code of Georgia [64].

4. Case law analysis

While discussing discrimination issues in pre-contractual relationship case law and landmark cases are of particular importance. It is essential to outline in what manner judges interpret legal norms while rendering decisions. As a result of examining Georgian case law appeared that there has not been any dispute regarding discrimination based on political or other opinion in pre-contractual relationships. However, disputes arising under discrimination during contractual relationships are often in Georgian reality and the Appeal Court of Tbilisi and the Supreme Court of Georgia have interpreted discrimination issues and distribution of burden of proof between the parties. In 2022 the Appeal Court of Tbilisi interpreted that during the litigation, the employer bears the burden of proving the denial of the facts of discriminatory treatment, but at the same time, the candidate himself must point out and present the necessary evidence for the assumption of discriminatory action. In addition, it should be possible to call for evidence confirming the facts, which may not be possible after a long period of time. It should also be taken into account that filing a dispute after a long period of time has elapsed since the alleged discriminatory act casts doubt on the alleged victim's assessment of the act as discriminatory (except in cases where the person is deprived of the opportunity to file a lawsuit). The goal should be to eliminate the consequences of discrimination, which is practically impossible in case of delayed response to possible discrimination facts.

The Appeal Court of Tbilisi differentiates discrimination and differentiation due to objective circumstances. Discrimination is only a self-serving, subjective, unjustified differentiation. Therefore, discrimination takes place only if the reason for discrimination is inexplicable, and lacking a reasonable basis. Accordingly, the right to equality prohibits not differential treatment in general, but only arbitrary, unjustified differences.

The Supreme Court of Georgia additionally outlines that discrimination is prohibited in contractual and pre-contractual relationships as well and mentions that there must

be circumstances justifying different treatment, which refers to cases where such treatment or the creation of conditions serves the purpose defined by law to protect public order and morals, has an objective and reasonable justification and is necessary in a democratic society, and the means used are proportionate to achieve such purpose [65].
Taking into consideration the mentioned interpretation, it might be deemed that Georgian courts define their position regarding discrimination in the same way during the pre-contractual discrimination as well.

5. Conclusions

Taking into consideration the presented discussion, several important issues can be identified as a conclusion. First of all, it should be noted that as a result of approximation with the European Union, taking into account the candidate status, Georgia will have to share the approaches and rules that exist in terms of discrimination in pre-contractual labor relations throughout the European Union. The pre-contractual labor relationship is characterized by certain specifics. At this stage, there is an ongoing negotiation between the candidate for employment and the employer, which will end with the signing of the labor contract or not. At this stage of labor relations, the issue of prohibition of discrimination is important. It is at the pre-contractual stage that the employer may show a discriminatory approach to the candidate and not sign an employment contract with him. One of the specific signs of discrimination is a political or other opinion and distinguishing a person from other candidates because of it. Political or other opinion as a form of discrimination is closely related to the right to expression, which makes the issue more specific. The term other opinion can be related to any issue and any topic. Therefore, any opinion is protected by this mark of discrimination.
If any point of view of the candidate for employment is unacceptable to the employer, this should not become the basis for discriminatory treatment towards the employee, and this principle is reinforced by international acts, the Labor Code of Georgia and other normative acts. The specificity of the Georgian legislation regarding discrimination in pre-contractual labor relations, such as political or other opinion, lies in the fact that the candidate for employment is able to apply to both the court and the public defender to restore his possibly violated rights. The competence of the public defender is to consider the application and complaint of the individual or legal person or group of persons who consider themselves victims of discrimination. Also, it will study the fact of discrimination both in the presence of an application or complaint, and on its own initiative, and issue a corresponding recommendation.
As for the burden of proof as mentioned above the Labor Code does not unequivocally establish the issue of unconditionally assigning the burden of proof to

the employer in a dispute related to discrimination revealed during the pre-contractual employment relationship. The above will most likely lead to a violation of the candidate's rights and will contradict European legislation. Thus, under Georgian legislation, it is unclear if discrimination under political or other opinion occurs who is in charge of proving the fact of discrimination. It is recommended that the Labor Code envisage that the burden of proof during the pre-contractual relationship is assigned to the employer.

In case of discrimination shown by the employer, the candidate is entitled to claim compensation for material damages not only for actual damages but also for lost profit, which, in turn, should be determined taking into account the interest of the candidate, the nature of the work, the probationary period and compensation. Also, as mentioned above, he may also demand the amount he would have received if, for example, a 1-year employment contract was signed with him. The claimant has the right to claim the aforementioned in the form of lost profit. Since, as mentioned, there is no case law, it is difficult to calculate damages. Accordingly, in this part of the Code, the method of calculating the amount of damage should be taken into account or it should be established according to case law.

In addition to material damages, the candidate for employment can also request compensation for moral damages, the specific amount of which is to be assessed by the court. At this time, the court should take into account both the subjective attitude of the victims towards the severity of such damage, as well as the objective circumstances. It is important that the amount of compensation be fair and reasonable in order to satisfy the discriminated person, to affect the person who caused the harm, and to prevent the violation of personal rights by others.

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