«ATYPICAL» DISCRIMINATION OF WOMEN IN THE WORLD OF WORK: ON EXAMPLES OF LEGISLATIVE REGULATION AND PRACTICES OF INDIVIDUAL MEMBER-COUNTRIES OF THE EURASIAN ECONOMIC UNION

Garanina Inna[1*], Izbienova Tatiana[2], Mustakimov Nail [3], Averyanova Maria[4] , Timofeeva Tatiana [5]

[1]As. Prof., PhD, Mari State University, Russia, ilneza@mail.ru
[2] As.Prof., Mari State University, Russia, nfnf1978@yandex.ru
[3]As.Prof., Mari State University, Russia, mustakim@bk.ru
[4]As. Prof., Nizhny Novgorod Institute of Management of the Russian Academy of National Economy and Public Service by the President of Russian Federation, miaverianova@yandex.ru
[5] As. Prof., Mari State University, gena83@mail.ru
*Corresponding author

Abstract

The article discusses the issues of «atypical» (unobvious) limitation of women's labor rights based on gender in certain states of the Eurasian Economic Union.

Based on the analysis of normative legal acts, judicial practice and statistical data on some countries, it is concluded that there are some negative trends in this area and is to be needed to take a few measures to effectively ensure the implementation of the principle of equality of subjects in the sphere of labor relations.

Keywords: discrimination against women, gender rights, labor rights, the Eurasian Economic Union

1. INTRODUCTION

On May 29, 2013, the Treaty on the Eurasian Economic Union (hereinafter referred to as the "Eurasian Union") was initially signed in the city of Astana (Kazakhstan), initially in the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan, then the Republic of Armenia, and subsequently the Kyrgyz Republic. The Union began its operation from 01/01/2015.

One of the goals of its creation is "the desire to form a single market ... of labor resources within the Union" (Article 4 of the Treaty), which in the long term implies further unification of its labor legislation and the

formation of a single legal framework for regulating the labor of hired workers, including in the field ensuring the basic guarantees of certain categories of employees. In this regard, the study of the national labor law of the countries participating in the Eurasian Union in order to determine the prospects for its gradual rapprochement, including in the issues of the regulation of women's labor (Morozov, Chanyshev, 2016), is a very interesting direction in the study of the legal systems of the post-Soviet states.

2. OPINION AND DISCUSSION

All the states participating in the Eurasian Union have ratified Convention No. 111 of the International Labor Organization "Concerning Discrimination in Respect of Employment and Occupation", as well as the UN Convention of 18.12.1979 on the Elimination of All Forms of Discrimination against Women, which contain a general and specific definition of discrimination.

The main features of discrimination in respect of employment, recognized by the scientific community and the competent authorities in the countries of the Eurasian Union is a difference in treatment on grounds of sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, Property, birth or any other characteristics not related to the employee's business qualities.

The problem with the understanding of "atypical" discrimination is more complex in the post-Soviet space. Indirect discrimination, according to information posted in the open access judicial bases, is not mentioned in court practice. The absence of references can be explained by the shortcomings in the national legislation of the countries participating in the Eurasian Union, which practically does not contain rules on indirect discrimination. However, according to the ILO manual on the development of labor legislation, Convention No. 111 applies to both direct and indirect discrimination.

The ILO recommends that States pay attention to both types of discrimination when preparing legal documents at the national level. In more detail, the concept of indirect discrimination is interpreted in the legal positions of the ECHR, which is understood as "the difference in treatment expressed in such an effect of a neutral policy or measure that causes disproportionate harm to certain groups of people" [ECtHR, Opuz v. Turkey. 2009. 9 June. N 33401/02. Para. 183; ECtHR, Zarb Adami v. Malta. 2006. 20 June. N 17209/02. Para. 80].

In determining the significance of the negative consequences of the implementation of neutral norms, the court uses statistical data, comparing with the data of the impact of the same standards on other groups of individuals. Then, in the case of establishing the fact of indirect discrimination, the court decides whether a neutral rule with an indirect discriminatory effect had justified and objective reasons ("reasonable and objective justification"). Such a justification takes place if the difference in treatment pursues a legitimate aim and if there is reasonable proportionality between the means used and the aim pursued (Arnardttir O.M. Non-discrimination Under Article 14 ECHR: Burden of Proof // Scandinavian Studies in Law. 51. P. 13 - 39].

The norms of the above-mentioned international treaties have been developed in the national legislation of the Russian Federation, the Republic of Kazakhstan, the Republic of Belarus, the Republic of Armenia, the Republic of Kyrgyzstan.

In the Russian Federation, the principle of the prohibition of discrimination in the world of work (including gender) is reflected in the Labor Code (art. 3), in Belarus this survey is regulated by the Labor Code (art. 14), Kazakhstan has the Law of the Republic of Kazakhstan 08.12.2009 года № 223-IV "On State Guarantees of Equal Rights and Equal Opportunities for Men and Women", In Kyrgyzstan, the prohibition of discrimination is reflected in article 9 of the Labor Code. And only in Armenia, in Article 3 of the Labor Code, there is a general mention of the equality of the parties to labor relations regardless of gender.

The national legislation of the countries of the Eurasian Union is based on the approaches to the "legalization of indirect discrimination" (in the understanding of this phenomenon by the ECHR), which were actually laid in the Soviet period, when the labor law traditionally paid attention to the protection of women's labor rights, but the researchers of this topic were linked by Marxist ideology and concentrated Their attention is rather on the technical side of the problem outside the social context (safety engineering, industrial sanitation, etc.) (Tolkunova, 1973).

The chosen approach is preserved now, and de jure, boils down to a "paternalism" for working women, creating for them safe working conditions, setting bans and restrictions, and in fact, prohibitions on employment in harmful and (or) dangerous working conditions. In practice, this mechanism is implemented through the adoption of lists of professions prohibited for women, including prestigious (for residents of emerging economies) and highly paid professions (in Russia 456 professions are prohibited for training and employment of women, 181 in Belarus, in Armenia - 430 professions).

This restriction is formally explained by “the need for special care of the state about people in need of increased social and legal protection” and, in the opinion of the judicial bodies of most states of the Eurasian Union, is consistent with the provisions of ILO Convention No. 111.

If we turn to the sociological and legal justification for such differentiated approaches, it can be found that the main reason for the legal and actual limitation of women's labor in the countries of the Eurasian Union is mainly:

1. Conclusions of competent organizations on the potential harm that can be done by the reproductive function of a working woman (the approach is prevalent mainly in Russia and Belarus);

For example, the Supreme and Constitutional Courts of the Russian Federation in the case of A. Klevets made conclusions about the legality of the prohibition of women working as an electric locomotive driver for the subway because of “taking into account the generally recognized social role of women in procreation” [Constitutional Court Judgment of 22.03.2012 No. 617- O-O], the presence in the production environment of harmful factors that “create a professional risk for the reproductive health of women” [of the Supreme Court of the Russian Federation of 21.05.2009 № KAS09-196].

The confirmation of this approach of the legislator, who cares not about the health of workers, but about the effective implementation of the demographic policy, is the existence in the array of Russian acts of the current norm prohibiting the involvement of women under the age of 35 (that is, until the end of the fertile age, determined morally obsolete in the present Time rules) to the implementation of operations in crop production, livestock, poultry and fur farming with the use of pesticides, pesticides and disinfectants [01.10.1990 No. 298/3-I “On urgent measures to improve the situation of women, the family, the protection of motherhood and childhood in the countryside”].

With this approach, the state positions the value of women only as a subject of childbearing and maternal functions. At the same time, the woman is deprived of the choice and the opportunity to realize her right to work, and her desire and (or) the opportunity to have children, as well as the presence of children, are not taken into account at all. Obviously, even under harmful working conditions, it is the woman (and not the state) who must decide what she wants: to work from the list or to monitor her health for a possible future pregnancy. For all the complexity of the issue in science, the most common is the following position: “From the medical point of view, there is no justification for the protection of exclusively female workers, except that due to their reproductive function there is a risk for children” (Lushnikova, Lushnikov, 2006).

2. Gender stereotypes about the role of men and women in society and family, widespread in some countries of the Eurasian Union (mainly in Armenia, Kazakhstan and Kyrgyzstan) and based on the idea that the specificity of the norms on women's labor is determined not only by physiological and biological (for example, Nurturing of children), but also by certain “social and cultural roles” of the two sexes in matters of family maintenance, the upbringing of children. These role characteristics, gender fix such moments as the duties (purpose) of sex (work-home) and lead to the persistence of gender discrimination in the labor market. Indirect evidence of the patriarchal culture of such countries in the sphere of social relations regulation are the facts recognized by the UN Committee on the Elimination of Discrimination against the practice of selective abortions as gender selection in Armenia. According to the government delegation, 100 girls are born for every 115 boys in Armenia [Armenia's report on the implementation of the UN Convention of 07.11.2016]. The country has adopted a ban on selective abortions, but according to their level, according to the UN, Armenia holds the second place in the world.

Such facts can be left without legal comments, as they are in themselves a manifestation of social and cultural patterns of behavior of men and women based on ideas of inferiority or superiority on the basis of gender or stereotyped roles of men and women [Article 5 of the UN Convention of 07.11.2016].

Speaking about the limitation of women's employment, the competent UN bodies recognize that states can take special measures aimed at protecting maternity, but such measures should facilitate women's access to the labor market in order to overcome actual disparities, rather than exclude employment opportunities for women. For example, we can talk about the right to a shorter working day, the employer's obligation to observe the gender balance when filling out workplaces and so on. At the same time, as the European Court of Human Rights has pointed out in cases involving men's access to social measures provided to women, so-called positive discriminatory measures should be proportionate to the goal of adjusting, compensating or mitigating the continuing consequences of suffering suffered by a historically disadvantaged group, such as women [European Court of Human Rights. ECtHR). Runkee and White v. the United Kingdom. Applications nos. 42949/98, 53134/99. Judgment of 10 May 2007. Paras. 37, 40 - 43.].

The decision (opinion) of the UN Committee on the Elimination of Discrimination against Women made the decision (opinion) on the first case against Russia (“Svetlana Medvedeva v. Russia”) [opinions, opinions, Adopted by the Committee at its sixty-third session, 15 February-4 March 2016]. The Committee, having received no evidence indicating that the inclusion of a profession for the replacement of which Medvedev claimed to be a prohibited work for women, is justified by scientific data, expressed the view that the restriction of labor reflects persistent stereotypes concerning the roles and responsibilities of women and men in the family and society , Which preserve traditional ideas about women as wife and mother and undermine its social status and prospects of educational and career growth. Similar remarks were made by the UN Committee on the Elimination of Discrimination against Women in 2016 on Armenia and Belarus, the meaning of which is reduced to the view that the restrictions should be rare and apply to exceptional situations where the use of women's work can be associated with a serious Risk of health. But the priority should still be the woman's right to decide whether she agrees to these risks or not.

3. CONCLUSION

Analysis of international legal contracts and national legislation of the countries participating in the Eurasian Economic Union allows us to conclude that there are problems of legal understanding and interpretation of atypical forms of discrimination against women in the world of work.

With further labor legal integration of the Eurasian Economic Union and adoption of the Union treaties or model laws in the sphere of labor necessary to include in their text of the provisions that reveal the interpretation of indirect discrimination as an unjustified difference in treatment (legal regulation) of the subjects expressed in the form of neutral regulation, collective agreement , agreements, local regulation or policy of neutrality, which cause disproportionate harm to specific groups of Deeds Cove (e.g., women, persons with a family responsibilities and others). When this sound is necessary to consider this difference in treatment which serves a legitimate target and by which is achieved a reasonable proportionality between the means (limitations, preference) and the aim pursued.

REFERENCES LIST

Lushnikova M., Lushnikov A. (2006). Essays on the theory of labor law. StPt. 940 p.

Morozov P., Chanyshev A. (2016). Labor law of the countries of the Eurasian Economic Union. Moscow. 336 p.

Tolkunova V.(1973). The Women Labor. 1973. 63 p.