THE PROTECTION (?) OF PERSONAL RIGHTS IN EMPLOYMENT RELATIONSHIPS

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Abstract: The article takes a critical view on changes which were caused by the latest amendment to Slovak Labor Code in the area of personal rights in employment relationships. It analyses selected questions of its protection and refers on disproportions which arose between obligations and rights of employers and employees. This disproportion between obligations and rights has a negative impact on certainty of participant relationship that has weaker position. Disproportion has negative influence on reduction of degree of protective function of labor law. Therefore the changes which were brought by the amendment to Slovak Labor Code do not mean stronger protection of personal rights in labor law.

Keywords: *Personal rights, employment relationships, mobbing, discrimination, personal data protection.*

Introduction

The amendment to the Slovak Labor Code (Act No. 311/2001) which was made by the Act No. 257/2011 takes into force in 1 September 2011. Changes which were caused with this act have intervened in the area of employee's personal rights and their protection. Personal rights or personality of individual is an institute of civil law. But nature of personal rights, especially their inalienability, causes that they stay in every legal relationship where natural person takes part like subject. In employment relationships there is a relation between employer and employee. Only natural person may be an employee. The legal regulation of employee´s personal rights is in labor law regulated not only in Slovak Labor Code, but in other labor relations acts too. Employees perceive realization of their personal rights in connection with labor institutes, among realization of their social rights and sometimes we can speak about their mutual interpenetration. In this article we shall try to analyze changes and their impact on qualitative aspect of protection of employee´s personal rights in the case of elimination of mobbing at workplace and personal data protection in pre-contractual relationships.

1 COMPLAINT FOR MOBBING AT WORKPLACE

The word "mobbing" is a very frequent word. It indicates behavior of individual or group at workplace which is undesirable and which makes hostile surroundings for person which is an object of this behavior[1]. It has a negative impact on personality of individual and abases its human dignity[2] and honor at workplace or society. It can be a cause of great variety of medical disabilities which may influence the absence at work[3].

Mobbing comprises from several undesirable behaviors. Slovak Labor Code has not legal definition of mobbing. This situation is not same if we speak about behaviors which make the contest of mobbing. Discrimination is one of the undesirable behavior which is very frequent in employment relationship[4]. Discrimination is a subject of legal regulation not only in Slovak Labor Code but there is a special act which describes discrimination behaviors. We speak about Anti-discrimination Act No. 365/2004 (the next "Anti-discrimination Act"). If person was the object of this behavior he/she may use a complaint. The addressee of this complaint is employer. Furthermore object of the discrimination may sue the employer for this behavior. These instruments of legal protection are regulated in provision § 13 section 4 and 5 of the Slovak Labor Code. Filing an action is not independent on filing a complaint. Object of the discrimination can use one of them or either in the same time.

The provision of § 13 of Slovak Labor Code regulates situations when one subject of employment relationship acts in contradiction of morality, abuses rights or duties from employment relationship and if there is a victimization. These three described situations are kinds of mobbing behavior. Legislator tries to eliminate these undesirable behaviors and determines restriction for them. This restriction is contested in provision § 13 section 3 of Slovak Labor Code.

While we analyze the provision § 13 of Slovak Labor Code, we can contend that it is a provision which regulates several behaviors of mobbing. We can find there discrimination, acting in contradiction of morality[5], abusing of rights and duties from employment relationships and victimization. Legislator tries to eliminate these behaviors and sets up the obligation for employer. This obligation contents the order that employer must solve this problems at workplace. Moreover provision § 13 of Slovak Labor Code regulates instruments of legal protection too. Before the latest amendment to Slovak Labor Code the object of behaviors selected in provision § 13 of Slovak Labor Code may sue his/her employer. This instrument of legal protection is regulated in provision § 13 section 5 of Slovak Labor Code. It can be used if there is discrimination likewise situations described in provision § 13 section 3 of Slovak Labor Code. In these cases legislator eliminates the manners of legal protection. The object may only use manners which are contested in Anti-discrimination Act. In accordance of provision § 9 section 2 of Anti-discrimination Act object may request forbearing from mobbing, removing the consequences and request appropriate moral satisfaction. If moral satisfaction is not sufficiency object may request in accordance of provision § 9 section 3 of Anti-discrimination Act a financial satisfaction likewise damages according special legal statutes[6]. This elimination means that behaviors indicated in provision § 13 section 3 of Slovak Labor Code are considered for kinds of discrimination and that whole provision § 13 of Slovak Labor Code deals with discrimination in employment relationships.

The next instrument of legal protection against mobbing is institute of complaint. Before adoption of the latest amendment to Slovak Labor Code was this institute used only if there was acting which is regulated in provision § 13 section 1 and 2 of Slovak Labor Code. Section 1 regulates situations when employer must observe the principle of equal treatment in employment relationships in accordance with special legal act. This special legal act is Anti-discrimination Act. Anti-discrimination Act sets up in provision § 2 section 1 that respect of this principle is realized through principle of non-discrimination from reasons which are enshrined there. Section 2

[1] The first definition of this behavior makes H. Leymann. See: LEYMANN, H.: *The Mobbing Encyclopaedia. Bullying, Whistleblowing. The Definition of Mobbing at Workplace*. Available on: http://www.leymann.se/English/12100E.HTM.

[2] Human dignity like a fundamental goodness of society is a subject of research in research activities for example M. Barinková and J. Trojan. See: BARINKOVÁ, M. – TROJAN, J.: *Etické aspekty zabezpečenia a ochrany dôstojnosti zamestnanca*. In: BARANCOVÁ, H. (ed.).: Pracovné právo 21. storočia. Plzeň: Aleš Čenek, 2009, p. 172 and the following.

[3] European agency for safety and health at work highlight that there is a thread between mobbing and health at work. See. European agency for safety and health at work: *Mobbing at work*. In: Facts 23. Bilbao: European agency for safety and health at work, 2003, p. 1.

[4] The subjects of this behaviour are special categories of employees too (women, pregnant women, mothers, youthful workers). See: ŽOFČINOVÁ, V.: *Limity ochrany práv osobitných kategórií zamestnancov (žien, tehotných žien, matiek, mladistvých) v kontexte medzinárodného pracovného práva.* In: Dny veřejného práva, sborník příspěvků z mezinárodní konference. Brno: Masarykova univerzita v Brně, 2007. p. 1265-1273.

[5] About morality see article: JANIČOVÁ, E.: *Kolektívna zmluva – lex contractus realizácie sociálneho dialógu a zodpovedného podnikania*. In: BARINKOVÁ, M. (ed.).: Európska dimenzia podnikovej sociálnej zodpovednosti a jej vplyv na reguláciu pracovnoprávnych vzťahov, zborník príspevkov účastníkov vedeckého sympózia s medzinárodnou účasťou. Košice: Univerzita P. J. Šafárika v Košiciach, 2009, p. 191 – 193.

[6] For example provision § 420 and following of Civil Code (Act No. 40/1964).

of provision § 13 of Slovak Labor Code prohibits discrimination from reasons which are contested in this provision. If we compare provision § 2 section 1 of Anti-discrimination Act with provision § 13 section 2 of Slovak Labor Code we can state that Slovak Labor Code sets up wider circle of discrimination reasons. What is the same is that Anti-discrimination Act and Slovak Labor Code do not close circle of discrimination reasons.

As we mentioned, using of institute of complaint was eliminated only on situations which are regulated in provision § 13 section 1 and 2 of Slovak Labor Code, but option to sue employer which is contested in provision § 13 section 5 of Slovak Labor Code, is enshrined for behaviors set up in provision § 13 section 3 too. We must remind that provision § 13 section 5 of Labor Code every behaviors considers for kind of discrimination, but it is not same at complaint. This access did not change after the latest amendment to Slovak Labor Code, but changes expanded the situations when object of mobbing may use complaint. Extension was made with inclusion the link on provision § 13 section 3 of Slovak Labor Code. This act makes way for object of mobbing to complain his/her employer. In accordance of provision § 13 section 4 of Slovak Labor Code employer must respond on complaint, secure the correction. If employer makes deterrent, undesirable environment at workplace, he must waive of this acting. If the victim of mobbing suffered any consequences of the act, employer must remove them. The manners of solving set up in provision § 13 section 4 of Slovak Labor Code have general nature. Therefore employer shall regulate detailed procedure about solving the mobbing at internal normative act (for example in working order). While we speak about internal normative acts which are made with concurrence of social partners, they may influence the content of these documents.

The victim of the mobbing behaviors usually does not know how rights she/he has, which ways of protection may use. The victim rather decides to change his/her employment like escape. This act is one of the causes of fluctuation which has a negative impact on labor productivity at business. The consequence of this situation is that employer must take on a new employee. Taking on a new employee needs the cost for her/his training. New employee has not competent skills. For this reason the problem of mobbing must be for employer important like is important for him to secure, for example, healthy working conditions. The question is if increasing of instruments of legal protection against mobbing means an effective manner of solving the problem. Effective protection means that toll of protection is easily available and efficient. Complaint fulfils the condition of easily available toll of protection. Legislator does not set up any form and terms of complaint. There is no obligation to file complaint in any period stipulated by law. Complaint must content the description of acting, who was a mobber, indication of witnesses. Using of this toll it may be effective in the cases if there is mobbing between employees. It is not conclusive if the mobber is one employee, or group of employees or primary employee, thus persons who do not decide about whole life of organization. If employer is a mobber, person who decide about whole life of the organization, about personal, financial questions, usually owner, the Slovak Labor Code sets up the employer the obligation to react on complaint, manner how to correct the consequences and the term in which must do this things. But what in the case if employer is passive? The provision § 13 section 4 of Slovak Labor Code does not solve this question. The solution of this question may be in participation of the social partners like investigator or control body which may initiate filing complaint to labor inspection or which may have right to plead like witnesses. At present employee must bring an action according the provision § 13 section 5 of Slovak Labor Code. Employee is a plaintiff and employer is a defendant. Whereas that provision § 13 section 5 of Slovak Labor Code considers the behaviors regulate in provision § 13 section 3 of Slovak Labor Code for kinds of discrimination, burden of proof lies on employer. Employer must prove that there was not any kind of mobbing. We write that before the objects of mobbing sue the employer, they must not file complaint. But complaint may be used like ancillary evidence. This document court may take into account when decides about case like an enormous circumstance, like a signal that employer wants to hide whole problem.

If there is a situation that another employee is a mobber and the victim is complaining but employer is passive, victim may initiate judicial proceeding. In this situation is a defendant not employee who is a mobber but still employer, because the employer is responsible that tolerate mobbing at workplace. Complaint may be used like evidence. An unsettled complaint may be classified like form of participation on these acts. Danger of judicial protection is in the length of the judicial proceeding. At time of the bringing an action to issuing a decision may this undesirable behavior continue. Employee who is a victim of mobbing must use one of kinds of preliminary ruling in accordance of Civil Proceeding Act No. 99/1963. Therefore this way of protection may dissuade employee.

The increase of situations when victim of mobbing may use a complaint, we can perceive like consolidation of protection of employee´s personality and his/her personal rights only in situation if employer wants to eliminate mobbing at workplace. It could be useful if in the process of solving can participate the representatives of employees like it is in Czech Republic. Czech legislator sets out that complaint must be discussed with social partners. We think that legislator could consolidate the participation of social partners by extended their powers, for example, that may contact control state organs or participate on judicial proceedings. The reckless of interdiction sets up in provision § 13 of Slovak Labor Code could be considered like breach of labor discipline. Control state organs for the area of employment relationships should make the lectures at workplace where they could provide the information about this negative social phenomenon. But if employer does not want to solve this problem then employee must sue the employer or change his/her employment.

2 TRADE UNION´S AFFILIATION vs. PERSONAL DATA PROTECTION

Amendment to Slovak Labor Code has intervened to provision § 41 of Slovak Labor Code which regulate the area of pre-contractual relationships and protection of personal rights of natural person - applicant, especially their privacy and personal data protection[7]. Change was made in provision § 41 section 6 of Slovak Labor Code from which was omitted the word "trade union affiliation". Provision § 41 section 6 of Slovak Labor Code which sets up circle of information which employer does not ask from applicant. Legislator has made situation that from 1 September 2011 employer may ask applicant about his/her trade union´s affiliation. From Explanatory statement to the latest amendment to Slovak Labor Code we can learn that legislator decided for this change so that employers might require trade unions, which want to operate at their workplaces and represent whole their employees, about demonstration if it has a sufficient membership ground. According provision § 230 section 3 of Slovak Labor Code *"if trade union want to represent all employees at workplace, it must demonstrate that 30 % of employer´s employees are member of this trade union."*

Detection of trade union´s affiliation is relevant if we speak about couple of applicants, which are employees and want to change their employment, because they may be members one of the trade unions. Therefore the next interpretation will be focused right on this couple of applicants.

Whole provision § 41 of Slovak Labor Code regulates relationships between employer and applicant. In this stage employer obtains information only from applicant, from his/her entrance documents, write or verbal references from the previous employment. Therefore the philosophy or reasoning in Explanatory statement why legislator have decided to exclude restriction to ask about trade union´s affiliation is illogical. In

[7] BARANCOVÁ, H.: *Zákonník práce. Komentár. 1. vydanie.* Praha: C. H. Beck, 2010, p. 5.

accordance of Explanatory statement employer will be able to require information from trade union if person – applicant is a member of this trade union. This act we may consider like manner how legislator expands circle of subject from who employer may require information about applicant. But applicant does not know about this process. The data about trade union´s affiliation is a special category of personal data in accordance of provision § 8 section 1 of Personal Data Protection Act No. 428/2002 (the next "Personal Data Protection Act"). These data may be processed only with former consent of data subject or if there are situations established in provision § 9 section 1 a) to f) of Personal Data Protection Act. Job interview it is not one of this situations, therefore employer will not require trade union´s affiliation without consciousness of applicant or without his/her consent.

Natural person provides its personal data when she/he entering to trade union. These personal data may be used only for evidence. Trade union may not provide these personal data another person while this obligation is not established in act and there must be defined purpose of their exploitation. The same situation is if we speak about providing information to another subject about membership. Thus there must be fulfilled requirements for legitimacy, legality and proportionality, because we speak about infringement to the privacy of person[8]. The simply manner like trade union may show its ground of memberships is providing list of its memberships which contents their name and surname. From this sign everybody may identify trade union´s affiliation of person and thus detects its personal data which has special protection. If trade union has not consent of data subject that it may provide his/her name and surname in list of membership, then trade union cannot provide this information to another person. If we speak about list of memberships, trade union must have consents from all persons who are its memberships. This is the same in the case if this obligation is not established in act. The opposite process would be in contrary with requirements which are established in union law, especially from *Directive No. 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data* (the next "Directive No. 95/46/EC") which is signed like "General directive"[9]. Especially we speak about respect of principles of protection of individual privacy, including personal data protection. These principles are: abovementioned principle of legality, legitimacy and proportionality. General direction sets up the next principles – **principle of finality, transparency, confidentiality, safeguard and control**[10].

Court of Justice of the European Union (the next Court of Justice) in the case **The Bavarian Lager Co. Ltd. vs. Commission of the European Communities,**[11] stated, that introduction of member´s name of professional organization on list of participants at organized event, it does not mean infringe to privacy of this member. The same situation is if statement of this member is recorded, because it is an opinion of organization which he/she represents. Court of Justice excludes professional activities from right to privacy, although European Court of Human Rights in its decisions states that article 8 of Convention for the Protection of Human Rights and Fundamental Freedoms, which contests right to privacy, covers not only family relationships but also professional activities[12]. Requirement for providing of trade union´s affiliation in pre-contractual relationships we cannot consider for representation of trade union. Thus we cannot speak about performance of professional activities. Trade union´s affiliation means relation of natural person to spectrum of opinions represented by trade union, anything what makes relation to society, therefore requirement of trade union´s affiliation means requirement of personal opinions and attitudes of this person and thus interference to his/her right of privacy. Therefore employer cannot require this data with reason that there is decision of Court of Justice, because the participation on job interview is not performance of professional activities.

In this case how legislator justified this change in Explanatory statement we may speak about situation when employer is able to contact trade union with requirement if applicant is a member of this trade union or not. Trade union is not able react on requirement because providing of trade union´s affiliation is a processing of personal data, especially special category of personal data. Processing of these data is bound with consent of applicant or there must be situations which are established in provision § 9 of Personal Data Protection Act.

If there is situation which is established in provision § 230 section 3 of Slovak Labor Code, trade union must respond and provide information from which employer could find out that obligation of representation of 30 % of all employees is fulfilled. But this provision we do not connect with provision of 41 section 6 of Slovak Labor Code. Provision § 230 section 3 Slovak Labor Code regulates the operating of trade union at employer´s workplace and not process of receiving of new employees. This situation we can subordinate under the provision § 9 section 1 a) of the Personal Data Protection Act.

Receiving of new employees is a very difficult process not only for employer but also for person who is an applicant. Employer wants to obtain about applicant a lot of information which may help him with decision which applicant is suitable for his business. The main criteria which influenced employer´s decision are question of costs and loyalty to employer. Some questions during job interview may intervene to applicant´s privacy. Thus legislator sets up boundaries which information employer may request from applicant. These boundaries are contested in provision § 41 of Slovak Labor Code. Boundaries have nature of restriction (data which may not be requested) or option which is conditioned by fulfilling another requirement. Provision § 41 section 6 of Slovak Labor Code, as was mentioned, sets up the circle of information which employer may not require from applicant. It contests restriction. The latest amendment to Slovak Labor Code has deleted term "trade union´s affiliation" from this provision. The legislator has made situation that employer is able to require this information. In the analysis of this change we pointed that trade union´s affiliation is personal data which has special protection in accordance of provision § 8 section 1 Personal Data Protection Act. Personal Data Protection Act states that is restricted to process these personal data. Exception from this restriction is established in provision § 9 of Personal Data Protection Act. They can be processed if there is consent of data subject or if there is one of established situations in provision § 9 section 1 a) to f) of Personal Data Protection Act. This act is lex specialis in relation of regulation in Slovak Labor Code. From this reason question of restriction of detection of trade union´s affiliation does not require regulation in Slovak Labor Code, because we have special regulation in special act – Personal Data Protection Act. This act considers like special personal data political and religious affiliation. The restriction of detection of political and religious affiliation in provision § 41 section 6 d) of Slovak Labor Code was not affected by its latest amendment. Nor in these cases the restriction would not be set up in Labor Code. The restriction in these cases is established in Personal Data Protection Act. We may speak about double regulation which highlights the restriction of detection of this information and about double protection of personal data of applicant. Before the latest amendment to Slovak Labor Code this situation was the same if we speak about trade union´s affiliation.

[8] European Court of Human Rights requires respect of these principles. See judgments: Case of Nimietz v. Germany from 16 December 1992, Case of Huvig v. French from 24 April 1990, Case of Amann v. Switzerland from 16 February 2000, Case of Rotaru v. Romania from 4 May 2000, Case of Z. v. Finland from 25 February 1997, Case of Copland v. The United Kingdom from 3 April 2007.

[9] KUNER, Ch.: *European data privacy law and online business*. Oxford: University Press, 2003, p. 17.

[10] HENDRIKX, F.: *Employment privacy law in the European Union: Surveillance and monitoring*. Intersentia, 2002, p. 4.

[11] See the judgment of Court of Justice of the European Union in the case The Bavarian Lager Co. Ltd. vs. Commission of the European Communities, case T-194/04, from 8 November 2007.

[12] Explanatory of article 8 of Convention of protection of human rights and freedoms made by European Court of Human Rights covered professional activities to right of privacy. See judgments: Case of S. and Marper v. The United Kingdom from 4 December 2008, Case of Amann v. Switzerland from 16 February 2000.

During job interview applicant is subjected to not only variety of questions but also has negative position, because he/she has not knowledge about his/her personal rights. Applicant may know that he/she has any right to privacy, but he/she does not know that this right entrance with him/her to every legal relationship and that employer does not be able to require any information from applicant. This legal darkness is for the benefit of employers. They have a great variety of ways how obtain information from applicants (for example they formulates the form of consent with processing of personal data, or they condition fulfillment of e-application form on providing any information). The double restriction was justifiable. Employer was wised up (if he does not know detailed regulation of personal data protection) that asking on trade union´s affiliation is restricted. On the another part of the problem the internet portals, which offers labor, provide for their visitors information concerned with area of employment relationships, for example, pre-contractual relationships. It is a way how natural person – applicant may obtain information about his/her rights and duties. The process of information consists from induction of concrete provision without relevant explanatory with which legal statement has connection.

We think that situation which was made by the latest amendment to Slovak Labor Code in provision § 41 section 6 d) should help employers to reach situation how trade union could not operate at their workplace.[13] Thus lower legal knowledge about rights of applicant may be abused from employer for the abovementioned purpose – disabling of operating of trade union at workplace. This change has negative influence on legal guarantee in connection of protection of applicant´s personality, especially his/her privacy and personal data protection. If employers shall require providing trade union´s affiliation from applicants at job interview this acting will be contrary to not only with Slovak legal order but also with international and union right. In this connection Court of Justice stated, "**that is necessary distinguish personal data which intervene to privacy and personal data which have not this character."**[14] Court of Justice points that special personal data has this character where in accordance with *Direction No. 95/46/EC and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data* appertains trade union membership too. This is in contrary with protective function of labor law which influences on pre-contractual relationships too and its function is to protect applicants because his/her position at job interview is very leak. When the number of applicants prevail on free places (like in this time), we do not agree that this change may subscribe to increasing of employment in Slovak country. For comparison in Czech Republic legislator placed the double protection for sensitive personal data not only for applicant but also for employees too. The protection is established in Personal Data Protection Act No. 101/2000, especially we speak about provision § 4 b) and provision § 9 of the abovementioned act. The restriction of processing sensitive personal data is in provision § 31 and in provision § 316 section 4 of Czech Labor Code (Act No. 262/2006).

Conclusion

In this article we try analyze several changes which were evoked by the latest amendment to Slovak Labor Code and their impact on selected problems of protection of personal rights of employees and applicants. Changes which have been bringing by the amending in lawful state should not cause unnecessary loading for its citizens. From the view of amending changes we may allege that they have established considerable disproportions between rights and duties of employee and employer. Slovak legislator, how we point in this article, makes ways that employers are able to abuse lower legal knowledge of their employees and applicants. This situation reduces the measures of protective function of labor law and has negative impact on social guarantees of employees (include potential employees).

The deficiencies in legal regulation which we analyze in this article therefore they have brought us to conclusion that changes which were made by the act No. 257/2001 have caused weakness of protective function of labor law and thus reduction of quality of protection of personal rights of employees.

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[13] On the lower number of trade unions which operate at Slovak workplaces is pointed in article: BULLA, M. – ŠVEC, M.: Ochrana súkromia zamestnancov pri prevádzkovaní kamerového systému na pracovisku (národné a európske východiská). In: Justičná revue, 62, 2010, č. 10, s. 1067 – 1069.
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