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Prohibition of Discrimination in Labour Relations

Introduction

Voluntariness is characteristic of labour relations and employment contracts. This means, on the one hand, the freedom to choose one's place of work and sphere of activity¹ and, on the other hand, the parties to a labour relation can conclude an employment contract in concordance with their free will. With labour relations, however, the parties' freedom of contract is restricted by several provisions of public law: labour laws are imperative and the parties may also conclude agreements on conditions more favourable than those prescribed in law.²

With an employment contract relationship, however, it is also important that the internationally recognised principle of equal treatment be observed.³ The principle of equality and prohibition of discrimination in labour relations are based on the both legal and moral standpoint that similar employees should be treated similarly.⁴

On the international level, a great number of acts have been enacted that prohibit discrimination in labour relations. Although the protection of workers' fundamental rights is provided for in several international agreements and the application of principles of human rights is guaranteed in all the developed countries with a number of legislative acts, this area is nevertheless not without problems as it is often difficult to guarantee the actual implementation of the principles stated in various documents. Therefore, it is understandable why, on the international level, so much attention has been paid to the protection of human rights and the avoidance of discrimination in labour relations.⁵

Of the international acts prohibiting discrimination, the following are currently binding on Estonia: the United Nations International Covenant on Economic, Social and Cultural Rights (1966), the United Nations Convention on

the Elimination of All Forms of Discrimination Against Women (1979) and ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951). In the near future, the Estonian parliament will ratify the European Social Charter (1961).

The elimination of discrimination is topical in many spheres of life, this article, however, focuses only on the equal treatment of workers. Within the context of labour relations, both international and domestic law pay special attention to the protection of certain groups of workers, e.g. the disabled, workers who have family obligations, and female employees. This is reasonable because in practice these groups of workers are those most often discriminated. The article treats the application of the principle of equal treatment of male and female employees in Estonia: it analyses the equal treatment of male and female workers in respect of hiring, remuneration, other working conditions and exclusions from the principle of equal treatment. The study is based on international covenants and conventions which prohibit discrimination.

In addition to international provisions binding upon Estonia, the article also analyses European Union (EU) legislation prohibiting discrimination insofar as the Europe Agreement⁶ imposes on Estonia the obligation to approximate Estonia's legislation to that of the Community particularly in the areas of trade, economy and related areas, including the issues pertaining to the protection of workers (Articles 68-69). Thus, Estonian labour laws should comply with Community standards which is a condition precedent to accession. On the other hand, within the EU more and more attention is paid to the equal treatment of female and male employees: Article 141 of the Amsterdam Treaty (1997) considerably expands EU competence in this area.⁷

The White Paper on the Preparation of Associated Central and East European Countries for Integration with the Internal Market of the European Union defines the guaranteeing of equal treatment of men and women in labour relations as a priority, making mention of the following important legislative acts: Council Directive 76/207/EEC 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, Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, and Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).⁸

In Estonian legislation, the prohibition of discrimination has not been a major issue. No special acts to this effect have been adopted. The general principle of equal treatment is provided for in § 12 of the Constitution⁹ under which everyone is equal before the law. No one is to be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status or on other grounds. Discrimination is also prohibited in the Employment Contracts Act¹⁰ and the Wages Act.¹¹

Application of the Principle of Equal Treatment as Regards Hiring

The UN Convention on the Elimination of All Forms of Discrimination Against Women,¹² which is binding on Estonia, sets out that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment (Article 11 paragraph 1(b)).

The following principle is provided for in Article 20 of the European Social Charter:¹³ with a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

- (a) access to employment, protection against dismissal and occupational reintegration;
- (b) vocational guidance, training, retraining and rehabilitation;
- (c) terms of employment and working conditions,

including remuneration;

- (d) career development, including promotion.

The prohibition of discrimination of female and male employees is also set out in Article 3(1) of Council Directive 76/207/EEC¹⁴ under which the application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

Estonian legislation does not set out the concept of the principle of equal treatment. The principle of equal treatment can be derived from § 10(1) of the Employment Contracts Act which provides for the bases which can in no case justify the giving of preferences or the restriction of rights: it is illegal to allow or give preferences, or to restrict rights on the grounds of the sex, nationality, colour, race, native language, social origin, social status, previous activities, religion, political or other opinion, or attitude towards the duty to serve in the armed forces of employees or employers. It is also illegal to restrict the rights of employees or employers on the grounds of marital status, family obligations, membership in citizens' associations, or representation of the interests of employees or employers.

Insofar as the principle of equal treatment provided for in § 10(1) of the Employment Contracts Act is applicable only to a labour relationship which has already been conceived, the principle can be applied to a candidate for a post on the basis of analogy. The same opinion can be found in the commented edition of the Employment Contracts Act: disadvantages or restrictions are contrary to subsection 1 only after the conclusion of an employment contract. A recruitment notice referring to circumstances, on the basis of which subsection 1 prohibits different treatment of people, is also contrary to law.¹⁵

Section 30 of the Employment Contracts Act provides for documents requisite to enter into an employment contract:

- (1) identification;
- (2) an employment record book;
- (3) certificate (diploma) regarding the necessary qualifications or education;
- (4) certificate (health record) regarding health if the employment contract is entered into for work where prior and periodic medical examinations are prescribed, or upon hiring persons who are under twenty-one years of age for work prescribed in special rules;
- (5) the written consent of one parent or guardian and the labour inspector upon hiring a minor between thirteen and fifteen years of age;
- (6) the written consent of one parent or curator upon hiring a minor who has attained fifteen years of age;
- (7) a work permit upon hiring an alien or stateless person in the cases prescribed by law;

(8) other documents in the cases prescribed by law or regulations of the Government of the Republic (subsection 1). Upon hiring, it is prohibited to require documents which are not prescribed by law or regulations of the Government of the Republic. On their own initiative, employees have the right to present employers with references, recommendations and other documents which characterise their previous work performance and the existence and application of their professional skills (subsections 2 and 3).

Under this list, an employer cannot demand a curriculum vitae from an employee upon the employee's taking up a position insofar as it is prohibited to require, upon hiring, documents which are not prescribed by law or regulations of the Government of the Republic; and the presentation of a curriculum vitae is not prescribed by any of the legal acts. However, it is a common practice to demand the presentation of a curriculum vitae and thus this section is not adhered to. However, this is not a discriminating practice as what is important is the data the employer obtains from the employee's curriculum vitae. It is not excluded that those data does not concern an area not connected with employment and is not a basis of unequal treatment of men and women.

The implementation of equal treatment is not guaranteed in practice: the employer is, in choosing labour, absolutely free, and both direct and indirect discrimination can be met upon hiring. An example of direct discrimination is the job offers published in newspapers which set restrictions regarding age or sex. The public has not responded to the publication of such advertisements and there are no court precedents in this area.

Even if a job advertisement is correct in its contents, nevertheless it does not guarantee the equal treatment of all candidates. The employer exercises a great discretion in selecting the best candidate and the employer is the one who sets the rules of the game. It is very difficult for a discriminated candidate to prove, at a later date, that the sex of the candidate was the decisive factor in hiring.

Implementation of the Principle of Equal Treatment in Remuneration

Article 7 of the UN International Covenant on Economic, Social and Cultural Rights,¹⁶ which is binding on Estonia, sets out that the States Parties to the Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work (Article 7 a) (i)).

A similar principle may be found in the UN

Convention on the Elimination of All Forms of Discrimination Against Women: States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work (Article 11 paragraph 1 (d)).

Article 4 third paragraph of the European Social Charter provides for the following principle: with a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake to recognise the right of men and women workers to equal pay for work of equal value. The principle of equal remuneration is also provided for in Article 20 c) of the above-mentioned Social Charter.

The principle of equal remuneration is also provided for in ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers, binding on Estonia, under Article 2 paragraph 1.: each Member shall, 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.

Under Article 2 paragraph 1 of Council Directive 75/117/EEC¹⁷ the principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called the "principle of equal pay", means, 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, where a job classification system is used for determining pay, it 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.

Under § 5 of the Estonian Wages Act, it is prohibited to increase or reduce wages on the grounds of an employee's sex, nationality, colour, race, native language, social origin, social status, previous activities, religion, political or other opinion, or attitude towards the duty to serve in the armed forces. It is prohibited to reduce wages on the grounds of the marital status, family obligations, and membership in citizens' associations or representation of the interests of employees or employers. Thus, in the cases listed here, increase of wages is permitted. Generally, the idea of this section is to induce the implementation of the principle of equal pay for equal work.¹⁸

The remuneration of people employed by state agencies is regulated by the 1999 regulations of the Government of the Republic¹⁹ No. 10 Remuneration of public servants²⁰ in 1999²¹ and No. 11 Remuneration in 1999 of employees of state agencies administered by gov-

ernment agencies to which, under the State Budget Act, an appropriation for wage costs is made²².

Government Regulation No. 10 provides for 35 wage rates.²³ Ministries, county governments, State Chancellery and the authorities within their area of government or administration and the Office of Legal Chancellor and the Supreme Court must determine the wage rates of office and support staff positions prescribed for their staff compositions within the amounts appropriated for remuneration in the state budget (clause 2). Under the Regulation, each institution may, in preparing the wage guidelines of its own institution as well as the institution within its area of government of administration, differentiate the wage rate corresponding to a certain office and support staff position, applying wage rates by 30% higher than the wage rates prescribed by the Regulation. A wage rate may be differentiated for important office and support staff positions of the institution on the basis of qualification, specific nature of working conditions, locality of work place or other characteristics of the position. Wage guidelines indicate, with proper justification, office and support staff positions together with wage rates in respect of which the differentiation of wage rates is applied (clause 3).

Under clauses 4-8 of the Regulation, bonuses and additional remuneration may be paid to public servants as provided for by law whereas additional remuneration may be paid for the fulfilment of additional service duties and better performance which is designated according to the conditions and procedure set out in the wage guidelines as decided by the head of the institution or the person who has the right to hire people for public service.

The limit rate of additional remuneration for the fulfilment of additional work duties or for a better performance than required is 50% of the wage rate corresponding to the office position of the public servant. Additional work duties are deemed to be those work duties which are not set out in the servant's job description and the orders of the head of the institution or direct supervisor not included in work or service duties. The basis for the payment of additional remuneration for better performance is the assessment of the knowledge, skills and work results of the public servant in accordance with the procedure established by the minister or state secretary.

Government Regulation No. 11 prescribes thirty-one wage rates.²⁴ Ministries, county governments and the State Chancellery must prepare the classification of position-based wage rates for the employees of state authorities in their area of government or administration on the basis of which the state agency determines the wage rates for the positions specified in the staff composition within the amount of money appropriated therefor in the state budget. (clause 2). The Regulation is in other respects similar with previously mentioned Regulation No. 10.

Thus, under the Regulations, wage rate may be differ-

entiated on the basis of qualifications, specific characteristics of working conditions, location of work place and other characteristics of the position for important to the institution office and support staff positions. Additional remuneration may be provided for on the basis of performance results or for fulfilment of additional duties. Those criteria grant the head of institution a rather extensive discretion for differentiation of wage rates and payment of additional remuneration.

Under § 12 of the Wages Act too if, upon the request of an employer, an employee performs additional work during determined working hours as compared with work prescribed in the employment contract, his or her wages shall be increased or additional remuneration paid in an amount determined by agreement of the parties. It is difficult to check compliance with the principle of equal treatment upon application of the previously cited provisions but it is also impossible for the State to impose more specific wage rates.

The situation is especially complicated as regards the implementation of the principle of equal treatment in private companies where the amount of wage is not prescribed by collective agreements but is determined on the basis of the understanding achieved between the employer and employee. Under § 9 of the Wages Act, an employer establishes wage rates in an enterprise, agency or other organisation according to the differences in work and working conditions, based on a collective agreement entered into between the employer and employees. According to this, the employer has a great freedom to differentiate wage rates, taking into account that it is quite unusual for Estonia to regulate labour (and wage) conditions by collective agreements.

The Wages Act provides for overtime remuneration, compensation for work on days off, remuneration for work performed on public holidays and additional remuneration for evening and night work (§§ 14-17). If an employer pays additional remuneration within the range of minimum rates prescribed by law, the equal treatment of male and female employees is guaranteed. An employer may prescribe more favourable wage conditions to an employee than those established by law or collective agreement.²⁵ In prescribing more favourable wage conditions, the principle of equal treatment provided for in § 5 of the Wages Act must be taken into account. However, other employees are usually not aware of the amount of individual additional remuneration prescribed and differentiation on the basis of sex is possible.

The implementation of the principle of equal treatment is complicated by the fact that it is very difficult to appraise which work should be considered equal. No related mechanisms have been created and it is hard to do. It is easier to assess work in production companies where workers manually perform similar operations. It is virtually impossible to assess the equality of mental work. An

employer may assign an employee a task which in practice does not exist but the employee's wage is increased as a result. In such a case it is difficult to prove that the larger wage was due to preference given on the basis of sex.

Implementation of the Principle of Equal Treatment as regards Other Working Conditions

The application of the principle of equal working conditions is provided for in Article 7 of the UN International Covenant on Economic, Social and Cultural Rights, Article 11 of the UN Convention on the Elimination of All Forms of Discrimination Against Women and in Article 20 of the European Social Charter.

Under Article 5 paragraph 1 of Council Directive 76/207/EEC the application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

Working conditions in a broader sense are regulated by all labour laws of Estonia which, as a general rule, establish identical standards for both male and female staff. In certain cases (amendment of employment contracts, daily breaks, parent holidays, etc.) female employees enjoy greater benefits in connection with pregnancy and the raising of children less than three years of age.

Under § 14 of the Employment Contracts Act, the rights granted to employees by law or administrative legislation may be extended by collective agreements or employment contracts, or by unilateral decisions of employers. The rights granted to employees by collective agreements may be extended by employment contracts or unilateral decisions of employers (subsections 1 and 2). In expanding the rights, one must also take into account § 10 of the Employment Contracts Act which prohibits unequal treatment in labour relations.

Working conditions in the narrow sense are the work to be performed and its level of complexity, the working time, the wages, the location of employment, the term of validity of an employment contract for a specified term, the date of commencement of employment as set out in § 26(1) of the Employment Contracts Act. Of those conditions, the principle of equal treatment is the hardest to achieve with the wages.²⁶

The following is an analysis of those provisions of labour laws which prescribe different standards for female and male staff as regards the working conditions.

The Working and Rest Time Act²⁷ prescribes that a woman raising a disabled child or child under fourteen years of age may only be required to work overtime, night shifts or work on a holiday with her consent (§§ 14, 19, 30). Under § 18(3) of the Working and Rest Time Act, at the request of a woman raising a disabled child or child

under fourteen years of age, an employer is required to apply part-time working time with respect to such person. The benefits also extend to a person raising a motherless disabled child or child under fourteen years of age (§ 8 1)). Those provisions of the Working and Rest Time Act discriminate male employees who can exercise those rights only in the case they raise, without contribution of child's mother, a disabled child or a child under fourteen years of age.

Under § 16 of the Republic of Estonia Holidays Act,²⁸ an employer is required to grant a holiday at the time requested by the employee to:

- (1) a woman before and after pregnancy or maternity leave or after parental leave;
- (2) a man during or after the pregnancy leave or maternity leave of his wife;
- (3) a woman raising a child of up to three years of age;
- (4) a man raising a child of up to three years of age alone (clauses 1-4).

This provision prefers a female employee: she can request from an employer a holiday after parental leave while a male employee cannot. Besides, a woman raising a child under three years of age can take the holiday at the time convenient for her while a male employee can request this only if he is a single parent to a child of up to three years of age.

A similar regulation can be found in § 34 of the Holidays Act, under which, at the request of the employee, the employer is required to grant a holiday without pay to:

- (1) a woman raising a child of up to fourteen years of age;
- (2) a man (guardian) raising a child of up to fourteen years of age alone (clauses 1 and 2).

The Employment Contracts Act provides for benefits to female employees in the following cases:

(1) It is prohibited to send pregnant women and minors on business trips. A woman raising a disabled child or child under three years of age may be sent on a business trip with her consent (§ 51(2)).

(2) On the basis of a decision of a state authority, an employer has the right to temporarily transfer an employee to a position at another enterprise, agency or other organisation in the same or another locality for the prevention of a natural disaster, expeditious elimination of the consequences thereof or prevention of the spread of disease, but for not more than one month. It is not permitted to transfer a pregnant woman, a woman who is raising a disabled child or a child under sixteen years of age, or a minor to another locality (§ 67(1), (2), (4)).

(3) A woman raising a child less than three years of age may terminate an employment contract concluded for specified or unspecified time by giving a notification five calendar days in advance²⁹ (§ 79(2), § 80(1) 3)).

In all cases listed above, the same benefit extends to

male employees, under § 11 clause 1, only in the case he raises a disabled child or a child under three years of age alone. This discrimination on grounds of sex cannot be deemed justified.

The termination of an employment contract on the initiative of the employer (dismissal) is regulated by §§ 86-109 of the Employment Contracts Act.³⁰ These provisions as a rule provide for identical conditions to female and male employees. As an exception, restrictions on the termination of employment contract are provided for employees who have family obligations. Under § 91(1) 2), it is not allowed to terminate an employment contract on employer's initiative while the employee is on a holiday (including parental leave and holidays without pay). This principle does not apply to termination of employment contracts due to the liquidation of an enterprise, agency or other organisation, or the declaration of bankruptcy of the employer (§ 91(2)).

Under § 30(1) of the Holidays Act, a mother or father is granted parental leave at his or her request until the child attains three years of age. If a mother or father does not use a parental leave, the leave may be granted to the actual caregiver (subsections 1 and 2). In this way, an employee on parental leave is protected against dismissal irrespective of who takes the leave — mother or father.

The termination of an employment contract is also restricted in respect of a pregnant woman or a woman who raises a child under three years of age. Under § 92(1), it is prohibited for an employer to terminate an employment contract with a pregnant woman or a woman raising a child under three years of age, except on the bases prescribed in § 86 clauses 1)-2), 5)-8) and 11) (upon liquidation of the enterprise, agency or other organisation; upon the declaration of bankruptcy of the employer; upon lay-off of employees; due to unsatisfactory results of a probationary period; upon breach of duties by an employee; upon loss of trust in an employee; due to an indecent act by an employee; upon hiring an employee for whom the position is a principal job). Termination of employment contracts with the employees on the bases prescribed in § 86 clauses 1)-2) and 5)-8) (liquidation of a legal person, bankruptcy of the employer, unsatisfactory results of a probationary period, breach of duties by an employee, loss of trust in an employee and an indecent act of an employee) is only permitted with the consent of the labour inspector of the location (residence) of the employer (§ 92(2)). It is prohibited to terminate an employment contract with pregnant women and women raising a child under three years if age due to lay-off, unsuitability, long-term incapacity for work and age.

Under § 11 clause 1 of the Employment Contracts Act, the benefits prescribed in § 92 for women raising disabled children or children under three years of age also extend to persons raising motherless children who are disabled or under three years of age. This protects primarily female

workers raising children less than three years of age as the benefit is only applicable to the child's father in the case the father raises a child less than three years of age without the child's mother. Such a discrimination of male employees is not fair but the current regulation proceeds from the belief that should male employees be granted equal protection in this respect, it will be difficult for young fathers to find a job as the employer would fear that it would be difficult to get rid of him later, besides the protection is guaranteed to the employee until the child reaches three years of age.

In order to achieve the reintegration of female workers with small children into the labour market, men and women should be treated equally in the question treated in the previous paragraph. Although the legislator's purpose was to offer benefits to women raising small children, the current regulation discriminates both male and female employees: men can enjoy the benefits only in the case they raise children alone (without mother) and, on the other hand, as the underlying idea of the Act is to offer benefits to women but as women are also the main caretakers of family, it puts female employees in a worse position compared with men. As far as dismissals are concerned, one of the options would be to shorten prohibition period, however, it would have a backfiring effect on the social protection of workers.

Exclusions to the Implementation of the Principle of Equal Treatment

Under international acts, prohibition, differentiation and preference in connection with the character of work, guaranteeing of national security or implementation of special means of protection is not considered contrary to the principle of equal treatment.³¹ In labour relations, the giving of preferences in connection with a woman's pregnancy or the raising of a child is not deemed to be discriminating. Exclusions may also be made due to the character of work. Many acts provide for additional guarantees to female employees which are required, firstly, to protect the health of the employee and, secondly, they are needed to help female employees reintegrate on the labour market.

Article 11(2) of the UN Convention on the Elimination of All Forms of Discrimination Against Women sets out: in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment,

seniority or social allowances;

(c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.

Article 8 of the European Social Charter regulates the right of working women to protection of maternity as follows: with a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake:

1. to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks;

2. to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period;

3. to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;

4. to regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants;

5. to prohibit the employment of pregnant women, women who have recently given birth or who are nursing their infants in underground mining and all other work which is unsuitable by reason of its dangerous, unhealthy or arduous nature and to take appropriate measures to protect the employment rights of these women.

Council Directive 76/207/EEC is without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor (Article 2 paragraph 2). The Directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity (Article 2 paragraph 3).

Detailed rules concerning pregnant women, women who have recently given birth and women who are breastfeeding are provided for in EU Directive 92/85/EEC.³² The most important principles provided for in the Directive are: if the results of the assessment of work reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoid-

ed. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health (Article 5 paragraphs 1-3).

Member States take the necessary measures to ensure that workers are not obliged to perform night work during their pregnancy and for a period following childbirth which shall be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned (Article 7 paragraph 1).

Member States take the necessary measures to ensure that workers are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice. (Article 8 paragraph 1).

In order to guarantee workers the exercise of their health and safety protection rights it is provided that Member States take the necessary measures to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of the maternity leave save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent (Article 11 paragraph 1).

Under § 10 of the Employment Contracts Act, preferences allowed and given based on pregnancy or the raising of children are not contrary to the prohibition of allowing or giving preferences, or restricting rights (subsection (2) clause 1). Thus, the Employment Contracts Act treats the protection of female employees wider than just in connection with pregnancy and birthgiving: under the law, female employees may also be given preferences in connection with the raising of children. Such a wide protection may cause indirect discrimination of female employees.³³

In employing it is allowed to make restrictions in respect of female employees: under § 35 of the Employment Contracts Act it is prohibited to hire and employ women for heavy work, work which poses a health hazard or underground work. The list of work which is prohibited for women is determined by 1992 Government of the Republic Regulation No 214 About the fulfilment of the resolution on the implementation of the Republic of Estonia Employment Contracts Act,³⁴ which ratifies the list of heavy works, works which pose a health hazard in

which women are prohibited from working and the list of sanitary, catering and related underground works in which women may work. This Regulation prohibits women from working in physically heavy and hazardous works. This list applies to all women, including women who have recently given birth or are breastfeeding.

Under § 18(3) of the Working and Rest Time Act, at the request of a pregnant woman or a woman raising a disabled child or child under fourteen years of age, an employer is required to apply part-time working time with respect to such person.

Under § 63(1) of the Employment Contracts Act, pregnant women have the right to request easement of working conditions or temporary transfer to an easier position based on the decision of a doctor. Pregnant women are paid the difference in wages in accordance with the procedure provided for in the Republic of Estonia Health Insurance Act.³⁵ If the labour inspector of the location (residence) of the employer establishes that it is not possible for the employer to ease the working conditions of the pregnant woman or transfer her to an easier position, she is discharged from work and paid compensation from medical insurance funds in accordance with the procedure provided for in the Republic of Estonia Health Insurance Act³⁶ (§ 63 (2)).

On the basis of the above, both pregnant women and women raising a disabled child or child under fourteen years of age may demand part-time working time; only pregnant women have the right to request easement of working conditions or transfer to another position or discharge from work. The Working and Rest Time Act and the Employment Contracts Act treat the employment of related measures as a right of a female employee and not as an obligation of an employer and they are subject to the existence of a sick leave issued by a doctor. Similarly, the amendments to the Employment Contracts Act dated 09.12.98³⁷ do not protect women who have recently given birth or are breastfeeding.

Work during night time is regulated by § 19 of the Working and Rest Time Act, under subsection 2 of which pregnant women are not required to work during night time (22:00- 6:00). A woman raising a disabled child or child under fourteen years of age or a person taking care of a Category I disabled person may only be required to work during night time with his or her consent (§ 19 (3)).

Under § 28 of the Holidays Act, a woman is, based on a certificate for maternity leave, granted a pregnancy leave of 70 calendar days before giving birth and a maternity leave of 56 calendar days after giving birth. In the case of a multiple birth or a delivery with complications, a maternity leave of 70 calendar days is granted. Pregnancy leave and maternity leave are added together and granted in full, regardless of the date of birth of the child. Compensation for the period of pregnancy leave and maternity leave is paid pursuant to the Health Insurance Act.³⁸ Consequently

a woman is as a general rule entitled to 18 weeks of pregnancy and maternity leave or to 20 weeks of leave in case of a multiple birth or a delivery with complications. The Holidays Act does not provide for the obligatory duration of a pregnancy or maternity leave but under the Health Insurance Act³⁹ a certificate of incapacity for work is executed for the duration of 126 calendar days in case of pregnancy or maternity leave (140 calendar days in case of multiple birth or a delivery with complications) (§§7(2), 8(2), 9(3)). Under § 10¹ of the Health Insurance Act, an employer may not allow an employee to work during the time of leave specified in the certificate of incapacity for work.

The termination of an employment contract with a pregnant woman or woman raising a child under three years of age is regulated in § 92 of the Employment Contracts Act. Under § 92(1), it is prohibited for an employer to terminate an employment contract with a pregnant woman or a woman raising a child under three years of age, except on the bases prescribed in § 86 clauses 1)-2), 5)-8) and 11) (upon liquidation of the enterprise, agency or other organisation; upon the declaration of bankruptcy of the employer; upon lay-off of employees; due to unsatisfactory results of a probationary period; upon breach of duties an employee; upon loss of trust in an employee; due to an indecent act by an employee; upon hiring an employee for whom the position is a principal job). Thus, it is absolutely prohibited to terminate an employment contract with a pregnant woman or woman raising a child under three years of age on the following bases: lay-off, unsuitability, long-term incapacity for work of an employee, age. Such dismissal prohibition is reasonable as in all the cases previously described, the termination of employment contract is connected with the employee's person (health, skills, abilities). The termination of an employment contract on the bases provided for in § 86 clauses 1)-2) and 5)-8) (liquidation of legal person, bankruptcy of the employer, unsatisfactory results of a probationary period, breach of duties, loss of trust and indecent act) are only permitted with the consent of the labour inspector of the location (residence) of the employer (§ 92(2)). The consent of the labour inspector is necessary so that the labour inspector could make sure that the economic justifications (liquidation, bankruptcy) are present and that the unsuitability or culpable acts of an employee are proved and subject to termination of employment contract. These guarantees do not extend to the termination of employment contract due to a corruptive act of an employee. The termination of an employment contract due to the employee's corruptive act is not connected with the employee's pregnancy or the fact that the employee gave recently birth or is breastfeeding; such an act can be viewed as an employee's culpable act and may be a basis for termination of an employment contract but nevertheless the consent of the labour inspector should be acquired for this.

Estonian legislation grants a number of benefits to female employees which are not in keeping with the principle of equal treatment but which nevertheless cannot be treated as discriminatory of male employees. These benefits are necessary for the occupational safety and health protection of pregnant women and women raising children and also for facilitating the return of employees to work after pregnancy and maternity leave. In single issues, however, Estonian laws need to be improved to take into account the provisions of international agreements. At the same time, in many realms Estonian female employees enjoy a more extensive protection compared with those prescribed by international standards: while international agreements provide for benefits only in connection with pregnancy and birthgiving, in Estonia such benefits are applicable until the child reaches three years of age. This may cause indirect discrimination of women.

Conclusion

Although several international agreements are binding on Estonia which prohibit discrimination in labour relations and as Estonian needs to insert the requirements of EU legislation in its laws for accession purposes, the implementation of the principle of equal treatment is nevertheless not guaranteed.

Section 10 of the Republic of Estonia Employment Contracts Act provides for a long list of bases on which benefits may be granted and rights may not be restricted but still the regulation of issues connected with the discrimination of employees is rather inadequate: the provisions which prohibit discrimination are not so much regulative as declarative and do not guarantee actual protection of employees.

Similarly, many current legal acts do not comply with the principle of equal treatment. Especially in the respect that female employees are granted greater rights: in several cases male employees can enjoy the rights granted in connection with the raising of children under three (or fourteen) years of age only if they raise the child alone, without the child's mother.

The problem with exclusions from the principle of equal treatment is that substantial rights granted to female employees in connection with pregnancy and child-raising have weakened their position on the labour market: employers do not wish to hire young women in birth-giving age.

It is also difficult to guarantee the laws providing for the principle of equal treatment. Employees may, in case of disputes related to the application of labour laws, refer the case to a labour dispute committee or court. This option may be purely theoretical in terms of the implementation of the principle of equal treatment, especially as regards the equal rights of men and women upon hiring and remuneration. In these issues it is very difficult to prove the presence of discriminatory acts. This leads to the question:

what is the awareness of Estonian labour dispute authorities in deciding on these issues. No precedents of the kind can be found. Besides, there is no mechanism to help evaluate equal treatment and the creation of equal opportunities at work.

The implementation of the principle of equal treatment is complicated in Estonia primarily because a lot of people are not aware of the problems brought along by equal treatment and the creation of equal opportunities. The fear of losing their jobs makes people work at any conditions whatsoever. Discrimination-related problems will perhaps become topical only after several years, after the economy and labour market have become stable and people start thinking of how to guarantee a better living standard.⁴⁰

Currently the drafting of a special law which would prohibit discrimination is being contemplated in Estonia to guarantee the implementation of the principle of equal treatment. Although this idea has not been realised yet, one should offer nothing but support to it. The law should specify discriminatory and non-discriminatory acts. Equal treatment of all employees and candidates for employment should be an obligation of an employer. The law should also provide for penalties to be applied in case of evasion of the discrimination prohibition. Likewise should the law specify the authorities which (and to which extent) must guarantee compliance with legislation prohibiting discrimination.

Bibliography:

1. The Treaty of Amsterdam. Consolidated Treaties. Tallinn, Estonian Translation and Legislative Support Centre, 1998.
2. R. Blanpain, C. Engels. Comparative Labour Law and Industrial Relations in Industrialized Market Economies. Sixth and revised edition. Kluwer Law International. The Hague, London, Boston, 1998.
3. M. Muda. Eesti tööseaduste täiustamisest integreerumisel Euroopasse. Magistritöö. (About the Improvement of Labour Laws upon Integration into Europe. Master's thesis.) Tartu, 1996.
4. I.-M. Orgo, H. Siigur. Tööõigus. Õpik Tartu Ülikooli õigusteaduskonna üliõpilastele. (Labour Law. Textbook for Students of Law Faculty of the University of Tartu.) Tallinn: Õigusteabe AS Juura, 1995.
5. Palgaseadus. Kommenteeritud väljaanne. (Wages Act. Commented Edition.) Compiled by H. Siigur. Tallinn: Õigusteabe AS Juura, 1997.
6. Töölepingu seadus. Kommenteeritud väljaanne. (Employment Contracts Act. Commented Edition.) Commentaries provided by I.-M. Orgo, H. Siigur, G. Tavits. Tallinn: Õigusteabe AS Juura, 1997.
7. The White Paper, on the Preparation of Associated Central and East European Countries for Integration with the Internal Market of the European Union. Tallinn, Estonian Translation and Legislative Support Centre, 1996.
8. Selection of European Union Social Legislation. Volume I. Tallinn, Estonian Translation and Legislative Support Centre, 1998.
9. European Social Charter, 1961. Available at: <http://www.coe.fr/eng/legaltxt/163e.htm>, 17.05.1999
10. United Nations International Covenant on Economic, Social and Cultural Rights — RT^{II} 1993, 10, 13.

11. United Nations Convention on the Elimination of All Forms of Discrimination Against Women — RT II 1995, 5, 31.
12. Association Agreement between the European Communities, their Member States and the Republic of Estonia (Europe Agreement) — RT II 1995, 22-27, 120.
13. Act ratifying the International Labour Organisation Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value — RT II 1996, 9/10, 31.
14. Constitution of the Republic of Estonia — RT 1992, 26, 349.
15. Republic of Estonia Health Insurance Act — RT 1991, 23, 272; 1992, 19, 276; RT I 1994, 23, 387; 1997, 28, 425; 1998, 1998, 111, 1829; 1999, 29, 397.
16. Republic of Estonia Employment Contracts Act — RT 1992, 15/16, 241; 1993, 10, 150; RT I 1993, 26, 441; 1995, 14, 170; 16, 228; 1996, 3, 57; 40, 773; 45, 850; 49, 953; 1997, 5/6, 32; 1998, 111, 1829; 1999, 16, 276.
17. Republic of Estonia Holidays Act — RT 1992, 37, 481; 1993, 10, 150; I 1994, 84, 1474; 1995, 16, 228; 1997, 74, 1229; 93, 1560.
18. Working and Rest Time Act — RT I 1994, 7, 70; 1995, 12, 120.
19. Wages Act — RT I 1994, 11, 154; 1995, 12, 120; 1999, 29, 397
20. Government Regulation No 214: About the Fulfilment of the Resolution on Implementation of the Republic of Estonia Employment Contracts Act — RT 1992, 34, 454.
21. Government Regulation No. 10: Remuneration of public servants in 1999 — RT I 1999, 5, 73.
22. Government Regulation No. 11: Remuneration in 1999 of employees of state agencies administered by government agencies to which, under the State Budget Act, an appropriation for wage costs is made — RT I 1999, 5, 74.
23. EU Council Directive 76/207/EEC 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. (OJ L 39, 14.02.1976, p. 40).
24. EU Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. (OJ L 45, 19.02.1975, p. 19).
25. EU Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC). (OJ L 348, 19.10.1992, p. 11).
- ⁵ M. Muda. Eesti tööseaduste täiustamisest integreerumisel Euroopasse. Magistritöö. (About the Improvement of Labour Laws upon Integration into Europe. Master's thesis.) Tartu, 1996, p. 49.
- ⁶ Association Agreement between the European Communities, their Member States and the Republic of Estonia (Europe Agreement) — RT II 1995, 22-27, 120.
- ⁷ The Treaty of Amsterdam. Consolidated Treaties. Tallinn, Estonian Translation and Legislative Support Centre, 1998.
- ⁸ Association Agreement between the European Communities, their Member States and the Republic of Estonia (Europe Agreement) Tallinn, Estonian Translation and Legislative Support Centre, 1996, p. 82-84.
- ⁹ Constitution of the Republic of Estonia — RT 1992, 26, 349.
- ¹⁰ Republic of Estonia Employment Contracts Act — RT 1992, 15/16, 241; 1993, 10, 150; RT I 1993, 26, 441; 1995, 14, 170; 16, 228; 1996, 3, 57; 40, 773; 45, 850; 49, 953; 1997, 5/6, 32; 1998, 111, 1829; 1999, 16, 276.
- ¹¹ Wages Act — RT I 1994, 11, 154; 1995, 12, 120; 1999, 29, 397.
- ¹² Convention on the Elimination of All Forms of Discrimination Against Women — RT II 1995, 5, 31.
- ¹³ Available at://www.coe.fr/eng/legaltxt/163e.htm, 17. 05. 1999.
- ¹⁴ Selection of European Union Social Legislation. Volume I. Tallinn, Estonian Translation and Legislative Support Centre, 1998, p. 51-61.
- ¹⁵ Töölepingu seadus. Kommenteeritud väljaanne. (Employment Contracts Act. Commented Edition.) Commentaries provided by I.-M. Orgo, H. Siigur, G. Tavits. Tallinn: Õigusteabe AS Juura, 1997, p. 24.
- ¹⁶ International Covenant on Economic, Social and Cultural Rights — RT II 1993, 10, 13.
- ¹⁷ Selection of European Union Social Legislation. Volume I. Tallinn, Estonian Translation and Legislative Support Centre, 1998, p. 43-49.
- ¹⁸ Palgaseadus. Kommenteeritud väljaanne. (Wages Act. Commented Edition.) Compiled by H. Siigur. Tallinn: Õigusteabe AS Juura, 1997, p. 18.
- ¹⁹ The Government of the Republic normally issues analogous regulations for each calendar year.
- ²⁰ Under the Public Service Act, public servants are classified into public servants who have a service relationship in public law with the State and support staff who have a contractual relationship in private law.
- ²¹ Government Regulation No. 10: Remuneration of public servants in 1999 — RT I 1999, 5, 73.
- ²² Government Regulation No. 11: Remuneration in 1999 of employees of state agencies administered by government agencies to which, under the State Budget Act, an appropriation for wage costs is made — RT I 1999, 5, 74.
- ²³ According to the wage scale, the wage of a public servant is 1,250-12,500 kroons depending on the wage rate.
- ²⁴ According to the scale, the wage of an employee of a state agency is 1,250-7,300 kroons depending on the wage rate.
- ²⁵ Under § 7 of the Wages Act, more favourable wage conditions than prescribed in law may be provided for an employee under a collective agreement or employment contract.
- ²⁶ Q.v. previous subdivision of the article.
- ²⁷ Working and Rest Time Act - RT I 1994, 7, 70; 1995, 12, 120.
- ²⁸ Republic of Estonia Holidays Act - RT 1992, 37, 481; 1993, 10, 150; I 1994, 84, 1474; 1995, 16, 228; 1997, 74, 1229; 93, 1560.
- ²⁹ As a general rule, an employee must give a notice of the termination of a contract concluded for an unspecified time and specified time respectively one month and two weeks in advance.
- ³⁰ Section 86 of the Employment Contracts Act provides for twelve bases on which an employer may dismiss an employee (upon liquidation of the enter-

Notes:

¹ Under § 29 first paragraph of the Constitution of the Republic of Estonia, an Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work.

² Under § 15 of the Republic of Estonia Employment Contracts Act, employment contract terms which are less favourable to employees than those prescribed by law, administrative legislation or a collective agreement are invalid. The law, administrative legislation or collective agreement applies instead of the invalid employment contract terms unless the parties agree on new terms.

³ In Estonian theory of labour law, the principle of equal treatment is deemed to be one of the principles of labour law. Q.v. I.-M. Orgo, H. Siigur. Tööõigus. Õpik Tartu Ülikooli õigusteaduskonna üliõpilastele. (Labour Law. Textbook for Students of Law Faculty of the University of Tartu.) Tallinn: Õigusteabe AS Juura, 1995, pp. 13-14).

⁴ R. Blanpain, C. Engels. Comparative Labour Law and Industrial Relations in Industrialized Market Economies. Sixth and revised edition. Kluwer Law International. The Hague, London, Boston, 1998, p. 239.

prise, agency or other organisation; upon the declaration of bankruptcy of the employer; upon lay-off of employees; upon unsuitability of an employee for his or her office or the work to be performed due to professional skills or for reasons of health; due to unsatisfactory results of a probationary period; upon breach of duties an employee; upon loss of trust in an employee; due to an indecent act by an employee; due to the long-term incapacity for work of an employee; due to the age of an employee; upon hiring an employee for whom the position is a principal job; due to a corruptive act of an employee). The employer may not terminate an employment contract on other bases.

³¹ Q.v. R. Blanpain, C. Engels. *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*. Sixth and revised edition. Kluwer Law International. The Hague, London, Boston, 1998, pp. 259-261.

³² *Selection of European Union Social Legislation*. Volume I. Tallinn, Estonian Translation and Legislative Support Centre, 1998, pp. 99-125.

³³ Q.v. previous subdivision of the article.

³⁴ Government Regulation No. 214: About the fulfilment of the resolution on the implementation of the Republic of Estonia Employment Contracts Act — RT 1992, 34, 454

³⁵ Under § 9 6) and § 104 of the Health Insurance Act, a benefit equivalent to the wage difference is paid in case of the easement of working conditions or transfer to an easier position until the conclusion of such arrangements.

³⁶ Under § 9 5) and § 104 of the Health Insurance Act, in case of temporary discharge from work, a benefit equivalent to 80% of the average income of one calendar day is paid per each calendar day until the end of the discharge from work specified on the sick leave.

³⁷ RT I 1998, 111, 1829.

³⁸ Under § 9 of the Health Insurance Act, the insured is paid a benefit as from date of the certificate for maternity leave (including) in case of pregnancy and maternity leave for a maximum of 126 calendar days (140 calendar days in case of a multiple birth or a delivery with complications). Section 104 of the Health Insurance Act provides that the sick fund pays the insured, in case of pregnancy and maternity leave, a 100% benefit of the average income earned on a calendar day per each calendar day.

³⁹ Republic of Estonia Health Insurance Act — RT 1991, 23, 272; 1992, 19, 276; RT I 1994, 23, 387; 1997, 28, 425; 1998, 1998, 111, 1829; 1999, 29, 397.

⁴⁰ M. Muda *Eesti tööseaduste täiustamisest integreerumisel Euroopasse*. Magistritöö. (About the Improvement of Labour Laws upon Integration into Europe. Master's thesis.) Tartu, 1996, p. 59.

⁴¹ RT = Riigi Teataja = the State Gazette.