



Gender Discrimination in Labor Relations

Tbilisi 2014



The presented research was conducted by the non-governmental organization “Article 42 of the Constitution” within the framework of the project: “Promotion of Gender Equality in Employment.”

This research was carried out with the generous support of the American people and funding of the U.S. Agency for International Development (USAID).

“Article 42 of the Constitution” bears full responsibility for the contents of the research paper. It may not express the opinions of the USAID or the Government of the United States.

Authors of the research:

Lika Jalagania
Tinatin Nadareishvili

Research team:

Lika Jalagania
Tinatin Nadareishvili
Maka Nutsubidze
Anna Argnashvili
Nino Nakeuri

Organization “Article 42 of the Constitution”

Address: #11a M. Kantaria Street, Tbilisi, 0160, Georgia

Tel: (+ 995 32) 299 88 56; (+995 32) 272 88 56

Fax: (+ 995 32) 299 88 56

Email: office@article42.ge

Facebook: Let’s work in an equal environment

www.tanastsoroba.ge

Print run: 1000

The project “Promotion of Gender Equality in Employment” is implemented by “Article 42 of the Constitution” with the financial support of the USAID. The project is multi-complex and strives to influence the current non-gender sensitive environment that is reflected in labor relations.

The goal of the project is to call for experts and professionals working in different social fields and to establish efficient methods in the fight against the manifestation of gender discrimination in the workplace.

The partners of the project are: Centre of Social Sciences (CSS), Georgian Trade Unions Confederation (GTUC), JumpStart Georgia, New Media Advocacy Project (N-map).

Contents

I. Introduction.....	6
1. Significance and the purpose of the research	6
2. Hypothesis of the research (information and data available before starting the research work)	7
3. Identification of the research question and sub-questions.....	8
4. Structure and methodology of the research	9
4.1. Structure	9
4.2. Methodology.....	10
II. Narrative Part	13
a) Gender discrimination in the pre-contractual relationship.....	13
1. Stages of the pre-contractual relationship	15
1.1. The job announcement.....	16
1.2. The stage of the job interview	19
1.3. Special job requirements	23
2. International standards.....	24
3. Review of the Georgian legislation	32
3.1. The Labor Code of Georgia	32
3.2. The Law on Elimination of All Forms of Discrimination	35
3.3. The Law on Gender Equality	37
4. International practice.....	38
5. Assessments by experts and advocates.....	42
b) Gender discrimination in the workplace	46
1. Positional segregation based on gender.....	47
2. The “glass ceiling”	49
3. International standards and equal remuneration	50
3.1. Georgian legislation on equal remuneration	54

4. Maternity leave.....	56
5. Assessments of experts and human rights advocates.....	57
C) Gender discrimination in termination of employment.....	65
1. The employer’s obligation to explain the dismissal based on gender.....	65
2. Dismissal during pregnancy, childbirth or maternity leave.....	68
3. Dismissal based on marital status.....	69
4. International standards on the prohibition of gender discrimination.....	70
5. Assessment of experts and human rights advocates.....	71
d) Sexual harassment in the workplace.....	73
1. Types and forms of sexual harassment.....	77
2. The identification of the harasser.....	79
3. Regulation of sexual harassment in Georgian and foreign legislation.	80
3.1 The issue of responsibility.....	83
3.2 The burden of proof and compensation for suffered damages.....	85
4. Assessment of experts and human rights advocates.....	88
III. Analysis of the court practice.....	89
IV. Conclusion.....	107
V. Recommendations.....	108

I. Introduction

1. Significance and the purpose of the research

The generality of gender equality is a concept recognized by international society, which commits to the elimination of gender discrimination and to which purpose member states develop appropriate legislation and state policy in order to fulfill the essence of equality in practice on every stage of social life.

Labor relations are an important part of public life and are based on the idea of labor and access to employment as principle human rights. Guaranteeing these rights is considered important as they influence the realization of other human rights.

The International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly in 1966, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) is of the utmost importance for the protection of labor rights. Within both the Covenants member states are obliged to widen women's participation in social life and recognize the right of equal pay for equal work. Every person has the right to a fair and favorable work environment, guaranteeing that the situation for women is no worse than for men as well as ensuring equal pay for equal work. The International Covenants guarantee every individual equal opportunity to be promoted at work on the basis of their work experience and qualification.¹

The aims of this research are:

- To provide an analysis of the range of gender discrimination in the workplace in Georgia (actual conditions);
 - To identify the factors that cause gender-based discrimination in the workplace in Georgia (reasons, causes and effects, and possible reasons not mentioned in practice);
- and

¹International conventions in the field of women's rights, Georgian legislative base and actual mechanisms.UNDP "Women in Development Process", Tbilisi, 1997.

- To identify specific activities aimed at the improvement of these conditions (recommendations);

2. Hypothesis of the research (information and data available before starting the research work)

According to preliminary information, discrimination in the workplace may occur during several stages:

Employment and selection. There are several cases of gender discrimination during both the application process and in the workplace; job announcements often include statements that only male (or female) applicants or eligible to apply. Announcements can also define age, as well as the physical appearance of women (for example: “good” or “pleasant” looking²) as specific job criteria. Our experience shows that Georgian society does not consider such announcements to be discriminating, despite the fact that they prohibit women from equal participation in job seeking. In addition, the Labor Code does not specify any appropriate norms for the protection of employees from discrimination, particularly during the selection process and employment.³

Salary: Women in Georgia earn only 60% of the amount that men earn for similar work,⁴ but many women are not aware of this problem. There is an assertion that some facts of inequality in payment are the result of horizontal and vertical segregation⁵ and that legislative gaps only worsen the problem. For example, Georgian legislation does not clearly protect the equal pay for equal work principle, which “hinders the elimination of discrimination in payment by gender.”⁶ Moreover, “even in the fields where women are the majority, their monthly remuneration is lower than men’s salary.”⁷

² Georgian Trade Unions Confederation, Promotion of Gender Equality in Labor Relations in Georgia, p. 17, 2012.

³Committee of Experts on the Application of Conventions and Recommendations (CEACR), observation: on discrimination (employment and workplaces) convention, 1958 (#111), Georgia, 2011.

⁴ World Bank, World Development Report, 2012: Gender Equality and Development (2011), p. 17.

⁵ Elisabeth Duban, Gender Assessment USAID/Georgia (2010), p. 26

⁶ILO CEACR, observation: convention on equal remuneration, 1951 (#100), Georgia, 2011.

⁷ Elisabeth Duban, Gender Assessment USAID/Georgia (2010), p. 26

One assertion is that this fact is partially caused by stereotypes. For instance, some women state that their managers told them that unmarried women will not receive the same remuneration as married women for similar work.

Benefits: The Labor Code envisages the right of an employee to maternity leave. According to our own experience, many women do not exercise this right for fear of losing their job and assume that the law does not offer sufficient protection if they should be fired during maternity leave.

Sexual harassment: In spite of sexual harassment being an acute problem in Georgia,⁸ there is no trustworthy and comprehensive information available about its occurrence or prevalence. Accessible information about sexual harassment at work mostly has a humorous character⁹ that is supported by a low level of awareness about sexual harassment and an inadequate understanding of its essence.¹⁰ Many people think that the concept of sexual abuse implies only physical violence against women and/or rape. According to the Law of Georgia on Gender Equality, the prohibition of sexual harassment is not “effectively secured and law enforcement agencies seldom investigate related suits”.¹¹

3. Identification of the research question and sub-questions

The identification of the research question appears to be very simple *prima facie*. This research aims at finding out whether gender discrimination in employment occurs in Georgia. Though, considering the importance and versatility of the problem and also taking the complicated nature of discrimination into account, which influences the correct formulation of the research question as well as defines the entire range of the research process, following question need to be answered:

⁸ US Department of State, Country report on Human Rights, 2011, Georgia, p. 42.

⁹ For instance, one researcher who studied BTC in Georgia noted that “women state that they claimed about sexual harassment at work and in rare cases they did so only after discharge from work”. Manana Kocholadze, Chercher La Femme: Inadmissibility of Gender Equality in Finance, August 10, 2011. <http://bankwatch.org/>.

¹⁰ Maia Barkaia, Torture in Silence?! Politics of Sexual Harassment: Perception and incidence of sexual harassment among students (working document, 2012).

¹¹ US Department of State, Country report on Human Rights 2011, Georgia, p. 42

- Is there an appropriate legal framework in Georgia, within which a minimum occurrence of gender discrimination in the workplace can be achieved?
- How explicit, clear and complete is the current Georgian legislation in providing extensive information to every interested citizen? The prohibition of gender discrimination itself represents a code of conduct of general legal nature and encompasses any type of social class or a workplace.
- Does the existing legal framework provide adequate legal outcomes for the victim?
- What is the level of public awareness concerning guaranteed rights and legal outcomes?
- Do victims of gender discrimination use their right to judicial remedy and other effective and adequate means (legislative or procedural)?
- What is the court's practice concerning gender discrimination in the workplace and how does it correspond with reality?

4. Structure and methodology of the research

Below we try to structurally and methodologically answer all questions asked on the basis of legislation analysis (I), court decision analysis (II), qualitative (III) and social research (IV) (in the form of Annex).

4.1. Structure

Based on the specifics and goal of the research, gender discrimination in the workplace has been studied in the following four directions:

1. Gender discrimination in the pre-contractual relationship;
2. Gender discrimination in the workplace;
3. Gender discrimination in termination of employment;
4. Sexual harassment in the workplace.

Sexual harassment at work represents a widespread form of discrimination, the struggle against which is an issue of international attention and we defined it here as the fourth paragraph of this research.

4.2. Methodology

The above-mentioned fields were studied on the basis of legislation analysis, court practice analysis, qualitative and social research.

1. Methodology of the legislative research

Several methodological instruments were used for the legislative analysis. The research used different methodologies and relevant methods for different parts of the analysis, which is conditioned by the complicated nature of the research subject and the research goals.

Theoretical discourse was used to review the four main issues of discrimination in labor relations: the pre- contractual relationship, the employment process, termination of employment and sexual harassment in the workplace.

The research includes reviews of both national and international legal frameworks, offering an analysis of the main regulating acts and state policies on labor relations. The research analyzes the national legislative basis on its effectiveness and sufficiency; it critically evaluates the problematic aspects of pre- contractual relations and reviews the obligations undertaken by the government to support the harmonization of regulations with international standards and the implementation and establishment of these norms in practice. State policy and legislation are discussed using international human rights, definition of appropriate international instruments and academic/theoretic references referring to labor relations.

For better presentation, the research also gives examples of labor relations theory and practice of several foreign countries: Estonia, Finland and Germany. These countries have been selected based on the existence of governmental policies and regulations regarding the prohibition of discrimination in labor relations. On the basis of analysis and evaluation of each study component, recommendations on legislative changes, improvement of government policy, as well as bringing them in line with standards of human rights will be prepared for relevant agencies.

2. Methodology of the qualitative research

At the onset of the qualitative part of the research, appropriate literature and previous studies were elaborated and questionnaires were agreed upon with the project working group. Interviews with 16 respondents were recorded using the half-structured interviewing method. The selection criteria for their selection were: practical experience in working on women's labor rights, experience in the fields of issues concerning different minority groups and studies, awareness about international standards on labor rights.

The following persons/organizations contributed to the presented research: the Sectorial Trade Union and representatives of the Central Trade Union's Confederation office, representatives of LBT women's and LGBT organizations, an expert of an international labor organization, Court of Appeal and Supreme Court judges, university professors in the fields of economics and law, a Member of Parliament and the head of the gender equality department of the Public Defender's office.

Interviews recorded within the research process were studied and detailed transcripts were elaborated and analyzed using the hermeneutic approach. Established first and second category codes were later integrated in sub-categories of the main topics. The topics were organized under four main issues:

- a) Gender discrimination in the pre- contractual relationship;
- b) Gender discrimination in the workplace;
- c) Gender discrimination in termination of employment; and
- d) Sexual harassment in the workplace.

3. Methodology of court practice study

According to the strategy of the research, at the preliminary level, decisions of common courts (civil and administrative) of the last five years, i.e. from 2009 until present were identified. In the search engine of the Supreme Court of Georgia (from April 1, 2009 to April 1 2014) the search was conducted by general civil and administrative criteria – "labor dispute". As a result we detected 421 civil law cases (331 cassation and 80 private suits, six newly identified

circumstances, two annulments on labor dispute case and one case on provisional allowance). The term “discrimination” gave only one search result and also one result was found under “discharge from work”. In addition, the Trade Unions Confederation provided cases concerning labor disputes, in which they were involved (also during the past five years). Accordingly, 49 additional decisions relating to women’s suits on labor disputes across the country were studied: ten from the Supreme Court of Georgia, 18 from the Court of Appeal of Georgia (Tbilisi and Kutaisi), 12 from Tbilisi City Court and nine from the Regional Courts of Georgia (Batumi, Gori, Kutaisi, Kvareli, Signagi, Telavi, Zestaponi).

To make the results of the research more specific, we decided to request decisions made by the Tbilisi City Court and the Court of Appeal after the new labor code entered into force on June 6, 2013, which gives a different definition to labor rights, establishes a clear basis for dismissal, and introduces a provision that directly prohibits discrimination. In addition, the third chapter of the law considers the termination of labor relations for any reason other than those established by law unacceptable. As such, we requested information from the City Court on decisions made on labor disputes for the period September 2013 - present and from the Court of Appeal for the period December 2013 –present.

The results were as follows:

1. 150 decisions from the Tbilisi Civil Court, including 100 from the Committee of Civil Affairs and 50 from the Committee of Administrative Affairs.
2. 42 decisions from the Tbilisi Court of Appeal (including nine decisions of the chamber of civil cases and 33 decisions of the chamber of administrative cases).

The Supreme Court search engine did not give any results under the keywords “labor disputes” and “labor legal dispute” for the period January 1, 2014 until present.

As for the Criminal Code, it is known that the project strategy also implies research into sexual harassment of women at work but Georgian legislation is unfamiliar with crimes of a sexual violence nature in the workplace. Accordingly, the search key word was article 137 of the

Criminal Code of Georgia – “rape”. The electronic search engine of the Supreme Court only found nine decisions under the word “rape” and none using the keyword “sexual violence”.

Thus, analysis of available court decisions was made by following methodology: a description of the identified decisions, the actual circumstances, a legal analysis and a summarizing part. The general recommendations elaborated as a result of the research on the four principal issues are reflected in the final document as follows:

- a) Gender discrimination in the pre-contractual relationship;
- b) Gender discrimination in the workplace;
- c) Gender discrimination in termination of employment; and
- d) Sexual harassment in the workplace.

II. Narrative Part

Legislation analysis

The analysis of relevant legislation was conducted in four main directions:

- a) Gender discrimination in the pre-contractual relationship;
- b) Gender discrimination in the workplace;
- c) Gender discrimination in termination of employment; and
- d) Sexual harassment in the workplace.

a) Gender discrimination in the pre-contractual relationship

The generality of gender equality is a concept recognized by international society, which commits to the elimination of gender discrimination and to which purpose member states develop appropriate legislation and state policy in order to fulfill the essence of equality in practice on every stage of social life.

Labor relations are an important part of public life and are based on the idea of labor and access to employment as principle human rights. Guaranteeing these rights is considered important as they influence the realization of other human rights.

In 2014, the Georgian government initiated changes in the Labor Code in order to bring positive results in women's rights protection, however, the changes did not reflect all of the problematic issues that women often face in labor relations. The government also approved a 2014-2016 action plan on gender equality policy in January 2014. This plan covers eight directions, including the strengthening of women's economical position, but nothing is said about the elimination of existing obstacles to employment accessibility.

Following the fact that there is no state policy, it is impossible to evaluate or measure its effectiveness. Nowadays, the country has no vision on how to ensure women's involvement on the labor market or how to establish equal working conditions from a labor accessibility standpoint. The existing situation on the labor market requires immediate and comprehensive actions from the government. Despite providing general regulations at the employment level, women's accessibility to labor as a means to eliminate discrimination is still limited. Even at the preliminary stage, starting from the job announcement, women face discrimination, reflected in the contents of unequally formulated announcement in terms of gender.

Job requirements invite "stable", "pleasant looking", "unmarried" women to apply; thus discriminating them and limiting their opportunity to present themselves as candidates. Very often a job announcement defines gender, which also constitutes discrimination if not conditioned by any special job requirements. Discrimination facts occur during the job interview as well when questions which have to identify a candidate's professional skills go beyond the limits and interfere with a person's private life. Questions about a woman's marital status, her plans about having kids or pregnancy put them in unequal conditions compared to men and can serve as a basis for discrimination. This is why it is important to incorporate an efficient provision of prohibition norms of discrimination into Georgian legislation. An employer should be obliged to formulate the job announcement in a neutral way. The stages of an interview also need to be defined in detail, because leaving this beyond the scope of regulation creates a risk for gender discrimination, especially against women who are pregnant. Relevant

and irrelevant questions during a job interview have to be classified at the legislative level as well. It is important to note, that the distinguished attitude towards men and women at work is also conditioned by stereotypes, which was proven by UNDP research carried out in 2013 on public attitudes towards gender equality. According to the mentioned research, the perception of participants is “nourished by stereotypes established in public about male and female models of conduct and gender roles, meaning those social or cultural expectations, which exist towards men and women in society”. According to such a wide-spread opinion a man must have a job and a higher salary than a woman. It should be noted that the majority of the respondents (45%) think that when there is a limited number of openings men should be at an advantage. This opinion is supported by a larger number of men (53%) than women (38%). From all the above it becomes obvious that there is a need of defining the government’s role not only in the elaboration of legislative norms, but also in changing and transforming gender stereotypes and roles established by society, which manifests itself on every stage of life and creates the basis for the discrimination of women.

1. Stages of the pre-contractual relationship

The common concept of the equality between men and women denies any difference directed at the prioritization of any gender. The idea of equality is universal and covers every stage of public life, including labor relations. Freedom of labor and a person’s choice to define his/her labor status and to make a decision about participating in the labor market or not is derived from the universal human rights and freedoms. Freedom and accessibility to labor implies the prohibition of discrimination and promotes equality. Any action hindering the establishment of relations based on the equality concept is deemed a violation of the universal rights. Discrimination in labor relations manifests itself in all severity, because we face subordinate, vertical relations during which the employer has the opportunity to misuse his advantageous condition against the weaker party – the employee. Accordingly, it is important to create legal regulations that balance this subordination. These norms have to involve all stages of labor relations. Pre-contractual relations are an important role of labor relations in general,

representing the direct prerequisite of signing an agreement between the parties. Despite the fact that none of the legislative acts regulate labor relations in Georgia or gives a clear definition of “pre-contractual relations”, the Civil Code of Georgia encloses similar relations under legal regulations and indicates that an expression of will also represents an agreement which may be unilateral, bilateral or multilateral and is directed to initiation, alteration or termination of legal relations.¹² The regulation of only contractual relations would not be complete without the regulation of labor accessibility and pre-contractual relations, as a prerequisite of entering into an agreement and the initiation of the responsibilities undertaken by this agreement.

Accordingly, obligations between the employer and employee also exist at the pre-contractual stage based on the principles of trust and good faith in both parties. The initiation of obligations at the pre- contractual stage is regulated by Articles 316 and 317 of the Civil Code of Georgia, which implies the obligation of due diligence towards the rights and properties on both parties. The mentioned obligations may arise on the basis of an agreement preparation.¹³

During the pre-contractual process, several important stages may be distinguished like the job announcement, testing, the interviewing stage and any other procedure used for identification and selection of candidates based on their qualifications. Despite a big variation of candidate selection forms, this research will discuss only the stages of the job announcement and the interview.

1.1. The job announcement

The concept of equality between men and women is equally spread at every stage of pre-contractual relations¹⁴ and brings about legal outcomes in the mentioned relations. A job

¹² Civil Code of Georgia, Article 50.

¹³ Civil Code of Georgia, Article 117, Part II.

¹⁴ILO, General Survey 2012, para 752, 753, 754. See:

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf

announcement may not contain any discriminating terminology, directly or indirectly putting part of the candidates in inappropriate conditions¹⁵ against other candidates and be directed towards the employment of a specific gender or artificial decrease or selection of candidates. The elimination of discriminating practices in the announcement represents one of the main issues for the international society. Some countries, Ukraine for instance, tried to prohibit the use of discriminating terminology at the legislative level.¹⁶

Government policy or practice that is gender insensitive and has a disproportionate negative effect on applicants or employees because of their specific gender represents discrimination, as in giving preference to the other candidates. A job announcement includes advertisements sent by email, disseminated via employment web-pages, radio or TV. The form of the announcement is of no matter to the regulation purposes, only its content is important; it should not include direct or indirect gender discrimination towards the candidates or assign an advantage to one specific gender.

Until today, no research has been carried out in Georgia that takes a look at the job announcements and analyzes their gender sensitivity. For this very purpose, a special section was elaborated within this research which identifies gender-related terms in job announcements published on the web pages jobs.ge and hr.gov.ge.¹⁷ The research covered the period from 2010 to October 2014. During this period, the web page jobs.ge published 71 360 and hr.gov.ge – 14 376 job announcements. 10.01% of the announcement used terms related to the female gender and 24.02% referred to male candidates. To be more specific, the keyword “man” was used 1 088 times on jobs.ge and 394 times on hr.gov.ge. The keyword “pleasant appearance” was found in 1 589 announcements (2.235) and the word “stable” in 780 announcements.

¹⁵ILO, General Survey 1996, para. 82, 83. See: <http://www.ilo.org/public/libdoc/ilo/P/09661/09661%281996-83-4B%29.pdf>

¹⁶Ibid.

¹⁷ A list of words which could prove signs of discrimination in job announcements was pre-determined for the application. The search was conducted using words: woman, lady, man, gentleman, pleasant-looking woman, handsome man, pretty woman, married, single, unmarried, stabile.

It is important to note that discriminating terms can be found more often on jobs.ge than on hr.gov.ge. For instance, the web page jobs.ge showed 607 announcements using the word “woman”. This part of the research is of an experimental nature and represents no clear picture, because the keywords were searched independently from the content of the announcement.

Nevertheless, the research does reveal some tendencies. The frequency of discriminative phrases and its open/public character reflects that the issue is not perceived as problematic. As a result, it is left outside the scope of attention of the government and society. It shows a lack of understanding the severity of the problem and the absence of any form of accountability of the employers, which gives them the opportunity to base their decision on the gender of the candidates. All of the above is overshadowed by the absence of clear regulations in labor legislation. Neither the government nor society perceives that these artificial barriers in the pre-contractual stage jeopardize women’s labor rights and hinder the introduction of the broader universal concept of access to employment into practice. Thus, any governmental mechanism aiming at achieving women’s equality in labor relations cannot be perfect if the problem is not eliminated at its very origin, by tearing down the barriers that limit women’s chances of employment. Some countries created a special guideline for employers with specific recommendations on how to draft a job announcement,¹⁸ explaining which terms constitute discrimination and offering example phrases of a neutral character. These documents raise employers’ awareness and enhance the equality between men and women. It is important that Georgia also elaborates such guidelines or methodologies for both public and private sector employers.

¹⁸Illegal Interview Questions, The Fair Inquiry Guidelines were established by the EEOC. See: <http://www.ncwc.edu/files/Illegal%20Questions.pdf>

1.2. The stage of the job interview

The job interview represents a stage in the pre-contractual relationship which follows the job announcement. In the selection process, a candidate's interview is often decisive and the questions asked by the employer should be chosen with special caution in order to not put candidates in unequal gender conditions.¹⁹ Countries often distinguish admissible and inadmissible question categories based on court practice, pointing out that any question which is not relevant to labor relations and does not represent a means to select a qualified candidate must not be used. The inadmissible question category includes questions about a person's private life, which may imply his/her gender identity, marital status, plans concerning having kids or pregnancy.²⁰

Above-mentioned questions are often used as a basis for gender discrimination and honest answers to these questions can negatively reflect on a candidate's employability. As a rule, employers try to avoid employing pregnant or married women. This is an acute problem in many European countries and several countries have carried out research on the interrelation of employment and "parental status" with the support of the European Commission. The research distinguishes a difference between men and women of different age groups. According to this qualitative research it is clear that throughout Europe the percentage number of employed women with children is lower than their counterparts who do not have children. Moreover, the parental status of women in the age group of 35 negatively affects their labor relations. For example, young parents are less employed in the Czech Republic, Germany, Great Britain, Hungary, Malta, and Slovenia compared to women of the same age who do not have children.²¹ This negative context decreases when women with children are older than 35,

¹⁹Illegal Interview Questions and Female Applicants, See: <http://employment.findlaw.com/hiring-process/illegal-interview-questions-and-female-applicants.html>

²⁰Illegal or Inappropriate Interview Questions, Leslie Cobb, Labor/Employee Relations, See: <http://www.gsworkplace.lbl.gov/DocumentArchive/BrownBagLunches/IllegalorInappropriateInterviewQuestions.pdf>

²¹Celine Miani and StijnHoorens „Parents at work: men and women participating in the labour force“. Short Statistical Report No. 2. RR-348-EC , May 2014. Pg. 5, figure 3. See: http://ec.europa.eu/justice/gender-equality/files/documents/140502_gender_equality_workforce_ssr2_en.pdf

however, with some differences in Eastern Europe and the Baltic countries (Croatia, Czech Republic, Denmark, Estonia, Hungary, Latvia, Portugal, Slovakia and Slovenia). The percentage of employed women aged 40-49 is higher than the percentage of women in the same age bracket who do not have children. This controversy is caused by the fact that young mothers often have younger children who need more care and attention.²² The situation is different in western European countries (Cyprus, Germany, Greece, Spain, Ireland, Italy, Luxemburg, Malta). Mothers older than 40 are less involved in the labor market.²³ Low divorce rates, less chances of having children out of wedlock and the low number of single mothers are characteristic for “traditional” societies. A country’s religious, social and institutional contexts also create the model of “stay-at-home moms”.²⁴

The picture is completely different for men. In most European countries, paternity positively affects the employment status of all age groups. This can be explained through the fact that having a job is some kind of “prerequisite” for fathers and it seems explicitly simple to combine work with fatherhood.²⁵ We observe a different situation in Great Britain, Luxemburg and Sweden, where the employment index for fathers aged 20-24 is low²⁶ compared to men of the same age group with no children. This can be explained by social-economic factors, and a lack of education and professional experience as an obstacle to employment.

In conclusion, the difference among age groups is based on a person’s choice to have children at a different stage in their life which is certainly reflected by the level of education level and experience and affects employment as well as access to employment. These inconsistent employment results can be related to barriers created at the pre-contractual stage, when employers artificially avoid employing pregnant women and mothers. These results once again stress the need to prohibit the use of irrelevant questions during the interview. The legitimacy of the questions asked during the interview should be evaluated in line with the employer’s

²²Celine Miani and StijnHoorens „Parents at work: men and women participating in the labour force“. Short Statistical Report No. 2. RR-348-EC , May 2014. Pg. 5, figure 3.

²³Ibid. p.6, diagram 3.

²⁴ Ibid. p. 6

²⁵ Ibid. p. 9

²⁶ Ibid. p. 9

interest to recruit a qualified candidate. On the other hand, it is in a candidate's interest to present information promoting his/her employability and, accordingly, avoids questions which might negatively affect his/her candidacy. In this case, the employer should only ask questions connected to the specific job opening.²⁷ As we already noted above, inadmissible questions are often discussed in the context of personal data protection which is part of the broader concept of the protection of personal life.

Personal data means information based on which a person can be identified such as first or last names, identification number, place of residence and other. Personal data may be perceived as a person's private property leaving him/her the right to choose who to give access to it at his/her own discretion. The Code of Practice of the International Labor Organization (ILO) on the "protection of employees' personal information" was adopted in 1996 at the 267th session of the ILO. The document covers the main principles of obtaining and processing personal data, which equally refers to the public and the private sector. However, this code is not binding and is only an auxiliary manual for the development of national legislation. Although the code only discusses employers, it comments that "employee" here also means "applicant" (someone who has not entered into a labor agreement with the employer), because obtaining and processing personal data equally relates to the employment and the application stages.²⁸ The main objective of the document is the provision of employees' personal information inviolability and the protection of personal information from illegal interference. The Code distinguishes several main principles,²⁹ particularly: data should be processed within the legal boundaries of its purpose established by law; In order to process the data it is necessary to obtain the person's consent or to have any basis established by law; Gathering personal information from the employee should be done directly through this person.³⁰ In case it is necessary to obtain personal information through third parties, an explanation of such necessity should be given to the employee including the reasons and purposes and the source and means to obtain the information.

²⁷EEOC, Prohibited Employment Policies/Practices, See: <http://www.eeoc.gov/laws/practices/#recruitment>

²⁸Protection of workers' personal data. An ILO code of practice, International Labour Office, 1997. Pg.10.

²⁹ Ibid. p. 2

³⁰ Ibid. p. 15

If the law does not define otherwise, acquisition of information is only possible upon informed consent. Following the principle of proportionality and conformity, the employer is only allowed to gather that personal information which is necessary for the candidate selection of that specific vacancy.³¹ The questions asked during the interview and the type of personal information acquired has to be in line with the purpose of selecting a qualified staff member for a specific position. It is important to define that any additional personal information should be seen as an exception from the general rule,³² and must be motivated. The employee is not obligated to assert why s/he did not present certain specific information or clarify why this information is needed. It is the employer's obligation to prove the need and necessity for the requested information.³³

The concept of protection of employees' personal data can be discussed in the light of ILO Convention #111 concerning discrimination in respect of employment and occupation. This is considered one of the main instruments to achieve equal access to employment for men and women, which it will not achieve if implemented ineffectively.

When reviewing personal information, it is also important to mention alternative methods of information acquisition. In times of technical revolution where the mechanisms of information exchange are permanently under change, the legislative regulations for protecting such information should also develop accordingly. Nowadays, social networks offer prompt, quick and effective means of obtaining information about a person. For example, it is very easy to obtain personal, specific, information about someone through Facebook. There are discussions about the legality and ethics of information acquisition using social networks during the pre-contractual stage and especially basing any decision of employing a particular candidate on such information. Some experts assume that discrimination based on this kind of acquired information is illegal rather than the fact of its acquisition.³⁴ Using Facebook instead of directly asking personal questions during the job interview has a very latent character, giving the

³¹Protection of workers' personal data. An ILO code of practice, International Labour Office, 1997. Pg. 14.

³² Ibid. p. 16

³³ Ibid. p. 12

³⁴Beth E.H. Lory, Employer use of Facebook as a tool in pre-employment screening of applicants: benefits and ethical, legal and privacy implications, 2011. Pg 109.

employer the opportunity to use important personal information in denying this person a job, for example information about a candidate's marital status, pregnancy or children.³⁵ This fact is even more promoted because there is no obligation to motivate a rejection.

In this aspect, it is important, that social media users are aware that their information is made public and accessible to third parties. According to this, scientists believe that denying employers access to public information is legally incorrect, but they also assume that information made public on Facebook is not trustworthy and often misleading.³⁶ Nevertheless, it is obvious that this issue needs to be regulated. Experts call for the citizens to not make public any information about their private lives that can be used wrongfully by the third parties.³⁷

1.3. Special job requirements

The discriminating character of requirements for a specific job during the pre-contractual stage does not always constitute a crime. Differences based on special job requirements are acceptable. Accordingly, candidates can become victims of discrimination on the basis of their gender, physical characteristics, skills, education and experience³⁸ only if this is not required by a specific job. But, beliefs or assumptions based on stereotypes may not be used in looking for a candidate with the mentioned requirements. For example, the job announcement should not be formulated in a way based on a man's special skills to carry out specific work "better than women", based on which the job advertisement only addresses male candidates. A focus should be put on significant requirements that are necessary to carry out the job and are linked to one specific gender,³⁹ like performing in the field of arts. Cases of legitimating different treatment by gender are strictly limited and represent an exception.⁴⁰ Directive 2000/78/EC of

³⁵ Ibid. p. 107

³⁶ Ibid. p. 111

³⁷ Ibid. p. 109

³⁸ILO, Better Work, Legal brief underlying better work's compilation assessment Tool: Discrimination, August 2012, pg.4. See: <http://betterwork.com/global/wp-content/uploads/Legal-brief-on-discrimination-FINAL.pdf>

³⁹ILO, Global Report 2007, Para. 35, See: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082607.pdf

⁴⁰Genuine Occupational Requirements in European Law, Gwyneth Pitt, pg. 1-3. See: <http://eprints.kingston.ac.uk/19801/1/Pitt-G-19801.pdf>

the European Commission also distinguishes the necessary requirements for an occupation⁴¹ when “such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”.⁴² Thus, we need to discuss special temporary measures which were used for the promotion and equal accessibility to public services for a marginalized part of society.

Special temporary measures are used to guarantee the improvement of protection of persons who were/are victims of permanent discrimination.⁴³

This is why women, and especially women with family responsibilities or who are pregnant, are equipped with more protection tools through international acts and conventions as well as in national legislation. Thus, the requirements of an employer considering employing a person of a specific gender in order to achieve gender balance in the workplace, to promote women’s representation or to provide access to work in general, does not constitute discrimination.⁴⁴ Moreover, international society encourages other countries to reflect on special temporary measures in their action plans and strategies to promote their usage in the workplaces.⁴⁵

2. International standards

International documents establish human rights protection mechanisms. Among the main UN documents that prohibit discrimination and elaborate the concept of equality are the International Covenant on Civil and Political Rights (ICCPR), the International Covenant of Economic, Social and Cultural Rights (ICESCR) and the Convention to Eliminate all forms of Discrimination Against Women (CEDAW). International documents do not apparently use the term “pre-contractual relations”, but it represents one of the components of access to work.

⁴¹Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Art.4 (1), See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

⁴² See footnote 27, p. 3

⁴³ILO Specil Survey, 2012, para. 862-864.

⁴⁴ILO Global Report 2007, Para 37.

⁴⁵CEDAW Committee, Concluding observations on the combined fourth and fifth periodic reports of Georgia.18 July 2014, Para. 16.

Member states are obliged to provide equal access to work for men and women. This implies the obligation to eliminate those barriers that hinder a candidate's employability because of his/her gender. The Limburg Principles require the elimination of discrimination de jure, which might demand the implementation of appropriate legislative amendments from some member countries.⁴⁶

ILO approaches

The International Labor Organization (ILO) is a special UN organization that explicitly regulates labor relations and creates international standards member states should adhere to. ILO Convention #111 on employment and occupation, and its accompanying recommendation #111 were adopted in 1958 to effectively prohibit discrimination. The convention equally refers to the public and private sector, and prohibits both direct and indirect discrimination in the field of employment and occupation. Article 1 of the Convention determines the concept of discrimination as "any distinction, exclusion or preference made on the basis of sex which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

Article 2 of the Convention obliges member states to declare and pursue a national policy designed to promote, by methods appropriate to the national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. According to the Convention any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.⁴⁷

It is important to note that Georgia still has not executed ILO's convention #156 on "workers with family responsibilities" its recommendation on employment #123 (women with family responsibilities). It elaborates measures to be taken in order to enable women workers to fulfill their various responsibilities harmoniously and without discrimination.

⁴⁶Limburg Principles, Para 35.

⁴⁷Convention No. 111, Art 1(2).

Article 3 of the Convention recognizes the right of equal opportunity and treatment for employed men and women having family responsibilities and elimination of discrimination in the field of occupation.

ILO's convention #183 on "Maternity Protection" and its accompanying "Maternity protection recommendation 191" create protection guarantees for mothers in labor relations. According to this convention, each member must adopt appropriate measures to ensure that maternity, childbirth and childcare does not constitute a source of discrimination in employment. Accordingly, the convention includes the prohibition from requiring a test for pregnancy or a certificate of such a test when a woman is applying for employment. The ILO directly calls for countries to increase the provision of maternity protection guarantees so that the fulfillment of their family responsibilities does not prevent them from employment. The committee understands that pregnant women cannot perform every type of work, however, protection mechanisms that are based on stereotypes regarding women's employability, their professional skills and their role in society violates the principle of equality between men and women.⁴⁸

Considering all the above the ILO encourages member states to eliminate all existing obstacles in the selection and employment process which prevent women from realizing their labor rights.

CEDAW

The UN Convention to Eliminate All Forms of Discrimination against Women does not specifically regulate labor legal relations at the stages of selection and job interview. Nevertheless, Article 11 of the Convention obligates member states to ensure equality guarantees between men and women. One of the most important requirements of the Convention is the provision of equal criteria by the employer during candidate selection, including equal opportunities for promotion at work.

⁴⁸Direct Request (CEACR), adopted 2013, published 103rd ILC session (2014). Discrimination (Employment and Occupation) Convention, 1958 (No.111)-Georgia.

Article 2 of CEDAW directly prohibits discrimination against women and obligates states to agree to pursue a policy of eliminating discrimination against women by all appropriate means and to undertake concrete steps to eliminate discriminatory laws, policies and practices in the national legal framework. Accordingly, states are undertaking positive as well as negative obligations.

CEDAW also includes an exception from the discrimination concept that envisages special temporary measures. Policy aimed at advancing women's equality to men and is not considered discrimination.⁴⁹ The mentioned measures have a temporary character and should be annulled once the objectives of equality of opportunity and treatment have been achieved.

A summarizing observation on elimination of all forms of discrimination against women in Georgia relates to the issue of special temporary measures. The Committee points out that the country does not have a full understanding of the concept of these measures, which is expressed by the absence of a quota system and other means that could provide de facto equality in every field of life. Thus, the Committee calls upon Georgia to integrate a quota system as a temporary measure and to carry out appropriate activities to advance marginalized women.⁵⁰

The Committee underlines the disproportionate employment of women and the continuing vertical segregation on the labor market, where women are mostly concentrated in low-paid jobs. The Committee recommends Georgia to take appropriate measures in order to increase women's participation in the labor market and simplify the reconciliation of professional and private life for both men and women which can be achieved by encouraging men to equally take part in childcare and family responsibilities. The Committee also recommends ratifying Convention #183 on maternity protection.⁵¹

⁴⁹CEDAW, Art. 1; 2.

⁵⁰Concluding observation on the combined fourth and fifth periodic reports of Georgia, CEDAW, 18 July 2014, Para.16, 17.

⁵¹Ibid,Para. 28, 29.

In its report on the elimination of all forms of discrimination and gender equality, the Committee requires the implementation of a law with effective execution mechanisms.⁵²

The European Union

Equality of men and women in labor relations is one of the fundamental principles of the European Union (EU). Already in 1957 the EU's initial agreement included the prohibition of gender discrimination. In 2010, the EU adopted the Charter of Fundamental Rights, Articles 21 and 23 of which also include the prohibition of discrimination and guarantee equality of men and women in labor relations. The prohibition of discrimination during the pre- contractual stage is included in Directive 76/207/EEC of the European Council⁵³ on equal treatment for men and women. The first paragraph of Article 3 of the directive points out that discrimination on the grounds of sex is inadmissible, including in access to work and in defining the selection criteria. The principle of equal treatment means the elimination of direct or indirect discrimination on the grounds of sex, especially on the grounds of marital status. The directive also requests the elimination of discrimination in the process of job announcement, selection of candidates or occupation.⁵⁴ Equality of men and women represents the fundamental principle of Articles 2 and 3 (2) in the EU agreement. This agreement points out the equality between men and women as the main "task" and "objective" of society,⁵⁵ it also includes a positive obligation to promote its execution. The directive is generated on the basis of the principle of discrimination prohibition which relates to access to work, including selection criteria, in any sector of activity. It obligates states to take appropriate measures to exclude unequal treatment in any law or administration regulation. The directive refers to direct and indirect discrimination, which are defined by directive 2002/73/EC. An employer's decision to not employ a candidate based on his/her sex constitutes direct discrimination in access to work.

⁵²Ibid, Para.10, 11.

⁵³Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976L0207:EN:HTML>

⁵⁴Margret ValaKristjansdottir, Gender Equality and Access to Employment, Institution for Human Rights, the University of Iceland. Pg. 31-32.

⁵⁵Directive 2002/73/EC, preamble.

In this case discrimination does not necessarily have to fall in the category of gender discrimination. For example, in the Dekker case, Mrs. Dekker was unable to get a job because of her pregnancy. This constitutes direct discrimination on the grounds of sex. At the same time, in this case there is no need to prove that the action was related to sex and it does not matter whether the employer recognizes the motive for his/her decision. Each candidate has to be interviewed using equal means and the decision must not to be based on gender stereotypes. In case of indirect discrimination, unequal treatment is expressed by law or criteria, which unilaterally implies the applicant's sex but on the basis of traditions or rules established in society is affected by only one sex.⁵⁶ Directive 2002/73/EC, which amends the previous directive, is characterized by wider and clear regulations. It encourages member states to use any legal mechanism to implement the directive norms in practice. It also implies the person's opportunity to protect his/her rights "if there is an allegation that the principle of equal treatment had been violated against him/her".⁵⁷

Member states also have to introduce necessary measures to ensure real and effective compensation or reparation into their national legal systems. The principle of distributing the burden of proof was interpreted by precedence law, which established the distribution of burden in relation to claims about human rights violations.⁵⁸ As soon as the applicant brings facts, which s/he sees as a basis for discrimination the burden of proof is transferred to the discriminating person.⁵⁹ The transfer of the burden of proof to the defendant is of special importance in relation to claims of indirect discrimination when a person needs to prove that a specific rule or practice disproportionately affected any group.⁶⁰ A definition of EU law was made by the European Court of Justice (ECJ). For example, in the case of Elisabeth Johanna

⁵⁶Margret ValaKristjansdottir, Gender Equality and Access to Employment, Institution for Human Rights, the University of Iceland. Pg. 31-32.

⁵⁷ Directive 2002/73/EC, Article 6, see: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002L0073>

⁵⁸ Manual on European Law on Prohibition of Discrimination, p. 130

⁵⁹Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Art. 19.

⁶⁰ Ibid. p. 130

Pacifica Dekker⁶¹ the employer explained the rejection of Mrs. Dekker that she could not request remuneration of expenses from the risks fund payable during her pregnancy and that he anyway had to hire her substitute temporarily.

It is important that the EU's regulations on rejecting a person based on pregnancy, even in case of risks of financial damage, is not justified because this constitutes direct gender discrimination which limits access to work for pregnant women. In this case, it is interesting that no men took part in the selection process. The ECJ discussed the issue and concluded that if an employer makes a choice among candidates of the same sex, there can't be discrimination on the grounds of sex.⁶² The ECJ underlined that if the employer had avoided employing pregnant women, which is an explicit characteristic of woman's biological sex, while men were also participating in the selection stage, Mrs. Dekker would have become the victim of gender discrimination. Directive 76/207/EEC provides an opportunity to prefer one specific sex if this gender requirement is a determining factor in the selection of the candidate. In the 1983 decision of the Committee vs. United Kingdom, the ECJ agrees with the legitimacy of limitations to a midwife vacancy selection, based on the sensitive relation between the pregnant woman and her obstetrician/midwife. Although, in 2000 the Committee stated that the profession of obstetrician is also open for male candidates.⁶³

Another important ECJ case is the case of Silke-Karin Mahlburg⁶⁴ in which the applying court wanted to know whether the first paragraph of Article 2 of the Directive prohibits employing a pregnant woman on a permanent job only because of the lawful prohibition of her employment during her pregnancy which does not grant her the right to be employed in this job from the very beginning.

⁶¹Judgment of the Court of 8 November 1990; Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus; Case C-177/88; European Court Reports 1990 Page I-03941.

⁶² Nona Gelashvili, EterKamarauli, EU Court Practices, 2010, p. 108

⁶³Gwyneth Pitt, Genuine Occupational Requirements in European Law, Pg.2 See: <http://eprints.kingston.ac.uk/19801/1/Pitt-G-19801.pdf>

⁶⁴Judgment of the Court of 3 February 2000; Silke-Karin Mahlburg and Mecklenburg-Vorpommern; Case C-207/98

The Court decided that the use of legislation for the protection of future mothers should not jeopardize their employment. It does not give the employer the right to refuse employing a pregnant candidate only because such candidate cannot take on a permanent position; neither from the beginning nor during her pregnancy.

In the context of presenting proof confirming discrimination, it is interesting to discuss the ECJ's approach towards the Galina Meister case.⁶⁵ The applicant claimed that she suspected her candidacy was not selected based on sex, age and national identity discrimination. To confirm her suspicion she requested the organization for information about the person hired and the selection criteria they used, but was refused this information by the defendant. The Court based its decision on Article 8(1) of Directive 2000/42/EC, Article 10(1) of Directive 2000/78/EC and Article 19(1) of Directive 2006/54/EC and stated that equal treatment provided by these directives has to be interpreted so that the claiming party has no right to request information about whether the employer selected a candidate at the end of selection process. The decision should not be interpreted so that it deprives the applicant of the right to present proof of grounded allegation.⁶⁶ Based on precedence law,⁶⁷ it concludes that eliminating the suspicion is the defendant's obligation. The defendant is responsible to present facts that deny the allegation of discrimination; denying doing so may only raise suspicions. The Court points out that the employer's denial to reveal information cannot be excluded, because it can create an opportunity to prove an allegation of direct or indirect discrimination while gathering evidence. This is why the ECJ leaves the decision-making up to the domestic court and notes that the court has to implement directives in such a way that it not loses the effectiveness of the equal treatment principle. How these principles will be fulfilled in practice is up to the national court considering every detail of the situation.

⁶⁵ECJ Judgment on Galina Meister, 19 April 2012, Case C-415/10.

⁶⁶ECJ judgment on Galina Meister v Speech Design Carrier Systems GmbH, PRESS RELEASE, 19 April 2012, See: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-04/cp120046en.pdf>

⁶⁷ECJ judgment on Patrick Kelly, Case C-104/10, 21 July 2011. See: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130deee326a60dba545d6aab8c55869c876cb.e34KaxiLc3eQc40LaxqMbN4Ob3qQe0?text=&docid=107927&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=427966>

3. Review of the Georgian legislation

3.1. The Labor Code of Georgia

The Georgian Labor Code does not regulate the process of the job announcement, which impedes the elimination of existing discrimination practices. According to the Georgian legislation, a job announcement is deemed the initiation of the pre-contractual stage. Article 329 of the Civil Code of Georgia regulates the publishing of a job announcement as an invitation to an offer that is directed to an unlimited range of persons. The aim of the job announcement is to encourage candidates to apply for the announced position before any negotiations and/or reaching an agreement between the employer and employee.

Following the ILO, member states are required to harmonize their laws on the prohibition of discrimination in labor relations with Article 1 of Convention #111.

It calls on states to use this opportunity to review their labor code and introduce adequate amendments regarding the definition of discrimination and labor relations. The ILO notes that Article 2, Para. 3 of the Labor Code is not conclusive and that it concerns labor rights in general which makes it hard to determine whether the prohibition of discrimination also refers to both the selection and employment stages.⁶⁸ Thus, it requested Georgia to regulate these norms in order to exclude discrimination not only in employment, but also in the pre-contractual process.

On the basis of the mentioned recommendation, pre-contractual relations were added to Article 2 of the Labor Code of Georgia that prohibit discrimination based on sex (together with other identities), which is positive. The Labor Code defines discrimination as creating circumstances for a person that directly or indirectly cause their position to deteriorate compared to other persons in similar circumstances.⁶⁹ This definition, as mentioned above, also

⁶⁸Direct Request (CEACR) - adopted 2013, published 103rd ILC session (2014). [Discrimination \(Employment and Occupation\) Convention, 1958 \(No. 111\)](#) - Georgia (Ratification: 1993) See: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3146413:NO

⁶⁹ Labor Code of Georgia, Article 2 (3)(4).

involves pre-contractual relations, where the non-neutral character of the job announcement can directly or indirectly deteriorate a candidate's position compared to other candidates in similar circumstances on the sole basis of sex.⁷⁰ Despite incorporating pre-contractual relations into the discrimination context, the Labor Code does not define situations in which discrimination can be expressed.

Although a "pre-contractual relationship" implies the selection stage, none of the norms in the labor legislation directly regulate admissible or inadmissible phrases that can be used in job announcements. This could make it possible to monitor these announcements on gender neutrality or whether they cause direct or indirect discrimination and, thus limit potential applicants to apply to a specific vacancy.

An opportunity to define discrimination at the pre-contractual stage is not given by Georgian precedence law, as there is no court practice on discrimination at the selection stage at all. The absence of this practice makes several severe issues clear. First, there is a low rate of applications to the court which may be related to the lack of awareness and a self-identification problem. On the other hand, this shows the obscurity and ineffectiveness of the current norms prohibiting discrimination, giving an advantage to employers who have the opportunity to avoid their responsibilities and permanently violate candidate's rights. The general contents of the Labor Code do not really provide equal access to work for women and men; neither does the Labor Code regulate the job interview stage. Article 5 of the code only refers to receiving information about the candidate at the pre-contractual stage which is mainly based on the employer's rights and the employee's obligations. The legislation does not distinguish any types of information such as which information is irrelevant in the selection process of a qualified candidate or does not consider the rights of the employee to not provide information or answers to irrelevant questions.

⁷⁰ILO, Special Survey 2012, para.752-754.ILO, Global Report 2007, Para 27.

The first part of Article 5 underlines the lawfulness of information acquisition, which is necessary for making a decision about a candidate's employability. Accordingly, the information that is not needed in the decision-making process is not included in this article.

The issue of information acquisition is regulated by the Georgian law on the "protection of personal data" in more detail. However, the law does not explicitly refer to labor relations. It regulates the issues of acquiring and processing personal data. The law requires that processing information should be made on the basis of principles of fairness, lawfulness and the inviolability of a person's dignity. Information should only be processed for purposes clearly defined by law and should justify its adequacy and proportionality.

The law prohibits processing data without a person's consent⁷¹ after motivating the reasons for processing this information to this person.⁷² If an employer fails to motivate his/her decision, a person can file a suit before the court or apply to the data protection inspector,⁷³ who will investigate the suit within the given timeframe and take appropriate measures.⁷⁴ Information on which an employer bases his/her decision concerning a particular candidate's employability has to be relevant and necessary from the beginning⁷⁵ and its use should not violate this person's rights,⁷⁶ since obtaining information is not the only component of the interview stage. Despite the fact that a candidate has the right to claim the lawfulness of the action, it will not exhaust the limits of discriminative actions. A person should have more effective guaranteed rights and legal means available against a discriminative interview and/or the non-neutral character of a job announcement that violates the candidate's rights. Nevertheless, the Labor Code of Georgia as well as the Law on Public Service does not provide direct legal aid to a person. While the Labor Code offers a definition of discrimination, it does not point out the

⁷¹ Georgian Law on Protection of personal data, Article 5 (a), Article 15 (1).

⁷²Ibid. Article 15.1 (b).

⁷³Ibid. Article 26 (1).

⁷⁴ Ibid. Article 39.

⁷⁵Council of Europe, Data Protection, Recommendation No.R (89) 2 on the protection of personal data used for employment purposes, Pg. 66. See:

http://www.coe.int/t/dghl/standardsetting/dataprotection/dataprotcompil_en.pdf

⁷⁶ Recommendations of personal data protection inspector on protection of personal data in labor relations, p. 3, see: http://personaldata.ge/res/docs/recommendation/PDP%20Labour%20Rec%20TK_2.pdf

right of a person to apply to the court to obtain restoration of his/her violated rights. The code does not list discrimination as a direct ground for dispute and is only refers to violation of the principle human rights and freedoms.⁷⁷ Article 1, Para. 2 of the Labor Code refers therefore to the Georgian Civil Code. According to Articles 316 and 317 of the Civil Code, a party has the right to request the other party to refrain from further action. The obligation imposes a special diligence on each party towards each other. In the case of discrimination which deprives a person of his/her dignity, a request can be made on the basis of Article 18 of the Civil Code which regulates the mechanisms of protecting private non-property rights.

The absence of regulation concerning reimbursement of damage caused by discrimination is another gap in the Labor Code that complicates the identification of a fact as discrimination. This hinders the process of raising citizens' awareness and the development of court practice, which is directed towards eliminating discrimination in labor relations in the long term. Based on Articles 316, 317 and 394, the creditor can require a reimbursement of the damage caused if a debtor violated his/her rights. Despite the fact that the victim can require a reimbursement of the damage based on the Civil Code, it is important that the code directly and clearly regulates the forms of discrimination in pre-contractual relations as well as the guarantee of legal aid and a remedy for the violation of these rights during occupation.

3.2. The Law on Elimination of All Forms of Discrimination

The "Law on the Elimination of All Forms of Discrimination" entered into force in May 2014 and differs from the draft law that was developed in consultation with the international society and Georgian civil sector. The government took out important guarantees, creating doubts about the effectiveness of legal actions against discrimination. Nevertheless, the adoption of anti-discrimination legislation, even with its weaknesses, is still a step forward for the country.

The old version of the anti-discrimination law regulated the scope of legislation according to specific fields, but the new law offers no such specifications. It covers all directions of public

⁷⁷Labor Code of Georgia, Article 47, paragraph 3(a).

activities, including labor relations and does not regulate any specific prioritized fields that are more prone to discrimination such as labor relations, services, healthcare, and education.

It is important that the law discusses a number of preventive measures in order to raise awareness about and eliminate unequal circumstances during pre-contractual relations. The anti-discrimination law is more oriented on the result of discrimination than on its avoidance. Accordingly, the general prohibition of discrimination jeopardizes the effective fulfillment of this legislation without explaining the reasons for such prohibition. Thus, the law needs to envisage the creation of opportunities for the recognition, enjoyment and perceptibility of a person's rights. It is important to note that the law allows special temporary measures which are not considered to be discrimination and are provided for the actual advancement of women.⁷⁸

Apart from the Labor Code which only states that discrimination is prohibited instead of regulating its legal results, the anti-discrimination law also gives citizens the opportunity to apply to the court and request reimbursement for financial and moral damage from the discriminating person.⁷⁹

The law on discrimination does not require that the discriminative actions and/or elimination of their results stop. Instead, this issue will be discussed by a civil court which will assess the facts of the case.⁸⁰ The law states that the Public Defender (PD), and not an inspector, is obliged to react to a case of discrimination. The Public Defender can give recommendations to both governmental institutions and to private persons committing discriminative actions.⁸¹ Thus, if these recommendations are not being taken into consideration, he has the right to sue the administrative body.⁸² Notwithstanding the extension of the Public Defender's authority on the issue, the absence of penalties in the law hinders the development of available means to fight against unequal treatment in pre-contractual relations. Both the financial and human resources of the Public Defender are limited and there is the question of how this institution will manage

⁷⁸Georgian law on "elimination of all kinds of discrimination", article 2 (7).

⁷⁹ibid. Article 10(1).

⁸⁰ Code of Civil Procedure of Georgia, Article 363², part 3(a)(b).

⁸¹ Georgian law on elimination of all forms of discrimination, article 6, paragraph 2(f).

⁸² Ibid. Article 6, paragraph 2(g).

to supervise equal treatment and the protection of human rights throughout Georgia in all fields of activities. This creates serious doubts about the effectiveness of the anti-discrimination law.

An inspectors' institute for legal labor disputes that would be responsible for the identification and litigation of discrimination cases would be more productive. Notwithstanding the weaknesses of the law it is important that the courts play a positive role in achieving the objectives of existing law by interpreting its particular regulations correctly and establishing legal practices in the fight against discrimination. These practices should be consistent with the Constitution of Georgia and the standards of international monitoring institutions.

3.3. The Law on Gender Equality

The Georgian Law on "Gender Equality" was adopted in 2010, however, there is no precedence of it being used in practice. The law is ineffective and provides no guarantees to achieve equality between women and men. The gender equality law does, contrary to the anti-discrimination legislation, distinguish particular fields that need special regulations and approaches. A separate chapter is dedicated to labor relations, but the law does not provide any general requirements regulating equal access to work during pre-contractual relations. This by itself limits the awareness about a candidate's rights at the stage of the job interview and hinders the protection of these rights. Monitoring gender equality is the responsibility of the Gender Equality Council of the Parliament of Georgia, however the committee is not equipped with any legal mechanism⁸³ that would allow for a prompt and effective reaction to facts of discrimination.

The law on Gender Equality should provide a direct reinforcement mechanism because the legislation cannot guarantee the protection of a person without access to any legal mechanisms.

⁸³Law of Georgia on "Gender Equality", Chapter III

4. International practice

Countries have individual approaches to the regulation of job announcements, nevertheless, the majority agrees on the general need for regulation.

Some countries regulate this issue in antidiscrimination law, gender equality law or other legislative acts that define labor relations.

Germany

In Germany, pre-contractual relations exist before concluding an agreement between the employer and potential candidate that is based on trust. Pre-contractual relations represent a source of obligations for both parties and its violation may result in undertaking various responsibilities.⁸⁴ During the application stage, it is expected that the candidate's answers are sincere and true. This information comes from the employer's legal interest to select a candidate with whom s/he would like to employ. This might also include stability according to the characteristics of a specific job. The Higher Labor Court of Nuremberg established that job announcements containing the words "flexible and stable" do not constitute direct nor indirect discrimination (in this case towards a persons with disabilities), as these words just clarify that particular job has specific obligations.⁸⁵

The German Federal Law on "Equal treatment" contains a record on selection and employment of the applicant in pre-contractual relations, which states that any discrimination in the workplace, implying employment process and its conditions concerning accessibility of work is inadmissible⁸⁶. This means that any kind of discrimination is prohibited at the stage of candidate selection, thus the announcement needs to have a neutral character. German Federal Law dedicates a separate article to this and states that a job announcement should be

⁸⁴Pre-contractual obligations in the employment relationship. see:

<http://www.eurofound.europa.eu/emire/GERMANY/PRECONTRACTUALOBLIGATIONSINTHEEMPLOYMENTRELATIONSHIP-DE.htm>

⁸⁵Higher Labour Court of Nuremberg, decision of 19 February 2008.

⁸⁶Federal act of equal treatment (2006, amended 2009), Section 2, paragraph one, no1.

formulated in such a way that it does not violate the candidates' rights in any way.⁸⁷ Particularly, any formulation of announcement causing the discrimination of a candidate, even just an allegation of discrimination, is prohibited. According to the decision of Labor Court of Stuttgart, the non-neutral character of the announcement which implies employment of men rather than women limits the right of women to be equally employed and appropriately represents a violation of paragraphs 11 and 7(1) of the Law on Equal Treatment.⁸⁸ This law also regulates the stage of the interview. The interviewer has to be very careful while asking questions about the candidate. For example, questions concerning a candidate's marital status or plans to have children might imply discrimination and constitute a violation of the candidate's rights.

Finland

The first law of Finland on equality of women and men was adopted in 1987. The law explicitly dedicates a separate article to the content of job announcements and states that "the job announcement must not invite exclusively female or male candidates, until this won't be justified by an acceptable reason, concerning the job requirement or special temporary measures."⁸⁹

According to the Labor Code of Georgia, the employer is not obligated to prove his/her decision on employment denial⁹⁰, giving an opportunity to unfair actions. Countries regulate similar issues in a different way. For instance, according to the Finnish law on equality, a candidate can request the employer to present a written report on his/her actions in case the applicant or employer considers themselves to be the victims of discrimination. The report has to state the reason of the decision, the educational background of the selected candidate; his/her work experience and all other obvious and demonstrated characteristics that had an influence on the employer's choice.⁹¹ It is important to note that the Finnish legislation does not limit the

⁸⁷Federal act of equal treatment (2006, amended 2009), Section 11.

⁸⁸Decision of the Labour Court of Stuttgart of 5 September 2007 – 29 Ca 2793/07. See: https://www.jurion.de/Urteile/ArbG-Stuttgart/2007-09-05/29-Ca-2793_07

⁸⁹The act on equality between women and men, Art. 14, See: <http://www.tasa-arvo.fi/en/publications/act2005>

⁹⁰Labor Code of Georgia, article 5 (8)

⁹¹The act on equality between women and men, Art. 10 (1)(2).

employer's right to decide at his/her discretion who to employ, but this decision should be based on specific requirements and criteria elaborated by the employer. Accordingly, the law on equality tries to limit the situations where a person is unfairly employed on the basis of his/her sex and gender whenever another candidate is more qualified. A presumption of discrimination emerges when an unsuccessful candidate can prove that s/he is more qualified than a person of the opposite sex who was hired for the position. In order to dislodge this presumption an employer has to prove that his/her actions were not conditioned by gender or sex. The law does not prohibit employers to select the best candidate; it attempts to eliminate unfair treatment towards qualified staff and ban preference actions based on sex. Finland pays special attention to pregnant candidates and notes that "any practice that might cause unfavorable conditions for a person who is pregnant, is having a child or a parental status, will cause discrimination by gender".⁹² Accordingly, the employer has no right to reject a woman from employment because of pregnancy.⁹³ Mentioned statements are especially important from the point of view of temporary contracts. Temporary contracts cannot be limited so that they can be terminated at the beginning of planned maternity, paternity or maternity leave. Denying the restoration of a temporary employment contract restoration cannot be based on an employees' pregnancy or maternity leave.⁹⁴ According to Finnish legislation, the employer or his representative bear responsibilities under the Criminal Code,⁹⁵ particularly under Article 47 of Finland's criminal law which refers to violations in legal-labor relations.

According to the third section of the above-mentioned article, labor discrimination⁹⁶ occurs if "the employer or his/her representative put the candidate in a weaker position for his/her sex or family status during the job announcement, candidate selection or work process by

⁹²In order to prove discriminative fact another candidate of same sex may be used as a comparator.

⁹³The ombudsman for equality of Finland. See: <http://www.tasa-arvo.fi/en/discrimination/workplace/pregnancy>

⁹⁴The ombudsman for equality of Finland. See: <http://www.tasa-arvo.fi/en/discrimination/workplace/pregnancy>

⁹⁵Ibid, Art. 14a (1)

⁹⁶It should be noted that paragraph 3 (a), article 47 of Criminal Code of Finland creates a term "extortionate work discrimination", which means cases when a candidate is put in significantly weak position by the employer because of candidate's or employee's economic condition, subordinate position, lack of information, rashness or ignorance. In this case if more severe punishment is not considered, according to the law of Finland a penalty or abridging freedom for 2 years shall be imposed.

important or ungrounded reason.” For this a penalty of up to EUR 3 000 or imprisonment up to six months should be imposed.⁹⁷ In case of discrimination during employment, the compensation reaches up to EUR 15 000. The decision to impose such a penalty is made by the Equality Committee and by the Equality Ombudsman.

Estonia

Article 8 of the “Law on Equality” of Estonia points out that any job or training offers directed towards employment of only persons of one specific sex is prohibited until it is motivated by important reasons, such as temporary special measures.⁹⁸ The law dedicates a separate article to discrimination in professional life and indicates that in case “the employer chooses or employs a person of specific sex for a position, despite another person’s higher qualification, can be deemed discrimination until proven that no essential reasons of the employer’s decision or decisions without a gender connection exist”.⁹⁹ This law also separately refers to discrimination based on pregnancy, maternity, paternity, childbirth, family responsibilities or other reasons relating to gender¹⁰⁰ and states that not employing a person for the abovementioned reasons or creating an environment which puts any person in unfavorable conditions in comparison to a person of the opposite sex has to be considered discrimination¹⁰¹. According to the law on gender equality, similar to Finland, an employer is obligated to present a written motivation within 10 days of the candidate’s request in case of an allegation of discrimination.¹⁰² The motivation must give information about the selected candidate, including employment terms, educational background of the selected candidate, his/her professional experience and other skills that are requested for the job and other reasons that gave significant advantage to the selected person.¹⁰³ Within 15 days after receiving the requested

⁹⁷Penal Code of Finland, Chapter 47, section 3 (1).

⁹⁸Gender Equality Act of Estonia, Art.5 (5). See: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/511042014003/consolide>

⁹⁹Gender Equality Act of Estonia, Art.6 (1).

¹⁰⁰Ibid, Art. 6.2 (1).

¹⁰¹Ibid, Art. 6.2 (2).

¹⁰²Gender equality act of Estonia, Art. 7 (1)

¹⁰³Ibid.

information, the employer has to motivate his/her activities towards the person who believes him/her to be the victim of discrimination.¹⁰⁴

Apart from the law on gender equality in Estonia, the prohibition of discrimination is also addressed in the law on “Equal Treatment” which also defines the functions of the independent and impartial commissioner¹⁰⁵ of gender equality and equal treatment.¹⁰⁶ The commissioner is not affiliated with any political party and acts independently while monitoring correspondence of the mentioned acts with the provisions of law and assisting persons considering themselves to be discrimination victims. He presents opinions on discrimination cases, issues recommendations to different agencies and publishes reports.¹⁰⁷ The law of Estonia on “Labor Agreements” also refers to discrimination in the workplace and Article 3 obligates the employer to protect his/her employees from discrimination.¹⁰⁸ The law includes a specific statement on information acquisition during the job announcement and interview, according to which the employer must not request information while having no legitimate interest of such action.¹⁰⁹ First of all, the legitimate interest considers whether questions refer to a candidate’s private life and whether they are relevant to find out if a candidate is appropriate for the offered job.¹¹⁰

5. Assessments by experts and advocates

(Qualitative research)

The discrimination of women in pre-contractual relations is the most complicated, covert form of discrimination and hardest to prove. This is related to the generality of the legislation and existing stereotypes. Discrimination of women in pre-contractual relations in Georgia is not yet recognized in all its severity. And so, ways to eliminate this have not been identified either.

¹⁰⁴Ibid, Art. 7 (2).

¹⁰⁵Equal treatment act of estonia, Art. 15, See: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/503042014003/consolide>

¹⁰⁶Ibid, Art.15 (1).

¹⁰⁷Ibid, Art.16.

¹⁰⁹Employment Contract Act of Estonia, Art.11(1).

¹¹⁰Ibid, Art. 11 (2).

Despite this, the non-governmental sector is the most powerful to reveal this problem and putting it on the agenda of the government. Non-governmental organizations (NGOs) mention that they are often approached by women and men about cases of discrimination in pre-contractual relations, but initiating legal proceedings is limited because of the absence of effective protection mechanisms, which makes it impossible to prove the real reasons of rejection. Even women employed in the non-governmental sector became victims of discrimination in pre-contractual relations and were unable to access adequate legal mechanisms to protect their rights. Below is a typical case of discrimination against a pregnant woman.

“I was denied employment in an NGO, I won’t mention the name, because of my pregnancy. During the interview my pregnancy was already obvious. Nobody directly told me, but it was clear [why I had been rejected]; because I was overqualified for the job. This may be subjective, but when a person with the experience will understand and I had experience in this field. When I entered the room [interview], they commented [on my pregnancy] and the interviewer was watching my belly and lost the motivation to conduct an interview from the very beginning. To say otherwise, I became an uninteresting candidate for them. Thus, their questions were very general and unpromising. It was a very unpleasant interview and I was absolutely sure that they would not hire me. In the end, they denied my candidacy at the interview and told me that I didn’t even have to call. Communication was over, I don’t remember the argument, but I was told politely that they were looking for another person [candidate], though I passed the initial exam with high grades”.

University professors working on gender equality mention that limiting the employment chances of women in their child-bearing years is difficult to prove, even in the cases where it is obvious.

“Nobody actually recognizes that a woman was rejected just for being in her child-bearing years or for having small children. Employers believe that if they hire a woman with small children, she will require sick leave when the children are ill, leave work early or refuse working overtime because she has to take care of the children etc. This is where the problems starts, but nobody

admits to not hiring a woman because she has children, is getting married or is pregnant. The problem is more often revealed in the private than in the public sector. In fact, a young woman may hope to be successful at work if she promises not to take care of her family or children”.

Discrimination has been proved to be an established practice in pre-contractual relations against LBT (lesbian, bisexual, and transsexual) women, which concerns the existing legislative gap about making the correction on a person’s passport after a sex change. A representative of an LGBT women’s organization states that despite the legislative obscurity in this field, the court made decision in 2005 on the possibility to change the passport after a sex change. According to the decision, a person may change his/her sex on the passport in Georgia only if s/he underwent full surgery. However, because of the existing social-economic conditions, such surgery is often financially unavailable for a person and it is not covered by the insurance either. On the other hand, being a trans-gender does not necessarily require surgery. There are cases where a person is unable to undergo the surgery due to health problems. Thus, the 2005 decision on obligatory sex change is discriminative for trans-gender persons. Accordingly, a trans-gender person who applies for a job is always unsuccessful because a potential employer sees the difference in a person’s appearance and passport data about sex.

“These conditions make it hard for us – organizations protecting LGBT persons’ rights. It is difficult to establish a precedence case because it implies the annulment of confidentiality about this person and making the case known to as people possible. Such openness and publicity can imply physical danger and an increased homophobic an intolerant attitude in society”.

The Member of Parliament (MP) of Georgia also talks about the inequality in pre-contractual relations. *“A woman with disabilities may also become the victim of discrimination, because employment conditions are not accessible to her. This is caused by the fact that Georgia, despite ratifying international agreements in this field, has not yet achieved to adapt an equal environment with universal design standards. In this case, women are the victims of double discrimination”.*

Discriminating practices in pre-contractual relations also exist towards ethnic and national minority women. The latter is conditioned by the fact that female representatives of ethnic and

national minorities are often unable to learn the Georgian language and are thus not integrated in the labor market. This language barrier excludes them from employment in the public sector and also decreases their chances to be employed in the private sector. Even though the MP states that the government is taking active steps in eliminating this language barrier, it is rather an issue of motivation and eagerness of these women to increase their chances for employment.

A representative of the Public Defender's Office states that discrimination in pre-contractual relations starts with publishing the job announcement that includes signs of discrimination because of a person's appearance or religious beliefs. These issues unlawfully limit the chances for employment for a particular group of people. Specific job requirements are only admissible in case where it is strictly motivated. Otherwise special requirements in pre-contractual relations imply possible discrimination.

The Head of the Sectorial Professional Trade Union says pre-contractual relations are less regulated by law:

"I don't know how others perceive this issue, but I think that there are no pre-contractual relations [regulated by law] in Georgia. Employment in Georgia is achieved by connections, friendship; nobody sits at a desk and discusses work conditions like employers and employees should; there is no agreement about salaries or how vacation time. In the best case, the job seeker goes to the HR department where s/he is offered a standard template agreement for signing and if s/he does not agree has to leave and refuse employment. Despite this, we never had any application concerning discrimination in pre-contractual relations".

According to this research, discrimination in pre-contractual relations really represents a gender-specific issue and mostly women are victims. It is specific for women to experience inequality on the basis of childbirth or taking care of a child. The examples made it clear that women experience this kind of discrimination mostly at the pre-contractual stage, where they have to deal with employers who have a negative attitude towards pregnant or married women

who work. Moreover, women are unable to effectively fight against such discrimination. The problem of discrimination in pre-contractual relations against LGBT, women with disabilities or women with an ethnic or national minority background is also very acute.

Conclusion

Practice of European countries revealed that more attention to pre-contractual relations as an extended part of labor rights and employment accessibility should be paid. These countries try to prohibit discrimination in job announcements, as well as during the interview, attempting to provide gender equality in employment. From both the legislation and qualitative research it is clear that the situation in Georgia is completely different.

b) Gender discrimination in the workplace

Gender discrimination in the workplace can take on different forms and characteristics. The main basis for unequal treatment is an employee's sex, marital status, children or pregnancy. Accordingly, difficulties occur while assigning tasks or paying out salaries, benefits and bonuses. They are also impeding factors for the promotion of women.¹¹¹ The labor rights of employed women have always been an important issue for the ILO. It has been protecting the rights of employed women since 1919, after the organization's first establishment. Moreover, it tries to concentrate on all those characteristics in the workplace that can be potentially discriminating for women.¹¹²

In 1966, the General Assembly took a significant step towards human rights protection when it adopted the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.¹¹³ Both documents call on the governments of member states to extend women's participation in social life and to recognize the right of equal pay for

¹¹¹Equality at work: the continuing challenge. Global report the follow-up to the ILO Declaration on Fundamental principles and rights at work. International labor conference, 100th session 2011.

¹¹²International conventions in women's rights.Georgian legislation and mechanisms existing in reality. UNDP program "Women in development process", 1997 p.3

¹¹³Ibid. p.7

equal work as well as the right to a fair and favorable work environment and equal promotion opportunities for both women and men.¹¹⁴

1. Positional segregation based on gender

First of all, the segregation of positions is conditioned by the division between “female jobs” and “male jobs”¹¹⁵ that is the result of certain socio-cultural aspects. Referring to work as either “masculine” or “feminine” can be traced back to educational segregation,¹¹⁶ which defines the gender differences for various professions and is even reflected in students’ choices to study a particular subject. Researchers try to explain this aspect of unequal participation on the labor market. There are three main theories:¹¹⁷ the neoclassic theory focuses on the question and demand of labor; the institutional theory is based on the segmentation of the labor market and the roles of institutions; and finally the radical gender theory is inspired by the hypothesis that there is only a need for one part of the labor force, the other part is therefore artificially excluded from the labor market.

The first theory, otherwise known as the theory of human capital, states that segregation in the workplace is caused by the fact that men are more prone to involve their resources and capital in work that brings a high level of productivity and responsibility. As a result they invest more in their professional growth.¹¹⁸ Contrary to this, women are more interested in investing their capital in a job that better corresponds with their family responsibilities.¹¹⁹ Accordingly, more women can be found in workplaces that require less investment and human capital. This also causes women to take on more part-time jobs. This willingness to invest in a specific job influences the decision of employers’ decisions to hire a person or not,¹²⁰ which is why men are selected more than women who are considered to be “unstable” because of their family responsibilities.

¹¹⁴Ibid.

¹¹⁵Women's Progress in Workforce Improving Worldwide, But Occupational Segregation Still Rife, ILO/97/35, 1997. See: http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_008040/lang--en/index.htm

¹¹⁶D.Meulders, R. Plasman, A. Rigo, S. O’Dorchai „Topic report Horizontal and vertical segregation“, UniversitéLibre de Bruxelles (ULB)September 2010, pg. 63, See: https://genderedinnovations.stanford.edu/images/TR1_Segregation.pdf

¹¹⁷Ibid, pg.9.

¹¹⁸Ibid, pg. 10.

¹¹⁹Ibid, pg.11.

¹²⁰bid.

According to the institutional theory, part of the workforce has to accept less attractive and less remunerating job only because there are no better opportunities for them on the labor market.¹²¹

The segmentation theory states that an individual's socio-economic status on the labor market depends more on the organizational structure and environment than on the human capital or resources of this individual.¹²² Thus, according to this theory, gender segregation is explained through specific characteristics and interaction within the organization.¹²³ An employee's motivation often depends on the position itself and the work specifics it entails. Accordingly, "the motivation of a woman who is employed on a lower position in the second sector will not be equal to the motivation of a man who has more responsibilities in his higher position."¹²⁴ The institutional theory also underlines that position segregation among women and men partially originates from general rules and politics that are elaborated on a higher organizational level and are mostly based on gender stereotypes.¹²⁵

The main principle of the radical gender theory is the "artificial" discrimination between women and men, where women are purposefully excluded from the labor market so men would have more opportunities to develop.¹²⁶ Positions occupied by women are mainly based on stereotypes and the result of a discriminative approach. Social behavior and cultural attitudes determine the approach towards an employee on the labor market. This is expressed in the fact that women are qualified as an unstable and ineffective part of the workforce. Thus, professional segmentation and gender discrimination further support women's unemployment, their lack of motivation and the disregard of their intellectual capital. The radical gender theory evaluates positional segregation from a male point of view, according to which, men in dominant positions follow their personal interests and create artificial barriers to women's professional development to keep these privileged positions.

¹²¹Ibid, pg.12.

¹²²Ibid,

¹²³Ibid,

¹²⁴Ibid, pg.13.

¹²⁵Ibid, pg. 12.

¹²⁶Ibid, pg. 14.

2. The “glass ceiling”

Researchers and experts use the term “glass ceiling” to analyze gender discrimination in the workplace. According to one of the earlier explanations, the “glass ceiling” is a transparent barrier hindering women’s promotion at higher corporate levels [...] it relates to women as to an easily identified group of people just because they are women.”¹²⁷

According to the US “Glass Ceiling” Committee (1995) a “glass ceiling” is an invisible, unreachable barrier, which prevents women and minorities from moving forward to high corporate positions despite their achievements and qualification.¹²⁸ The term “vertical segregation” describes a man’s domination in high status positions as traditional “male” and traditional “feminine” positions. In theory nothing prohibits women’s promotion in the workplace, but there is an invisible, however, real barrier to overcome which is very hard for women. This is directly caused by discrimination based on sex and positional segregation.¹²⁹

The general hypothesis of the “glass ceiling” is that the issue not only concerns the fact that women encounter more obstacles in their career than men, but that these barriers also exist for women who have already been promoted or who are struggling their way to high hierarchy positions.¹³⁰ Gender discrimination in promotion does not exist at all hierarchy levels, but it is very intensive at the highest positions.¹³¹ The situation of women’s participation in higher positions today has improved; the process is still progressing weakly. Despite preparedness at the corporate level to eliminate barriers for women, the phenomenon of the “glass ceiling” and its negative impacts still remain in place.

¹²⁷Morrison et al. 1987, 13 (as Cited in J.Baxter, E.O.Wright „The glass ceiling hypothesis“, Gender & Society, Vol. 14 No. 2, April 2000, pg. 276).

¹²⁸J.Angeovska, “Invisible barriers that women cannot break-Glass Ceiling”, International Balkan University, Macedonia.Pg. 7.

¹²⁹Ibid, pg.4.

¹³⁰J.Baxter, E.O.Wright, “The glass ceiling hypothesis“, Gender & Society, Vol. 14 No. 2, April 2000, pg. 275. See: <http://www.ssc.wisc.edu/~wright/GenderGap.pdf>

¹³¹Ibid,

The “glass ceiling” implies three main factors.¹³² First, there is a social barrier that is created by gender stereotypes and the persistent differentiation of professions by society. Second, an internal organizational barrier that is oriented on the fear of loss including financial loss and position domination loss, and a third governmental barrier that considers the implementation of relevant legislation and the lack of monitoring, information and accountability on problematic issues. The latter also includes incomplete and irregular statistics.

All three factors equally support the exclusion of women’s capital from the labor market and the strengthening of male domination.

3. International standards and equal remuneration

One indicator of gender inequality is the difference in remuneration which can be explained by several interrelated factors. Economic literature divides this difference into explainable and unexplainable parts.¹³³ Explainable gender differences in pay concern those differences which can be explained by demonstrative characteristics of women and men (for instance different working hours, the level of education, experience etc.). Unexplainable unequal pay is based on those differences which cannot be explained by perceptible factors. The latter is assumed discriminative as it leaves no opportunity for the researcher to explain the difference between women’s and men’s remuneration for similar work.¹³⁴ Despite the prohibition of discrimination, this problem occurs in many workplaces.

According to the ILO, “in most regions and workplaces women are paid less than men for fulfillment of similar work. Women’s remuneration constitutes on average 70-90% of men’s remuneration”.¹³⁵ This difference in remuneration is explained by employment and sector

¹³²Good For Business: Making full use of the nation’s human Capital, A Fact-Finding Report of the Federal Glass Ceiling Commission Washington, D.C. March 1995, Pg. 26-30. See: <http://www.witi.com/research/downloads/glassceiling.pdf>

¹³³J. Angeovska “Invisible barriers that women cannot break-Glass Ceiling, International Balkan University, Macedonia. Pg.3

¹³⁴Ibid, pg. 5.

¹³⁵J. Angeovska

¹³⁵J. Angeovska “Invisible barriers that women cannot break-Glass Ceiling, International Balkan University, Macedonia. Pg.2

segregation.¹³⁶ According to 2014 data from the European Commission, women’s remuneration in EU member countries constitutes on average 16.4% less than that of men. Georgia also experiences a significant imbalance in this regard.¹³⁷ The first international instrument that created the provision of equality and the elimination of discrimination was established in 1951; ILO Convention #100 and its accompanying recommendation #90. According to Article 2 of the Convention each member should, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. The realization of these principles should happen through the following means:

- (a) National laws or regulations;
- (b) Legally established or recognized system for wage determination;
- (c) Collective agreements between employers and workers; or
- (d) A combination of these various means

According to the ILO, the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.

Convention #100 proposes a definition of the equality principle in two directions: 1) is the work equal and 2) is the paid remuneration equal? The presence of both aspects at the same time is essential and subject to objective evaluation methods.¹³⁸

ILO Convention #111 of 1953 “concerning discrimination in respect of employment and occupation” states that each member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national

¹³⁶Ibid,

¹³⁷Tackling the gender pay gap in the European Union.

¹³⁸Report of the Committee of Experts on the Application of Conventions and Recommendations, 2014.

conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminate any discrimination in respect thereof.¹³⁹

Apart from the ILO conventions, directives of the European Union also refer to equal payment issues. Particularly, Directive 75/117/EEC of February 10, 1975 establishes the principle of equal pay in its very first article: “for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.” In particular, a job classification to determine the pay must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

When talking about the provision of real mechanisms for equal pay, it is important to note that European countries directly implement European directives in their legislations and programs, thus creating high standards of protection towards every employee. Here, the example of Finland is interesting. The law of Finland on “equality of women and men” explicitly refers to the issue of equal pay and states that discrimination in the workplace occurs when “while selecting a person for specific training or occupation and determination of payment rate the person is put in unfavorable conditions compared to others because of pregnancy, childbirth or other reasons grounded on the employee’s gender”¹⁴⁰ Also, the case when “during determination of the salary a person or persons are in unfavorable conditions compared to other person or persons when fulfilling the similar work of similar value”.¹⁴¹ The fact that the mentioned law obligates the employer to promote and systematically support gender equality in the workplace is also very important, which considers offering similar opportunities to men and women equally and provision of equal professional growth.¹⁴² Particularly the law on “equality of women and men” obligates employers who permanently have more than 30

¹³⁹Article 2.

¹⁴⁰Act on Equality between Women and Men (609/1986; amendments up to 232/2005 included), Art. 8 (1) 2. See: <http://www.tasa-arvo.fi/en/publications/act2005>

¹⁴¹Ibid, Art. 8 (1) 3.

¹⁴²The Non-Discrimination Act (21/2004) and the Act on Equality between Women and Men (609/1986)

employees in the workplace to create a special plan of gender equality;¹⁴³ this process has to be conducted by the staff and it should include:

1. An evaluation of gender equality in the workplace; information on positions occupied by men and women; analysis of the character and quality of their work; information on remuneration for persons occupying mentioned positions and differences among payment rates;
2. Information about those planned events that have to be established and implemented in the workplace for achievement of gender equality and provision of equal pay for equal work.
3. Measurable information on events conducted in the past and the results achieved.”¹⁴⁴

Apart from internal legislative regulations there is also a program of trilateral equal payment program which aims at decreasing 20% of unequal pay in 2006-2015 years to 15%¹⁴⁵ and provision of equal remuneration for similar work. This program includes activities such as the “prohibition of segregation, development of a remuneration system, planning of supporting measures for women’s career growth and development of social partnership within equal remuneration”.¹⁴⁶

The law on “Gender Equality” of Estonia, apart from a general explanation of direct and indirect discrimination, separately lists the alleged reflections of gender discrimination in the workplace for more visibility and states that “discrimination may be any action when the employer established such conditions of receiving remuneration for work or benefits in connection to labor relations, which puts an employee or employees of one sex in unfavorable conditions compared to employee or employees of another sex fulfilling similar work or similar value work”.¹⁴⁷ Moreover, Estonia ratified an action plan in 2012 which aims at eliminating the practice of unequal pay in the workplace. Considering the complexity of measures providing

¹⁴³The Act on Equality between Women and Men (609/1986), Art.6a (1).

¹⁴⁴Ibid, Art. 6a (2) 1; 2; 3.

¹⁴⁵Short review of Legislation and equality plans, Finland. See: http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/law/index_en.htm

¹⁴⁶Ibid,

¹⁴⁷Gender equality act of Estonia, Art.6 (2)3. See: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/511042014003/consolide>

gender equality, the plan points out five main directions¹⁴⁸ which should be taken into consideration when elaborating state policy. Particularly, improving the implementation of the existing law on “gender equality”, harmonizing work and private life, promoting gender equality especially in educational fields, eliminating gender segregation in organizational practice, analyzing remuneration in the public sector and improving the conditions where necessary and needed.

3.1. Georgian legislation on equal remuneration

The Georgian Labor Code establishes no clear and well-ascertained provisions for the prevention of gender discrimination. According to data from the National Statistics Office of Georgia, the average salary of employees in the second quarter of 2014 was GEL 864,4. This was GEL 1 051,4 in the second quarter for men and GEL 640,2 for women. The average man’s salary rate is GEL 411,2 higher or 1.64 times more than women’s average salary rate. It is important to note that in the fields where the number of women exceeds that of men’s salary is significantly higher.

For example, about 70% of employees in the educational field are women and their average salary is GEL 381,9; men in the same sector earn GEL 484,1. Similarly, about 60% of hotel and restaurant staff are women and are paid GEL 416 on average; men – GEL 635,2.

This data shows that unequal pay on the basis of gender on the Georgian labor market is a serious problem and that the skills and competence of women is undervalued. For example, a female cashier’s salary is lower than that of her male coworkers.¹⁴⁹ Neither the Labor Code of Georgia nor any other legislative act implies the principle of equal pay for equal work that is requested by Convention #100 of the ILO. Besides, the definition of “remuneration” is nowhere to be found in Georgian legislation, which according to ILO Convention #100, Article 1, Para. “a” is “the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and

¹⁴⁸Short Review of Legislation and equality plans, Estonia. See: http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/law/index_en.htm

¹⁴⁹Tackling the gender pay gap in the European Union.

arising out of the worker's employment". Even though this is only a definition of the notion, the obligation of equal pay for equal work cannot solve the problem if the state does not determine a methodology to develop the definition of equal work, which should be based on objective and non-discriminative evaluation criteria in order to prevent gender discrimination. Nevertheless, the labor and anti-discrimination legislation of Georgia do not include the provision of equal pay for equal work for women and men, and as such we can speak of a legislative gap. The experts' committee¹⁵⁰ on the usage of ILO conventions and recommendations has been repeating for years that the labor code does not include clear statements on equal pay for equal work principle for women and men. In order to eliminate the legislative gaps and implement the obligations of ILO convention #100, it is necessary to elaborate the following addition: "man and woman in labor relations shall have rights to equal pay for equal work". Thus, the remuneration should be defined and a specific, objective method of execution of this norm in practice should be elaborated which will enable the determination of equal pay for equal work criteria. The ILO Committee calls on the Government of Georgia to take definite steps towards the adoption of legislative amendments that will effectively execute the principles of the convention.¹⁵¹ The Committee expresses concerns that since the cancellation of the labor inspection in 2006, there is no monitoring agency. It underlines that the government should elaborate an effective execution mechanism which will establish the equal pay (for equal work) principle. The Committee requires the government to present information about its activities on how the effective execution of this principle will be made in accordance with the convention. The Committee also recommends initiating awareness raising campaigns and trainings to support the recognition of labor rights and the accessibility of laws and procedures.

Also, a permanent evaluation of unequal pay by officials or competent institutions should be made in order to build the capacity of the judges.

¹⁵⁰Report of the Committee of Experts on the Application of Conventions and Recommendations, 2014.

¹⁵¹Report of the Committee of Experts on the Application of Conventions and Recommendations, 2014.

4. Maternity leave

(Comparative analyses of national and international legislation)

Article 27 of the Labor Code of Georgia foresees the right to maternity leave. Though, in general, we often see a discriminating approach against women. A double standard still exists as women employed in the private sector are in an unequal condition compared to those employed in the public sector. According to the labor legislation a (female) employee is protected from termination of the labor agreement during maternity leave, but the legislation does not protect her from termination of an employment contract after her maternity leave. Unlike women who are occupied in the public sector, women in the private sector receive GEL 1 000 from the government for pregnancy, childbirth and childcare. This financial incentive is supplemental to their work remuneration during maternity leave. Women employed in the private sector receive GEL 1 000 GEL from the state, but whether are not they receive a salary during maternity leave is left to the employer's sole discretion. ILO Convention #183 on "maternity protection" determines the cash benefit amount connected with pregnancy and childbirth at a level which ensures that the woman can maintain herself and her child in proper health conditions and with a suitable standard of living. Recommendation #191 accompanying this convention defines that the cash benefit should be equal to the full amount of the woman's previous earnings. Unlike in Georgia, the Labor Code of Germany provides full remuneration during maternity leave by the employer. Maternity leave starts no later than six weeks before childbirth and lasts until eight weeks after childbirth.

Nowadays, many men worldwide use their right to paternity leave; but in Georgia there are only a few cases where the father took paternity leave. This is not only caused by cultural characteristics, but also by the legislative gaps and the fact that many men are unaware of this right.

The first country enabling fathers to go on paternity leave was Norway in the nineties of the previous century. Later on, Great Britain adopted the same law. Both parents were able to simultaneously take paid leave for the period of one year. In Germany, men were granted the guarantee to return to work on the same position. In Portugal, men did not use their paternity

leave despite the opportunity in law; as a result men are now obligated to take five days of paid leave since 2001.

Amendments to the Labor Code of Georgia entered into force on September 27, 2013. According to the new law men can also take paternity that is paid by the state, however, the cash benefit does not exceed 1 000 GEL¹⁵². In addition, there are some other problems with the order of the Ministry of Health and Social Affairs. Particularly, Article 10, Para. 6 says that maternity leave and the corresponding cash benefit for pregnancy, childbirth and childcare cannot be issued to a pregnant woman's family members, except in the cases where the woman dies in labor and the child is born alive. In this case, the benefits can be paid to the child's father or another trustee.

This approach is conditioned by a patriarchal society and, moreover, GEL 1 000 is not enough for a man to decide to stay at home.¹⁵³

Psychologists argue that men should more frequently use their paternity leave based on the following factors:¹⁵⁴ 1. If the mother suffers from a postnatal depression, a father can take care of the child; and 2. If a mother makes substantially more money than the father, maternity leave can cause financial problems for the family. As such, it is important to promote the use of paternity leave while making amendments to the labor legislation and developing government.

5. Assessments of experts and human rights advocates

(Qualitative research)

Despite recent changes to the labor code, one of the heads of the Sectorial Professional Trade Union claims there are still numerous obscure and uncertain provisions that are used in bad faith by the employers: *"It's necessary for the law to promote the employee, because employees are strong. How can a person be an active citizen if s/he is suppressed by the employer; the law*

¹⁵²http://www.sazogadoeba.ge/index.php?post_id=1536

¹⁵³ Ibid.

¹⁵⁴ Ibid.

does not enable me to execute my active, citizen's positions and for this we need promotion by the legislation".

The current law also makes it difficult for NGO representatives to establish facts of discrimination and later prove them in court:

"You become an investigator when working on discrimination cases and attempting to prove them; each detail matters – what was the length of telephone conversations etc. Well-recorded testimonies give us more chances to prove the discrimination. Also, government policy should encourage women to disclose more information through email if they feel uncomfortable or see the process go wrong, which will be preliminary evidence".

Discriminative labor conditions

According to NGOs, the oppression and discrimination of women in the workplace directly relates to the employer's discriminative assumptions which s/he fulfills by creating unfavorable and offensive work conditions:

"There were three of us, ladies, his subordinates; He was the boss – like they use to say in families: he thinks that the man knows best; we just had to obey him; we had to be at work by 9 in the morning when work began at 10 and the three ladies had to stay till 9, even when all other workers left at 7. We had no right to go out and eat, because he thought we would lose too much time and that a person was too relaxed after eating and lost the ability to work; he used to go out pretending to have some business but obviously he went to eat; if we had refused, we would have been fired; we tried to endure because none of us wanted to lose our job; we didn't say a word because we would be fired immediately; I lost 12 kilos in two months"
- details a human rights NGO representative who personally experienced discrimination in the workplace.

After this she was unable to find a job for eight months; she suffered from severe psychological damage because of the suppression and needed rehabilitation care, which she never received.

Woman's discrimination on the grounds of race

Non-governmental organizations state that discrimination of women in the workplace also occurs on the basis of their race, sometimes the aggression is even directed against her family members. One respondent recalled a case that occurred in Tbilisi:

"This lady worked at a school, where they even praised her work. When she gave birth to a child and after her husband came to school once, the manager saw he was black and decided to fire the lady. However, they were unable to do so because she knew her rights and opposed this decision. Since they couldn't fire her, they made her take 126 days of maternity leave and afterwards they did not let her back into the classroom. Ever since then, she hasn't been teaching or has been able to attend any meetings or go on excursions with the schoolchildren. The final thing that is most worrying happened in summer: everybody had vacations and every teacher had to be on duty for two days, but this lady had to work each day for two months while she has two children of two and seven months old. Every day she came to Tbilisi from Rustavi to work alone; not even the guard was there. While other teachers worked for two days, she went to the school every day in summer.

Absence of flexible working hours

According to the representative of the Georgian Trade Unions Confederation, an inflexible work schedule significantly limits women in combining their work and family responsibilities.

"Among the people working in shifts in factories are also mothers, standing at different machinery. They might have to take their children to the kindergarten or to school in the morning and no adequate support mechanism exists in the legislation. They are alone and if a mother cannot agree with her employer or if there is no collective agreement that supports mothers' needs, women cannot carry out this kind of job. I assume that the working hours of these women have to be regulated in a different manner."

The representative of Georgian Trade Unions Confederation mentions that gender insensitivity also exists in the kindergartens. A woman working in shifts has to stay at work for 12 hours, goes home around 8 p.m. and is not able to take her children to the kindergarten or to school:

“She always has to ask a neighbor or relatives to collect her kids from school”.

One female MP says that along with the necessity of flexible working hours, also comes the necessity to promote men taking up more responsibility in the household and with childcare:

“I assume that single mothers, as well as single fathers, need protection. They are alone in raising their children. Maybe his wife died or left them which leave the father alone with a child or children, and of course he needs help. Even the fact that the public sector announced that working hours could begin a little later than 9 o’clock for employees with small children; this should not be considered just for female employees. Fathers also have to be taken into consideration, because we must not support discrimination ourselves”.

Discrimination for unpaid work

Gender researchers talk about an existing disrespectful attitude towards women’s unpaid work and how it hinders their career growth. On the one hand do the labor market and employers recognize unpaid work and on the other hand, it does not support women who want to combine the housework with career goals. Women again face double pressure while taking care of a non-proportional part of the household and also trying to handle the high expectations at work:

“I carried out some research on the time budget of men and women. This research revealed that 70% of women dedicate more than two hours per day to housework and an absolute majority of the men does not dedicate any time at all to it, especially in the cities. In the villages, housework includes bringing and chopping firewood, fetching water etc. which is mostly done by men. When I calculated the aggregated indicator, it turned out that women dedicate 13 times more time to housework than men. Also, it became obvious that women have far less time or no time at all for qualification; women also think that they need more capacity at work for performing their duties at work than men. A survey showed that women require more qualification for

professional growth than men. Over the course of 1.5 years, men had been promoted 2-3 times while women needed 3-4 years on average to get promoted only once”.

Women’s employment on law qualification positions

Research revealed that women are often employed in low qualification work in spite of their education level. The majority of women do not work in a decision-making position, but at a lower level. In spite of the fact that women very often perform most labor consuming work they are less visible and do not get promoted according to their performance and qualification.

“Women are employed in low qualification positions, to say otherwise these are positions denied by men because [their associates assume] he cannot work for this salary” – notes a university professor who works on gender issues.

The representative of the Georgian Trade Unions Confederation and Head of the Metropolitan Railway Professional Union also proves this practice.

“Despite the fact that some women have been working for the metro about ten years and know the specifics of the system, the decision makers in this field are mostly men with no previous experience. Thus, the success of the new manager and the performance of the system depend on the work of the women with more experience.”

The problem of equal pay for equal work

Problems concerning equal pay for equal work especially relate to those workplaces where women are occupied in low level positions. Despite women and men working at the same positions and have similar remuneration, there is a difference in bonuses and salary supplements or other nonmaterial benefits.

“There is equal pay at equal positions, but the difference lies in the positions, which reveals a gender imbalance. Generally, men are occupied in higher positions with higher remuneration” – says researcher.

The ILO links these problems of equal pay to the lack of harmonization of Georgian legislation with international agreements:

“Once again I want to mention that this is a general problem; appropriate use of convention #111 in practice which refers to the equal pay for equal work principle, directly requires regulation of national legislation for the purposes of its fulfillment.”

The Georgian MP also discusses the practice of women’s employment in low level positions and underlines the strength of this tendency in both the private and public sector. He assumes that this tendency is not logically connected to the unemployment rate in the country; but that the practice is guided by stereotypes and those discriminative opinions need to be revised:

“Yesterday I asked whether we should have at least one male cleaner at the parliament; many people are looking for a job. When a single father, a status not considered by the law, of five children is ready to work as a cleaner, why should we limit this opportunity? Again stereotypes; because men cannot clean like women”.

Discrimination of LGBT community representatives

The identification of discrimination cases during pre-contractual relations and the response to them is hindered by societal stereotypes such as homophobia and a strong pressure of the normative order on the one hand and low self-esteem, and on the other hand, fear of the victims. In labor relations, discriminative attitudes towards trans-gender persons are often expressed by co-workers. For example, there were cases where co-workers protested against these persons using the toilet. This problem can be traced back to the absence of corresponding provisions in the codes of conduct of institutions, including in the public sector. Neither the public nor the private sector require non-stereotypical and free of discrimination behavior towards LGBT representatives.

“In most cases, problems about working overtime between an employer and employees hinder pleasant working relations”–says the representative of the Trades Union Confederation. Employers do not care about employees’ high motivation and do not agree to negotiate on the

improvement of their working conditions. The argument for this is that “what’s not written in the law as their obligation is not considered to be done.”

The representative of Trade Union also notes that the employer is always the dominant party that violates the rights of the employees:

“If an employee walks through the doors of an enterprise, he thinks: my rights are left here and I have to do as they tell me to.”

He believes that the lack of awareness about labor rights causes labor agreement violations. A labor agreement proves a person’s consent to work overtime, it also grants a person the right to require compensation for that overtime, but the reality is different. Often, specific workplaces and for specific duties additional workforce is needed and they give those extra workers completely different tasks than what the labor agreement says. For example, an electrician can be put to work as a loader. Despite the labor agreement, these employee will not requires any remuneration or protest because after three months this can become the unofficial reason as to why their labor contract was not extended., Also, membership of the Trade Union Confederation has been a reason for contract breach many times.

Promotion of women and professional achievements

The Head of the Sectorial Trade Union Confederation says that in spite of the fact that women work in metallurgy, mining and chemical enterprise industries *“none of them is the head of any of the 35 factories of “Rustavi Nitrogen”. Women only hold managing positions in those departments where mostly women work such as laboratories, medical service, accounting; even though the chief accountant of the factory is a man.”*

One of the factors supporting discrimination of women in the workplace may also be the procedures of professional promotion that are not transparent and lack gender sensitivity. On the one hand, this makes it impossible for human rights organizations to evaluate whether the process was arranged by taking gender equality into account or not. The representative of the Public Defender of Georgia mentions that:

“There are no transparent procedures for professional promotion; we cannot evaluate the procedure, whether it was gender sensitive or oriented on the equal participation of both genders.”

The representative of the Sectorial Trade Union believes the issue of a labor protection inspector to be very important in the elimination of this and other types of discrimination against women. He thinks that the restoration of the labor inspectorate will provide the study and solving of discrimination against women in labor relations. The function of the labor protection inspector should not only concern labor safety issues, but any issue that can eliminate labor discrimination. This is why he assumes that the role of the labor protection inspector goes beyond resolving individual cases and acquires the function of preventing discrimination in labor relations. This will be operatively provided also by authorization of imposing penalties.

Lack of capacity building opportunities

An important promotion barrier for women is their limited opportunity to attend qualification courses or to build professional capacity in general. This limitation, according to the representative of the Public Defender’s Office is especially acute when women intake breaks from their professional life for maternity leave or childcare needs. When they return to work afterwards, they are often less competitive and are unable to meet the job requirements:

“Let’s discuss the case where a woman goes on maternity leave for six months and returns to work after this period; there is no professional capacity building or training or any kind of support for this woman. Our universe changes every minute and every day; it develops and so do technologies. These women lose an equal opportunity to be competitive with employed men.”

Conclusion

The research showed that employed women are the victims of different forms of discrimination. The danger of discrimination is not only created by direct interference, but also

by the absence of supportive conditions that women require following their social role. The execution of these mentioned positive measures in the public sector is a direct obligation of the government. As for the private sector, experts assume this should be regulated by law. As practice shows the existing labor code remains insensitive towards the needs of employed women. Again, especially vulnerable groups experience double or even triple discrimination in the workplace.

C) Gender discrimination in termination of employment

While talking about the general principles, Georgian legislation is in line with international law in all spheres of the public sector. It prohibits discrimination, sets the necessary conditions for equal rights, freedoms and opportunities between men and women, and prevents and eliminates discrimination.¹⁵⁵ Despite this general principle, there are a large number of cases where labor relations were terminated based on gender discrimination. In most cases this is caused by the absence of specific legislation that protects against such practice.

According to Georgian legislation, gender equality in the workplace is guaranteed. An employer must ensure the equal treatment of men and women and prevent discrimination based on the grounds of gender while evaluating the quality of work.¹⁵⁶ Nevertheless, dismissal cases are common during pregnancy, maternity leave, or based on marital status and other gender-related reasons.

1. The employer's obligation to explain the dismissal based on gender

In accordance with the Constitution and other laws of Georgia, as well as international legal acts, gender discrimination is not a reason to terminate an employment contract. According to the Law on Gender Equality, gender equality is guaranteed in equal treatment of men and

¹⁵⁵ The Law on Gender Equality; Article 2

¹⁵⁶ Same Law; Article 4.2 (i)

women, particularly in assessing the quality of work. Therefore, it is necessary to set out a legislative mechanism to protect women and men from such discrimination. The general prohibition in itself does not constitute an effective method to prevent gender discrimination. Despite the multitude of appropriate articles in legislation, none of them contain provisions that are included in the legal effects of gender discrimination in labor relations; therefore, it is harder for victims to prove facts of discrimination.

Under the Labor Code, an employee can settle legal disputes in accordance with the norms of the Civil Code.¹⁵⁷ Articles 316, 317 or 384 of the Constitution state that an employee can claim liability for contract breach and in case of non-pecuniary damage sustained according to the Civil Code, sections 2 and 6 of Article 18. As already mentioned, Article 42 of the Constitution investigated the cases of labor disputes in the courts of all three instances. During the past five years, none of the courts received a case about gender discrimination. Consequently, the relevant legislation is ineffective.

According to Article 38, Section 7 of the Labor Code, the burden of proof in the case of gender discrimination lies with the employer. Nevertheless, discrimination is always difficult to prove because often an employee only suffers non-pecuniary damage. It would be good to adopt the Estonian example in order for an employee to protect herself in such a situation. In Estonia, an employer must give the employee a written explanation if there is a doubt of discrimination.¹⁵⁸

The employee is entitled to demand an explanation from the employer, if s/he believes s/he was discriminated against while pregnant, being a parent or other gender-circumstances, or if someone of the opposite sex receives a different salary or if s/he suspects a (non-) promotion was based on his/her gender.¹⁵⁹ If there is a suspicion of discrimination, the requested documents should clearly explain why a specific person was given the lead in the promotion. This motivation should be done within 15 days of the request. Such a written motivation makes

¹⁵⁷ The Labor Code, Article 1, Section 2

¹⁵⁸ Estonian Gender Equality Act [Soolisevõrdõiguslikkuseadus]; 2004.04.07. § 7

¹⁵⁹ Same, § 6.2

it easier for employees to prove acts of discrimination and to establish evidence-based decisions.

The Georgian Labor Code contains several grounds for the termination of an employment contract, including objective circumstances justifying the termination of an employment contract. "Objective circumstances" are completely subjective and this passage allows employers to deliberately misinterpret this sentence.¹⁶⁰ Finnish legislation also provides causes for termination, as well as for a special objective which is essentially grounded.

However, the section of the Employment Act of Finland specifically sets out what can be considered a dismissal for objective reasons. In particular, there are two main reasons. The first is related to a sudden change in the employee's effectiveness while performing his duty. The second is for the economic reasons.¹⁶¹ Accordingly, it is necessary to make changes to the Labor Code that imperatively explains circumstances to better protect employees from gender and other discrimination.

These cases are governed in the same manner by Estonian labor legislation.¹⁶² The act on employment contracts specifies what can indicate an employee's effectiveness in the workplace: health status, violation of the rules, not through a performance appearance, which has significantly damaged the employer's property. Economic causes are determined as the reorganization of an enterprise or when it can no longer continue its business. A list of objective reasons in the Labor Code would lead to a decrease of discrimination against an employee by his/her employer. This provision also excludes the possibility of gender discrimination because the employer would not have the freedom to interpret this provision in his favor.

¹⁶⁰Report of the Trade Unions in the 2014.

¹⁶¹Employment Contract Act of Finland. Chapter 7, Articles 1-3.

¹⁶² Ibid, Article 88-89.

2. Dismissal during pregnancy, childbirth or maternity leave

Article 37, Para. 3 of the Labor Code, in general, prohibits firing an employee while she is pregnant or on maternity leave. The employee is entitled to defend herself and to challenge the dismissal. It would be better if there was more specific legislation regulating some protection mechanisms, since currently there is a high risk that the employer terminates the contract in order to avoid the law. . In most cases, employers prefer to replace employees on maternity leave by other personnel or accept them on a lower position. Unfortunately, there are no statistics available for Georgia on this issue. In order to adequately assess the risks, this research will elaborate some international best practices. For example, according to a 2013 study in the United Kingdom (UK), every year 50 000 women are unable to return to the position salary they had before their maternity leave¹⁶³ Such practice is discriminative and in contradiction with the basic principles of the ILO , the EU and the European Council on the prohibition of gender discrimination in the workplace.

The Finnish law on labor contracts excludes the dismissal of pregnant women or women who just gave birth. Finnish legislation prohibits dismissal cases where employees are required for a medical certificate.¹⁶⁴

In Germany, the Legislative Act of Maternity Leave Benefits states that the dismissal of pregnant employees or employees on maternity leave are only allowed in exceptional cases such as when there is a serious breach of duty. Otherwise, German labor legislation prohibits the dismissal of these women.¹⁶⁵

The Georgian Labor Code does not specify during which period of time an employer cannot fire the parent of a newborn, but the Law on Public Service does. Section 2, Para. 111 specifies that an employee (woman) cannot be dismissed during pregnancy or while parenting a child of three

¹⁶³ Work and Family Life Balance in EU Law and Policy 40 Years on: Still Balancing, Still Struggling; European Gender Equality Law Review - No. 2/2013: http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013_2_final_web_en.pdf 29.09.2014. Page 7

¹⁶⁴ Finnish law on labor contract [Employment Contract Act of Finland], Chapter 7, Article 9

¹⁶⁵ German Federal Act on Maternity Protection, 1997

years old based on health deterioration, long-term disability or after showing a medical certification". Unfortunately, this article only applies to women working in the public service. The German legislation, in particular the Federal Act on maternity leave, prohibits the dismissal of a pregnant employee or mother who has a baby younger than four months. In Finland and Estonia, the dismissal of a pregnant employee or mother of a newborn child is only possible when the enterprise is filing for bankruptcy.¹⁶⁶ In addition, the Estonian labor legislation prohibits the dismissal of a mother with a child younger than three years old. Her release is only permissible in cases of a serious violation of her work duties.¹⁶⁷

Based on EU standards, the right to work and family of employees on parental leave are protected in particular because this category of employees faces the biggest risk of discrimination. To prevent a violation of their labor rights it is important to specify a provision in the law that will protect this group while once again, reminding and calling on the employer to not violate their rights and to not put them in an unequal situation compared to their colleagues.

3. Dismissal based on marital status

Article 2 of the Labor Code of Georgia defines dismissal based on marital status as a form of discrimination. Article 23 of the Labor Code considers the possibility to take unpaid leave because of family circumstances. Because of the acuteness of the situation, it is recommended to include the termination of a labor contract based on family circumstances as unlawful.

Both Estonian and German legislation recognizes the right to take leave from work because of family circumstances, including taking care of a sick child (less than 12 years) or other member of the family. In Estonia, the Estonian Health Insurance Fund covers this leave of absence. The employer is not obliged to pay the salary or other benefits, but he is not allowed to dismiss that employee during this period.¹⁶⁸ The German labor legislation includes short and long term leave due to family circumstances. The employer has no right to terminate the contract when an employee takes days off to take care of a sick child (short term) or when a family member is

¹⁶⁶ ECA Finland 7 chap. Section 9

¹⁶⁷ ECA Estonia § 93

¹⁶⁸ JusLaboris, Individual Dismissal Across the Europe - Estonia; pg 88

seriously ill (long term). Dismissal in such cases is only permissible if an authorized official issued a document stating that the dismissal is legal.¹⁶⁹

According to Finnish labor law, an employer cannot terminate a labor contract with an employee who missed work because of family reasons. Article 7, Chapter 4 of labor contract law states that an employee is allowed to take leave because of marital status, sickness of a family member or an accident, if this does not result in great damage and the employer is notified at the first opportunity.

In Georgia, it is mostly female employees that are forced to skip work because of family reasons. Consequently, this can be seen as one of the cases where employees are dismissed based on their gender. The Georgian Labor Code only covers this in brief and very general. However, in reality we often encounter such problems. The Georgian labor legislation should regulate this in a similar way to Finnish, German or Estonian legislation.

4. International standards on the prohibition of gender discrimination

According to the EU Association Agreement (AA) between Georgia and the EU that was signed in 2014, both parties recognize the importance of joint work on the trade-related aspects of environmental and labor policies. This also includes gender equality in the workplace and to bring Georgian legislation into compliance with EU and ILO standards.¹⁷⁰ The AA obligates Georgia to bring national legislation in line with the minimum international standards. EU legislation prohibits all forms of discrimination based on gender, direct or indirect.¹⁷¹ The binding EU Charter of Fundamental Rights sets out minimum living standards that are related to a contract termination based on gender. Article 33 of the Charter in particular prohibits contract termination on the basis of pregnancy, maternity leave or child adoption. Pregnant women and parents on maternity or paternity leave are defined as a separate category in order to prevent dismissal on the grounds of gender. According to ILO standards, an employer should

¹⁶⁹ Same, pg 128

¹⁷⁰ 2014 Association Agreement between Georgia and the EU, Article 239 (H),

¹⁷¹ Council Directive 97/80/EC

http://europa.eu/legislation_summaries/employment_and_social_policy/equality_between_men_and_women/c10913_en.htm

justify his/her reasons for dismissal of an employee and this ground should be reasonable.¹⁷² In addition, ILO Convention # 158 provides a list of reasons that cannot lead to dismissal, including an employee's family status, social origin, pregnancy or maternity leave. The grounds for dismissal should relate to the incompetence and/or inappropriate behavior of the employee or the specific operations of the workplace. Georgia did not ratify the above-mentioned convention and as such it is not binding for the country, nevertheless, it sets out some minimum standards to which Georgia's domestic legislation should adhere to anyway.

5. Assessment of experts and human rights advocates

(Qualitative research)

A judge of the Supreme Court of Georgia talked about cases of pregnant women who were dismissed and where the employer presented them with written statements. Even in such rare cases, it is important to define the will of a pregnant woman. This should be guaranteed through a gender-sensitive approach towards pregnancy as an especially vulnerable condition for a woman:

“A woman who is seven months [pregnant] desires a specific moment, because a pregnancy in a woman's life is an entirely different event, a special occasion. Her mental mindset is totally different; it may be labile, easily subjected. In the village, in the family, the only one employed, a seven-month pregnant girl. It was impossible to write a statement for her. She could already go on maternity leave, but the head of the administration was not interested. He showed no sign of humanity. Never asked the pregnant woman – why she decided to leave the job? Where there any personal problems causing her to leave? Why should a soon-to-be mother quit her job?”

The representative of the United Labor Unions of Georgia also agrees with this opinion. Who believes that an employer should strengthen and renew the competence of an employee after taking leave because of family responsibilities (including maternity leave)? Otherwise, the competition that she had to undergo (based on which results she was dismissed) can be considered as an unequal condition, because she objectively did not have the possibility to

¹⁷²International Labor Organization 158th convention, Articles 4-5.

participate in an equal competition with other participants who were not on leave because of family circumstances.

“Any person, no matter male or female, who took a break from work for any reason, of course needs some time to get back into shape, to develop. [ILO] Conventions stipulate the need to retrain these people by supporting them.”

A lawyer of the Labor Union of Georgia believes that despite recent positive changes in the Labor Code that restrict the dismissal of employees, there are still gaps in the legislation that are being used by unscrupulous employers. One such mechanism is the short-term contract. Often, short-term contracts are not continued after the initial contractual obligations are fulfilled. The employer does not justify his/her decision nor takes past accomplishments of the employee into account:

“Even though there are some restrictions, short-term contracts, which are now, above all, relevant, are a very good tool for discrimination. In the general contract term there are no obligations for either party, neither the employer nor the employee is bound to prove why the contract wasn’t continued. It remains a tool of discrimination. We have seen cases where a woman’s pregnancy or the fact that she had under-aged children was the reason for not extending the contract.”

The United Labor Union considers the fact that the labor legislation foresees “objective facts” (Article 37, Part 1, Section "o") to terminate a labor contract as a potential risk of discrimination towards employed women. Since the above notion is of a value judgment, it should be further defined in the court, however, due to the low indicator of the lawsuits, this kind of provision will adversely affect all employees, including women in the process of dismissal:

“The grounds for termination can be certain objective circumstances, except on the grounds as defined in Article 37. In general, we were not in favor of this definition of “objective circumstances” in the legislation. We wanted a comprehensive definition for both a short-term contract and a contract in general. Now, some elements still allow for discrimination and unequal treatment. A general assessment of the notion “objective circumstances” proves that

there is no specific definition and in the end, the court must determine whether this or that circumstance constitutes the objective.”

Conclusion

The above-mentioned legislative and qualitative analysis of our study showed that the particularly problematic issue of gender discrimination in employment relations still remains. It is therefore important for the state to take appropriate measures to ensure the harmonization of Georgian legislation with international standards. It should also establish a mechanism that will effectively enforce the relevant legislation and which will not allow for an employer to dismiss an employee on discriminative grounds. As such, it will provide better protection for employees.

d) Sexual harassment in the workplace

The issue of sexual harassment and its methods for elimination are the subjects of international public attention. International society calls on governments to design a regulatory framework on sexual harassment which includes relevant safeguards so that alleged victims can apply for protection.

Sexual harassment is considered a manifestation of violence against women and equally occurs in both developed and developing countries. According to statistics from the US Equal Employment Opportunities Commission and Fair Employment Practices Agencies,¹⁷³ 11 364 persons reported cases of sexual harassment to the FEPA- EEOC in 2011.

40 to 50 percent of women in the EU have at least once been the victim of various forms of sexual harassment in the workplace, including unwanted sexual suggestions, physical contact or other forms of sexual harassment.¹⁷⁴ Studies in Asian countries found that in Japan, Malaysia,

¹⁷³ Sexual harassment charges, EEOC, 1997-2011 statistics. See: http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm

¹⁷⁴ UN Women, Statistics on violence against women and girls. See: <http://www.endvawnow.org/en/articles/299-fast-facts-statistics-on-violence-against-women-and-girls-.html>

the Philippines and South Korea, 30-40 percent of women suffer from discrimination in the workplace.¹⁷⁵

It is noteworthy that it is mostly women who become the victims of sexual harassment.

This is corroborated by a 1998 Dutch study of the European Commission that examined the situation in 11 European countries during 1987-1997. Research showed that in each of these countries the percentage of sexual harassment is equally high. The fact that sexual harassment against women is disproportionately high¹⁷⁶ raised the discussion about the relation between this behavior and gender discrimination. This notion is reinforced by the direct or indirect consequences that are associated with different forms of harassment in the workplace. In particular, a hostile work environment for women interferes with the quality of work and the chances of promotion.

Also, these artificial barriers that women face during their job alleviate the chances of quitting. The occurrence of sexual harassment and the fact that it is ignored discourages women to work in a male-dominated workplace. As such sexual harassment is as a form of gender discrimination that can both bring forth and result in gender inequality. This clearly points out the need for separate regulation and explicit policy on the issue.

Not all women experience the same frequency or forms of sexual harassment. The Dutch study showed that the risk of harassment is the highest with financially dependent groups, including separated, divorced, young people (20-40 years old) and single women.¹⁷⁷ Cases of harassment are more common in male-dominated offices; women with male direct supervisors are more likely to experience harassment.¹⁷⁸ In developing countries, the risk group also includes migrant

¹⁷⁵ Ibid

¹⁷⁶Sexual harassment in the workplace in the European Union, European Commission, 1998, pg.5; 15. See: <http://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf>

¹⁷⁷Sexual harassment in the workplace in the European Union, European Commission, 1998, pg.6. See: <http://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf>

¹⁷⁸ Ann Numhauser-Henning and SylvaineLaulom "Harassment related to sex and sexual harassment law in 33 European Countries, discrimination versus dignity", 2011, Pg. 16, See: http://www.ec.europa.eu/justice/gender-equality/files/your_rights/final_harassment_en.pdf

women because of their low financial capacity, social isolation, language and cultural barriers. They also encounter additional obstacles to change their workplace.

Despite the fact that mostly women are the object of sexual harassment, we also came across more and more cases where a man was subjected to unwanted behavior. Here the risk groups include young men, gay men, members of ethnic minorities and men who are working for women.

The problem of sexual harassment also has specific results and effects. Employees who are subjected to sexual harassment often develop psychological problems and, in the worst cases, this can decrease the quality of their work and result in dangerous conditions.¹⁷⁹ The problem becomes more evident when an employee's psychological problems, poor health and depression threaten the development and growth of his/her career and result in losing his/her job.¹⁸⁰

Sexual harassment in the workplace also creates barriers to employers. Frequent absence from work and high stress levels and despair of employees because of the work environment causes reduced performance. The loss of productivity and opportunities for significant personnel, harm the employer's budget. While considering these complex results, it became clear that it is necessary to define sexual harassment as a form of violence in law and develop methods to eliminate this behavior.

The Committee on the Elimination of All Forms of Discrimination against Women defines sexual harassment against women as violence in its general recommendation from 1989.¹⁸¹ Recommendation #19 from 1992 defines gender-based violence as a form of gender discrimination and thus as a violation of the Convention. The Committee points out that: "Equality in the work place may be seriously impaired when women are subject to gender-

¹⁷⁹ Sexual harassment in the workplace in the European Union, European Commission, 1998, See: <http://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf>

¹⁸⁰ Sexual harassment in the workplace in the European Union. European Commission, 1998. Pg.29, See: <http://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf>

¹⁸¹ General Recommendation No.12, 1989.

based violence, such as sexual harassment in the workplace”¹⁸². The Committee also notes that under the Convention, member states should take legal and other relevant measures to ensure the effective protection of women from gender-based violence, including sexual harassment in the workplace.¹⁸³ States must establish effective legal mechanisms, which includes civil action to claim compensation for suffered damages as well as criminal sanctions.¹⁸⁴ Moreover, in addition to a legal framework, the Committee emphasizes the importance of preventive measures and the fact that the state should use educational programs about the gender roles of women and men to change public opinions and attitudes.¹⁸⁵

The CEDAW Committee issued recommendations concerning the lack of implementation of the laws on sexual harassment and calls on Georgia to develop and strengthen effective measures in the prevention of sexual harassment. The Committee also refers to the need to establish a labor inspectorate to overcome discrimination.¹⁸⁶

ILO Convention #111 from 1958 concerning discrimination in the workplace calls on states to respond appropriately in order to eliminate harassment in the workplace.

ILO's Committee of Experts defines sexual harassment as “Any inappropriate remark, a joke, regarding a person's dress, appearance, age, family situation; Condescending or paternalistic attitude, which bears the sexual implications of human dignity; Any unwanted request or an invitation, both implicit and explicit in nature, though, whether or not it considers threat. Any gaze or other gestures associated with sexuality. And any unnecessary physical contact, such as touching, fondling, pinch or attack.”¹⁸⁷

In its general observation, the ILO stresses that "harassment undermines sexual equality in the workplace, putting into question the integration and prosperity of individual workers, it affects

¹⁸² General Recommendation No. 19 on violence against women, 1992. Para.17.

¹⁸³Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104 of 20 December 1993, 85th plenary meeting.

¹⁸⁴ General Recommendation No. 19 on violence against women, 1992. Para. 24 (t(i)).

¹⁸⁵ General Recommendation No. 19 on violence against women, 1992. Para. 24 (t(ii)).

¹⁸⁶CEDAW/C/GEO/CO/4-5, 24 July 2014, Para.29 (d).

¹⁸⁷ ILO: Equality in Employment and Occupation: Special Survey on equality in employment and occupation in respect of Convention No.111, Geneva, 1996, Para. 39.

productivity and reduces the weakening of the institution of the basis on which the whole labor relations are supported ...”¹⁸⁸

European legislation states that: “Sexual harassment contradicts equal treatment principle between men and women and represents discrimination based on sex, which will be discovered, not only in their work, but also employment, promotion and professional training processes. And as a result this kind of behavior should be prohibited, against which effective, proportionate and dissuasive measures have to be applied.”¹⁸⁹

The concept of sexual harassment is relatively new to EU legislation. Only in 2002, amendments were made to the Equal Treatment Directive from 1976. EU Directive 2002/73/EC notes that discrimination based on sex and sexual harassment therefore, should be banned. The second article defines sexual harassment in the following manner: “Unwanted sexual, verbal, non-verbal or physical behavior aimed at or causing a person's dignity or insulting, hostile, humiliating or offensive environment.” A similar definition can be found in EU Directive 2006/54/EC on Gender Equality (updated).¹⁹⁰ The EU directive requires that employers be encouraged to take all appropriate measures in place to fight against discrimination at work, in particular in relation to harassment and sexual harassment.¹⁹¹

1. Types and forms of sexual harassment

The international community defines two categories of sexual harassment.¹⁹² The quid pro quo (service for service) form occurs when an increase in salary, promotion or even the continuation of a job depends on the victim's consent to any offers of a sexual nature.

The second type of harassment is the creation of a hostile work environment that creates an unwanted and intolerable working environment for the victim, which might also consist of

¹⁸⁸ ILO: Committee of Experts: Special Survey on the application of Convention No.111 on discrimination in Employment and Occupation, Geneva, 1996, P.16.

¹⁸⁹ Council Directive 2006/54/EC (6).

¹⁹⁰ Art. 2 (1(d)).

¹⁹¹ Council Directive 2006/54/EC, Art.2 (5).

¹⁹² ILO, Brochure, Fact Sheet on sexual harassment at work. See: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf

forms of a sexual nature (it does not include services in exchange for blackmail) such as sexual degrading comments, hints, and the circulation of sexual subtext material.

The definition names the three main forms to better illustrate.¹⁹³

Physical Behavior

- Physical violence;
- Physical contact (touch, embrace...); and
- Job-related threats or rewards in exchange for requests of a sexual nature.

Verbal Behavior

- Comments on the employee's appearance, dress, age, and other personal lives;
- Sexual comments, stories, jokes;
- Recurring invitation (meeting, romantic date);
- Abuse of an employee on the grounds of sex; and
- Condescending or paternalistic notes.

Non-verbal behavior

- Circulation of sexually pronounced materials;
- Sexual gestures; and
- Whistling.

"Undesirability" is the most important element in the identification of sexual harassment. The issue is whether or not undesirability should be stated by the employee. In some countries the law does not qualify particular actions as harassment if victims do not express interest (Israel).¹⁹⁴ While Philippine legislation indicates that an action can be classified as sexual harassment, regardless of whether the victim believes it appropriate or not.¹⁹⁵ Clearly, the definition of "desirability of a standard" is important to take into account regarding the victim's

¹⁹³ M. Rubenstein: Dealing with sexual harassment at work: The experience of industrialized countries, 1992. (as cited by Deirdre McCann, Sexual harassment at work, national and international responses, pg2.)

¹⁹⁴ Israel: prevention of sexual harassment law, Art.3 (3), See: https://www.knesset.gov.il/review/data/eng/law/kns14_harassment_eng.pdf

¹⁹⁵ Philippines: Anti-Sexual Harassment Act, Article 3.

perception. Employees should have the right to establish the boundaries of the nature of the action. Apart from subjective limitations, there are also some objective limitations ¹⁹⁶ which serve as a balance between the borders of severe and less severe harassment. Limitations of severe harassment are inherently abusive behavior, physical violence and threats. In these cases, a victim should not demonstrate the "undesirability" of the actions ¹⁹⁷ because no proof is required. Other objective limitations occur during insignificant action, which may include sexual implications, but are harmless and do not qualify as sexual harassment. Due to the abovementioned, the standard of reasonableness was set for the complaint which has to respond to the relevant quality and effect of sexual harassment so that the responsibility of the person and the right to request can arise.

One of the important features is the "repeating" nature of the action, ¹⁹⁸ which is logically linked to the "reasonableness" of the complaint. A number of states recognize that some forms of sexual harassment are so severe that there is no need to prove whether or not the action is repetitive. However, when talking about milder forms of harassment, an element of "persistence" is essential to strengthen the reasonableness of the evidence submitted. ¹⁹⁹

2. The identification of the harasser

The legal norms that explicitly identify "harasser" play an important role in the effective implementation of the legal framework on sexual harassment. A clear list is an auxiliary source for an employer to narrow down a wide circle of persons who may be involved in sexual harassment, including employees, customers or partners. Such a list would allow paying more attention to so-called 'quid pro quo' harassment cases by people who have access to certain benefits.²⁰⁰

¹⁹⁶ Deirdre McCann, Sexual harassment at work, national and international responses. ILO, Conditions of work and employment series No.2. 2005, Pg. 3.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid, pg. 20.

¹⁹⁹ Ibid, Pg. 21.

²⁰⁰ Ibid, Pg. 21.

Several states have similar regulations on harasser identification. In the USA²⁰¹, a harasser can be the direct boss of the victim, other management staff, an employee, colleague, partner or customer. Sexual harassment is not limited to only the work place where the victim or the harasser was present. Sexual harassment can occur in the work place, but also during a conference, on a business trip, corporate visits, sponsored events and receptions, or any other place that is associated with professional activities.²⁰²

3. Regulation of sexual harassment in Georgian and foreign legislation.

The Georgian Labor Code, which establishes the prohibition of discrimination in general, also contains records about harassment and sexual harassment. However, it does not explicitly refer to harassment and does not determine possible forms of harassment. Article 2, Para. 4 defines it as "judging a person's direct or indirect harassment aimed at or resulting in an intimidating, hostile, degrading, degrading or offensive environment, or the person in such conditions, which are directly or indirectly causing his condition as compared to other persons in similar circumstances." The record combines harassment and discrimination in the general definition and demands the existence of a comparator to prove discrimination cases. Essentially, this is a defect of the legal norm. Based on international standards, the existence of comparator is not necessary to prove a case of sexual harassment to compare the situation of harassment victims to other persons in similar circumstances, given the sexual nature of the harassment and the negative influence it has on the work environment. Unlike in Georgia, the Estonian Law on Gender Equality recognizes several forms of sexual harassment: "Any unwanted sexual verbal, non-verbal or physical conduct or activity that has the purpose or the result of an individual's dignity" ²⁰³ that results in the creation of an inappropriate environment. A similar definition is provided in Finnish legislation.²⁰⁴ Germany, however, is a different case. The German law on "equal treatment" gives an explicit definition of sexual harassment that applies to all stages of the work relationship and explains all actions related to sexual harassment: "Sexual harassment should be considered as discrimination, the sexual nature of the unwanted behavior, unwanted

²⁰¹ <http://www.eeoc.gov/laws/types/harassment.cfm>

²⁰² *Ibid*, Pg. 51.

²⁰³ General Equality Act of Estonia, 2004, Art.3(5).

²⁰⁴ *ibid*: <http://www.tasa-arvo.fi/en/discrimination/harassment>

sexual behavior and a request that sexual relationships involve sexual physical contact, notes and comments, as well as unwanted behavior, which includes pornographic photographs showing or public exhibition of the purpose or results individual dignity, where he created a hostile, intimidating, abusive, threatening or degraded environment.”²⁰⁵

Even though Georgian law does not use the term “sexual harassment”, an important step forward was made in Georgia in 2010 when the Law on Gender Equality determined the content of sexual harassment as: “Any unwanted behavior in sexual nature - verbal, non-verbal or physical aimed at or resulting in personal offense or a degrading, hostile or offensive environment.”²⁰⁶ The content of this provision is in line with international standards, nevertheless, the definition of the enforcement mechanisms and the lack of formal rules hinder the effective implementation of the law. In fact, the definition in itself is meaningless if a person has no opportunity to argue whether or not sexual harassment had occurred at the work place. The lack of enforcement mechanisms also hinders the development of relevant case law. Until today, there is no precedent of the practical application of the gender equality law. Obviously, this is not only the result of the gap in legislation because sexual harassment is a sensitive and personal issue. The delicacy of the subject and its hidden character hinder its identification. This is typical for a patriarchal culture where women do not talk about their problems, because they are afraid of criticism in their family or from the public. It is twice as difficult to identify and eliminate the problem in a patriarchal society where one sex is subordinate to another and is intolerant against victimized women.

The ILO has called on the government to present: “How and by which entity is sexual harassment records Law on Gender Equality, which should include information about the compensation and sanctions.”²⁰⁷ In addition, it asks for any statistical information that was collected by the court or any other competent authority.

The ILO requested this information in 2013, but the situation has not changed. The state does not keep statistics on sexual harassment in the workplace an on-site inspection body does not

²⁰⁵General Act on Equal Treatment of Germany, Art. 3(4)

²⁰⁶ The Law of Georgian on Gender Equality, Article 6 (1).

²⁰⁷ ILO, Direct Request (CEACR)-adopted 2013, published 103rd ILC session (2014), Georgia.

exist. The Committee expresses its regret ²⁰⁸ over the cancellation of the labor inspectorate in 2006, because currently there is no body that carries out the supervision of labor relations.

Apart from the absence of official statistics, there is also no case law available in Georgia which would allow observing the interpretation of the norms of sexual harassment by judges as well as the applicability of the cases. ILO experts note that the fact that there are virtually no complaints about sexual harassment in the workplace does not mean this type of behavior does not exist in the county.²⁰⁹ On the contrary, it reveals even more serious symptoms that indicate a gap in the legislation, the ineffectiveness of the law, a lack of knowledge or understanding of sexual harassment by the judges and the absence of any reconciliation strategies and plans.²¹⁰ It can also mean that the enforcement mechanism is ineffective, a gap in the access to court and mistrust towards the victims which could explain why they prefer to keep silent. Therefore, a clear definition of sexual harassment is necessary to ensure that the legislative framework covers all its forms.

A number of states regulate sexual harassment in the Criminal Code, including the Criminal Code of Georgia, which defines sexual harassment as rape committed using work positions,²¹¹ sexual activity while using overwhelming power,²¹² forcing sexual intercourse or other types of sexual action, using work positions.²¹³ However, the scope and severity of these actions defines them as a criminal offence rather than sexual harassment. Experts point out that, based on the sensitivity of sexual harassment, solely regulating such cases with criminal law is incomprehensive ineffective in the fight against sexual harassment.²¹⁴ Criminal regulation often is only applicable for the worst forms of sexual harassment and does not cover all forms of harassment and excludes other forms of action. Therefore, it is important to expand the

²⁰⁸ Ibid.

²⁰⁹ Giving Globalization a Human Face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, Report III (Part 1B), 2008, Para. 790. See: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf

²¹⁰ Ibid.

²¹¹ Criminal Code, Article 137, paragraph (2 (a)).

²¹² Criminal Code, Article 138, paragraph (2 (a)).

²¹³ Criminal Code, Article 139, paragraph (1).

²¹⁴ Giving Globalization a Human Face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, Report III (Part 1B), 2008, Para.791-792

definition of sexual harassment via other legislative acts that are also dedicated to equality and the elimination of discrimination.

3.1 The issue of responsibility

Different states differently regulate responsibility in sexual harassment; often, only the perpetrator bears responsibility. However, this approach is mainly characteristic for states that regulate sexual harassment in their criminal codes. However, in many countries the responsibility falls on the employer, based on the specific information s/he has on the case.²¹⁵

In the US, the responsibility lies with the perpetrator or with the employer, supervisor or manager who has the negative obligation to protect their employees against discrimination of any kind and who has to take measures to eradicate and punish the harasser.²¹⁶ For example, in the case of EEOC vs. Sage Realty Corp,²¹⁷ the employer forced employees to wear an uniform that subjected the applicant to comments of a sexual content from customers and customers. The court expressly referred to the employer's responsibility, whether or not he knew that his employees were suffering from unwanted and offensive behavior that was related to the uniforms.

Article 42 of the Administrative Code of Georgia regulates the violation of labor code regulations by enterprises, institutions and organizations and imposes fines in these cases. However, it is the state labor inspectors that are tasked with the discussion of administrative law violation cases and the administrative punishment of the responsible officers.²¹⁸ However, current Georgian legislation does not consider the existence of such state labor inspectors. Thus, the provision is outdated.

It is important that the Administrative Code records sexual harassment in the work place, in both the public or private sector, as a violation of the labor laws and that these violations consist of administrative liability and are subject to the appropriate administrative sanctions. In

²¹⁵European gender equality law review, No.2/2011, Pg.10.

²¹⁶ Employers Liability for Harassment, See: <http://www.eeoc.gov/laws/types/harassment.cfm>

²¹⁷ EEOC v. Sage Realty Corp, United States District Court, S.D. New York. January 29, 1981 See: <https://casetext.com/case/eeoc-v-sage-rlty-corp>

²¹⁸ Administrative Code of Georgia, Article 215

order to do so, it is important to be allocated a separate section in the Labor Code regarding sexual harassment with a specific definition of the crime as well as a wide range of its characteristics.

It is also noteworthy that none of the statutory (including the labor code) provisions mentions the positive obligation of the employer to provide a safe and healthy working environment. Although Article 35 of the Labor Code regulates the obligation of the employer to provide employees with a safe working environment, sexual intimidation does not always jeopardize an employee's health or life. The Estonian law on labor legal agreements has a separate chapter regarding employer obligations²¹⁹ and states that an employer must provide working conditions "which correspond to labor health and safety conditions." In addition, the law on equal treatment demands equality in the workplace and considers the employer as implementer of the Equal Treatment. Thus, it imposes the duty on the employer to take adequate measures to protect employees from discrimination.²²⁰ Also, according to the 2009 amendments, the employer must ensure that employees are protected from gender-based harassment and sexual harassment in the work environment.²²¹ Article 6, Para. 5 states that the employer is responsible for his/her inaction when s/he knows or should have known about facts of harassment and did not take the appropriate preventive measures.²²²

The German law on equal treatment is similar to the Estonian legislation and has a separate approach towards the employer's obligation to take appropriate preventive measures. In case particular discrimination facts were revealed, the law obliges the employer to take necessary and acceptable measures appropriate to the specific situation²²³ in order to protect employee.

The German law on "equal treatment" also obliges the employer to create an appropriate environment for employees and take timely relevant measures to prevent discrimination in the work place. Also important is the fact that in case an employer did not perform his/her duties and does not react in a case of sexual harassment or if an employer uses insufficient measures

²¹⁹Employment contract act of Estonia, Art.28 (6).

²²⁰Estonia, Equal treatment act, Art.12 (1).

²²¹Estonia, gender equality act, Art. 11(4).

²²² Ibid, Art. 6(5).

²²³General act on equal treatment, Art. 12 (1)(2)(3)(4).

to fight discrimination, the employee has the right to refuse to carry out the job duties while keeping his/her salary.²²⁴

The Finnish law on "gender equality" is similar to German legislation, but regulates the issue of responsibility differently. The law recognizes the employers' liability in the case if they knew about the harassment fact but did not implement any preventive measures.²²⁵ The law says that in such cases the employer's actions are considered to be discriminative, similar to the sexual harassment itself.

Significant differences exist between the European countries regarding an employer's responsibility when sexual harassment takes place outside the formal workplace. 14 European countries (Austria, Belgium, Czech Republic, Denmark, Estonia, Germany, Hungary, Italy, Latvia, Malta, Portugal, Slovakia, Spain, Sweden) takes away the employer's responsibility if the action takes place outside of the usual time and place of work.

Finland and Ireland have a different approach. According to their law an employer remains responsible, even if the harassment took place outside of the usual work place and hours²²⁶ but the time and place should be directly linked to the performance of the employee's professional duties. During evenings and corporate events, the burden of responsibility is reduced based on the nature or if the event is not work related.²²⁷

Georgian legislation should also have standards that correspond to European legislation where employers have the obligation to provide a healthy work environment.

3.2 The burden of proof and compensation for suffered damages

A definition of sexual harassment in labor legislation will not be effective as long as there is no effective defense mechanism that regulates both the issue of burden of proof and compensation. In cases of discrimination, the burden of proof is divided between the parties;

²²⁴ Ibid, Art. 12; 14.

²²⁵ Act on Equality between man and women of Finland (Amendments up to 2005 included), Art. 8d.

²²⁶ Report on Sexual Harassment in the workplace in the EU member states, Government of Ireland, 2004, Pg. 56-57. See: <http://www.justice.ie/en/JELR/SexualHrrsmtRpt.pdf/Files/SexualHrrsmtRpt.pdf>

²²⁷ In this case, it means free, corporate event, which has an entertaining character and where you can drink alcohol. Obviously, the employer cannot control the behavior of employees or third parties caused by the influence of alcohol.

however, the employer holds a stricter obligation. The unequal situation the parties are in is the reason for this. EU directive 2000/78/EC requires from its member states that they take all appropriate measures in conformity with national legislation in order to ensure that, and in case of reasonable doubt, persons who consider themselves the victim of unequal treatment have the right to petition the court or any other competent authority. It is then the defendant's obligation to prove the no discrimination took place.²²⁸

In cases concerning reasonable doubt, the Law on the Elimination of All Forms of Discrimination adopted in 2014 distributes the burden of proof between the parties according to international standards.²²⁹ The provision of the burden of proof regulation had already been modified with the 2013 changes to the Labor Code. So, the burden of proof in discrimination cases falls on the employer. If the employee alleges that the circumstances provide reasonable doubt to believe that the employer was acting in violation with the requirements of Article 37, Para. 3 of Article 37 of the Labor Code, "b". This article prohibits the termination of a labor contract on discrimination grounds. Despite the fact that this passage significantly reduces the burden of proof for victims of discrimination, it only covers issues related to the termination of an employment contract and does not include pre-contractual relationships or sexual harassment. Germany holds a different approach and its legislation covers the burden of proof on all aspects of labor legal relation issues. Article 13 of the equal treatment act states that an employer has the right to file a complaint against a particular firm, company or organization when he sees discrimination occurs against his or her employer, supervisor, employee or third party.²³⁰ The complaint has to be investigated in a timely manner and applicant must be informed about the decision.²³¹ The "Law of equality of men and women" of Finland takes on the same approach towards the burden of proof as its German counterpart. In addition to the obligation for dissipation of discriminatory doubts, the employer must explain and prove that the action was

²²⁸Council Directive 2000/78/EC, Art.10.

²²⁹ Article 8 (1)

²³⁰General act on equal treatment, Art.13 (1).

²³¹Ibid.

reasonable and not made on gendered grounds. However, this provision does not apply in cases of discrimination that are so severe they constitute a criminal offense.²³²

According to Article 15 of the German "Law on equal treatment" the employer is obligated to compensate the damage caused by discrimination, except in cases where the employer's guilt is not clear. In such cases, and where the damage do not involve financial losses, the employer has the right to demand appropriate financial compensation.

According to Finnish legislation "Any person who has violated the non-discrimination provision, is obliged to compensate the damage caused by this action".²³³ We cannot find any similar records in the Georgian legislative acts that regulate labor contract relations. This contributes to the development of a practice of impunity and essentially stops the elimination of discriminatory facts.

When the Georgian "Law on Elimination of All Forms of Discrimination" was accepted in 2014, changes were also made to the Civil Procedure Code of Georgia. A seventh chapter was added, which defined rules and procedures for victims of discrimination on how to apply to a court with a petition.²³⁴ According to these amendments, "any person, who considers themselves the victims of discrimination, has the right to bring a petition to the court against an alleged discriminating person/institution".²³⁵ S/He also has the right to require the termination of discriminatory behavior and/or the elimination of its consequences as well as compensation for moral and/or material damage. However, it is doubtful whether a victim of sexual harassment can invoke these norms if the "Law on Elimination of all Forms of Discrimination" does not contain a specific provision on sexual harassment. Of course it is possible to consider his under the general definition of discrimination, but in this case, the burden of proof in a sexual harassment claim cannot take place without a comparator, which can be seen as a drawback of the substantive law (similarly to the Labor Code). Consequently, the general prohibition of sexual harassment and discrimination is a hindrance to the identification of facts and proof.

²³²The act of equality between women and man, Art. 9a.

²³³ Ibid, Art. 11 (1)

²³⁴Code of Civil Procedure of Georgia, Articles 3631-3636.

²³⁵ Ibid, Article 3632 (1); (3 (a, b)).

4. Assessment of experts and human rights advocates

(Qualitative research)

Sexual harassment in the workplace is one of the most taboo subjects of discrimination, even after its identification. Victims often refuse to go to court because they have no hopes of winning the case or try to avoid a life-long stigma.

LBT (lesbian, bisexual and transsexual) women constitute a high-risk group for sexual harassment. According to the representative of a human rights organization a typical case of harassment ends in either psychological trauma for the woman or in losing her job during the aftermath. Unfortunately, not only the employer but the entire staff is involved: “When they heard about the [LBT] orientation of this woman, she didn’t say, but they found out anyway and forced her to flee [to quit her job on her own initiative]. Her dismissal was not direct. They just stopped greeting her, turned their backs on her, never spoke with her. So, she said it was impossible to work in such a situation. She was forced to leave, but we could not convince her to take this case to court.” According to this person, such situations are common and people become so depressed that they even give up fighting for their rights. This is why they hide their gender identity in the workplace.

Following MP holds some interesting views on the subject of sexual harassment:

“Sexual harassment, as such, is not written in the law and the term is not used in any relevant Georgian legislation. There are series of articles in the Criminal Code regarding sexual offenses, including in relation to work responsibilities, but the term “sexual harassment” is not established in the law yet. The scope of this action should be reflected and explained in the disposition. By the way, the Committee against discrimination and several NGOs have also suggested us to establish, formulate sexual harassment as a crime. But if we consider it a crime, the offender is not obliged to prove his innocence. In this case, the burden of proof is on the prosecution side and the prosecution will have to prove that he is guilty.” The Head of the Trade Union Federation talks about how the trade unions successfully advocated a case of sexual harassment of a woman. According to him, there was such a case in one of the plants:

“A very serious fact had taken place and a woman wrote to us that her boss was obscenely abusive towards women, and particularly to her. This woman retorted and when in 2013 her contract expired, it was not extended following January. This coincided with the start of large-scale strikes and we tied this issue of this woman to the other issues. The background was so clear that the administration reinstated her; the reason for this was that I submitted evidence to the Director-General.”

Conclusion

The extremely small amount of cases of sexual harassment demonstrates the secret nature of this form of discrimination. This research shows that at this point even the definition of the concept is problematic. Therefore, under inaccurate conditions there is no adequate legal response mechanism. Clearly, the reason of the non-existence of defense and notification is the impossibility of proving the fact. In turn, NGOs also note that since there is no expectation of a positive response from the state on similar cases, they cannot encourage victims to speak publicly about it and put their own reputation at risk. The issue will continue to break ice for the improvement of the legislative framework through advocacy activities of NGOs and trade unions. Therefore, it is important that the anti-discrimination law also includes a separate clause on sexual harassment that provides victims with the possibility to submit proof of the facts and claim compensation.

III. Analysis of the court practice

In addition to the analysis of existing legislation framework, it is also important to review judicial practices. Article 42 of the Constitution applied to the Tbilisi Court of Appeal and requested the decisions/judgments made by the chamber of civil and administrative affairs between September 2013 and July 2014 regarding quashing the order of dismissal and severance pay for a recovery in demand and truancy issues.

We received nine rulings of the Chamber of Civil Affairs from the Tbilisi Court of Appeal and 32 rulings of the Chamber of Administrative Affairs in a hatched form.

The first difficulty in the study of court decisions lies in requesting this information since an electronic system is only available for judgments of the Supreme Courts. Considering the specifics of the Supreme Court of Appeal, it was doubtful much information would be available.

The second difficulty relates to the decisions by the City and Appeal court decisions. The Court of Appeal informed us that for the given period they had 229 judgments fitting our criteria; 111 judgments by the Chamber of Civil Affairs and 118 by the Chamber of Administrative Affairs. However, we only received 41 judgments (nine judgments by the Chamber of Civil Affairs and 32 judgments by the Chamber of Administrative Affairs). It is not clear why these specific 41 decisions were chosen.

Third difficulty – content wise and substantial. We had a suspicion that due to the hatched nature of the rulings the applicant's gender could affect the research. However, there was no need in any of the above cases to address the court in a written form and request to specify the gender of the applicant.

The fourth difficulty was that we allocated a separate request for maternity-related wage arrears disputes and discrimination cases. However, not one court decision was found according to the specific criteria. There was only one decision on a discrimination case and one that was related to maternity leave.

Our study was already completed, when we were informed about one more decision related to maternity-leave. This was the Supreme Court decision in the case of Nino Maisuradze. Although the decision did not constitute direct discrimination, we believe that the analysis of innovative ideas and arguments in this decision would indirectly affect the general research issue and we decided to analyze the Supreme Court's decision in Nino Maisuradze's case. We believe it would be appropriate to analyze all three decisions in a separate part below.

We divided the analysis of the court decisions into two parts: decisions with reduced legislative standard (Part I) and decisions made in regarding the prohibition of dismissal without reason (Part II).

Part I - Decisions with reduced legislative standard

In this part, we consider the court decisions in labor disputes during the period from January 1, 2009 to June 13, 2013, before the new Labor Code came into force.

The list of decisions

The search was carried out with the search engine of Supreme Court of Georgia (January 1, 2009 - June 13, 2013) and using the general criterion - civil and administrative - labor legal dispute. The search resulted in 421 civil cases (331 Cassation complaints, 80 private complaints, six newly discovered circumstance, two labor legal disputes over annulment, one provision).

The key-words 'discrimination' and 'dismissal' each only got one decision.

The Trade Union of Georgia also provided labor dispute cases they were involved in over the past five years.

Additional research has been carried out across the country on 49 decisions related to women's complaints concerning labor disputes; including ten cases before the Supreme Court of Georgia, 18 before the Court of Appeal (both Tbilisi and Kutaisi), 12 before the Tbilisi Municipal court and nine before the District Courts of Georgia (Kutaisi, Batumi, Gori, Sighnaghi, Telavi, Kvareli).

Actual situation

The majority of the studied cases referred to a job dismissal from the job under Article 37, Section "d" of the Labor Code – breaking of the labor contract. Only rarely, there was a demand for damages suffered after a breach of contract, dismissal of women on maternity leave or salary-related disputes.

In cases where the employment contract was terminated on the basis of Article 37, Section "d" of the Labor Code, labor disputes lost their meaning. The Court does not consider the merits of this dispute, because the contract is terminated based on the unconditional cessation of labor relations. In this case judicial review makes no sense, because the norm of the law does not allow the examination of the judicial grounds of cancellation.

Consequently, this an important factor : the number of labor disputes has decreased sharply in recent years, citing the need to consider the fact that until recently, the Labor Code gave a clear advantage to the employer.

Legal Analysis

The right to work is closely linked to the prohibition of slavery and forced labor provided in Article 4 of the European Convention (case - Siliadin v. France, decision from 2005 July 26 of the Strasbourg Court). European Human Rights Court case law also prohibits manifestations of discrimination in labor relations (case - Schild v. Germany, 1999 July 18 ruling, the Strasbourg Court).

Typically, a labor dispute in Georgia only starts after the dismissal. Consequently, we have studied an absolute majority of the cases concerning the annulment of dismissal, restoration on the job and the reimbursement of salaries. Only two of the plaintiffs demanded compensation for moral damages.

We did not examine any disputes arising from any other grounds of the Labor Code, other than dispute cases with a request for restoration and reimbursement. With the exception of a few cases, where compensation for maternity leave (one case) was requested, and the annulment of a decision made in a competition for directors (one case).

None of the studied case showed any aspects of dismissal on grounds of discrimination, except in one case where a party considered himself to be a victim of political discrimination.²³⁶ None of the claimants indicates gender as a possible motive for release.

²³⁶The case of #as1177-1322-08 03.09.2009.T.M.'s vs. the National Forensics Bureau. The Court of Appeal rejected the claim the following reasons: were not shared by the appellant's motive, that he was subjected to labor legislation prohibited discrimination, since it creates unequal conditions have been treated with other employees with respect and pointed out that the Labor Code 37-38 of the Act the same conditions for all workers. The court found that the defendant, and the specifics of the type of work, free choice of the counterparty and, therefore, the plaintiff his release shall not constitute discrimination. The Court noted that Article 37 of the Labor Code,, d "on the basis that the defendant was not obliged to indicate the background. In addition, the Labor Code does not provide for termination of the contract of employment of the employee during the notification obligation. The appeals court ruling on the appeal was upheld in part, the same court annulled the contested decision and returned the case to discussion: the motives of discrimination, the Court explained that the plaintiff has the

The position of employees in labor disputes is clear. They are complaining only when they are dismissed while in all other occasions they are accepting all the conditions due to the fear of dismissal. Furthermore, for years the Labor Code offered employers the opportunity to dismiss their employees without any ground – breach of labor contract.

The majority of the cases referred to dismissal from the job within Article 37, Section “d” of the Labor Code – breaking of the labor contract. Rarely, there was a demand for damage compensation for contract breach or disputes related to dismissal during maternity leave or salary-related disputes. When a case of dismissal was illegal according to the Labor Code; disputes on late wages take place as well.²³⁷

Article 37 cannot be used by employees of public entities. The chamber of the Supreme Court issued a recommendation that even though legal public entities are engaged in public work, labor disputes regarding legal public entity staff should be put under the Labor Code and not under the Law of Georgia on Public Service entities.

The labor rights of public authority officials and their employees working in Legal Entities of Public Law, including schools, must also be protected; just as the rights of public servants. Unlike the private sector or a private entrepreneur, a legal entity does not have the right to dismiss an employee without a legal basis.

Claims with a request of reinstatement are not granted because Article 37, Section “d” of the Labor Code gives ground for the unconditional dismissal of an employee, neither does the law allow the judge to examine the legal basis of the dismissal. Therefore, based on Article 408 of

burden of proof lies. In case, if the exemption is not the type of work, must be confirmed by the plaintiff. Otherwise, the dismissal can not be considered as discrimination.

²³⁷Case # 1106-1068 (-08 C) 10.03.2009.T.S's lawsuit against the Social Protection Agency. Circumstances of the case: The plaintiff is the musician of National Symphony Orchestra of the Music Center of the cast. In 2005 she gave birth to the first child, the second child in 2006. Was on maternity leave, which could amount to a 6-month period of the agency, because of childbirth complications followed. Tbilisi City Court on 3 October 2007, the claim was rejected on 25 August 2006, the Minister of Health # 231/6 of the time-barred. May 7, 2008 ruling of the Court of Appeal's t.s appeal was rejected. The decision of the Court of Cassation upheld the plaintiff's appeal, annulled the contested decision and the claim was accepted. The Court of Cassation different legal assessment of the findings of fact and concluded that the employer's obligation - the plaintiff's application was sent to the National Agency, performed later, which does not have to become a plaintiff's request of conditional basis, because he filed an application with the employer submitted on June 11 2007, when the six-month period was due to expire on June 12, the plaintiff has the right to sell the employer's statutory 6 month period.

the Civil Code, the defendant bears the compensation of damages, which mainly includes the amount (wages) that were supposed to be paid to the employee before the expiry of the employment contract.

When a contract is terminated on the basis of Article 37, Section “d” of the Labor Code disputes no longer make sense. The Court does not consider the merits of this dispute because there is a contract breach on the basis of unconditional cessation of labor relations. The law does not even allow a judicial examination of the cancellation grounds.

The Labor Code does not include standards regarding reinstatement or reimbursement for the lost days. However, the plaintiff can request this via Article 408 of the Civil Code. Then, the employer must continue the employment contract for the term for which the person was originally hired or in other words restore the original state. Unfortunately, court practice in this regard is not uniform. Some judges use Article 408 to reinstates people or to continue the term of the contract, others refuse to do so and only accept to compensate the damages.

Labor disputes have fallen sharply in recent years, which proves that, until recently, the Labor Code took the side of the employer.

Conclusion

Two aspects were revealed:

- 1) The reduction of the legislative standard; and
- 2) A surplus of arbitrary and illegal decisions made by employers and public sector officials
For example, a change in administration automatically leads to de facto dismissal of civil servants, which is contrary to the basic principle of public service - staff stability and leads to disregard of the experience.

In addition, we believe a progressive and important decision was made in case #1261-1520-09 on March 23, 2010.²³⁸

²³⁸M.Sh. suit vs. a public school in the village of Bolnisi. Subject of the dispute: the annulment of the order of dismissal, reinstatement on position, salary reimbursement.

This case is important in terms of interpreting Article 37 of the Labor Code. Lower courts have found that the only obligation imposed on the employer in the case of contract breach is to pay one month's salary, while the decision did not impose as an obligation on the employer.

The Court of Cassation remitted the case to the Court of Appeal to discuss the case again on the following legal grounds:

According to Article 2, Section 6 of the Labor Code, parties must abide basic human rights and freedoms defined by the Constitution and legislation of Georgia. Labor agreement constitutes the special reflection of the relations in the framework of the obligations and it differs from the private law contracts by the circumstance that one of the most important principles of private law - the equality of the parties is being modified and the employees depend on the employers' will, on their orders and on the working and organization conditions set by the employers. Thus, the relationship between the employers is clearly outlined as a predominantly "weak" side – the employee, which will undoubtedly lead to the use of threat by the "strong" party.

This kind of "imbalance" that establishes the standards of the employee's rights via a conjunction of international acts and norms of the Constitution of Georgia. The court based its conclusion on Article 4 of the European Social Charter, Article 6.2 of the ICESCR; and Article 22 of the Universal Declaration of Human Rights. It concluded that there is an alternative to determine the state's obligation regarding the minimum protection of labor rights and to its objectives to change these standards solely in the employee's favor by improvement of the economic situation within country.

The Court referred to Article 24 of the European Social Charter "a" which obliges the parties to recognize the right of all workers to stop employment without valid reasons, which should be based on their capacity or conversion, as well as the rules and regulations of the enterprise.

Part II - Decisions made on unjustifiable contract terminations

This section of the research discusses the decisions of courts that were taken in labor disputes in the period June 13, 2014, to November 20, 2013. In other words, since the new Labor Code has come into force.

The list of decisions

The Tbilisi Municipal Court provided 150 decisions, including 100 judgments by the Chamber of Civil Affairs and 50 judgments by the Chamber of Administrative Affairs.

We received 42 judgments from the Tbilisi Court of Appeal, nine judgments by the Chamber of Civil Affairs and 32 judgments by the Chamber of Administrative Affairs.

In the search engine of the Supreme Court of Georgia no cases were found using the key words “labor disputes” for the period January 1, 2014 until present.

The research also covers sexual violence against women in the workplace, but Georgian legislation does not particularly mention this in a separate article. The search criterion for criminal cases was thus “paragraph 137 of the Criminal Code of Georgia.

The search engine of Supreme Court of Georgia gave nine hits over the past five years for the keyword “rape”, but gave no results for “sexual violence”.

Factual Circumstances

The new Labor Code was accepted on June 6, 2013. This Code amended Article 37 and now defined the grounds for dismissal. Also, the statute of direct prohibition of discrimination was added. The third section of the law considers it unacceptable to dismiss an employee on the bases of any other reason that is not explained in the law.

In order to concretize our study and with our research priorities in mind, we requested Tbilisi Court of Appeal for decisions that were made after the new Labor Code came into force. For the Tbilisi City Court these are decisions made between June 2013 and present; for the Court of Appeal this is from December 2013 until present.

The studied decisions consider the annulment of dismissal orders, reinstatement and compensation for lost wages. The judgments made by the Chamber of Civil Affairs of the Tbilisi Municipal Court showed a trend that the court is not willing to discuss the actual motives for the dismissal in labor dispute cases. It only examines the procedures for dismissal. The factual

and legal grounds for cancellation of the appealed decision implies a study of the procedure. (Case #2b/6165-13, 2014; January 15, 2015; Chamber of Civil Affairs of the Tbilisi Municipal Court).

In addition, we took a look at two decisions made by the Chamber of Civil Affairs in labor dispute cases.

1. Decision of the Chamber of Civil Affairs of the Court of Appeal; July 23, 2013 #2b\1736-

13.²³⁹

The Civil Chamber found that “during discussion of the labor dispute, the Court must assess whether a violation of the rights of parties occurred as a result of any legal acts; to determine whether a violation of the principle of equality or discrimination took place etc. This is an impossible task if the court is not aware of the reason for terminating” (pg. 16).

According to the Chamber’s evaluation, Article 37, first section, “d” sub-point of the acting Labor Code cannot be interpreted as the employer’s unilateral right to dismiss employee without any grounds. “Such opinion contradicts the general principles of labor legislation, particularly Article 2 of the Labor Code – “a labor relationship is based on the equal rights of parties” – and with Section 3 of the same article - “discrimination of any kind is prohibited” (pg. 16).

Article 37, first section, sub-point “d” gives parties the right to break off the contract, but this right “is not unlimited. It is not an absolute, unlimited civil right and has always been limited to the lawfulness of its implementation”.

We consider it to be very important that the Court of Appeal considered ensuring the lawful implementation of the civil right as the primary task of the court: “In case of any dispute, as a rule, the court should first of all verify the legality of the use or performance of obligations by the parties and then assess the appropriateness of the requirements applied to court by parties. Otherwise, the right to apply to court becomes senseless. And to assess the legality of

²³⁹ The subject of dispute decision is compensation of wage for missed period.

using the right it is necessary to assess lawfulness of the circumstances which led to its usage” (pg. 16).

The appellate court found that not only the appointed right should be followed during the decision of labor disputes, but other human rights and freedoms regulated by the constitution and other legal acts as well. Violations of these rights cannot be assessed without knowledge of the grounds for termination of the contract (pg. 17). In the given case the ground for dismissal was Article 37, first section, sub-point “d” of the Labor Code. In other words, the contract was terminated by the employer’s initiative, based on the unilateral will of the employer and without a reference to any factual basis that “contradicts to international legal acts and Constitution of Georgia, as well as to principle of equality of parties considered by Georgian Labor Code” (pg. 17).

The Court of Appeal ruled in favor of the plaintiff's request for compensation for the missed period.

2. Decision of the Chamber of Civil Affairs of the Court of Appeal; January 10, 2014; #2b\5149-13.²⁴⁰

The author of the appeal states that the decision was not beyond his will, because he was threatened and psychologically oppressed, was and then forced to write a letter of dismissal. The psychological pressure prior to his dismissal is much harder to prove than physical pressure, but the claimant considers that “in the given case, there are a number of circumstances to form the judge's inner conviction”. These, however, were not considered by the court.

It appears that the “side of the opponent forced witnesses to change their testimony via psychological pressure. The witnesses, who gave a written testimonial before, changed these during the court hearing” (pg. 6).

²⁴⁰ The subject of dispute decision is annulment of dismiss order, restoration to job, compensation of wage for missed period.

The Court of Appeal upheld the decision of the lower court and on the basis of Article 86 of the Civil Code of Georgia concluded that “the circumstances of factual evidence (threats, psychological pressure) are not presented in the case”(pg. 10).

We did not find any case law regarding discrimination of women in the workplace, whether as a direct or indirect reason for dismissal.

Conclusion

The existent court practice does not provide the possibility of the in-depth legal analyses of the gender discrimination facts. All we have to do is to define the causes of non-existence of the court practice in this regard.

We consider that the first factor concerns the legal nature of discrimination based on gender; the second factor is the ‘indifferent’ attitude of the court regarding nature of dismissal, even in cases of voluntary written statements. As a result, we can make several conclusions:

1. As a rule, the court keeps within the frames of the arguments made by the parties;
2. As a rule, the courts keeps within the examination of procedural norms in labor dispute cases;
3. Parties do not talk about discrimination. They do not consider discrimination as the reason for dismissal, or they do not know or they believe it will not be helpful. In addition, they do not identify discrimination as a criminal offence.
4. The role of the attorney in defining his/her rights in terms of discrimination.

Legal analysis

As mentioned above, in the absence of judicial practice, we believe it is extremely important to analyze two, in our opinion very significant, court decisions on gender-based discrimination that are powerful court precedents. On the one hand, it includes a scientific analysis and on the other gives a precise explanation of the principles and approaches courts should take into account while dealing with disputes regarding the labor rights of women. Moreover, the

remarkable decision of the Supreme Court in the Nino Maisuradze case summarizes not only the procedural side of labor disputes but the essential context as well.

I. Decision of the Chamber of Civil Affairs of the Court of Appeal from September 16, 2014.²⁴¹

The Chamber of Civil Affairs explained that during a discussion of a labor dispute on dismissal, the court must examine whether or not the employer acted lawfully. The clarification of the termination of the contract can only be specified as a result of research on the grounds for dismissal.

The Chamber notes that the burden of proof in civil proceedings is distributed fairly and objectively. The standard of objectivity and fairness of distribution of the burden of proof stipulates the determination of the circumstances enshrined in the subject of proof of the plaintiff and the respondent. In that case the possibility of realizing the right to provide the evidence by the parties is taken into account. This principle is based on positive proof in the event of a lack of negative proof. It should be noted that the labor disputes have peculiar characteristics in terms of the distribution of the burden of proof. The plaintiff, an employee who appeals that he has been illegally dismissed, could not confirm that his dismissal was illegal. Accordingly, the plaintiff's indication that he was illegally dismissed puts the burden of proof back with the employer. This conclusion follows from a basic principle, namely, that the employer has an advantage. He brings evidence to the court evidence that is favorable for his case; that the worker violated his labor responsibilities. The employee, on the other hand, will not be able to provide evidence stating that he performed his obligations dutifully.²⁴²

²⁴¹ Subject of the dispute: the annulment of order on dissolution of the labor contract, restoration to work, and recovery of lost wages. In accordance with the impugned order cause of a labor relations. Sitting as a labor contract and bylaws by its obligations, its qualities and skills with the requirements of the employer.

²⁴² Accordingly, in this case a defendant is required to confirm the relevant evidence. Sitting as a violation of the contractual obligations. These considerations, the Chamber examined thoroughly documented report of the essential facts, and the court came to the conclusion that h. Q. from the attempt to commit an unlawful act was not due to a fault. Sitting as the omission or improper performance of official authority by indifferent treatment, since the applicant has not committed any misconduct, which could become the basis for his dismissal. The Chamber dismissed the appeal and annulled the contested decision.

Legal assessment

From a legal point of view, it is very important that the employer uses his rights in good faith. Although the employer is entitled to terminate the labor relationship with the employee, it is necessary that these rights are implemented properly in accordance with the law and in compliance with the ruling of precision. "This is of particular importance in terms of labor legislation by the ultima ratio principle. This means that the employee's dismissal should only be used in cases where the employee had committed the offense of contract breach. This conclusion is based on the principle that prioritizes maintaining labor relations over dismissal."²⁴³

II. Another decision of the Supreme Court is directly related to the dismissal of a woman on maternity leave and is of special interest to us because we believe that the Supreme Court developed a higher standard of labor rights protection here.

The decision of the Administrative Chamber of the Supreme Court, from February 18, 2014 on the Nino Maisuradze case²⁴⁴ is of precedential importance.²⁴⁵ On the one hand, it analyzes the

²⁴³ Consequently, although the Labor Code, Article 37 of the "c" according to (on 18 June 2013, in particular, a. Sitting as the release time of the current edition), labor relations, termination of the employment contract of a violation, however, is the Regulation logical and meaningful definition. The Chamber emphasizes that if the only set of the literal definition of rises, then any violation, even minor, a person can become the basis for dismissal, which is unacceptable and contrary to the constitutional principle of the protection of labor rights. Accordingly, each violation committed by an employee of its commitment to be assessed frequency, severity, and most importantly, in terms of cause and effect. Consequently, the labor law requires an employer to an employee of ultima ratio's dismissal of his action in terms of cause and effect assessment, In which case, the question must be answered - is whether the release of the violation (misdemeanor) adequate? It is noteworthy that the same principle, the employer's violation (misdemeanor) commission shall be used such measures as the situation will improve, improve, make better workers, raising the qualifications, more prudently and should be tackled in force. Accordingly, in terms of feasibility, the violation shall be elected through proportional punishment mechanism, which is cause and effect, in addition to the punishment of the offender, it will create incentives for more effective labor and other employees. Thus, in order for the dismissal of an employee from the employer adequate, necessary and proportionate measure to be considered, it is necessary to be a serious violation of the face, which makes it inappropriate for other lighter sanction.

²⁴⁴ The case subject: annulment of the individual legal act, restoration and compensation of lost wages. N. Maisuradze Kareli was released from the Kareli territorial district government unit agencies, on 8 January 2013, at a time when she was going to use maternity leave due to the pregnancy. Nino Maisuradze was forced to write a letter of resignation on the grounds that the new governor would appoint him to re-position. Then she was refused the appointment. In this case, there were a lot of reasons, which was a reasonable assumption that N. Maisuradze did not correspond to the genuine will to write a resignation letter. However, the first two court rejected her claim.

characteristics of dismissal of public service employees on maternity leave, and on the other hand, offers a code of conduct for high-ranking officers in public service.

The present decision reveals some important standards. Below we will discuss each one of them separately:

The Supreme Court decided that the presented case ²⁴⁶ is important in several respects, as the Court of Cassation has to legally assess the following:

1. Forms of relations and its legal consequences based on the norms of the law on “Public Service” in a legal dispute between the public authority and a public servant, as well as the quality of using legal institutions and standards set by international and national legal acts.
2. Public relations should be interpreted within labor rights and obligations, and assess the latest trends in a number of public institutions and practice.
3. In European countries the labor rights and specifically women’s labor rights constitute the special protection category. The cassation court should discuss the level of protection of women's labor rights in the public institutions. It should be assessed how the Georgian public administration and the judicial system correspond to the international obligations both from the normative and practical point of view.

²⁴⁵ In this case, the Supreme Court granted the development of uniform court practice and the work has changed the decision of the lower court ruling in 2014.

²⁴⁶ The factual circumstances:

1. Appellant, the court pointed to the undisputed factual circumstances in the fact that the dismissal of an application to write to threaten her, or forced to write a letter of refusal was not a hint of the possible outcome. The court did not recognize the factual circumstances that the officer had been deceived, in particular, as if it was compulsory to write a resignation letter, had only a formality and they were subsequently re-appointment. The appellant's view, the fact was intended to further the application of the exemption. Appellant notes that not lie, she do not write the statement. Consequently, the local district court did not apply the law, which is to be used and applied the law, which is not to be used.
2. Gave incorrect assessment of the evidence and decided the case based on evidence that was not the strength of the evidence.
3. On appellant indication, although witnesses by the court testimony was false, court evidence the force of only their evidence, did not consider any of his explanations and any records where the acting governor said that all the employees to write a statement, the decision on.

4. The rule of preparing and issuing the dismissal orders in public service and the standards of the decision making should be defined in the labor relations.

5. The legal assessment should be made to decide whether the declaration of intent made by the civil servant is actual.

The Court of Cassation found that:

1. The heads of civil servant departments should base their decisions not only on administrative law, but on international standards and other legal institutional acts as well.

2. Writing the letter of dismissal is the demonstration of public servant's will, however, it should be done freely, without any restrictions, protected from any improper influences. Hence, the question of free expression of one's will is subject to investigation and analysis.

3. The cassation court deems that the content of the disputed legal relation²⁴⁷ needs the generalization of the discussion on to what extent the women's labor rights are protected at the public institutions in particular. Also, it should be discussed how the public administration system of the Government corresponds to the obligations towards the international community both from the normative and practical point of view as far as in the developed world, as well as according to the European standards the women's labor rights constitute the special protection category.²⁴⁸

4. Following the legal significance of the case,²⁴⁹ which it considers extremely critical for lower courts, judgments and assessments, the Court concludes:

The judiciary, through the administration of justice, has two very important constitutional functions in its essence:

²⁴⁷ In the present case, the applicant government employees were women, who had seven months pregnant, who wrote a letter of resignation to the condition, which is forced by the authorities to be satisfied.

²⁴⁸ Cassation Court, that this point of view, the recommended guidelines for court judgments and estimates are still not reflected in the judicial acts, which is why it will contribute to the establishment of a common judicial practice, also useful for the practice of the civil service system and strengthening the rights of public servants.

²⁴⁹ The Court of Cassation court said that the case has been studied by the Public Defender. As a result, the Municipality Council to recommend,, the dismissal of pregnant women, "and concluded that there had been a government official in the case of a pregnant woman,, by international conventions and local legislation of the procedural and substantive violations". Refer to info. pg. 35-41/

- 1) The legal and fair resolution/solution of a conflict (dispute); and
- 2) Judicial control over the decisions and actions of the authorities, which in turn serves the legal and democratic state and the law governing public services.

The Court is required to provide reasonable control over the administrative authority's discretion. All administrative acts should be subject to review by a judge;²⁵⁰ the judge will be independent and competent in his decision-making, provide access to the legal proceedings and decision must be made and executed in a timely matter.

Judicial control over the decisions of administrative bodies ensures the restoration of the violated rights and establishment of the rule of law, putting the activities of the administrative body within a framework strictly regulated by the legal norms, realization of effective protection, etc.

According to a modern European legal trend, the state must guarantee the control of administrative acts, fully abide by the law and at the same time, ensure the efficient operation of administrative authorities. If there is an imbalance of powers between the public administrative authorities and individuals, the rights of persons violated by an effective control of the administrative body must be restored. No one can speak of the rule of law, when the state itself together with its administrative bodies do not obey the law.

In conclusion, the Court of Cassation noted that an impartial, objective and fair administrative justice system has an important role to play in the development of rule of law in Georgia. Moreover, an effective judiciary should make irreversible democratic values and respect for human rights, putting the government and the self-governing bodies within the legal framework and should raise the authority and trust of the governmental institutions.

²⁵⁰ It should be noted that the Council of Europe and Central and Eastern Europe legal cooperation within the framework of multilateral meetings organized in 1996. 13-15 November in Madrid meeting conclusions of the administrative acts to control the democracy and the rule of law one of the basic requirements have been considered, since the state and its many administrative body regulating or individual acts regularly affects their jurisdiction issues and direct impact on human rights in the European Convention recognized human rights and freedoms.

The cassation court considers that taking into account the interest of justice, in the identical legal disputes the task of the judicial authorities is the differentiation of the cases when a person's will is formulated by his/her attitude, perspective plans, the quality of self-esteem and etc, and when the will is determined on the one hand by a) the low awareness of the obligations stemming from the civil service and the unconditional obedience to the administration; b) self-interest (promotion, raising of the salary, bonuses, etc) and on the other hand by a) compulsion of the public servant, threat and using his special condition (health, difficult social conditions, marital status and so on). It will be impossible to realize the right to judicial defense without finding the above facts.²⁵¹

The Court of Cassation deems that putting the pregnant women and their rights under the special legal protection regime by the international acts is conditioned by objective conditions. The life, health and psychic of a pregnant women is the matter of special care. Pregnancy (gestation or gravidity (med. Terminology) – the physiological process in a women's body lasts for 40 weeks that is a special period not only for a woman but also for the entire family since the changes that occur in a pregnant women's life is reflected in their lives as well. The changes of the body as well as the psycho-emotional sphere takes place during all trimesters of pregnancy.

Special medical literature and scientific research dedicated to the special status of pregnant women confirms the need for specific dependence of the system, including from a legal point of view. Pregnant women, as a special category of a woman, provides for an exception to the standard in virtually all areas of the law, including in labor legislation. Under the civil code it is prohibited to divorce from a pregnancy wife. Without the consent of the wife, the husband cannot request a divorce until one year after the birth (Civil Code Section 1123.2). Criminal law considers it a crime committed against a pregnant woman, pregnancy being an aggravating circumstance. On the other hand, for a woman pregnancy can be a mitigating circumstance (Criminal Code).

²⁵¹ The Cassation Court ruled that the lower courts had not examined the case, and have discussed N.M. will of freedom, the respondent administrative authority and the legality of the decision by the developer polls special protection of pregnant women complete disregard of international standard.

The Court of Cassation considers that due to the changes of the psycho-emotional sphere in the woman's organism during the pregnancy the examination of her will should not be a standard procedure but should be subject to individual assessment. The sharp increase on women's sensitivity during the pregnancy has an impact on her mood. That is why while defining the factual circumstances the administrative bodies well as the courts should discuss not only the coercive nature of the will but also how it is profitable for her and the child's interests. Therefore, the will of a pregnant woman needs an in-depth specific examination – what are the reasons of the desire to be dismissed from work, what will be the consequences for her and the child's interests, whether she fully understands the results of her decision.

The Court of Cassation notes that the above decision should in no way be understood as if the expression of the will of a pregnant woman or a nursing mother differs from the expression of the will of a legally capable person. The special legal protection standard of pregnant women should be expressed by specific distribution of the burden of proof from the procedural point of view.

The national courts have to link the verification of a pregnant woman's will to the standards of the legal order to establish and realize in practice the international standards. For the legality of public administration the careless, indifferent and intolerant attitude towards the pregnant women's rights is absolutely unacceptable.

According to the above-mentioned, procedural legal mechanisms for studying and establishing the factual circumstances of the case in every labor dispute should address whether the inner desire and its expression coincide while forming a person's will, also whether his/her goal is to leave the labor relations and if the administration's (employer's) right to satisfy a person's request for dismissal is used properly.²⁵²

In conclusion, yet another point of the above ruling should be discussed: the Court of Cassation noted that the administrative procedure implies the obligation to deliver a lawful and reasoned

²⁵² The Court of Cassation said, because the administration did not dispute the N explored. M desire, can not be forced by the decision on the application complied with the law.

ruling by complying with all the procedures prescribed by law, which in turn serves the achievement of the lawful public administration standard.

IV. Conclusion

At the beginning of the presented research, we mentioned that the goal of our report was a comprehensive study of the issue and respond to the questions in advance.

Discrimination against women in the workplace and the qualitative survey (Annex), as well as the analysis of legislation and judicial practice has allowed us to draft some conclusions and the recommendations.

1. Qualitative research results and court decisions indicate that the current wording of the legislation does not provide for the protection of women against discrimination in the workplace. Nevertheless, the court observed a very low number of discrimination victims because of women's low awareness of their rights and the lack of legal aid services.

2. The results of the legislative analysis identified that the Government of Georgia does not adequately address the problem of discrimination in labor relations. It is necessary to develop methods that will break down gender-based labor segregation as well as traditional gender roles and stereotypes. To this end, it is important to share international best practices and European standards that can be adjusted to Georgian reality.

Equal participation of women and men in the labor market, women's emancipation are necessary to fully exploit the relevant agencies to consider a number of recommendations.

Gender inequality in Georgia is recognized as a reality, but not as a problem. It is considered a part of cultural heritage and therefore, any attempt to reduce it is perceived as a danger to traditional values.

Gender equality in Georgia and women's economic empowerment is very important and it is necessary to strengthen its real mechanism.

V. Recommendations

1. Add a separate article on the prohibition of discrimination in pre-contractual relations to the Labor Code and the Law on Public Service. Separately, norms that strengthen the gender protection during the application and interview stages should also be defined; this will obligate employers to formulate job announcements in a neutral way.
2. Protect candidates' private life and develop a set of specific questions at the legislative level which will exclude asking questions that are irrelevant and unnecessary in order to reach a decision about the employability of a candidate. In particular, questions about marital status, pregnancy, family planning and other personal questions.
3. Impose the obligation on the employer to, upon request of the applicant, present the reasons on which s/he based his/her decision to select another candidate for a specific job opening.
4. Regulate the issue of the employer's responsibility in case of a violation of the norms that ensure gender balance during the pre-contractual relationship in the Labor Code.
5. Modify the note about burden of proof; it should not only cover dismissal but the pre-contractual and labor relationship as well.
6. Develop awareness-raising campaigns on discrimination and the prevention of discrimination.
7. Define the right to equal pay for equal work in the Labor Code. In addition, the Labor Code should give a definition of equal pay which will allow specific references to made to this article in the future.
8. Alleviate the working conditions of a pregnant woman in case she, or due to medical reasons, desires so. It is inadmissible for a pregnant woman to work in the same conditions as she did before.

9. Consider medical examinations as a valid reason for missed working hours. While women working in the public sector already enjoy this right, women in the private sector do not.
10. Provide employees with up to three months of paid educational leave per five years.
11. Equalize the status of women employed in the private sector with the status of women in the public sector regarding pregnancy, childbirth, childcare, maternity leave and compensation.
12. Maintain the position for an employee with a child younger than three years.
13. Carry out activities that are aimed at the professional development of employees returning from parental leave.
14. Define the status of a “single mother” and of a “mother with a large family” which establishes additional guarantees for them.
15. Establish the right to maternity leave for mothers who had a baby through a surrogate mother.
16. Define the burden of proof in the pre-contractual and labor relationship. It is recommended to put the burden of proof with the employer, not only during contract breach but whenever there is a dispute regarding discrimination in pre-contractual and labor relations.
17. Establish a labor inspectorate in order to audit and monitor the principle of equal pay for equal work.
18. Reduce segregation through positive actions.
19. Grant fathers the right to paternity leave, because women and men should equally share the responsibilities of childcare.
20. Ratify ILO Convention #183 on maternity protection.
21. Add a provision to the Labor Code that requires employers to motivate their suspicion of discrimination in writing. This should not only apply upon dismissal of an employee, but during the entire employment term.

22. Clearly define “other objective circumstance justifying termination of the employment contract”, in Article 37 “e” of the Labor Code. The alternative can be an exhaustive list of circumstances in which dismissal is lawful. Accordingly, remove the notion of objective circumstances.

23. Specify the duration of maternity leave, during which a women cannot be dismissed from her work. According to the Civil Service law, women working in the public sector cannot be dismissed as long as their child is younger than three years old; this regulation should be extended to women working in the private sector as well.

24. Provide the opportunity for unplanned leave due to family circumstances in the Labor Code. Unplanned leave cannot be a reason for contract breach in case the employee can present evidence about the necessity of this leave.

25. Ratify ILO Convention #158 which will establish procedures for the termination of a labor agreement.

26. Develop separate regulations regarding sexual harassment as a form of discrimination in both the Labor Law and the Law on the Elimination of All Forms of Discrimination. Although Georgian legislative acts already ensure compensation for moral and material damage caused by discrimination, these rules are not yet adjusted to all forms of discrimination.

27. Obligate the employer to provide a healthy and safe work environment for employees and establish an appropriate mechanism that has the authority to sanction the employer who avoids this obligation.

28. Regulate sexual harassment in the Administrative Code and put the responsibility with the employer in case the identity of the offender is not clear. Establish an independent and impartial labor inspectorate that will monitor employees’ rights and discrimination in the workplace.

29. Identify and eliminate all forms of discrimination from all spheres of public life, not only with administrative and legal mechanisms (repressive) but also through educational activities.

30. Provide more information about the legal nature of discrimination to employees, employers, judges and lawyers.