

Jana Žul'ová – Marek Švec

THE LEGISLATIVE MEASURES PROMOTING DIVERSITY IN THE LABOR MARKET

The case of Slovakia



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INTRODUCTION

“If we are to build a stable world, diversity shall be its basis.”

UN Agenda 2030

In 2015, the UN adopted the 2030 Agenda for Sustainable Development at the extraordinary summit in New York. The Agenda sets out a general framework and the various means needed to eradicate poverty and achieve sustainable development. There are 17 objectives in the field of sustainable development and 169 related sub-targets that balance the three dimensions of sustainable development – economic, social and environmental – in areas such as poverty, inequality, health care, food security, sustainable consumption and production, growth, employment, infrastructure, sustainable management of natural resources, climate change, as well as gender equality, peace and inclusive societies.¹ The 2030 Agenda also calls for diversity. The objectives explicitly address gender, age, racial/ethnic and cultural diversity, as well as inclusion of disability. Strategic planning of national policies affecting, among others, labour market stakeholders and their internal policies, is expected to contribute to the achievement of the global objectives set.

The scientific monograph *The Legislative Measures Promoting Diversity in the Labour Market* examines the legislation of the Slovak Republic which directly or indirectly regulates and promotes diversity building in the labour market environment. In connection with the first year of handling the VEGA project, (project no. 1/0291/23 – *Legislative Challenges for Labour Law in the Creation of Diverse and Inclusive Workplaces*), the authors of the monograph pay attention to the legal context, the ideological bases, terminology and the three interrelated dimensions of diversity based on sex, gender, and sexual orientation. Gender diversity also includes parental diversity. The presence of females in the labour market is essential and desirable, as is the increase in male participation in parental care. This does not, however, in itself guarantee equal treatment of males and females in those areas. Although the topic is not new in the Slovak Republic's circumstances, especially in relation to sex and gender diversity, but the fact does allow building on the authors' existing publishing activities and focusing on the complexity of the efforts to implement outputs previously processed. The subject of sexual orientation is still treated as taboo and, in relation to the working conditions of

¹ The Slovak Republic has subscribed to the implementation of the 2030 Agenda in *The Framework for the Implementation of the 2030 Agenda for Sustainable Development* approved by Government Resolution No. 95/ 2016.

employees with a minority sexual orientation, the same is not a frequent subject of professional writings.

The first step of organisations that have decided to implement diversity management in their own environment is to comply with legislative conditions, in particular (but not exclusively) with the anti-discrimination ones, and to create a basic framework for promoting equal opportunities. The aim of the scientific monograph presented on the topic is to identify case studies implementing sex and gender diversity, as well as diversity related to sexual orientation in corporate practice. This shall be achieved through examination of articles dedicated to the topic in professional literature, professional journals dealing with HR issues and web sites addressing diversity. That objective also includes subsequently adding a legal basis to those measures. Diversity management requires understanding of legal requirements and their implications for the process. It is not conceivable that the legal reality, in particular the mandatory minimum granted to employees under a legal regulation, be presented as a measure promoting diversity in the workplace. The *de lege lata* situation may “only” be the starting point for implementing diversity strategies, which are thus built, to a certain extent, on the optional and voluntary initiatives of the stakeholders. Further, the monograph presents those legislative measures that promote diversity in the workplace. It also offers an interpretation for legally consistent applicability of those measures, which may serve as a basis to build on further.

The publication is primarily intended for employees in the human resources departments and the employee representative relations departments or those at departments formed specifically to manage diversity. The same applies to lawyers or attorneys who provide legal advice on the implementation of individual and collective labour relations. The publication may also be used by employees who are keener on mastering basic legislation and application overlaps thereof in the area of legal and social relations arising from the exercise of the right of natural persons to work.

Košice, October 2023

Jana Žuľová, Marek Švec

1 DIVERSITY, GOVERNANCE AND THEIR RELATION TO EQUAL OPPORTUNITIES POLICY

According to the dictionary of the current Slovak language,² in the first place, diversity is defined as the characteristic of a system, expressed in number and positions of the elements making up that system. It is, therefore, a diversity of species inherent in the biological environment and a term commonly used in natural sciences. In the social sciences and, in particular, in Slovak law, from the terminological point of view this concept is not embedded, yet it is gradually being brought to the attention of legal experts, firstly with respect to the concept of labour diversity and targeted practices in the form of its management (the so-called diversity management).

From the very beginning, *i.e.* in the 1970s, the concept of workforce diversity³ was used to refer to minorities and females among employees. Diversity in the workplace therefore consisted in increasing the proportion of persons of a particular sex and nationality or ethnic origin. At present, the workforce diversity includes other group and situational identities of employees, such as gender, age, religion, sexual orientation, *etc.* By its very nature, diversity is not a compact and indivisible concept. It is possible to define several types or dimensions thereof. Sepehri and Wagner recognise diversity on the basis of (i) visible characteristics: gender, age, ethnicity and physical appearance (ii) invisible characteristics: personality, values, professional capabilities and skills.⁴ Dimensions such as age, ethnicity, sex, mental and physical skills, race and sexual orientation are key or primary dimensions of diversity, as they have a significant impact on early socialisation and largely affect our values, perceptions of ourselves and others, and determine how people come together on the basis of common characteristics.⁵ We do not, to a certain degree, control these primary dimensions, they are visible to others (except for sexual orientation) and they result in first impression that we leave. The systematic procedure used by organisations to work with a diverse workforce in order to obtain a certain strategic advantage is then referred to

² JAROŠOVÁ, A. *Slovník súčasného slovenského jazyka (Dictionary of the contemporary Slovak language)* Bratislava : Veda, publisher SAV, 2021, p. 219.

³ Later workforce diversity was perceived as a part of wider concept of work diversity which besides workforce diversity also includes behavioural diversity, structural diversity and business diversity. See further: HUBBARD, E. E. *Diversity management*. Amherst : HRD Press, 2004, pp. 23-28.

⁴ SEPEHRI, P. – WAGNER, D. *Diversity Management: Impulse aus der Personalforschung*. München : Hampp. 2006, p. 41.

⁵ *Ibidem*.

as diversity management.⁶ The primary task of diversity management is to create conditions within the organisation that enable all people, regardless of their individual differences, to fully develop their personal potential.

The introduction of theme of diversity and management thereof at the turn of the millennium was in professional literature based on a description of the advantages and added value that the targeted implementation of this concept will bring to corporate culture. The European Commission's 2003 study *The costs and benefits of diversity* identifies the following five main benefits:⁷

1. strengthening cultural values within the organisation,
2. improving the reputation of the firm,
3. better ways of attracting and retaining highly talented people,
4. improving staff motivation and performance,
5. improving the level of innovation and creativity among employees.

Furthermore, it may be stated that the diversity management implemented in corporate culture and strategic objectives presents the organisation as socially responsible and demonstrates the human nature of its business. The organisation is building a positive image in this way. Properly seized diversity management may widen the range of suppliers, customers or new clients. It may, in the same way, contribute to the overall satisfaction of employees, thereby reducing the rate of fluctuation and saving the cost of training new employees.⁸

On the other hand, we consider it necessary to refer to the literature which denies some of the stated advantages of implementing diversity and emphasises that it is a matter of a number of variables (the type and degree of diversity, the nature of activities of the collective and its structures) that determines the relationship between diversity and performance. What works in one organisation may not be work in another.⁹

⁶ BEDRNOVÁ, E. – NOVÝ I. *Psychologie a sociologie řízení (Psychology and sociology of management)*. 3rd ed. Praha : Management Press, 2007, pp. 597-598, 607, 608.

⁷ *European Commission: The costs and benefits of diversity. A Study on Methods and Indicators to Measure the Cost-Effectiveness of Diversity Policies in Enterprises*. Executive Summary, 2003, p. 20. [online]. [cit. 20.10.2023]. Available at: <https://www.coe.int/t/dg4/cultureheritage/mars/source/resources/references/others/17%20-%20Costs%20and%20Benefits%20of%20Diversity%20-%20EU%202003%20ExSum.pdf>.

⁸ Other long-term advantages and benefits of diversity management are described in the following publications: HARRIS, H. – BREWSTER, C. – SPARROW, S. *International human resource management*. London : Chartered Institute of personal development, 2004, also: LINEHAN, M. – HANAPPI-EGGER, E. *Diversity and diversity management: comparative advantage. Managing human resources in Europe. A thematic approach*. London : Routledge, 2006, pp. 217-221, 230-231.

⁹ Those studies are described in ĹÁPAL, A. – KONEČNÝ, S. – SÝKOROVÁ, L. *Mýtus: Čím větší diverzita v týmu, tím lepší výsledky (Myth: The greater the diversity in the team, the better the results)* [online]. [cit. 20. 10. 2023]. Available at: <https://psych.fss.muni.cz/cosedede/aktuality/mytus-cim-vetsi-diverzita-v-tymu-tim-lepsi-vysledky>.

The inhomogeneous results of studies and analyses describing some time the advantages, while at some other time drawbacks of diversity and management thereof in the workplace may suggest that it is more of a fashion issue. Just a nice thing that organisations may busy themselves with. However, in the opinion of the authors of the publication submitted, demographic changes and globalisation of the labour market lead to changes that directly require attention for diversity and management thereof. The declining birth rate in Europe, although partly offset by the influx of migrants and the increase in life expectancy, presents employers with challenges in terms of focusing on specific working conditions for economically active employees over 50 years of age and for employees from third countries. Globalisation links labour markets, many domestic firms are foreign-owned which creates a global (international) corporate culture that influences people's daily interactions in the workplace. The growing heterogeneity of the workforce – whether in terms of age, race, gender, sex, religion or language – may result in employers and employees encountering hostile relationships in the workplace which may not be disregarded.¹⁰ Lack of targeted management of this diversity may leave the employer encountering various cooperation problems and, ultimately, the effectiveness of the very operation. Professional literature identifies a number of consequences resulting from workplace diversity not being reflected, even though it should be reflected. These are: (i) reduced productivity, (ii) conflict occurrence, (iii) communication errors due to misunderstood cultural context, (iv) unfair recruitment, (v) unfair promotion preference, etc.¹¹

We believe that, apart from the above reasons, attention paid to diversity and its management also makes sense in view of the duty to respect legal rules governing the labour market, if anything else. Knowledge of the topic is expected, although it does not necessarily constitute a pre-condition.

The primary role of anti-discrimination legislation should be to protect the rights and legitimate interests of natural persons in the legal position of employees, who have an objective reason for being rejected, isolated or even penalised in a majority society and which the legislation ranks under the so-called discriminatory reason. The minimum basis for diversity management is legislating the equal treatment principle, the so-called anti-discrimination legislation. Anti-discrimination legislation at the European and national levels aims to prevent discrimination and create equal opportunities for all. The general legal framework for the protection of persons with a non-majority sexual orientation and personality profiling is, in particular, the Universal Declaration of Human Rights (Art. 12), the International Covenant on Civil and Political Rights (Art. 26), the

¹⁰ Although it is necessary to note that these are not the result of diversity *per se*, but of prejudice, stereotyping and discrimination.

¹¹ HUBBARD, E. E. *Diversity management*. Amherst : HRD Press, 2004, pp. 31-33.

Charter of Fundamental Rights of the European Union (Art. 21) and the Treaty on the Functioning of the European Union (Art. 1, 2, 10, 153, 157). European anti-discrimination law is made up of the European Union and the Council of Europe through the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights. At European Union level, secondary legislation in the form of several anti-discrimination directives is particularly relevant.¹² The same is subsequently implemented in national law. It is, for example, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Legal standards at international and European levels did, shortly after adoption thereof, also constitute a significant complement to ECHR decisions¹³ and the EU CoU¹⁴ which laid the foundations for current perception of the issue.

In the Slovak law, the Directive was implemented by the Act no. 365/2004 Statutes on Equal Treatment in Certain Areas and Protection against Discrimination Amending Certain Laws (hereinafter referred to as the Anti-Discrimination Act). The Anti-Discrimination Act constitutes comprehensive legislation on the principle of equal treatment and creates a common legal basis for compliance with this principle in all areas of Slovak law. Article 2 of the Anti-Discrimination Act provides that observance of the equal treatment principle is to be based on prohibition of discrimination on grounds of sex, religion or belief, race, nationality or ethnic group, disability, age, sexual orientation, marital

¹² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Official Journal of the European Union L 204/23, 26.7. 2006. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303, 02/12/2000, p. 0016-0022. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Official Journal L 251, 2003, p. 12; Special edition 19/006, p. 224). Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing the Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

¹³ For example: Van Oosterwijck (1980, Application No. 7654 / 76), Rees (1986, Application No. 9532 / 81), James (1988, Application No. 10622 / 83), W. (1989, Application No. 11095 / 84), Eriksson and Goldschmidt (1989, Application No 11095 / 84). 14573 / 89), Cossey (1990, Application No. 10843 / 84), B. (1992, Application No. 13343 / 87), Schuler-Zraggen (1995, 14518 / 89), LF (1997, Application No. 28154 / 95), Roetzheim (1997, Application No. 31177 / 96), Goodwin (1998, 28957 / 95), Salgueiro da Silva Mouta (1999, 33290 / 96), Van Kück (2003, Application No. 35968 / 97), Grant (2006, Application No. 32570 / 03), Parry (2006, Application No. 42971 / 05), R. and F. (2006, Application No. 35748 / 05), L. (2007, Application No. 27527 / 03), Schlumpf (2009, Application No. 29002 / 06), Schalk and Kopf (2010, Application No. 30141 / 04) and others.

¹⁴ For example, C-13/94 in the legal matter of P v S and Cornwall County Council, C-109/91 Ten Oever, C-200/91 Coloroll, C-249/96 Grant, C-267/06 Maruko.

or civil status, skin colour, language, political or other opinion, national or social origin, possessions, birth or other status or for reporting a crime or other antisocial activity.

In this context, diversity is sometimes wrongly confused with the issues of equal opportunities policy and non-discrimination, although these are, of course, closely related issues. Equality of opportunity is a legal requirement for equal (working) conditions, *i.e.* it is a minimum which is guaranteed and must be complied with. Equal opportunities are often only seen within the limits of legislation as a concept that seeks to create anti-discrimination laws. Legislative measures to ensure equality (Affirmative Action) are linked to the notion of positive discrimination and the effort to favour the discriminated group. Legislation, as an external factor under threat of sanction, forces organisations to promote equal opportunities by guaranteeing access to organisations for “different” employees. However, it only creates the presence of a diversified workforce, not a living diversity. Diversity management is not just a legislative obligation in the form of implementing a non-discrimination policy, but the same expresses and emphasises the importance of differences between people, while helping at the same time to remove barriers arising from discrimination, prejudice, stereotyping and the exclusion of disadvantaged individuals from the labour market. The idea of diversity is a much broader a concept than equal opportunities or affirmative actions.

2 SEX, GENDER AND SEXUAL ORIENTATION AS EMPLOYEES' IDENTITIES

The concept of sex is a biological fact of a human, that is to say, a human being is anatomically either a female or a male. It represents the sum of the essential biological traits that distinguish males and females. In the literature, gender as the biological status of a person according to which a natural person is a male or a female, is not the same concept as gender as a social category to which certain notions of the society on what is or is not typical, appropriate or correct for a female or a male are attached.¹⁵ Gender as a term refers to a socially constructed role, behaviour, activity and attributes and is understood as a set of roles, behaviours and habits typically associated with a certain sex. The strictly defined notions, expectations and standards as connected with gender form the basis for the maintenance of an unequal relationship between females and males and form a starting point for gender discrimination.¹⁶

A horizontal and vertical division of the labour market may be considered by gender optics. Horizontal gender segmentation is referred to when females and males are concentrated in occupations that are perceived as gender-specific.¹⁷ Typical feminised branches are, for example, social services, administration or health care. Males then predominate jobs in construction, engineering and transport.¹⁸ Vertical gender segmentation means that even in branches dominated by females, senior jobs are occupied by men. Barriers that block the career

¹⁵ BARANCOVÁ, H. et al. *Zákoník práce. Komentár (Labor Code Commentary)*. Bratislava : C. H. Beck, 2017, p. 49.

¹⁶ LAMÁČKOVÁ, D. *Zákaz diskriminácie na základe pohlavia a rodu – právne východiská (Prohibition of discrimination based on sex and gender – legal approaches)*. Bratislava : Občan, demokracia, zodpovednosť. 2013, p. 8.

¹⁷ PALÍŠKOVÁ, M. Diskriminace na trhu práce a kritická analýza fungování nástrojů používaných pro zmírnění diskriminace (*Discrimination on the labor market and critical analysis of the functioning of tools used to mitigate discrimination*). Praha : VŠE v Praze, 2019, p. 61. [online]. [cit. 20. 10. 2023]. Available at: https://ipodpora.odborny.info/soubory/uploads/CAST_I_04_Diskriminace_na_trhu_p.pdf.

¹⁸ HAUSENBLASOVÁ, J. Koncentrace mužů a žen v tradičně mužských ženských profesích škodí nejen ekonomice, ale hlavně ženám (The concentration of men and women in traditionally male and female professions harms not only the economy, but especially women). In *Feminismuz CZ* [online]. [cit. 20. 10. 2023]. Available at: <https://www.feminismus.cz/cz/clanky/koncetrace-muzu-a-zen-v-tradicne-muzskych-a-zenskych-profesich-skodi-nejen-ekonomice-ale-hlavne-zenam>.

advancement of females are referred to as the glass ceiling. The glass ceiling is an invisible yet tangible barrier to the advancement of females to the top positions in organisations, despite the fact that there are enough females working in junior positions there.¹⁹ The glass wall represents the phenomenon where a male starts at a feminized branch, and it's easier for him to get into a management position with an unusually high salary. The phenomenon threatening successful females in leading positions is referred to as a glass cliff. These are situations where females break the glass ceiling and occupy a position originally intended for men, while the willingness to appoint a female a leader is motivated by the poor economic performance of the organisation.²⁰

Such occupational segregation by sex is explained by different job choices, which may, however, be due to gender stereotypes, unequal access by females to certain occupations and different requirements for the performance of work (level and specialization of education, practical experience, flexibility, *etc.*).²¹ Vertical and horizontal segregations are combined in the labour market and result in worse employment for women, lack of career advancement and lower pay compared to men. One may, therefore, speak of unequal status of females in employment, which is reflected in gender discrimination against females. That status is manifested in four fundamental aspects: the pay gap, discrimination on the grounds of maternity and parenthood, gender segregation and the exploitation of females' work.²²

Females at the same time represent an important source of skilled labour and are therefore strategically important for the labour market from an economic point of view. The difficulty of females' position in the labour market stems mainly from their maternity and parenthood. Females who have spent longer time on parental leave are in a worse position than men in the labour market. Taking maternity leave and subsequent taking parental leave will, as a rule, put a stop to their career advancement for several years. When they return to the labour market, they have to cope with simultaneous management of work and family responsibilities. For employers, females (mothers) offer less flexibility and adaptability. Employers often assume these characteristics in females in general, *i.e.*

¹⁹ VELÍŠKOVÁ, H. *Rovné šance jako konkurenční výhoda (Equal opportunities as a competitive advantage)*. Praha: Gender Studies, 2010, p. 30.

²⁰ MACHOVCOVÁ, K. *Výzkum potřeb cílové skupiny personalistů, limitů a možností pro rozvoj rovných příležitostí pro ženy a muže. Výzkumná zpráva. (Research of the needs of the HR target group, limits and possibilities for the development of equal opportunities for women and men. Research report)*. Praha : Gender Studies, 2006, p. 17.

²¹ HAVELKOVÁ, B. *Rovnost odměňování žen a mužů (Equal pay for women and men)*. Praha : Auditorium. 2007, p. 45.

²² KRÍŽKOVÁ, A. *Pracovní dráhy žen v České republice (Career paths of women in the Czech Republic)*. Praha : Sociologické nakladatelství (SLON), 2011, p. 41.

also in those who have not yet become mothers, either because of their own preference or because they cannot bear children.²³ The concept of equality between females and males as a freedom to develop their personal skills and to apply decisions without restriction by gender stereotypes or prejudices is being corrupted.²⁴ Given the biological factors, it is mainly females who are more affected by the birth of a child and by parenthood than men, but so far no study has shown that fathers are unable to participate in family responsibilities to an equal extent with mothers. In the context of gender diversity management, we are also talking about the agenda for reconciling work and family. However, the concept of sex and gender must be relatively strictly separated from the concept of sexual orientation and gender identity, which constitute separate discriminatory grounds, but at the same time relatively unambiguously fall within the scope of the current diversity management. Discrimination on the grounds of sexual orientation may be perceived as harassment or undesirable behaviour of another person which directly affects the dignity of a natural person. The practical manifestations consist, in particular, of seeking to intimidate, denounce, humiliate or insult a selected person because of his or her other sexual or personal preference.²⁵ The nature of a discriminatory ground of sexual orientation presupposes only a psychological dimension consisting in the personality of the specific individual. This means that a natural person displays emotional and sexual preference towards persons of the same sex without any visible signs or changes in physical disposition of that person. In assessing discrimination on grounds of sexual orientation, the sex of the persons concerned shall not be taken into account. On the contrary, discrimination based on sex presupposes only the biological dimension of the discriminatory ground. A natural person has male or female sex organs. As a result of the presence thereof, he/she is subsequently treated differently from another person in a comparable situation.²⁶ The legal protection of transgender persons, consisting in the prohibition of discrimination on grounds of sex, shall be provided when a change in the sex of the person occurs or when the person immediately prepares to have the same carried out. A clear contradiction in theoretical specification of

²³ HORÁKOVÁ, M. – HORÁK, P. Zaměstnatelnost skupin ohrožených nezaměstnaností na současných trzích práce (Employability of groups at risk of unemployment in current labor markets). In *Sociológia – Slovak Sociological Review*, 2007, 45, pp. 128-149.

²⁴ KVAPILOVÁ, E. – PORUBĀNOVÁ, S. *Rodová rovnosť: Prečo ju potrebujeme* (Gender equality: Why we need it). Bratislava : Stredisko pre štúdium práce a rodiny, 2003, p. 24.

²⁵ FUCHS, M. – MARHOLD, F. *Europäisches Arbeitsrecht*. Wien : Springer Verlag, 2010, pp. 214-217.

²⁶ MÉSZÁROS, P. Zdanlivá vzdelanosť slabšej strany ako dôvod na jej diskrimináciu (The apparent education of the weaker party as a reason for its discrimination). In *Diskriminácia v zmluvnom práve. (Discrimination in contract law)*. Trnava : Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity v Trnave a Vedy, vydavateľstva Slovenskej akadémie vied, 2015, pp. 213-220.

both discriminatory grounds is caused by persons defined as transsexual and intersexual people (between two genders), whose legal status is highly problematic due to ambiguous European legislation and the decisions of both the ECHR and the EU CoJ. The key question is whether transsexuality should be assessed under the gender-based discriminatory conduct legislation or whether, given the current state of medical science and the practical cases, it would not be more appropriate to subsume transsexuality as discrimination on the basis of sexual orientation. International legislation²⁷ did in the previous period contain no clear reference to sexual orientation as a discriminatory ground (nor do they contain the same to date). A person's sexual orientation and gender identity are thereunder subsumed to the right to respect for private and family life. However, application practice subsequently means that decisions which do not directly affect sexual orientation as a ground for discrimination against a natural person thus indirectly affect legal status of that person. The articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantee respect for private and family life, residence and correspondence, the right to marry and to found a family, as well as equality between spouses, protect a wide range of overlapping and interconnected relations. Thus, sexual orientation enjoys clearly different legal protection from discrimination on grounds of sex. It is, however, equally impossible to apply, by analogy, the legal protection afforded by a discriminatory ground based on the sex of a person because of its biological nature.

On the other hand, the European legal framework contains an express prohibition of discrimination on the grounds of sexual orientation, whether in the form of the binding legal content of the Charter or the Directive No. 2000/78/EU. However, its content continues to exclude unequal treatment of transgender persons and considers such, particularly on the basis of the ECHR decisions, as discrimination on sex grounds. Although the Directive and the Charter use the concept of sexual discrimination, still there is no provision therein to provide for obligatory effect thereof. As a result, it is interpreted by several European nations in accordance with their national rules, which generally include exclusively homosexual and bisexual orientation. According to current legal terminology, discrimination on the grounds of sex (or the right to protection of private and family life), therefore, presupposes the protection of transgender and intersex persons following the judgment of the Court of Justice of the European Union in the lawsuit of *P v S* and *Cornwall County Council*.²⁸ The *P* versus *S* case involved

²⁷ The European Convention for the Protection of Human Rights and Freedoms, The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights.

²⁸ C – 13/94 in the legal case of *P* vs. *S* and *Cornwall County Council* of 1996.

a medical procedure resulting in a change of gender of Ms. P, after which her employer terminated her employment. The justification given by the employer in defence against the unequal treatment charges was that the same procedure would have been applied if the female in their place of work had undergone a female-to-male surgery. However, the EU CoJ did not share this view and compared the situation then with that of any man – that is, a member of the sex to which Ms. P used to belong. The EU CoJ subsequently held that discrimination on the grounds of sex took place in the case at hand, arguing that discrimination on the grounds of sex is not only limited to cases where a person belongs to one of the sexes, but also involves a change thereof. In its rationale of the Decision, the EU CoJ further stated: *“to tolerate this type of discrimination of a person would be just as wrong as the failure to respect the dignity and freedom to which such a person is entitled and which the Court of Justice is required to uphold”*.²⁹

However, at the same time as transsexuality may be subsumed under discrimination based on sexual orientation, a terminological inaccuracy arises. The concept of sexual orientation presupposes, primarily, the differentiation of persons solely on the basis of their sexual preference towards persons of the same sex. It does not include the possible psychological problem of gender identity (transsexuality). In cases of intersex persons, as opposed to transsexuality, this is evidently a biological predisposition of a person who falls exclusively within the field of sex discrimination. The most prominent aspect of the issue of inappropriate assessment of transsexuality is the application for reimbursement of the costs of a gender-affirming surgery or reimbursement of hormonal and psychiatric treatment from health insurance systems (only possible in the case of the so-called necessary surgery).³⁰

Similar position was expressed in the past in the case of Ch. Goodwin,³¹ by the ECHR, too. Mrs. Goodwin's case dealt with the issue of a transsexual female who underwent surgery and the positive obligation of the state to recognise her new, altered gender. In its judgment, the ECHR stated that *“human dignity and freedom are at the very heart of the European Convention for the Protection of Human Rights and Freedoms”*. They, *inter alia*, went on to say that ‘in the 21st century, transsexuals must be able to fully enjoy the right to personal development and physical and mental integrity as do their fellow citizens’. With respect to the first sentence of

²⁹ C – 13/94 in the legal case of P vs. S and Cornwall County Council of 1996.

³⁰ For example, Van Kück vs. Germany (2003), Schlumpf vs. Switzerland (2009) *etc.* However, the following finding of the ECHR is a turning point in the reasoning of the judgment in the legal case of Schlumpf. *“Even though Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not guarantee the right of transgender men and women to reimbursement of the costs of a sex change from the health insurance system, the States Parties to the Convention should take into account the interests of transgender persons in the reimbursement of any costs incurred in defining the principles and conditions of social and health insurance systems.”*

³¹ Christine Goodwin vs. the United Kingdom (judgment of 11 July 2002).

Article 12 of the Convention, expressly stating the “right of a man and a woman” to marry, the Court stated that “(...) *they are not convinced that it can still be accepted today that these terms imply gender should be determined according to purely biological criteria (...)*”.³² Although that decision of the ECHR may be assessed positively in the light of the clear legal acceptance of the protection of rights of transgender persons, justification thereof continues to be based on the erroneous understanding of transsexuality as a disease which primarily consists in the physical alteration of the sex of a particular person. Thus, any practical assessment of the cases of transsexuality or intersexuality of persons or proving the same may be significantly complicated. In any event, a natural person may not decide to improve their mental condition by having a gender-affirming surgery. At the same time, without having undergone the operation, that person would not have been able to succeed to demonstrate sufficiently that they suffer from such a personality disorder. However, applying the established case law of the courts would imply that they do not enjoy any protection against possible discrimination. There would be a demonstrable violation of the fundamental human rights and freedoms of a transsexual man or woman, with a clear reference to incorrect or incomplete European case-law.

Performing a gender-affirming surgery will not eliminate the transsexuality of the natural person, but will only mitigate effects thereof on the patient's *psyche*. Therefore, the possible unequal treatment on the basis of transsexuality cannot be eliminated by assessing a case under legal protection on the basis of membership of one or the other sex which presupposes a purely biological factor of the case. However, the legal opinion of the ECHR on the assessment of transgender persons has not been based on a long-term re-evaluation of transsexuality from a medical point of view and at present medical knowledge is not fully taken into account, either. The latest revision of the International Statistical Classification of Diseases and Related Health Problems (ICD-10-GM) definitively classifies transsexualism as an impairment of the personality or behaviour of a natural person. It defines the same as “*the wish of a person to belong (live) in another sex and, at the same time, to be recognised as such, to be regarded as a person of the opposite sex*”.³³ Thus, the legal status of transsexuality with regard to possible discriminatory

³² The European Court of Human Rights has already addressed the issue of discrimination on the grounds of transsexuality in their earlier decisions. (Rees, Cossey, X., Y. and Z., Sheffield and Horsam). Given the impossibility of reaching a reliable conclusion on the aetiology of transsexuality, the defendant was left free to decide on the question of the legal recognition sought. In that decision, the United Kingdom was convicted of a violation of articles 8 and 12 of the Convention.

³³ *Internationale statistische Klassifikation der Krankheiten und verwandter Gesundheitsprobleme*. [online]. [cit. 20. 10. 2023]. Available at: <http://www.dimdi.de/static/de/klassi/diagnosen/icd10/index.htm>.

conduct clearly does not correspond to the medical perception thereof. Thus, the legal consequence of taking the same into account must be a clear assessment of discrimination from the point of view of its protection in terms of sexual orientation and not in terms of the sex of the individual (because of its non-biological nature). In case of transsexuality, analogously it is not a question of the chromosomal predisposition of the individual and his or her physical nature, as is the case of gender discrimination, but that of the psychological understanding (perception) of oneself.

3 PRACTICAL IMPLICATIONS OF DIVERSITY MANAGEMENT IN TERMS OF SEX, GENDER AND SEXUAL ORIENTATION AND THE LEGAL BASIS THEREOF

In the application practice, the effort to manage diversity is logically the task of the human resources management and, in addition to the non-discrimination policy management, it constitutes a series of personnel processes that seek to improve the working environment. In the area of human resources, diversity management means introduction of processes such as recruitment, selection and hiring of staff, their development and education, promotion in the context of internal mobility, talent management, maintaining contact with employees – parents on maternity leave, paternity leave, parental leave, flexible working arrangements, domestic work, *etc.* It is up to the organisation to decide which area to focus on as part of their diversity effort, whether it be the problem of unequal pay in the same positions with the same qualifications and experience, the express definition of measures against bullying and sexual harassment, the establishment of programmes and procedures for dealing with complaints and ensuring safety at work, the appointment of females to top positions, the creation of employment benefits for staff with family responsibilities, the implementation of an integration programme for new staff (on-boarding program) or a combination of several of these measures.

The following chapters cover specific measures observed in the practice of organisations which ensure the implementation of workplace diversity in three aspects thereof: sex, gender and sexual orientation. Three basic thematic units of diversity management instruments which are linked to one another are analysed in this chapter with regard to sex and gender. The first and second one are the very creation of diversity in the workforce through job advertisements and the setting up of the so-called quota systems. The employer's decision to adopt a quota for the less represented sex must be preceded by a rigorous internal evaluation process of observance of the legal conditions. The third unit focuses on the identification of tools for maintaining a diversified workforce in the workplace, which, from a gender perspective, means an analysis of tools for reconciling work and gender equality. Finally, in the last chapter, attention is paid to issues of diversity management in relation to persons with a minority sexual orientation.

3.1 Creation of Job Advertisements in Terms of Sex and Gender

According to the theory of human resources management, the first step in filling a vacancy is recruiting potential staff. It is a process in which a sufficient number of competent and motivated applicants are attracted to work for a given organisation in order to fill a position in a particular organisation, when it is required and at a reasonable cost.³⁴ The recruitment of potential employees is, thus, the primary tool enabling the employer to create workforce diversity. In this context, the question arises as to how such a process may be managed to achieve the desired and, at the same time, legally consistent result. If an employer wishes to take advantage of the work of a diversified team at their workplace, a diversified 'sample' of jobseekers must be gathered. From the legal point of view, this may conflict with the obligation not to discriminate, either directly or indirectly. Job advertisements using slogans such as: "Men Recruited Now", or "Females Coming to Power" may be, but at the same time may not be compliant with the legislation.

The analysis of the legal regulation in this context starts with an explanation of the concept of two different legal categories, which may be regarded as synonymous in ordinary language. These are the prerequisites for the performance of the work and the requirements for the performance of the work in the occupied post.³⁵

The prerequisites are the substantive criteria for filling a post as laid down by law. The employer may not use discretion or deviate from the job profile in the legislation when creating a job profile and specifying terms and conditions thereof. The same is based on objectifying the assumptions for work performance. If the law provides for medical fitness, certain age, qualifications, driving licence, length of professional experience, etc. as conditions to fill a job, the employer is then obliged to respect these prerequisites and failure to do so may not be tolerated. It is very rare for the prerequisites laid down by law to be just optional and that is when it is up to the employer whether or not the same would be required.³⁶ Since the prerequisites are laid down by law, only a legislative provision may change the

³⁴ KRAVČÁKOVÁ, G. *Manažment ľudských zdrojov (Human resources management)*. 1st ed. Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2020, p. 63.

³⁵ The distinction between the prerequisites for the performance of work and the requirements for the performance of work is crucially important in employment law for terminating the employment relationship by notice. Confusing the facts of the case under the legal regime according to Article 63 (1d), Item 1 or Article 63 (1d), Item 3 may result in the employer's failure in a dispute on termination of employment invalidity.

³⁶ VALENTOVÁ, T. – HORECKÝ, J. – ŠVEC, M. *GDPR v pracovnoprávnej praxi. Ako byť v súlade s nariadením o ochrane osobných údajov (GDPR in labor law practice. How to comply with the Personal Data Protection Regulation)*. Bratislava : Wolters Kluwer, 2020, pp. 97-98.

precondition required for performance of a particular job. The employer is entitled to require the employee also to comply with a condition which was laid down by law only during the period of that employee's employment and which was not yet required by law when the employment came into existence. Assessing prerequisites for performance of work agreed under the new or amended legislation is not, however, an inadmissible retroactivity (the retroactive effect of the legislation). This is the so-called false retroactivity, which is not actually retroactive and, therefore, it is permissible.³⁷ In this respect, the transitional and final provisions of the legislation will have an important role to play as those provisions should stipulate a period of time for which employees would be exempted from complying with the amended (tightened) presumption so that the employee could additionally comply with the same. On the other hand, the requirements for proper work performance are the conditions laid down by the employer for the position to be filled. The legal certainty requirement shows that such requirements must be defined in advance, should the same constitutes conditions for the establishment of an employment. The same may be derived from the employment contract, the organisation's system, the internal (inter-company) regulations of the employer, the instructions given by the managers, or these may also be requirements generally known for the work to be performed.³⁸ It may not be ruled out that the requirements for proper performance of the work agreed result from a decision or opinion of an authority other than the employer holding under the special rules authorisation to exercise, *vis-à-vis* the employer, the management powers in the performance of their tasks.³⁹

It is the employer that shall specify the requirements for the performance of the work, taking into account the specific conditions of the workplace and according to their expectations and criteria for the future employee. The employer may not, however, do so quite to his liking. The requirements for the work performance set by the employer must be significant, justified and objectively justifiable by the nature of the work in the post being occupied.⁴⁰ They must also not be abusive, defy good morals or violate the equal treatment principle. The employer

³⁷ Decision of the Supreme Court of the Slovak Republic of 31 May 2007, Case File No. 4 Cdo 2/2006.

³⁸ Opinion of the Supreme Court of the Czech Republic of 24 March 1978, Case File No. Cpjf 44/77 published in the Reports of Judgments and Opinions under No. 15, Vol. 1978, p. 500 or also Decision of the Supreme Court of the Slovak Republic of 23 October 2001, Case File No. 1 Cdo 86/2000, R 97/2002.

³⁹ Decision of the Supreme Court of the Czech Republic of 25 June 2013, Case File No. 21 Cdo 3641/2012.

⁴⁰ Decision of the Supreme Court of the Czech Republic of 07 September 2010, Case File No. 21 Cdo 2894/2009

should be able to justify why the requirement is considered to be necessary for the performance of the work in question.

The requirements may relate to both the physical and psychological characteristics of the employee or to other factors which have a significant impact on performance of workplace duties. Examples of legitimate requirements laid down by the employer may be deduced from court decisions. The following requirements have been recognised as those relating to the type of work or to the conditions under which the work is to be carried out:

- specific expertise,
- specific qualifications,
- manual skills,
- managerial and organisational skills (managerial skills),
- moral qualities and characteristics (honesty, truthfulness),
- appropriate manner of social behaviour and cooperation with clients (including outside working hours),⁴¹
- wearing the required work clothes,
- dressing and taking care of appearance in general during rest periods.

Just as a change in the conditions for work performance is permissible, a change in the requirements for work performance is permissible, too. The employer may change the previously laid down requirements for work performance which represented conditions for the establishment of an employment. This is, for example, because it is not possible to achieve adequate performance through the requirements set so far, or because the continued operation of the employer or business thereof requires a change.⁴² The form in which the amendment is to be made is not prescribed, but it follows from the nature of the case that the amended requirements must be communicated to everyone whose rights or obligations may be affected thereby. If, during the course of employment, the employee ceases to meet the requirements laid down by the employer without the employer's fault, it is immaterial whether this is due to the employee's incapability, incapacity or irresponsibility in performance of their duties. For the purposes of drawing consequences, it is enough that there objectively is a failure by the employer to meet the requirements laid down and the fault of the employee is not looked into.⁴³

⁴¹ Decision of the Supreme Court of the Czech Republic of 25 October 2001, Case File No. 21 Cdo 1628/2000.

⁴² Decision of the Supreme Court of the Czech Republic of 03 June 2009, Case File No. 21 Cdo 2383/2008, also Decision of the Supreme Court of the Czech Republic of 25 June 2013, Case File No. 21 Cdo 3641/2012.

⁴³ Decision of the Supreme Court of the Czech Republic of 17 August 2017, Case File No. 21 Cdo 5302/2016.

It should also be noted that the employer is not obligated by law to employ only those natural persons seeking employment who fulfil the requirements laid down (contrary to the mandatory conditions). The employer may, at their discretion, tolerate non-compliance with certain requirements or waive certain requirements for the proper work performance.⁴⁴ The employer's arbitrariness is limited by the obligation to respect the equal treatment principle and the prohibition of conduct contrary to good morals.

From the perspective of the diversity aspect analysed, there is no legislation that explicitly provides for sex as a precondition for work performance in the Slovak Republic. Sex may be a precondition for filling a position where biological differences between males and females may not be ignored. This is the difference in treatment in situations where equal treatment would mean a direct or indirect disadvantage for women as compared with men. Thus, by implication, the assumption of sex may be identified in the form of legislation defining, for example, jobs prohibited for women, and specifically for pregnant women, breastfeeding women and mothers until the end of the ninth month post childbirth.⁴⁵ In this connection, however, employers are reminded that, in the light of the Case C-207/98 *Silke-Karin Mahlburg vs. Mecklenburg-Vorpommern* and the effects of case-laws of the Court of Justice of the EU, information that the work offered is prohibited by national law to pregnant women, to women who are breastfeeding or to mothers until the end of the ninth month after childbirth may not have the intended legal relevance. In the light of that judicial decision, a pregnant woman (and also a breastfeeding woman, a mother, until the end of the ninth month following a childbirth) also has the right to apply for a job which is prohibited to her (by the very legislation), all the more so in case of a permanent job. The application of legal provisions to protect pregnant women (equally so breastfeeding women and mothers until the end of the ninth month after childbirth) must not result in unfavourable treatment in terms of access to employment. This means that an employer must not refuse to employ a pregnant woman under an indefinite term employment because there is a legal prohibition on performing certain

⁴⁴ Also: VRAJÍK, M. *How to solve unsatisfactory work results of an employee*. 2013, p. 10 [online]. [cit. 20. 10. 2023]. Available at: <http://dhplegal.sk/files/730fc9edce3f5a21b89f42f13d2e71a0.pdf>.

⁴⁵ Government Regulation No. 272 / 2004 Statutes, which establishes a list of works and workplaces which are prohibited to pregnant women, mothers until the end of the ninth month after childbirth and to breastfeeding women, a list of works and workplaces involving a specific risk for pregnant women, mothers until the end of the ninth month after childbirth and for breastfeeding women and which lays down certain obligations for employers in the employment of such women. In addition, Government Decree No. 356/2006 Statutes on the protection of the health of employees from the risks related to exposure to carcinogenic and mutagenic agents at work, Government Decree No. 281/2006 Statutes on minimum safety and health requirements for manual handling of burdens *etc.*

work in pregnancy which prevents her from performing the work from the outset and during the course of her pregnancy.⁴⁶

As regards the establishment of a sex requirement for the performance of a particular job, the very legislation provides for this in so far as it allows exceptions to the equal treatment principle by sex. Article 8 (1) of the Anti-Discrimination Act stipulates as follows: Discrimination is not such a difference in treatment as is justified by the nature of the activities pursued in employment or by the circumstances in which those activities are pursued, where that reason constitutes a genuine and decisive requirement of employment, provided that the objective is legitimate and the requirement is proportionate. It follows from the foregoing that an employer may define certain jobs only for women and, where appropriate, only for men, provided that sex is a necessary requirement for the work performance in the position being occupied. The employer may consider reserving a position only for one of the sexes if (i) the nature of the work or the circumstances in which it is carried out requires differential treatment (ii) such a requirement for employment is real and decisive and (iii) the objective of differential treatment is legitimate and the requirement proportionate. At the same time, it is the cumulative compliance with those signs that is relevant. In a number of their judgments, the Court of Justice of the EU has clearly defined that sex may in justified cases be a determining factor in relation to the circumstances of the work. A number of decisions concerned, in particular, the limited to inadmissible involvement of women in the armed forces of the State⁴⁷ and the assessment of whether the exception approved by the Member State as to the inadmissibility of an employment position for women fulfilled all the legal attributes. In contrast, it was acknowledged that personal sensitivity may play an important role in the relationship between a midwife and a patient,

⁴⁶ Legal case C-207/98 Silke-Karin Mahlburg vs. Mecklenburg – Vorpommern.

⁴⁷ For example, in the legal case C-222 / 84 Marguerite Johnston vs. Chief Constable of the Royal Ulster Constabulary, C-222 / 84, EU: C: 1986: 206, the Court of Justice of the EU considered the admissibility of the exception for police service, in Case C-273 / 97 Angela Maria Sirdar vs. The Army Board and Secretary of State for Defence, EU: C: 1999: 523, the Court of Justice of the European Union dealt with inadmissibility of military training for women in the area of artillery, in the legal case C-285/98 Tanja Kreil vs. Bundesrepublik Deutschland the legitimacy of the general exclusion of women from access to the armed forces was considered; further information thereon in: DAVALA, M. Pohlavie ako dôvod na legitímne rozdielne zaobchádzanie v európskom práve (Gender as a reason for legitimate differential treatment in European law). In *Dny práva – 2008 – Days of Law*. Brno : Masarykova univerzita, 2008, p. 593. MARTINSKÁ, M. Manažment diversity a rodovej rovnosti v Ozbrojených silách Slovenskej republiky (Management of diversity and gender equality in the Armed Forces of the Slovak Republic). In *Manažment ľudských zdrojov v ozbrojených silách, bezpečnostných a záchranných zboroch. Zborník príspevkov z medzinárodnej konferencie*. Liptovský Mikuláš : Tlačiareň Akadémie ozbrojených síl gen. M. R. Štefánika, 2019, pp. 201-202.

and the possibility of excluding men from that profession would not constitute discrimination on grounds of sex.⁴⁸

As a result of the decision-making activity of the Court of Justice of the EU, the threshold of legitimate difference in treatment in cases which may be justified by biological differences is much clearer. The objective which the employer seeks to achieve through differential treatment on the grounds of sex must be clearly communicated. The employer must also be certain that their preference for one or the other sex in the filling of a given vacancy is a genuine and determining requirement for the job in question.⁴⁹ Although, in the opinion of the present authors, the exclusion of the employment position as a whole from the equal treatment principle of males and females represents an excessive effort bordering on failure, being gender neutral is an even greater a challenge for employers. The point is that the basic human tendency is to give priority to those who are perceived as being similar and to discriminate against those who are different. Sometimes we are not even aware of it. Gender discrimination is very closely linked to gender stereotyping. It is based on unequal treatment of people because of their associated characteristics, which are connected with manhood or womanhood. If women or men do not fulfil the stereotypical characteristics attributed to their sex, there may be gender discrimination. This may also be reflected in the creation of job advertisements. The phrases like *“Looking for women for easy work in production”*, *“A very physically demanding position suitable for men”*, *“The job of female assistant director offered”* have a clear gender discriminatory connotation. Advertisements that require time flexibility, willingness to work overtime, to go on frequent business trips that largely affect the initial decision to apply for such a job, and stereotypically discourage female applicants with children, may also be described as such.

On the other hand, it should be noted that the use of the male grammatical gender does not in itself reveal the discriminatory nature of the advertisement. Generic masculine gender is used in a number of job advertisements. This is a characteristic of the Slovak language, according to which, when talking about a group of persons, the male gender is used to cover all members of the group *i.e.* including females. A job advertisement of a nursing position does not *a priori* mean that a man is wanted. Man and woman may be a nurse. However, only a woman may be a female nurse and Slovak is asymmetrical in this regard. Therefore, if female lawyers, doctors and assistants are advertised for, the same

⁴⁸ Legal case of 165/82, Commission of the European Communities vs. United Kingdom of Great Britain and Northern Ireland, ECR (1983) 3431.

⁴⁹ Comapre also: MADLEŇÁK, A. Kríza internej komunikácie v podniku v kontexte Covid-19 (Crisis of internal communication in the company in the context of Covid-19) In *Zdravotná spôsobilosť zamestnancov (Medical fitness of employees)*. Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2020, pp. 161-170.

targets only female candidates and may be gender discriminatory in relation to male candidates. An exception to that may be the profession of nurse, which in Slovak includes the demand for both males and females. However, it is certainly necessary to avoid formulations such as “looking for a male operator”. The wording of such an advertisement makes it clear that men are required to fill that post and it is not clear why female jobseekers are not taken into account. The Slovak advertising portals offer an increasing number of advertisements mentioning the job title in both male and female equivalents. Although this is criticised by a part of the Slovak linguistic experts,⁵⁰ the generic masculine is criticised as well.⁵¹ We believe that the use of gender-sensitive language in employers’ job advertisements does not entail additional costs. In the context of creating diversity in the workforce, it is worth mentioning the study according to which gender-balanced job advertisement has an impact on the overall increase in interest in the job offered, not only on the attraction of one of the sexes.⁵² The wider the “sample”, the greater the chance of selecting the most suitable future employees.

3.2 Quota System – Balancing the Number of Women and Men within the Organisational Structure

Targeted gender diversity management may and does also take the form of reserving certain jobs to just one, less represented sex. The so-called quotas, *i.e.*, the minimum number of employees with a selected characteristic working for the employer or in a selected job, are established. For example in the Slovak Republic, the quota system is established by the Act No. 5/2004 Statutes, on Employment Services as amended, in relation to persons with disabilities.⁵³ However, most often the quota system is associated with women or their insufficient representation in top management. Reserving jobs for women in male-dominated jobs (also *vice*

⁵⁰ *Language consultancy* [online]. [cit. 24.10.2023]. Available at: <https://jazykovaporadna.sme.sk/q/8746/>.

⁵¹ CVIKOVÁ, J. (ed). *Analýza významu a možností používania rodovo vyváženého jazyka* (Analysis of the meaning and possibilities of using gender-balanced language), 2016, p. 37. [online]. [cit. 24. 10. 2023]. Available at: http://www.ruzovymodrysvet.sk/chillout5_items/1/6/0/1/1601_5755f0.pdf.

⁵² ANDERSON, J. *Data Doesn't Lie: Removing These Gendered Keywords Gets You More Applicants*. 2016 [online]. [cit. 24.10.2023]. Available at: <https://www.ziprecruiter.com/blog/removing-gendered-keywords-gets-you-moreapplicants/>.

⁵³ See further in: DOLOBÁČ, M. Kvóta systém v pracovnom práve (Quota system in labor law). In JURČOVÁ, M. – OLŠOVSKÁ, A. – ŠTEFANKO, J. (eds.). *Diskriminácia v zmluvnom práve* (*Discrimination in contract law*). Bratislava : TYPI UniverSitatís Tyrnaviensis, 2015, p. 249.

versa) is a typical example of the so-called positive action.⁵⁴ The terminology used in this context also includes terms such as “reverse” discrimination, “preferential treatment”, “temporary special measures” or “affirmative action”. Abstaining from discriminatory treatment is sometimes just not enough to achieve real equality. The adoption of special measures has the potential to ensure actual equality, *i.e.*, equal exploitation of opportunities to access benefits in society, rather than merely formal equality. If such measure is adopted, a differential treatment which favours persons on the basis of their protected reasons takes place. From the point beneficiary’s point of view, a more favourable treatment under a protected characteristic is received compared to a person in a similar situation. From the affected person’s point of view, a less favourable treatment is given in the absence of that protected characteristic. There is, therefore, a very thin line between what action is still an admissible positive measure and what action is already discriminatory.

The Slovak legal environment is in terms of gender quotas very reserved. At the moment, there is no legislation providing for the compulsory introduction of quotas. However, this will have to change in the context of our membership of the European Union. Efforts by the European Union⁵⁵ of several years in the field of the more practical application of equality between males and females have been completed with the adoption of Directive (EU) 2022 / 2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures (hereafter referred to as “the Listed Companies Directive”). The efforts of the Member States and the institutions of the European Union to promote gender equality in economic decision-making, in particular to strengthen the representation of women in the top bodies of companies, through recommendations and self-regulation, have not yielded the desired results, which is why regulation in the form of a directive has been adopted. It is the responsibility of the Member States to ensure, by June 2026, that listed companies meet fixed percentages of the less represented sex in managerial positions. As a result of the adoption of the Directive, compulsory and voluntary quotas for the less represented sex in management diversity may be referred to.

3.2.1 Mandatory Quotas for the Less Represented Sex

The objective of the Listed Companies Directive, as its name implies, is to achieve a more balanced representation of women and men in the managerial positions of the so-called listed companies. A listed company is a company established in a Member State the shares of which are listed for trading in one

⁵⁴ Handbook on European Anti-Discrimination Law. European Union Agency for Fundamental Rights and Council of Europe, 2018, p. 76.

⁵⁵ Directive no. 2022/2381 was approved ten years after its submission to the legislative process.

or more Member States on a regulated market under Article 4 (1), Item 21 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast). The Directive does not cover micro, small and medium-sized enterprises.⁵⁶ The gender-balance objectives in the top-level bodies of these listed companies are set by the Article 5 of the Listed Companies Directive under which Member States shall ensure that listed companies are alternatively subject to one of the following objectives:

- either at least 40% of non-executive managerial positions are held by members of the less represented sex; or
- members of the less represented sex hold at least 33% of all managerial positions, both executive and non-executive.

Where listed companies would not be subject to the objective set out in the second item, Member States shall ensure that these companies set individual quantitative targets in order to improve the gender balance among executive managers. In simple terms, women should make up at least 40% of the members of the supervisory board of a listed company and also, their participation in the statutory body as individually determined by the company, or, alternatively, at least 33% of all the members of the statutory body or supervisory board of the listed company. The Directive therefore aims to improve the gender balance in all managerial positions, not just those that are non-executive.⁵⁷

The selection process or the process of appointing candidates should play the key role in achieving these objectives. Member States should ensure that listed companies which do not achieve the objectives set out in the Directive modify the process of selecting appointees or the process of election to managerial positions. As the very wording of the Directive clearly shows, one of the main factors enabling its correct implementation is the introduction and application of a set of transparent procedural requirements for the selection of candidates for appointment or election to managerial positions, in which the qualifications, knowledge and skills of candidates would be assessed in the same way, irrespective of

⁵⁶ Micro, small and medium-sized enterprise or SME' is a company which employs fewer than 250 persons and whose annual turnover does not exceed EUR 50 million or whose annual balance sheet total does not exceed EUR 43 million or, in the case of SMEs, established in a Member State whose currency is not the euro, equivalent amounts expressed in the currency of that Member State.

⁵⁷ MRÁZOVÁ, Ž. Rodová vyváženost' vo vrcholových orgánoch kótovaných spoločností – neštandardný zásah európskeho zákonodarcu? (Gender balance in the top bodies of listed companies – a non-standard intervention of the European legislator?) In *Neštandardné legislatívne zásahy štátu v neštandardných situáciách. Pocta profesorovi Milanovi Ďuricovi (Non-standard legislative interventions of the state in non-standard situations. Tribute to Professor Milan Ďurica)*. Banská Bystrica : Belianum. 2023, pp. 280-292.

gender.⁵⁸ The Directive strictly respects the prohibition of automatic preferences for one sex (as described below in Chapter 2.2.2) and also introduces the obligation to have a kind of ‘feedback’ if the candidate so requests. A candidate who has been assessed during the selection of candidates for appointment or election to a managerial position shall have the right to ask the listed company to provide information on the selection criteria on which the selection was based, the objective comparative assessment of the candidates on the basis of these criteria and, where relevant, the specific reasons for preferring a candidate who does not belong to the less represented sex (Article 6 (3) of the Listed Companies Directive).

The Directive also introduces a control mechanism for achieving the objectives set, in the form of a requirement for listed companies to submit annually to the competent authorities, information on the gender composition of their top-level bodies and on the measures they have taken to achieve the objectives set out in this Directive. The purpose is to enable those competent authorities to assess the progress of each listed company towards achieving gender balance in managerial positions. If the listed company failed to achieve the applicable quantitative targets, the information so submitted shall then also include a description of the specific measures taken so far or intended to be taken in the future to achieve the targets set out in the Directive.⁵⁹

Laying down adequate sanctioning mechanisms for non-compliance under the Listed Companies Directive has been left upon discretion of the Member States. The Member States may not penalise the failure to meet the quantitative targets itself, that is to say, the failure to achieve a certain number of women and men in managerial positions, but only the failure to comply with the individual obligations laid down in the Directive, which are intended to contribute to the achievement of those quantitative targets. More specifically, it is only possible to penalise a company if no adequate requirements relating to the selection of candidates exist, if there are no required quantitative objectives set and if the company does not comply with the notification obligation.⁶⁰

The adoption of the Directive met embarrassment of the experts in the field. The reserved position was also expressed by the Ministry of Labour, Social Affairs and Family of the Slovak Republic when, as representative of Slovakia, abstained at the EU Council meeting on the adoption of the Directive on 14 March 2022. The Ministry of Labour, Social Affairs and Family of the Slovak Republic is the competent authority concerning the Labour Code. The legal basis for the adoption of the Listed Companies Directive was Article 157 (3) and (4) of the Treaty

⁵⁸ Article 6 (3) of the Listed Companies Directive.

⁵⁹ Article 7 (1) of the Listed Companies Directive.

⁶⁰ *Ibidem*, Items 47 and 48.

on the Functioning of the European Union. That article renders introduction of such measures possible which allow for special advantages for the less represented sex in order to facilitate the exercise of professional activity or to prevent or compensate for disadvantages in professional careers.⁶¹ That article is used to primarily harmonise labour law rules, and the very European Commission states in their accompanying documents on the adoption of the Directive that this is in no way any harmonisation of company law. Electing or appointing a member of a company body is under the Directive seen through a prism of the employee selection procedure. In the circumstances of the Slovak Republic, the election of the members of the organs of business companies is subject to the Act No. 513/1991 Statutes, the Commercial Code as amended, with the Ministry of Economy of the Slovak Republic as the competent body thereof. It will therefore be interesting to see who will become the competent body for the implementation of the Listed Companies Directive, and in which code changes will eventually take place.

3.2.2 Voluntary Quotas for the Less Represented Sex

According to available statistics, it turns out that quotas stipulated under the law are more likely to be achieved than just targets set on a voluntary basis.⁶² On the other hand, also available are statistics which show that despite absence of legislation, a significant progress has been achieved in increasing the proportion of women in top company bodies,⁶³ even in those Member States where no legal standards or any measures in the form of quota recommendations have been adopted so far. This is also the case in the Slovak Republic. The trend in the representation of women in top positions in the Slovak Republic turns out to be relatively positive. Since 2003, the participation of women in management (President and CEO level) of Slovak companies has increased from 7.6% to the current 27.7%, which basically follows the EU average (from 8.5% to 30.6%).⁶⁴

As stated above already, the legal framework for voluntary quotas to increase the number of employees of the less represented sex is Article 8a of the Anti-Discrimination Act. The provision quoted provides for the so-called temporary

⁶¹ Recitals no. 3 of the Listed Companies Directive.

⁶² DENIS, E. *OECD Corporate Governance Working Papers No. 28. Enhancing gender diversity on boards and in senior management of listed companies*, 2022, p. 7 [online]. [cit. 15. 10. 2023]. Available at: [4f7ca695-en.pdf](https://oecd-ilibrary.org/publications/4f7ca695-en) (oecd-ilibrary.org).

⁶³ Gender Diversity Index of women on boards and in corporate leadership, 2021 [online]. [cit. 15. 10. 2023]. Available at: <https://europeanwomenonboards.eu/wp-content/uploads/2022/01/2021-Gender-Diversity-Index.pdf>.

⁶⁴ The second report on the results achieved in the national priorities of the implementation of the 2030 Agenda [online]. [cit. 15. 10. 2023]. Available at: <https://mirri.gov.sk/wp-content/uploads/2018/10/2-monitorovacia-sprava-Agenda-2030.pdf>.

compensatory measures which, if in compliance with the attributes defined, are not regarded as discrimination. Article 8a of the Anti-Discrimination Act provides for as follows: *“Discrimination is not the adoption of temporary compensatory measures by public authorities or other legal persons aimed at removing disadvantages...”*. The same only implies the competence to adopt temporary compensatory measures for public authorities or other legal persons. The employer, who may also be a natural person under the conditions of the Slovak Republic, is being ignored without precedent.

In the context of managing gender diversity, the employer's decision in favour of a voluntary introduction of quotas for the less represented sex is bound to comply with the following legislative rules:

- i. a demonstrable inequality exists, i.e., the quota adoption is objectively justified,
- ii. the measure aims at reducing or eliminating this inequality, i.e., the quota adoption pursues a legitimate interest in increasing the less represented sex in the workplace,
- iii. the measure is appropriate and necessary to achieve the objective pursued, i.e., it is short-term, temporary and lasts only until the inequality, which led to the adoption of that measure, has been eliminated.

The latter rule concerning the appropriateness and necessity of the measure in order to attain the objective pursued was narrowed down by the Court of Justice of the EU in their rulings.⁶⁵ Several of their decisions prohibited the application of the requirement of automatic preferences as in legal case C-450/93 Kalanke vs. Freie Hansestadt Bremen. This case concerns legislation adopted at regional level in case of which female candidates with an interest in a job or career have automatically been given priority. If male and female applicants were equally qualified and if a conclusion was drawn that women were insufficiently represented in the sector, priority had to be given to women applying for jobs. Under-representation was considered when at least half of the staff at the post concerned were not women. It was recognised that this rule pursued a legitimate objective of eliminating inequalities in the workplace. Measures that give women a particular advantage in the workplace, including promotion, would therefore be acceptable, as they have been introduced in order to improve women's ability to compete in the labour market without such discrimination. However, a rule guaranteeing absolute and unconditional priority to women when they are appointed or promoted would in

⁶⁵ See judgment of the Court of 17 October 1995 in the legal case of Kalanke / Freie Hansestadt Bremen, C-450 / 93, ECLI: EU: C: 1995: 322; judgment of the Court of 11 November 1997 in Marschall / Land Nordrhein-Westfalen, C-409 / 95, ECLI: EU: C: 1997: 533; judgment of the Court of Justice of 28 March 2000 in Case C: 158/ 97, ECLI: EU: C: 2000: 163; Judgment of the Court of 6 July 2000 in Case C-407 / 98 ABRAHAMSSON and Anderson, ECLI: EU: C: 2000: 367.

fact be inadequate to achieve the objective pursued. The preferential treatment could not therefore be justified in the case at hand. The established quota system for women will not be disproportionate if there is a guarantee, on a case-by-case basis, to male candidates with the same qualifications as female candidates that their applications will be considered objectively in the light of all the criteria relating to the applicant and that preference will not be given to female candidates if one or more of the criteria favours male candidates.⁶⁶

In the employer's practice, the introduction of quotas without a statutory obligation should incorporate the following requirements and procedures:

- a situation of proven inequality exists, either known to the employer (from its own audit, survey) or from external statistical data, the situation of inequality is measurable and may, therefore, be proven, a presumption is then not sufficient,
- the necessity to apply a measure is justified by the failure of other measures and actions by which the employer has already attempted to overcome objective inequality,
- the objective is clearly defined and it is clear when the measure ceases to be effective,
- comprehensive publicity of the action taken is ensured, its content is clearly explained and its transparency ensured in the application of the same,
- the implementation of the measure is evaluated and the results are known.⁶⁷

Transparency in the voluntary quota application process should also include the creation of a mechanism to protect the unsuccessful applicant. In this respect, the employer should inform unsuccessful jobseekers of the reasons for their failure if they so request, even if the employer's obligation to provide information does not stem from any legislation. The case-law of the Court of Justice of the European Union also confirms that Union law (*acquis communautaire*) does not impose any obligation on subjects to state reasons for their decisions not to recruit an applicant or any obligation to provide the unsuccessful candidate with information as to who has been recruited and on the basis of which criteria, but the obstinate silence and refusal by the employer to disclose any information about the selection process may prove that the applicant concerned had not been recruited with correct intention.⁶⁸

⁶⁶ From the judgment of the Court of Justice of 11 November 1997 Marschall/Land Nordrhein-Westfalen, C-409/95, ECLI:EU:C:1997:533.

⁶⁷ See further in: CENKNER, M. *Dočasné vyrovnávacie opatrenia – ako postupovať v procese ich prijímania a implementácie (príručka pre zamestnávateľov)* [Temporary compensatory measures – how to proceed in the process of their adoption and implementation (handbook for employers)]. Bratislava : Slovenské národné stredisko pre ľudské práva, 2022 [online]. [cit. 15. 10. 2023]. Available at: https://www.snslp.sk/wp-content/uploads/DVO-metodika_web.pdf.

⁶⁸ Judgment of the EU CoJ of 19 April 2012 in the legal case of Galina Meister vs. Speech Design Carrier Systems GmbH no. C-415/10. Also Judgment SD EU of 21 July 2011 in the legal case of Patrick Kelly vs. National University of Ireland no. C-104/10.

Finally, one more employer obligation may be highlighted in connection with the adoption of quotas. Pursuant to Article 8a of the Anti-Discrimination Act, a report is to be drawn up on the monitoring, evaluation and publication of the measure adopted; the same shall be submitted to the Slovak National Centre for Human Rights.⁶⁹

3.3 Reconciling Work and Family in the Context of Gender Equality, Gender and Sexual Orientation

Equality of opportunity is based on the principle of equal rights for males and females and equal treatment of males and females. Equality of opportunity for women in the labour market through measures to reconcile work and family life means the elimination of the gender stereotype, of the unequal representation of women in the overall structure of the labour force, the equality of opportunity for men with regard to parental rights and the increase in their participation in unpaid domestic work. None of the spheres (authors' remark: work and family) is by definition gender-specific in the sense that the representatives of either sex are better or worse suited to the tasks associated with them. Males and females of all ages have a need to operate in each of these spheres (environments) in their own way and have an irreplaceable position in them.⁷⁰ In other words, women can work as top managers and men are capable of taking care of children. However, equal opportunities shall be available for both sexes to be able to demonstrate the above. We should start by abolishing the idea of reconciling work and family life as an agenda aimed at "positive discrimination"⁷¹ in favour of women. We should also continue by abandoning the idea of favouring only such a family that resulted from marriage. The right to marry is reserved exclusively to persons of different sex under the conditions of the Slovak Republic and persons of the same sex are not offered any possibility of a legally recognised union in the Slovak Republic. This does

⁶⁹ ZUZČÁKOVÁ, L. *Prípravná štúdia o praktickom využívaní dočasných vyrovnávacích opatrení na Slovensku a v zahraničí. (Preparatory study on the practical use of temporary balancing measures in Slovakia and abroad)*. Bratislava : Slovenské národné stredisko pre ľudské práva, 2022 [online]. [cit. 15. 10. 2023]. Available at: https://www.snslp.sk/wp-content/uploads/DVO-studia_web-1.pdf.

⁷⁰ PISÁR, P. et al. *Rovnosť príležitostí na trhu práce (Equality of opportunities on the labor market)*. Banská Bystrica : Ústav vedy a výskumu Univerzity Mateja Bela v Banskej Bystrici, 2008, p. 20. Author of the Chapter: PISÁR, P.

⁷¹ The use of the link positive discrimination is in itself incorrect. Discrimination can never be positive.

not exclude the possibility of same-sex couples caring for children and, at the same time, being the beneficiaries of the concept of reconciliation of work and family life. We hold the view that the diversity management aimed at the sexual orientation of employees should also include the consistent equality of employees caring for children, regardless of the form in which the family exists, although the Slovak legislator may not set an example in this regard (see herein below).

Marriage and marital status as grounds for not discriminating against any natural person are included in Article 1 of the Labour Code. Enumerating discriminatory grounds, Article 1 of the Labour Code goes beyond the scope of any international source dealing with the issue of equal treatment and the principle of non-discrimination. Only the Convention on the Elimination of All Forms of Discrimination Against Women explicitly mentions the prohibition of discrimination against women on the basis of their marital and civil status in its provisions.⁷² The principle of non-discrimination on the grounds of marital and civil status applies throughout the term of employment, but in terms of legislation, this principle is emphasised at the stage of the employer's selection of potential employees. In accordance with Article 41(6) of the Labour Code, the family situation of a job applicant in the recruitment process is to constitute "*terra incognita*" for the employer. In terms of content fulfilment, it is a wide range of kinship relations and relations that imitate them.⁷³ It is inadmissible for an employer to enquire of a potential contractor whether they are planning to start a family in the near future, or whether they already have a family, how many children they have, whether they have someone to take care of them if they fall ill, whether the applicant is married or in a different form of a partnership, and so on. In specific situations, the prohibition of discrimination on the grounds of marital and civil status further means that an employer may not use a job application form with a specification leading to identification of the marital status of the job applicant. Favouring single persons over married persons is not permitted, an employer's policy of favouring childless employees over employees with family responsibilities is not permitted, discrimination on the basis of the specific identity of a spouse or a family member is not permitted (e.g., termination of an employment of an employee after a divorce), and harassment on the basis of marital status,

⁷² In addition, the calculation of discriminatory grounds may be found in Article 21 of the EU Charter of Fundamental Rights, Article 19 of the Treaty on the Functioning of the EU (in consolidated form), Article 26 of the International Covenant on Civil and Political Rights, Article 14 of the European Convention on Human Rights, Part V of Article E of the European Social Charter (revised), and Article 1 of the ILO Convention on Discrimination (Employment and Occupation) of 1958. Neither of those articles expressly mentions marital and family status as a ground of discrimination.

⁷³ Compare: KOVALČÍKOVÁ, M. – BARINKOVÁ, M. The protection (?) of personal rights in employment relationships. In *AD Alta: journal of interdisciplinary research*. Vol. 1, no. 2 (2011), pp. 55-58.

which may consist, for example, of teasing about the number of children a particular employee has, is also prohibited.⁷⁴

Discrimination based on marital status is relatively obvious in that it refers to discrimination based on the fact that the employee is either married or single. By contrast, the identification of discrimination on the basis of marital status is more complex, due to the very identification of the concept of marital status. We are convinced that an employer may not discriminate against an employee on the grounds of marital status in the full breadth of the term as defined by the case law of the European Court of Human Rights, where marital status is to be understood to include the “family relationships” of cohabiting unmarried couples, as well as the cohabitation of same-sex couples. Therefore, according to the “Strasbourg” case law, it is prohibited to: i) treat unmarried (heterosexual) partners differently from married partners, ii) treat (unmarried) homosexual partners differently from (unmarried) heterosexual partners, and iii) treat registered partners differently from married partners. The classification also reflects another prohibited ground for discrimination – sexual orientation, as decisions of the courts (in particular those of the EU CoJ) have shown that there is a close relationship between sexual orientation and marital status, whether established by marriage or by “*de facto*” cohabitation of homosexually oriented persons.

The principle of equal treatment prohibiting preference of unmarried partners over married partners is not *vice versa* applied consequently in the statutory provisions. This is evidenced by the clear differentiation between a married employee and employees living in “*non-marital forms of cohabitation*”, which is made by the Slovak legislator in the provisions of the Labour Code in favour of the married employee only. According to H. Barancová, “*giving marriage a privilege by the employer is correct... not only because marriage is under the protection of the Constitution of the Slovak Republic itself, but also because marriage, as a part of family law, falls within the competence of the individual Member States and there is as yet no Community competence in this area*”.⁷⁵

Concluding marriage as the exclusive way of entering into marital bond (under Slovak law) is reflected into the employer’s obligation to allow the employee

⁷⁴ For reasons of interest, we add the conclusion of the Canadian case-law in the legal case of Blatt vs. Murray vs. Toope 1990, 13 CHRR D / 94, according to which discrimination in employment based on an extramarital affair is not discrimination on grounds of marital status, but discrimination on grounds of sex.

⁷⁵ BARANCOVÁ, H. Základné ľudské práva v pracovnoprávných vzťahoch (Basic human rights in labor relations). In BARINKOVÁ, M. (ed.) *Európska dimenzia podnikovej sociálnej zodpovednosti a jej vplyv na reguláciu pracovnoprávných vzťahov* (The European dimension of corporate social responsibility and its impact on the regulation of labor relations). Košice : UPJŠ v Košiciach, 2009, pp. 71-74.

to attend his or her own wedding and that of his or her next of kin. The wedding ceremony itself interferes with the sphere of the employee's employment as an accepted important personal impediment to work. An employee's marriage, *i.e.* attendance by the employee at his/her own wedding, constitutes the employer's obligation to grant them one day's leave with pay. Parents are also entitled to one day's leave without pay for attending their child's wedding. The same applies to employees attending their parent's wedding. (provision of Article 141(2)(e) of the Labour Code). A prerequisite for the real applicability of the leave to be granted is that the wedding will interfere with the employee's work shift. If the employee's wedding took place on a Saturday and the employee does not work on that day, that employee shall not be entitled to paid leave. The employee shall not be entitled to paid leave either the day before or the day after the wedding.

The employee is entitled to a total of three days' paid leave in the event of the death of their spouse (Article 141(2)(d)(1) of the Labour Code). For the sake of completeness and coherence, we add that if the employee wishes to attend the funeral of their partner⁷⁶ (whereby they must meet the condition of cohabitation), they are entitled to a paid leave for the time strictly necessary, up to no more than one day, to attend the funeral, and for another day if the employee is also arranging the funeral (Article 141(2)(d)(3) of the Labour Code). The discrepancy between the number of days granted by the Labour Code to an employee on the death of their spouse and that granted to an employee on the death of their partner may be compensated for by the employer voluntarily granting additional time off with or without pay, at its discretion (Article 141(3) of the Labour Code), possibly also in the form of a legal claim arising from a concluded collective agreement.

The existence of the marriage bond during the employee's lifetime plays a role even after his or her death. Pursuant to Article 35(1) of the Labour Code, unless a special regulation provides otherwise, an employee's pecuniary entitlements do not cease to exist upon his death, but up to four times his average monthly earnings, the wage entitlements arising from the employment pass in turn directly to his/her spouse, children and parents, if they were living in the same household at the time of his/her death. The same shall become subject to inheritance, should there be no such persons. Partners, whether same-sex or heterosexual couples (common-law spouse) managing and maintaining a joint household, shall in this case settle their claims from employment in the context of the probate proceedings. It always means lower claims from employment for the partners in the absence of a will than if the same had been directly transferred on the basis of

⁷⁶ The term "partners" will be used in the text of the dissertation submitted to refer to persons of the same sex (homosexual and lesbian orientation) and of the opposite sex (most commonly referred to as a common-law spouse) who meet the legal requirements for cohabitation.

Article 35(1) of the Labour Code.⁷⁷ In our view, the transfer of claims from employment upon the death of an employee to a partner is not an option under the current legislative situation, even if the employer were so tolerant of these types of “*de facto*” family relationships to agree to a direct transfer of rights. With regard to the requirement of cohabitation, we hold the view that this should apply to all parties entitled. We base this primarily on the purpose pursued by the provision of Article 35 of the Labour Code. The direct and rapid payment of wage compensation, without waiting for the employee's other assets to be settled in the probate proceedings, is intended to help overcome, at least in the short term, the family's material losses as a result of the employee's death. In our view, such a material loss is suffered to the greatest extent by those who shared a household with the employee. The statutory scheme expects (assumes) that the employee's spouse, then children and finally parents should have been living in the same household with the employee at the time of his/her death in order to be able to make wage claims under the deceased employee's employment contract, even assuming that the employee's parents' claim would have skipped over that of his or her children if the employee had been living in the same household only with his or her parents. If no one was living in the household with the employee at the time of his/her death (even if the employee had a spouse, children and parents), the wage claims from the terminated employment would become a part of the estate. *A contrario*, if the spouse, children and parents were living in the household with the employee at the time of his/her death, the right to payment of compensation for wage claims up to 4 times the deceased employee's average monthly earnings belongs in full to his/her spouse in the first instance.

When interpreted literally, the Article 41(1) of the Constitution of the Slovak Republic⁷⁸ provides constitutional protection not only to marriage, but also to the family in general (regardless of whether it was established by marriage or not). In our opinion, the concept of the privileged status of marriage in the law of the Slovak Republic is not so much determined by the generally formulated provision of Article 41 of the Constitution of the Slovak Republic as by the context of secondary legislation implementing this constitutional article. We acknowledge that the protection of marriage enshrined in a domestic document of the highest legal force constitutes in itself an acceptable legitimate objective. The mere existence of a legitimate objective is not sufficient to justify differential treatment. The less favourable position of unmarried partners compared to that of married partners

⁷⁷ In theory, the partners will inherit in the second community of heirs along with the parents of the partner (the testator). If there are no parents of the partner, the heirs in the third community of heirs shall inherit along with the siblings of the partner or their children.

⁷⁸ Article 41 (2) 1 of the Constitution of the Slovak Republic, the first sentence reads as follows: Marriage, parenthood and family are protected by the law.

will not constitute discrimination, provided that the laws implementing Article 41 of the Constitution of the Slovak Republic provide for proportionate and, at the same time, necessary means to achieve that objective. In other words, a statutory provision that favours marriage over an unmarried partnership will be legitimate only if the same fully satisfies the proportionality test, i.e., the interference with the right(s) of the unmarried partner is necessary and proportionate to the legitimate objective pursued. In our opinion, both provisions of the Labour Code analysed above (Article 141(2)(d)(1) and Article 35) would fail the proportionality test.

It is thus a matter for each employer how to accept or take into account stable personal “*de facto*” relationships outside marriage in their internal policies. It is true, however, that “*when an employer privileges marriage as opposed to a non-marital domestic partnership, there is no direct discrimination against a homosexual employee because the same also excludes heterosexual unmarried domestic partners from that privilege. The employer would have to provide their benefits either to all marriage-like partnerships or only to married couples....*”⁷⁹ Thus, if an employer extends a privilege in employment to opposite-sex cohabitation and excludes same-sex cohabitation from that privilege, it is more or less certain, in the light of Strasbourg case law, that unless the employer properly justifies the measure on the grounds of necessity and proportionality, the employee will be discriminated against on the basis of his/her sexual orientation (Article 14 of the European Convention) and his right to family life (Article 8 of the European Convention) will be violated.

Many employers have included specific measures in their diversity programmes friendly to men and women taking care of children. It is useful to define the legal basis for the measures taken, which the employer may inform their employees about and further build on. In the following chapter, the legal analysis of the measures which make it possible to reconcile the family and working life of employees is examined with gender (with the exception of breastfeeding breaks), sex and sexual orientation being completely irrelevant to the employer when granting them.

3.3.1 Offering Flexible Employment and Work Forms

Focus of diversity programmes is in case of a number of employers on offering flexible employment forms and flexible work forms. In most cases, this is an offer targeted at reconciling work and family life, without interrupting the employee's work performance. Flexible working hours arrangements are undoubtedly one of the ways in which family care and work duties may simultaneously be

⁷⁹ BARANCOVÁ, H. Základné ľudské práva v pracovnoprávných vzťahoch (Basic human rights in labor relations). In BARINKOVÁ, M. (ed.). *Európska dimenzia podnikovej sociálnej zodpovednosti a jej vplyv na reguláciu pracovnoprávných vzťahov* (The European dimension of corporate social responsibility and its impact on the regulation of labor relations). Košice : UPJŠ v Košiciach, 2009, pp. 71-74.

managed. Flexibility takes many forms in the work context. In terms of the impact on the form and content of employment, flexible forms of employment (employment flexibility)⁸⁰ and flexible work forms performance (work flexibility) are distinguished. Flexible employment includes agreements on work outside the employment, fixed-term employment, probationary employment, agency employment and temporary assignments.⁸¹ Flexible work forms are those where work in a traditional employment is carried out in a flexible way that takes into account the individual needs of the employee. These include, for example, part-time employment, uneven working hours arrangements, overtime work, working hours account, domestic work, telework, etc.⁸² Atypical employment or atypical employment is a common and apt terminology for a flexible employment with a particular feature, whether it is its duration, the length of the working hours, the place of work or the person of the employer.⁸³ According to the European Glossary of Industrial Relations of the European Foundation for the Improvement of Living and Working Conditions (Eurofound), atypical forms of employment are employment which do not correspond to the standard or “traditional” model of full-time employment with evenly distributed working hours, concluded for indefinite period of time, with a single-employer and a long-term employment perspective.⁸⁴

⁸⁰ Compare: GILAROVÁ, R. *Metodika využití flexibilních forem práce – částečné pracovní úvazky, sdílení práce a přerušení práce (Methodology of using flexible forms of work – part-time work, work sharing and work breaks)*. Praha : Euro profis. Equal, 2004, p. 13.

⁸¹ SKOLODOVÁ, K. Digitálna doba a jej výzvy pre organizáciu pracovného času. (The digital age and its challenges for the organization of working time). In *Zamestnanec v digitálnom prostredí: recenzovaný zborník príspevkov z vedeckej konferencie (Employee in the Digital Environment: reviewed Proceedings of Papers of the Scientific Conference)*. Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2021, 164 p.

⁸² HŮRKA, P. Flexibilní formy zaměstnání v pracovním právu České republiky (Flexible forms of employment in the labor law of the Czech Republic.). In *Flexibilní formy zaměstnávání. Sborník příspěvků z mezinárodní vědecké konference Pracovní právo 2010 (Flexible forms of employment. Proceedings of the International Scientific Conference Labor Law 2010)*. Brno : Právnická fakulty Masarykovy univerzity. 2010, p. 6.

⁸³ Compare: DOLOBÁČ, M. Právna ochrana atypických pracovnoprávných vzťahov z pohľadu práva EÚ (Legal protection of atypical labor relations from the point of view of EU law). In *Európska dimenzia podnikovej sociálnej zodpovednosti a jej vplyv na reguláciu pracovnoprávných vzťahov. Zborník príspevkov z vedeckého sympózia s medzinárodnou účasťou. (The European dimension of corporate social responsibility and its impact on the regulation of labor relations. Proceedings of a scientific symposium with international participation)*. Košice : UPJŠ v Košiciach. 2009, p. 262.

⁸⁴ Eurofound's European Industrial Relations Dictionary, 2010. Processed according to: BELLAN, P. – OLŠOVSKÁ, A. *Flexibilné formy zamestnania v rámci EÚ – možnosti a riziká ich uplatnenia v rámci Slovenskej republiky (Flexible forms of employment within the EU – possibilities and risks of their application within the Slovak Republic)*. Bratislava : Inštitút pre výskum práce a rodiny, 2012, p. 14. [online]. [cit. 1. 10. 2023]. Available at: http://www.sspr.govs.sk/IVPR/images/IVPR/vyskum/2012/Bellan/2157_olsovska_bellan.pdf.

In the context of diversity management, work flexibility is of interest as one of the labour market options for those groups of people for whom standard employment would be difficult or not possible at all. It is also interesting as a better alternative to unemployment, which would be an unintended consequence of not making use of flexible forms of employment. Work flexibility is thus presented as a tool for harmonisation of work and family life, which should enable employees with family responsibilities to reconcile both spheres to their own satisfaction and to effectively meet the requirements of both their family members and their employer. In particular, the length of working hours and the ways in which the same is allocated directly and proportionately affect the actual time an employee will devote to caring for their family. Atypical employment arrangements, which offer employees time and place flexibility, are interesting in terms of parallel management of private and work tasks.

3.3.1.1 Labour Code Provisions Supporting Time Flexibility

Pursuant to Article 90(11) of the Labour Code, if the employer's operation so permits, the employer is obliged to allow an employee, at his/her request, for health reasons or for other serious reasons on his/her part, an appropriate modification of the fixed weekly working hours or to agree the same with him/her under the same conditions in his/her employment contract. The Labour Code does not specify what the employee's health or other serious reasons should be. Therefore, reasons of a social nature, but also of a societal or other nature, which prevent the employee from performing his/her work to such an extent that he/she may not perform his/her work for the employer in the employer's standard regime of equal or uneven distribution of working hours, may be taken into account. Article 90(11) of the Labour Code does not differentiate between even or uneven distribution of weekly working hours. This entitlement may be exercised by an employee working under both working hours scheduling regimes, without precluding the possibility that these reasons may also coincide with the reasons for which the special legal regulation in Article 87(3)⁸⁵ or Article 164(2)⁸⁶ of the Labour Code

⁸⁵ The wording of Article 87 (3) of the Labour Code: An employee with a disability, a pregnant woman, a woman or a man who is permanently caring for a child under the age of three, a lone father/mother who is permanently caring for a child under the age of 15, may only in agreement with him be allocated working time unevenly.

⁸⁶ The wording of Article 164 (2) of the Labour Code: If a pregnant woman and a woman or a man permanently caring for a child under the age of 15 requests shorter working hours or other appropriate adjustments to the prescribed weekly working time or, in justified cases, an earlier return to the original way of organising work, the employer shall be obliged to comply with their request, unless serious operational reasons prevent this. The employer must justify in writing the rejection of the application under the first sentence.

may be applied. However, in comparison with the above-mentioned provisions of the special regulation, the range of employees for the purposes of the application of Article 90(11) of the Labour Code is wider and they do not have to belong to any of the special categories of employees, but only to those for whom the reasons for the appropriate adjustment of the weekly working hours have arisen. For this reason, Article 90(11) of the Labour Code is also used in application practice as a legal instrument for solving problems of employees for whom the special provisions of Article 87(3) of the Labour Code and Article 164(2) of the Labour Code could not be applied for some reason. A special (atypical) regulation of working hours specifically related to the category of employees caring for close persons is then made possible by the provision of Article 165 of the Labour Code, which extends the scope of Section 164(2) of the Labour Code also to an employee who personally cares for a close person who is mostly or completely immobile and who is not being cared for in a social services facility or provided institutional care in a health care facility.

Within the meaning of the cited provisions, the modification of working hours may consist of a reduction of working hours (see herein below) and/or other appropriate modification thereof,⁸⁷ the essence of which lies in an individually adjusted working hours regime on the basis of a request by an entitled person, which the employer is even obliged to comply with if the employer's operation so permits or if serious operational reasons do not prevent the employer from doing so. Serious operational reasons constitute the only reason recognised by law as an exception to the employer's otherwise mandatory practice of complying with an entitled person's request for an adjustment of working hours. The decisive criterion for limiting the employer's arbitrariness in defining their own operational reasons in Slovak law is, for example, a decision of a regional court dating back to 1967.⁸⁸ It is considered absurd to describe the administrative and organisational burdens resulting from part-time employment as serious operational reasons.⁸⁹ Arguably, serious operational reasons could be the increase in additional costs for creating a part-time position or the inability to redistribute work among other staff.

⁸⁷ We hold the view that an employee within the meaning of Article 164 (2) of the Labour Code may simultaneously request shorter working hours and other appropriate working time arrangements.

⁸⁸ District Court, Decision No. 75 / 1967: *"Assessment of the seriousness of the operational reasons within the meaning of Article 164 (1) of the Labour Code requires in particular establish in a particular case the scope, organisation, function and work schedule of the employee, the operational situation of the employer, the possibility of ensuring that the employee is substituted by other employee performing the same function in the undertaking, the financial possibilities, the relationship and connection of the employee's work with individual units of the employer."*

⁸⁹ SCHMIDT, M. New of Atypical Work in Germany: Recent developments as to fixed-term contracts, temporary and part-time work. In *German Law Journal*. Volume 3. Issue Number 7. 2002.

It follows from the above that identification of the features relevant for assessing what may and what may not be considered as operational reasons will always depend on the specific case.⁹⁰ The following may be examined by the court and argued and proven by the employer: a) the nature of the operation and the severity of the interference with the same as compared to the baseline condition, b) the organisational and technical conditions of the employer, c) the number of employees working for the employer, d) the possibility of mutual substitution, e) the possibility of remuneration for the work done, f) what problems (complications) would be caused by such substitution (by different employees: within the very same department, another department, another unit, a new part-time employee or a work arrangement to the extent required), (g) what specifically would have to be reorganised (which specific employees would be affected) and to what extent, what would be their (modified) workload.⁹¹

The employer's obligation under the provisions of Articles 90(11), 164(2) and 165 of the Labour Code is correlated with the right of employees to request flexible working hours. The provisions are based on the employee's request. The Labour Code does not stipulate that the employee must justify such a request, *i.e.* in principle he/she bases his/her request on the factual situation of health reasons, other serious reasons, pregnancy or permanent care for a child.⁹² However, even if it is not apparent from the provisions cited, the change in the organisation of working hours requested by the employee should be causally linked to the employee's needs, that is to say, if the female employee requests to come to work later, *e.g.* at 9 a.m. instead of 8 a.m., she should not be so entitled merely because she is in general permanently caring for a child, but because the child's care requires such a change (*e.g.* she drives the child to a nursery).

The employer may offer flexible solutions on their own initiative and determine what other appropriate working hours arrangements are permissible in the light of the operational situation. In addition to the employer's internal regulations, the possibilities and rules for the use of flexible forms of work time organisation may also be formulated within the framework of a collective agreement, thus ensuring a stable form of guarantee and transparency for the procedures established. The nature of the Articles 90(11) and 164(2) of the Labour Code offers a hidden scope

⁹⁰ Compare: OLŠOVSKÁ, A. – DIVÉKYOVÁ, K. – MĚSZÁROS, M. *Organizačné zmeny zamestnávateľa a skončenie pracovného pomeru (Organizational changes of the employer and termination of employment)*. Bratislava : Wolters Kluwer SR, 2023, p. 44.

⁹¹ ŠVEC, M. – TOMAN, J. et al. *Zákoník práce: zákon o kolektívnom vyjednávaní: komentár (Labor Code: collective bargaining law: commentary)*. Bratislava : Wolters Kluwer SR, 2019, p. 678.

⁹² Only a request is for an earlier return to the original way of organising work is the one based on justified cases. The employee must justify why he/she wants that the original state be resumed earlier than planned.

for flexible options of individually negotiated working hours framed by mandatory provisions on the maximum number of daily working hours and mandatory rest periods. If employers wish to make use of flexible working hours organisation not expressly regulated by the Labour Code, their creativity, framed by the legislation in force is supported by the provision cited. The options explicitly listed by the Labour Code may include modification of work shifts (e.g., splitting a work shift or merging a split work shift), assignment to a single-shift operation only, assignment to a day-shift only, change of arrival to and departure from work or flexible working hours.

The legal grounds for the even or uneven flexible distribution of working hours are provided for in the provisions of Article 88 of the Labour Code. The essence thereof consists in the flexible shifting of the beginning or end of the working day, the working week or even of the flexible four-week period. Only a certain period of time, the so-called basic working hours, during which all employees must be present at the workplace is fixed. The basic working hours is usually “sandwiched” in between two optional periods of working hours, within which the employee is entitled to choose the beginning and end of his or his/her shift. In the aggregate, basic and optional working hours constitute business hours which are the total working hours that the employee is required to work in the flexible working period determined by the employer (Article 88(4) of the Labour Code). Just as it is the employer’s right, not the employer’s obligation, to introduce flexible working hours in the workplace, such an employer also holds a right to set the basic working hours. The employer may *a contrario* introduce the so-called full flexible working hours where no basic working hours is set. The employee shall only work during the business hours within the optional working hours, however, the length of the working shift may not exceed 12 hours (Article 88(6) of the Labour Code). At first sight, such a liberal regulation of flexible working hours consisting only of optional working hours evokes a great advantage for the employee. Flexible working hours allows the employee to manage his time in more free and better a way in terms of balancing his work and out-of-work duties and to adapt his/her arrival to and departure from the workplace to the local infrastructure (transport, administration, shops, schools, medical facilities, etc.). However, in the context of Article 143(1) of the Labour Code, impediments to work on the part of the employee in the application of flexible working hours are remunerated by wage compensation only to the extent that they interfere with the basic working hours. H. Barancová states in this regard: “*Since the Labour Code establishes no legal minimum length of basic working hours, the shorter the basic working hours, the less the employer will be obliged to compensate the employee’s impediments to work with wage compensation.*”⁹³ To the extent that obstacles on the part of the employee

⁹³ BARANCOVÁ, H. *Zákoník práce. Komentár (Labour Code. Commentary)*. Praha : C. H. Beck, 2012, p. 595.

interfered with the optional working hours, the same is treated “only” as excused work obstacles, not as work performance, and no wage compensation is provided therefor (Article 143(1) of the Labour Code *in fine*).

In application practice, especially as a result of inspiration from foreign legislation, further possibilities of other suitable working hours arrangements are also being discussed. It is, however, necessary to say that their adaptation to the Slovak legal situation may be complicated. These are, for example, working hours arrangements in the form of a compressed work week or the so-called working hours banking scheme accumulated time of which are used during school holidays (term-time working). In the case of compressed work, the employee works an unchanged number of working hours, agreed in the employment contract or stipulated by the employer, on a shorter number of workdays. Maintaining the number of weekly working hours increases the daily working hours while, at the same time, provides for accumulation of free working hours. Employees work less than 5 days per week, although on fixed days, according to a personal schedule, they work extended shifts of 10 hours or more (with the most common 40-hour fixed working hours). This arrangement may, for example, suit the employees who commute from more distant locations and save the time deficits associated with travelling to work. The drawback of such organization of weekly working hours is the fact that the extension of daily working hours is associated with higher risks in terms of health and safety at work and the need for, e.g., a parent to provide supervision for a child in the afternoon while they are at work. The condensed working week shows the signs of unevenly distributed working hours and certain rules established by the Labour Code apply to its introduction by the employer. Unevenly distributed working hours shall be possible if: (i) the nature of the work or the operating conditions do not permit the working hours to be allocated evenly; (ii) the employer agrees on the unevenly allocated working hours with the employee; and (iii) the average weekly working hours must not exceed the stipulated weekly working hours for a maximum period of four months (Article 87 of the Labour Code). Compliance with the second and third conditions may be assumed in case of condensed working week. It is questionable whether the first condition, which in our view may not be overridden simply because this option of working hours organisation satisfies both parties to employment, is met. The same problem may also be identified in the case of the so-called working hours banking scheme, which allows to continuously change the number of hours worked by an employee. The employer shall agree with the employee on establishing a working hours banking scheme on a monthly or annual basis, i.e., they shall agree the number of hours worked within a defined period of time and, at the same time, on the manner in which the accumulated hours

are used. The employer shall offer the employee the option of transferring the extra hours and then using the same in the form of a leave of absence according to the individual needs of the employee. The accumulation of hours worked, for which the employee takes a compensatory leave during the entire period of the school holidays, is abroad referred to as the term-time working, i.e., the employees work only during the school year. Adapting working hours to the school year is particularly advantageous for parents of schoolchildren, who can take full advantage of the two-month summer holidays to spend with their children.⁹⁴ In the circumstances of the Slovak Republic, it is essentially an institute of the working hours account provided for in Article 87a of the Labour Code. In relation to the reasons for and method of introduction of a working hours banking scheme with the employer the definition under Article 87a of the Labour Code may, in connection to Article 87 of the Labour Code as the legal basis for uneven allocation of working hours result in legal conclusion that the introduction of working hours banking scheme requires fulfilment of the objective conditions laid down in Article 87 (1) and (2) of the Labour Code. It means that the nature of work or the conditions of operation or the activity for which a different need for work is required do not permit the working hours to be allocated evenly.⁹⁵ Thus, individual need of the employee is not a legally relevant reason for agreeing to uneven working hours.

The above mentioned options for flexible working arrangements related to clarification as to what may be understood as other appropriate organisation of working hours within the fixed weekly working hours which is 40 hours in the Slovak Republic.⁹⁶ The flexible organisation of work that is frequently used locally is working reduced hours which is in practice commonly referred to as part-time work. The hours worked by the employee are reduced as compared to the weekly working hours that the employer have in place. Unlike the above-mentioned flexible arrangements for the organisation of the employee's working hours, there will always be a reduction in the prescribed working hours, with the lower limit of his/her reduction not being limited whatsoever by the Labour Code. There

⁹⁴ ŠIPIKAL, M. et al. *Zosúladzovanie pracovného a rodinného života v krajinách Európskej únie (osvedčené príklady z praxe)*. (*Reconciliation of work and family life in European Union countries (proven examples from practice)*). Banská Bystrica : Regionálne európske informačné centrum Banská Bystrica. Ústav vedy a výskumu Univerzity Mateja Bela v Banskej Bystrici, 2007, p. 8.

⁹⁵ Wording of Article 87a of the Labour Code: (1) A working time account is a method of unequal allocation of working time which the employer may introduce only by a collective agreement or in agreement with the employees' representatives. The agreement to set up a working time account shall be in writing. The agreement may not be replaced by a decision of the employer. The establishment of a working time account for an employee referred to in Article 87 (3) of the Labour Code also requires agreement of that employee.

⁹⁶ In two-shift operation 38 and $\frac{3}{4}$ hours and in three-shift/non-stop operation 37 and $\frac{1}{2}$ hours.

are two aspects to part-time employment: voluntary and involuntary.⁹⁷ Voluntary part-time work is an employee's preference. At certain stages of life, this atypical form of employment may be considered by such an employee as a solution to harmonise his/her private and professional life and is opted for upon his/her own request. Involuntary part-time work is performed on the basis of the employer's demand for part-time work. The employer is the one that offers a part-time job and the employee is forced to choose the same because the same is better than no job.

New forms of part-time work are also emerging along with working several hours a day, i.e., working of an employee on a part-time basis, whose actual work is less than half that of those working on a weekly basis.⁹⁸ A specific form is provided for in Article 49a of the Labour Code which regulates a split job. Other specific forms of part-time work include casual work, on-call work and irregular assistance.

A split job is, based on experience from abroad, an institute suitable for employees with small children, students, persons who want to carry out other activities in addition to their work (e.g. upgrading their qualifications, volunteering) as well as persons preparing for retirement.⁹⁹ A split job as provided for in Article 49(a)(1) of the Labour Code is a job where part-time employees allocate their working hours and the workload pertaining to that place of work among themselves. The Slovak legislator regards the split job as a special form of part-time employment. Therefore, all rights and obligations arising from the part-time employment also apply to employees participating in a split job scheme. The identifiable inclusion of a split job in the part-time job system affects the employee in a positive way generally. With regard to the prohibition of discrimination in favour of a part-time employee in relation to a comparable employee (Article 49 (5) of the Labour Code), no employee assigned to a split job may be favoured or limited in comparison with a comparable employee.

The working hours of an employee working in a split job must be less than the weekly working hours fixed, i.e. always less than 40 hours per week. Most often, there will be two half-time jobs. The range of working hours for individual employees may be different (one employee will work one-third working hours agreed, while the other one will work two-third the working hours). At the same time, we hold the view that the total working hours of employees assigned to a split job should be equal to or less than the prescribed weekly working hours of the employer concerned. The very essence of a split job is to divide the volume and scope of a full-time job to two or even more employees.

⁹⁷ SANDOR, E. *Part-time work in Europe. European Company Survey 2009*. Luxembourg : Eurofond. European Foundation for the Improvement of Living and Working Conditions, 2011, p. 8.

⁹⁸ Part-time employment with a working time of up to 19 hours a week is referred to as marginal employment, while the one with a working time of 20 to 34 hours a week as substantial.

⁹⁹ Statement of reasons on the Act no. 257/2011 Z. z. Item 27. [online]. [cit. 10. 10. 2023]. Available at: www.epi.sk.

A split job as defined under the Labour Code in practice corresponds to a job-sharing modification which is referred to as job-pairing. Job-pairing means that employees direct their own work from both time (allocation of working hours) and content (allocation of work content) points of view. They do not only share the weekly working hours in place, but also the tasks assigned to that split job.¹⁰⁰ The employer's power to allocate the working hours of an employee in a split job then falls within the competence of the employees themselves. It is up to them whether they allocate working hours evenly or unevenly, but they must also respect the mandatory provisions of the Labour Code concerning statutory daily working hours limits or other related scheduling rules. It is absolutely up to them to distribute the workload and to redistribute the work assigned to that post among themselves. Even though the Labour Code does not specify until when they are obliged to do so, just another legal requirement is that working hours be allocated and work be divided in such a way as to ensure that work is carried out in that job.¹⁰¹ In the absence of agreement between the employees assigned to the job, the employer shall determine the hours of work and the division of duties between them (Article 49 (a) (4) of the Labour Code). In our opinion, the temporary character of the agreement on the allocation of working hours and on the redistribution of work also tests the ability and appropriateness of placing an employee in a split job. The sooner the employees reach an agreement, the clearer the signal they give to the employer that in the future they can handle organisational matters relating to the work performance in a split job. There are also higher requirements for the planning, coordination and management of performance-related processes imposed on the employees themselves and the same also relates to how they will inform each other of the work already carried out. In some cases, it will be necessary for their working hours to overlap for a certain period at least. The individual working hours of the staff involved in a split job should otherwise be scheduled differently. It is clear from the above that the efficiency of a split work will depend primarily on the skills of those who share the work in question. At the same time, however, the provision of Article 49 (a) (6) of the Labour Code does not preclude the employer from conducting himself prudently to a certain degree and from "testing" the organisational capacity of employees assigned to a split job. An agreement on assignment of a person to a split job

¹⁰⁰ Individual job – sharing practical modifications are detailed by ŠVEC, M. Flexiistota a job sharing – teória v praxi (Flexicurity and job sharing – theory in practice). In *Teoretické úvahy o práve 7. zborník vedeckej konferencie doktorandov a školiteľov Trnavskej univerzity v Trnave, Právnickej fakulty. (Theoretical reflections on law 7. proceedings of the scientific conference of doctoral students and supervisors of the University of Trnava in Trnava, Faculty of Law)*. Trnava : Trnavská univerzita, Právnická fakulta, 2011, p. 5.

¹⁰¹ See detailed obligations of an employee under Article 81 of the Labour Code.

may be terminated in writing by the employer and shall cease to exist within one month of the date of notification of termination of the agreement, unless otherwise agreed between the employer and the employee. The Labour Code does not further specify any grounds for such termination, or the need to state the same in the notice of termination of the agreement. There is no sanction therein of nullity for non-compliance with requirement of the written form of termination of the agreement, either. Certainly, the justified reason on the part of the employer to terminate the agreement on splitting will be that the employees assigned to that split job are not able to agree on the allocation of their working hours and tasks.

The contractual freedom of the parties to this employment is not just limited as to the extent (the possible giving any reasons for the termination of the assignment to a split job agreement), but the same also covers the entities entitled to terminate that agreement. Both the employer and the employee may terminate the assignment to a split job agreement, although the employee is likely to jeopardise thereby his or her shorter working hour job (see herein below).

As regards the period of one month for the termination of the assignment to a split job agreement, the duration thereof may, in our view, be affected by the agreement of the parties thereto in two regards, in particular in connection with the provision of Article 1 (6) of the Labour Code.¹⁰² Article 49a (6) of the Labour Code does not expressly prohibit that the same may not be deviated from, nor does it follow from the nature of its provision, even the use of the phrase ‘unless otherwise agreed between the employer and the employee’ results in such a deviation being anticipated. The provision concerned is, by its nature, non-mandatory. Article 1(6) of the Labour Code stipulates as qualitative requirement of possible regulation of an employee’s employment conditions that the same shall always be more favourable to such an employee. The question is as follows: May the employer and the employee also agree to reduce that one-month period? It is not possible to say with certainty which answer (yes or no) is the correct one. The relativism of the answer is linked to who terminates the assignment to a split job agreement. Should the employee do so, he/she thereby clearly expresses his opposition to remaining in that split job (perhaps even in general terms also with his/her further employment with that employer). The employer may agree with him/her to shorten the one-month termination period of the agreement, since one may perceive the employee’s failure to remain with the employer as advantageous for the employee (and thus see the provision of Article 1 (6) of the Labour

¹⁰² Article 1 (6) The Labour Code reads as follows: In employment relations, the employment and working conditions of an employee may be regulated more favourably than provided for in this law or in other employment legislation, unless expressly prohibited by this law or other employment legislation or provided that, by virtue of its provisions, it is not apparent that they may not be derogated from.

Code as non-contradictory). If the assignment to a split job agreement is terminated by the employer, the minimum period of one month for termination of that agreement must be complied with and an extension thereof may also be considered as an advantageous aspect for the employee. Article 49a (6) of the Labour Code, however, allows for a different interpretation. In order to preserve the legal certainty of both parties to the legal relationship (without more or less subjective speculation, what is and what is not more advantageous for the employee), it is necessary to designate a period of one month's notice as the mandatory minimum, which may only be exceeded.

As already indicated, *de lege lata*, in addition to the conclusion of an employment contract establishing a part-time employment with a particular employee, the conclusion of an agreement on his/her assignment to a split job is also required for the work performance in such a split job. The Labour Code provides for a written form thereof as failing to execute the same in that prescribed form results in nullity thereof. There is also the mandatory requirement of informing the employee of the conditions of employment applicable to a split job (Article 49 (a) (2) and (3) of the Labour Code). An agreement to assign an employee to a split job may be included in the employment contract or may be drawn up separately. The increased administrative burden associated with that type of employment is due to the fact that the need to draw up employment contracts and subsequent agreements to assign an employee to a split job increases directly in proportion to the number of staff to share that post. The employer must conclude an employment contract with each employee taking part in a split job. The same shall include all the essential requirements thereof. There should also be an agreement to assign him/her to a split job. The personal irreplaceability of an employee as employed under the Slovak law excludes what is distinctive for job-sharing: a single employment with the plurality of subjects on the part of the employee.

The unresolved legal consequences result from legal obligation of mutual substitution of employees in a shared position, as provided for in Article 49 (5) of the Labour Code. If there is an impediment to work on the part of the employee assigned to a split job, the employees who share that job with him/her, shall be required to fill him/her in, unless there are serious reasons for not doing so on their part. We may just wonder whether the conditional legal obligation of an employee to deputize for another employee does not restrict the employee assigned to a split job as compared to a comparable employee¹⁰³ not subject to such an obligation by

¹⁰³ Article 40 (9) the Labour Code defines a comparable employee as one who concluded employment relationship of indefinite duration and fixed weekly working time with the same employer or with an employer pursuant to Article 58 and who performs or would perform the same type of work or a similar type of work, taking into account his qualifications and professional experience.

law. The legalisation of the inadmissible situation of unequal treatment of an employee assigned to a split job compared with a comparable employee is possible on the basis of the establishment of an objective ground. This could, in our view, be just due to the nature of the split job which consists in splitting working hours and the workload of just one job as well as in the inevitable consequence which is the need to continue by the substitute employee what was started by the absent (substituted) employee. A follow-up and, to a much greater extent, problematic fact is the assessment of the performance of the substitute employee. It turns out that this type of work will meet all the characteristics of overtime work.¹⁰⁴ An employee assigned to a split job does in principle carry out work in excess of the prescribed weekly working hours to substitute another employee. Such a working hours results from a pre-defined or agreed distribution of working hours between colleagues and exceeds the schedule of work shifts. The employer's consent or direction to perform such work consists in the employer's obligation to inform the employee without undue delay if there is a need for substitution of other employee (Article 49a (5) *in fine*). M. Barinková underlined: *"However, the overtime work ordered to an employee assigned to a split job is in stark contrast to the requirement as laid down in Article 97(2) of the Labour Code which prohibits an employer from ordering an employee working shorter working hours to work overtime."*¹⁰⁵ That legislative deficit may be remedied by changing the statutory structure of compulsory mutual substitution of employees in a split job into an option. The necessary need for mutual substitution of employees in a split job could be addressed by the employer in implementing practice through an agreement on overtime work, which the statutory provisions do not prohibit from being agreed upon even for part-time work. In order to avoid the collapse of the whole system of a split job as a result of an employee's refusal to enter into an agreement on overtime, the agreement on overtime work may, by reason of the need to substitute an employee, already made a part of the agreement on assignment to a split job, while retaining the right by the employee to refuse to perform that work for serious reasons on his part.

It is not disputed that a split job as atypical work is a flexible form of work reflected in the organisation of working hours and work. Conclusion of atypical employment result from grounds which are (first and foremost) convenient for the

¹⁰⁴ Overtime work shall under Article 97 (1) of the Labour Code be understood as work performed by the employee upon instruction of the employer or with the employer's consent in excess of weekly working time under working time allocation fixed in advance and performed outside working shifts scheduled.

¹⁰⁵ See: BARINKOVÁ, M. Sociálna „pseudoochrana“ zamestnanca po novele Zákonníka práce. (Social "pseudo-protection" of the employee after the amendment to the Labor Code). In HODÁLOVÁ, I. *Dôstojnosť zamestnanca v pracovnoprávných vzťahoch. (The dignity of the employee in labor relations)*. Bratislava : Sprint dva, 2011, p. 33.

employer or the employee. Where, in practice, flexibility brings mutual advantages for both the employer and the employee, such a phenomenon is referred to as positive flexibility. Flexibility as the result of strict promotion of the employer's interests, irrespective of the preferences and needs of the employees, is called negative flexibility. The concept of diversity explained above is precisely to promote such forms of work flexibility that are acceptable to the employer and, at the same time, to the employee. It is the employer that decides to create a split job. Whether that job is subsequently filled depends on the interest and benefits for the employee. In our opinion, the prospects of creating a split job at the employer's place of work and, subsequently, of staffing the same are rather pessimistic. In the first place, the employer may be discouraged by the administrative (if not even bureaucratic) method of creating a split job and the associated increased financial cost.¹⁰⁶ It is only for the employer to assess what advantage a shared post is "attractive" in order to create a split job for the employee and not to conclude just a contract on shorter working hours with him/her instead, where, moreover, the establishment of a work plan and the division of duties will be within the employer's remit. The disadvantage for employees is, in particular, the statutory duty to substitute one another, the justification of which is besides linked to an indeterminate notion of serious reasons, without a solution to records or remuneration for such substitution work.

It is clear from the very nature of the activity that casual work, due to the volatility of the permanent source of income, will not only prove to be a positive tool for implementing diversity in the workplace. On the other hand, the idea of considering casual work as an opportunity to increase the "family budget" and of welcoming this form of work, especially during certain periods of life, may not be entirely rejected. The International Labour Organisation defines casual work as work of no fixed duration carried out by full-time or part-time employees only when the employer needs and calls them to work. It is emphasised that casual work depends on the amount of work carried out by the employer and that casual employees may only work for just a few days, but also for a few consecutive weeks. Contracts covering the performance of casual work, if any, often do not contain provisions on working hours (the so-called zero-hour contract), there is just an obligation on the part of the employee to make himself/herself available to the employer, but without assuring that employee that he/she will ever be called upon to work.¹⁰⁷

¹⁰⁶ For example, the costs of training two employees for the same job instead of just one, the increase in the costs for reliable time records. If employees allocate working time in the way that they work for more than 4 hours per shift, the catering costs of the employer are increased.

¹⁰⁷ *ABC of women employees' rights and gender equality*. Second edition. [cit. 10. 2. 2013]. Geneva, International Labour Office, 2007, p. 32. Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf.

Casual work is directly identified as another form of part-time employment by Directive 97/81/EC on part-time work. The same does not, however, define casual work or casual employees. The main attributes of casual work are the absence of a lasting stable relationship between the employee and the employer, less work, less protection and entitlement to fewer (or even no) benefits. The casual work performed by an employee does not impose the same requirements on the employer as regards the safeguarding of working conditions as those imposed on the employer concerning regular (permanent) employees. This is also confirmed by Annex No. 2 to Directive 97/81/EC which allows a Member State to exclude from the scope of the Directive the employees working on casual basis. Such an exclusion must be justified by objective factors, *i.e.* those which correspond to a genuine need on the part of the employer, are appropriate to achieve the objective which they pursue and are necessary for that purpose.¹⁰⁸ The possible use of casual work also follows from the Directive 91/553/EEC on the obligation of the employer to inform employees of the conditions applicable to the contract or employment. This Directive covers all employees who concluded an employment contract or employment in accordance with the law in force in a Member State and/or determined by the law in force in a Member State. Casual and/or specific staff may under Article 1 (2b) be excluded from the scope of application of the Directive by Member States provided again that the non-application of the Directive is objectively justified. Similarly, the ILO Convention No. 158 of 1982 on termination of employment at the initiative of the employer (notification of Ministry of Foreign Affairs of the Slovak Republic No. 172/2010 Statutes) allows States Parties to exclude from all or some of the provisions of this Convention the category of employees employed on casual basis for a short period of time. The scope of application of the directives quoted and of the Convention will not therefore depend on the national classification of the legal relationship as casual activity, but, however, on the objective justification for inapplicability. Work may be casual and/or specific and still fall within the scope of the Directive abovementioned and the Convention, the very nature of the casual and/or specific work does not prejudice the employment. In the circumstances of the Slovak Republic, agreements on off-the-job work are often perceived as casual work, although this perception is probably incorrect. The scope of the agreed contractual obligation to work (in the case of an agreement to work a maximum of 350 hours *per* calendar year, in the case of an employment agreement a maximum of 10 hours *per* week and in the case of an agreement on student temporary work for a maximum of 20 hours *per* week on average over a reference period of up to 12 months) materially subsumes agreements on off-the-job work as well as a natural person working on the basis thereof under Article 2 (2)

¹⁰⁸ Decision of the EU CoJ in the legal case C -170/84, Bilka-Kaufhaus GmbH vs. Karin Weber von Hartz, par. 37.

and Article 3 (1) of the framework agreement on shorter working hours.¹⁰⁹ Annex 2 (1) defines the scope of application of Directive 97/81/EC by covering employees working shorter hours who concluded an employment contract or an employment as defined in the law, collective agreement or practice in force in each Member State. The Directive also allows for part-time work to be carried out in a labour relationship other than employment. The agreements on off-the-job work above are available in the Slovak Republic. Table of Conformity of the Labour Code with Directive 97/81/EC, however, refers to the transposition thereof into national law only in relation to the provisions of Article 1 (1), Article 42 (1) and Article 49 (1) of the Labour Code, but there is, however, no reference to Article 223 (1).¹¹⁰ In other words, in the Slovak Republic, working hours shorter than fixed working hours only takes place on a part-time basis; it is “concealed” that part-time work is also carried out locally on the basis of off-the-job agreements. However, if the Slovak legislator did not wish to subsume the off-the-job agreements into the scope of Directive 2004 / 83 / EC, Article 2(2) of framework agreement on shorter working hours should have been transposed into Slovak law. The opinion of the experts is unanimous in this respect. The Slovak Republic has not yet made use of that clause,¹¹¹ so agreements on off-the-job work are, *de facto*, another “type” of part-time work.

¹⁰⁹ Annex 2 (1) 1 to Directive 97/81/EC: This Agreement shall apply to part-time employees who have concluded an employment contract or employment relationship as defined in the law, collective agreement or practice in force in each Member State.

Annex 3 (1) to Directive 97/81/EC: The term “part-time employee” refers to an employee whose regular working time, calculated on the basis of a week or an average of up to his employment of up to one year, is shorter than the regular working time of a comparable full-time employee.

¹¹⁰ Table of Conformity available at: <http://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=3031>. [cit. 10. 10. 2023]. See further: ŠVEC, M. et al. *Kultúra sveta práce. Závislá práca a dohody o prácach vykonávaných mimo pracovného pomeru. (The culture of the world of work. Dependent work and agreements on work performed outside the employment relationship)*. Bratislava : Friedrich Ebert Stiftung, 2012, p. 30.

¹¹¹ BARANCOVÁ, H. et al. *Pracovné právo v európskej perspektíve. (Labor law in a European perspective)*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2009, p. 260. Author of the Chapter: OLŠOVSKÁ, A.; ŠVEC, M. et al. *Kultúra sveta práce. Závislá práca a dohody o prácach vykonávaných mimo pracovného pomeru. (The culture of the world of work. Dependent work and agreements on work performed outside the employment relationship)*. Bratislava : Friedrich Ebert Stiftung, 2012, p. 30. Contrary to the above-mentioned opinion of the experts in the field, the table of conformity of the Labour Code with Directive 97/81/EC thus appears to be the case as the same refers in case of Annex 2 (2) to the Directive to note EÚ in column (7) which, according to the legislative rules of the Government of the Slovak Republic means that provisions of the Directive were transposed in their entirety, correctly, in their appropriate form, including a secure institutional infrastructure and appropriate sanctions and in in conjunction with one another. At the same time, however, we can also point out that columns 4 and 5 no longer provide an example of the Slovak proposal for a general statute transposing the relevant article of the Directive (although this column is to some extent optional). [online]. [cit. 10. 10. 2023]. Available at: <http://www.azss.sk/doc/socdialinf/Legislativne%20pravidla%20vlady%202010.pdf>.

The performance of a job only when actually needed and when the persons are invited to perform the same is also what characterises on-call work (call on working). In our view, the differences between casual and on-call work (with professional literature also using the notion of non-regular assistance), are, in our view, very difficult to understand universally, given the similar nature of casual work and the different conditions in which the same is carried out in the individual Member States of the European Union.¹¹² In the Slovak Republic's circumstances, on-call work is regarded rather as a specific type of working hours within the framework of a work relationship (a work-related emergency). On-call work is not under Slovak legislation covered by a specific type of part-time contract, as for example in Germany.¹¹³ It is typical of the Slovak Republic that on-call work is carried out in addition to the existing work relationship, which is most often agreed on a fixed working hours basis.

In the context of on-call work, the question arises as to whether just on-call work as the main work obligation may be agreed by the employer and the employee in the employment contract *i.e.* that the employee will be available to the employer to perform the work at any time when the employer needs it, but the employer does not, however, undertake to assign the employee to work on any specific scale. In the Wippel case,¹¹⁴ the Court of Justice of the EU also recognised as legally correct an employment in which the extent of the employee's employment is not negotiated between the parties to the employment contract. In the present case, there was an employment contract which provided that the duration and the allocation of working hours were to be determined by agreement between the parties on a case-by-case basis, depending on the amount of work to be carried out. The Court has defined the conditions under which an employee with such an employment contract may be included in the scope of Directive 97/81/EC concerning Framework Agreement on part-time work.¹¹⁵ However, a high degree of unpredictability leads to uncertainty as to the applicable rights and social protection of the employees concerned, and therefore a number of minimum rights aimed at promoting safety and predictability in employment should also be granted to such employees. In particular, employees whose working arrangements are wholly or mainly unforeseeable

¹¹² The European Parliament: Policy Department Economic and Scientific Policy (2007): The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union, p. 33. [online]. [cit. 10. 10. 2023]. Available at: <http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24292/20110718ATT24292EN.pdf>.

¹¹³ BELLAN, P. – OLŠOVSKÁ, A. *Flexibilné formy zamestnania v rámci EÚ – možnosti a riziká ich uplatnenia v rámci Slovenskej republiky. (Flexible forms of employment within the EU – possibilities and risks of their application within the Slovak Republic)*. Bratislava : Inštitút pre výskum práce a rodiny, 2012, pp. 76-77, [online]. [cit. 10. 10. 2023]. Available at: http://www.sspr.govs.sk/IVPR/images/IVPR/vyskum/2012/Bellan/2157_olsovska_bellan.pdf.

¹¹⁴ Decision of the Court of Justice of the EU of 12 October 2004 in the legal case C -313/02 Nicole Wippel vs. Peek & Cloppenburg GmbH & Co. KG.

¹¹⁵ *Ibidem*, par. 40.

should be entitled to a minimum level of predictability where the working hours schedule is determined primarily by the employer, either directly, for example by allocating work tasks, or indirectly, for example, by requiring the employee to respond to requests from clients. The above is specifically addressed by Directive of the European Parliament and of the Council (EU) No. 2019/1152 on transparent and predictable working conditions in the European Union (hereinafter only referred to as the transparent and predictable working conditions directive) and Article 10 thereof entitled Minimum predictability of work. Within the meaning of that Article, Member States are required to ensure that, where an employee's working arrangements are wholly or mainly unforeseeable, the employer does not require him/her to work unless both of the following conditions are concurrently met:

- the work shall take place within predetermined reference hours and days as referred to in Article 4(2)(m)(ii) of the transparent and predictable working conditions directive; and
- the employee is informed by his or her employer of a work assignment within a reasonable notice period established in accordance with national law, collective agreements or practice as referred to in point Article 4(2)(m)(iii) of the transparent and predictable working conditions directive.¹¹⁶

Part-time and on-call work consists only in the work performed by the employee when the employer needs him/her and calls him/her to perform the same. These work forms are associated with substantially less favourable working, especially wage conditions. Thus, the risk of uneven workload and stress increases disproportionately. Such “available” staff may not be able to plan the extent of their working hours, and thus may not even plan in advance their working hours and its allocation between work and family. We believe that these forms of atypical employment are pushing employees into a very vulnerable position.¹¹⁷ The ideal solution for employees would be introduction of these atypical work forms, especially if they were complementary, informal jobs existing alongside other employment. In other respects, however, casual and on-call work may provide flexible solutions for the employer, such as providing urgent and qualified assistance in the abrupt absence of the employee (for example, due to the sudden illness of his or her child, taking leave during school holidays, *etc.*). If the employer decided to implement casual and on-call work in their environment, there are two options available in the Slovak Republic. The first one concerns the framework for the legal regulation of agreements on off-the-job work (Article 223 *et seq.* of the Labour Code), while the second one the framework for the legal regulation of employment for shorter working hours.

¹¹⁶ The transposition of that obligation by the Member States is, in the circumstances of the Slovak Republic, reflected in Article 223a of the Labour Code.

¹¹⁷ DOLOBÁČ, M. Slovakia: Traditions and New Challenges of Labor Law. In *Fundamentals of Labor Law in Central Europe*. Budapest : Central European academic publishing, 2022, p. 38.

3.3.1.2 Provisions of the Labour Code Promoting Place Flexibility

The work performance from a place other than the place of work performance agreed in the employment contract, constitutes a relatively substantial flexibility element capable of harmonising the work and private obligations of employees. In this respect, the application practice succeeded in developing a number of flexible working models for employees, which are not primarily oriented towards domestic work and telework under Article 52 of the Labour Code, but which combine the employer's benefits in the form of home office with a number of agreed places of work or work travel, so that the employee be able to perform the tasks entrusted to him/her and, at the same time, be able to satisfy his/her private needs even during the employer's working hours.¹¹⁸ That is to say that the provision of Article 52 of the Labour Code does not offer any mandatory elements to differentiate between domestic work and telework (apart from the vague wording of the exercise of telework which thereunder includes the use of information technology which regularly involves the remote electronic data transmission) or possibly to differentiate between domestic work and telework, as provided for in Article 52 (1) of the Labour Code. In comparison with other work forms outside the employer's workplace, e.g. home office (the mere presence of "regularity" of work is often not sufficient in application practice), the legal framework for the exercise of work outside the regular workplace is therefore brought to completeness by the employer's in-house regulations which lay down additional supplementary conditions and criteria for the identification of the various work forms outside the employer's workplace. At the same time, those regulations also establish the threshold parameters of the employer's obligations under their own legislation (domestic work and telework within the meaning of Article 52 of the Labour Code) and, for example, the home office or mobile office as well.

Defining domestic work and telework under Article 52 (1) of the Labour Code was also based on the Framework Agreement of the social partners at EU level on telework, or on ILO's Domestic Work Convention (N° 177) of 1996. At the same time, in practice, a distinction is sometimes made between domestic work/telework (such as regular domestic work) and home office (such as casual domestic work). In practice, legislation of the Slovak Republic does not apply the often-used concept of home office and the English version of the ILO Convention No. 177 of 1996, which regulates the so-called domestic work, may be translated as *domácka*

¹¹⁸ MÉSZÁROS, P. et al. Výhody a nevýhody obchádzania právnej úpravy pracovného pomeru. (Advantages and disadvantages of circumventing the legal regulation of the employment relationship). In *Kultúra sveta práce. (The culture of the world of work)*. Bratislava : Friedrich Ebert Stiftung, zastúpenie v SR, 2012, p. 34-52.

práca/práca doma – the Slovak version of the translation of the Convention uses the term “*práca doma*”. The concepts of domestic work/telework and home office are therefore to a certain extent synonymous.¹¹⁹

For employers who are, however, predominantly foreign multinationals, 4 basic models of work outside the agreed place of work have, along with traditional domestic work and telework, been developed in the employment contract, namely:

- Domestic work – domestic work performed pursuant to Article 52 of the Labour Code, with the employee performing a certain part (e.g. 4/5 of the scheduled weekly working hours) of work at home domestic and another part thereof (e.g. 1/5 of the stipulated weekly working hours) at the employer’s place of work. That ratio is based on the contractual freedom of the employee and the employer; Article 52 of the Labour Code also allows for full-time domestic work.
- Telework – performance of telework pursuant to Article 52 of the Labour Code by means of a laptop and a telephone. The same is intended for employees who will only carry out telework pursuant to Article 52 of the Labour Code, often without differentiating between domestic work and that performed from the workplace of the employer.
- Home Office – a benefit for the employee. The employee shall request home office indicating the duration and place of work. Approval of his/her request by his/her superior, the place indicated by the employee in the request shall become his/her regular place of work for the period in question.
- Mobile office – performance of work by means of a laptop and telephone during a business trip – linked only to the employee’s business trip. The place that the work will be carried out from will be specified in the travel order for that business trip. These are situations where the employee needs to work or be on the telephone or at the computer during the business trip.

Domestic work and telework are characterised by common features, differing only in dependence on the possibility of using information technology, which regularly involves the electronic remote data transmission. In both cases, regular work takes place within the limits of the weekly working hours or within a part thereof as laid down in the agreed amendment to the employment contract or in the very employment contract; the work is performed from within the household where the nature of the work so permits (the household is generally understood to mean the agreed place of work outside the workplace of the employer and is referred to

¹¹⁹ ŠVEC, M. – TOMAN, J. et al. *Zákoník práce. Zákon o kolektívnom vyjednávaní. Komentár. (Labour Code. Collective Bargaining Act. Comment).* 2nd, revised and supplemented edition. Bratislava : Wolters Kluwer, 2023, p. 511 et seq.

in the amendment to the employment contract or in the employment contract as a fixed option to change the place of work); in the working hours determined by the employer which is the same as the normal working hours at the workplace (where applicable, the working hours is allocated by the employee himself/herself). Although the provision of Article 52 of the Labour Code does not directly make such a differentiation, the application practice distinguishes between the so-called principles and conditions of domestic work and telework (derived from the statutory provisions of Article 52 of the Labour Code) provided that those principles and conditions under which such a work is possible are complied with.

The so-called principles of domestic work and telework¹²⁰ include:

- double volunteering¹²¹ – possibility to work and the very work are voluntary and are only possible with the agreement of both parties – the employer and the employee;
- an appropriate work task – an appropriate work task is a prerequisite for the performance of the job. A work task is appropriate if the same allows temporary absence from the workplace without adversely affecting the outcome of the work, the operational process and contact with the firm;
- prevention of employee isolation¹²² – domestic work and telework must not interfere with the employee's contact with the employer, employees remain involved in corporate communication, have access to information and to the enterprise;
- maintaining a workplace – for employees who perform domestic work or telework, a workplace in the organisational unit with the employer remains available;
- upgrading of qualifications¹²³ – employees performing domestic work and telework remain integrated in all measures relating to the planning and development of staff;
- prohibition of discrimination¹²⁴ – the employee performing domestic work and telework must not be favoured or restricted in comparison with a comparable employee working at the employer's place of work;
- the right to disconnect¹²⁵ – an employee performing domestic work and telework shall have the right to not use working means *i.e.* the right to disconnect

¹²⁰ Compare: DUŠEKOVÁ SCHUSZTEKOVÁ, S. – MÉSZÁROS, P. *Procesy v individuálnom pracovnom práve. (Processes in individual labor law)*. Bratislava : Wolters Kluwer SR, 2022, p. 26.

¹²¹ The provisions of Article 250b of the Labour Code, where special provisions apply under exceptional circumstances, in emergency or state of emergency, constitute an exception.

¹²² Article 52 of the Labour Code Domestic work and telework, par. 8, item e).

¹²³ Article 52 of the Labour Code Domestic work and telework, par. 8, item f).

¹²⁴ Article 52 of the Labour Code Domestic work and telework, par. 11.

¹²⁵ Article 52 of the Labour Code Domestic work and telework, par. 10.

during his/her uninterrupted daily rest periods and uninterrupted weekly rest periods, unless he/she is ordered/he/she agreed to work or to be on standby or to work overtime at that time, as well as during his/her leave, during the holiday for which he/she has been dismissed and while an impediment to work persists.

Characteristics in respect of which the employee has the right to apply for domestic work and telework and the employer is entitled to agree with him/her performance thereof are subsumed into the so-called domestic work and telework conditions, if all the following conditions are met:

- the type of work performed by the employee under the employment contract makes this possible (the suitability of the type of work is assessed by the manager);
- domestic work does not jeopardise the outcome of the work, the functioning of the unit, the continuity of the processes, the projects, the quality of the services provided, cooperation with other departments and the presence of the employee concerned in the workplace is not necessary, *etc.*;
- the employee has in the past complied with, has not disregard any of the rules of domestic work, or has not otherwise violated the trust of the manager, the employee is working with already assigned mobile hardware (at least a laptop and a mobile phone as decided by his/her immediate supervisor);
- the employee has his or her own high-quality home Internet connection, given the type of work that he or she performs;
- domestic work and telework do not constitute casual and irregular work from home (*i.e.* the same may be done on a regular basis, *e.g.* every Friday or any other day of the week).

In that connection, the amended wording of Article 52 (7) (b)¹²⁶ of the Labour Code is quite interesting to read, where, in the case of domestic work or telework, the employee himself schedules his working hours, his employment shall be governed by the Present Act, with the following exceptions: (b) the provisions on delay times shall not apply except in the case of delay times for which the employer is responsible.' In the first place, the provision in question is nonsensical, since neither the Labour Code, nor any other labour law governs the issue of the delay time occurrence except for Article 142 (1) of the Labour Code which regulates delay times for which the employer is responsible. It is therefore not possible to exclude the scope of the other provisions on delay times because there are none. Article 142 (1) of the Labour Code which regulates delay times only contains regulation of those delay times for which the employer is responsible, since the

¹²⁶ Act No. 76/2021 Statutes effective until 1 March 2021.

same constitutes an impediment to work on the employer's part and the Labour Code makes no distinction as to whether such time delays were caused by the employer, the employer's subcontractor or by a third party. What is only taken into consideration is the very occurrence of a time delay. Logically, one can see what situations the legislator intended to exclude by this unfortunate formulation. The basis and purpose of domestic work and telework results in conclusion that this is a work as performed outside the employer's workplace and that there is just a limited power of disposal on the part of the employer. It is indeed unreasonable and contrary to the very essence of domestic work and telework for an employer to be liable for certain periods of time when the employee does not work for reasons on his/her part, which do not, however, satisfy the substantive definition of impediments to work applicable to domestic work and telework by reference to Article 52 (7)(c) of the Labour Code. These are temporary and short-term periods, where the employee, for example, performs personal activities, at the end of which work for the employer is resumed. However, the formulation on time delays used is unfortunate precisely on the grounds that there is no such labelling to describe an impediment to work on the part of the employee in the legislation and that the only legal definition of a time delay is contained under Article 142 (1) of the Labour Code. On the other hand, a time delay as an impediment to work on the part of the employer, is always caused by the employer and it is the employer that is responsible for the same, since, on the one hand, the employer is obliged to allocate work to the employee and, on the other hand, Article 52 (8) of the Labour Code¹²⁷ obligates the employer to create such an environment for the employee that he/she can perform that domestic work and telework. Eventually, any cause

¹²⁷ Article 52 (8) of the Labour Code states as follows: the employer shall take appropriate measures in respect of domestic work or telework and in particular shall:

- (a) provide, install and regularly maintain the technical equipment and software necessary for the performance of the telework, except where the teleworking employee uses, in agreement with the employer, his own technical equipment and software;
- (b) ensure the protection of data processed and used for telework, in particular as regards software;
- (c) pay under the conditions laid down in Article 145 (2) demonstrably increased expenditure incurred by the employee in connection with the use of his own tools, equipment and articles as needed for telework;
- (d) inform the employee of any restrictions on the use of technical equipment and software, as well as of the consequences of breaching such restrictions;
- (e) prevent the isolation of an employee performing domestic work or telework from other employees and allow him/her to enter the employer's workplace, where possible, in order to meet with other employees;
- (f) allows an employee performing domestic work or telework to have access to a further qualification in the same way as a comparable employee with a place of work at the employer's workplace.

relating to the interruption of work by an employee as related to the operation of the employer will always be borne by the employer and it is the employer that will be responsible for the same. Practical application of Article 52 (7) (b) of the Labour Code is at least moot, if not even obsolete.¹²⁸

The employer's benefit system usually (apart from domestic work and telework) also includes the possibility of other work forms outside the employer's workplace. In general, the same as a rule takes place on an irregular basis, in order to differentiate those work forms outside the employer's workplace from domestic work and telework. Therefore, the most commonly recognised application practices are the so-called home office and mobile office.

Home office is a work performed by an employee for the employer in a place other than the regular workplace (including the place of work). It is no business trip under the Act No. No 283/2002 Statutes, on travel allowances. Such work shall be carried out exceptionally, at the written request of the employee. Home Office may only be performed with the employer's approval of the employee's request in writing which means that performance of that work at a later stage is not being negotiated in the employment contract, as in the case of domestic work or telework under Article 52 of the Labour Code. In the application, the employee is required to specify the place where the work will be carried out at temporarily – his/her temporary workplace. By accepting the Home Office application, the regular place of work of the employee as agreed in the employment contract is changed into the regular place of work of the employee as defined in his/her Home Office application. As the case at hand is a benefit which has no legal basis in the relevant labour legislation, but only in the employer's internal regulations, different conditions for the operation of a home office are laid down depending on the employer. However, it is possible to identify a range of common obligations and guidelines for the employee in such a way that, on the one hand, he/she does not fall within the scope of domestic work and telework under Article 52 of the Labour Code, in particular with regard to the observance of casual work in the form of a home office, while at the same time retaining the minimum rights available to the employer for such work. The employee may in the case of a home office determine the start and end of the work shift himself/herself, but employers generally limit the flexibility of the employee's decision-making and resolve that a work shift shall take place between 6.00 *a.m.* and 10.00 *p.m.* In so doing, they avoid the employee's night work which is associated with the employer's other duties (e.g. the obligation by the employee to undergo a health check or provision

¹²⁸ Although in the past (in the Labour Code No. 65/1965 Statutes) there was a provision in Article 115 (2) which stated that, at present, the concept of "delay" on the part of an employee is not defined in the legislation, not even by analogy with that on the part of the employer.

by the employer of compensation for night work). Despite making a separate decision on the allocation of working hours, each working day an employee shall work a work shift in full under a valid employment contract. Unless there is a defined range of work shift, his/her work shift shall then be 8 hours. Given the high degree of autonomy of a Home Office employee, employers also generally provide for a limitation of overtime work in the case of home-office. As compared with the provisions of Article 52 of the Labour Code in conjunction with Article 145 of the Labour Code, an employee is not entitled to reimbursement of the costs related to the operation of his/her workplace and the wear and tear of his own equipment or other items used to perform work in the home office regime. Thus, the absence of any legal rules governing the work performance at home creates scope for employers to determine the conditions of their own for the performance of that work, not only in relation to the possible establishment of, for example, a liability relationships or compliance with health and safety conditions at work, but also, for example, in relation to the virtual observance of work discipline at the employer's workplace. For example, an employee is then required, at the latest after 6 hours of continuous work, to take a meal break lasting in total for 30 minutes; to organise his/her work in such a way to avoid disturbance by members of his household; to follow established working procedures while working and to avoid dangerous behaviour; or to take steps to prevent injury to a third party (a member of the household, a visitor *etc.*) from occurring as a result of his work or to notify the employer immediately if an accident or injury has occurred in connection with the performance of the work. At the same time, in spite of the existence of home office, the employee shall be required, during the performance of the work in the form of home office, to work under conditions which could put his safety or health at immediate and serious risk or threaten to cause harm; to consume alcoholic beverages and other addictive or intoxicating substances; or to smoke in the vicinity of the workplace where the IT infrastructure provided by the employer is located.

A mobile office as compared to a home office, represents a relatively non-traditional work activity outside the employer's workplace and is mainly linked to a business trip of an employee. The employee shall carry out the work with the aid of a mobile phone and a laptop assigned. Thus, the employee carries out his work in the form of a mobile office at a place designated in the travel order as a place of work during that business trip. One of the basic conditions for the use of a mobile office is, as a rule, that the mobile office is used by the employee during a business trip; when working in the form of mobile office, the same working hours allocation as agreed in the employment contract or the beginning and end of the work shift as determined by the employer under Article 89 of the Labour Code shall apply; the current place of work shall be the place of work referred to in the

travel order (it means that there is no time change of place of work). At the same time, there are additional bonuses awarded for the very business trip as nature of the same is that of *quasi* telework. The additional duties of the employee shall, as a general rule, be directed towards the obligation to comply with the prescribed working procedures and to avoid dangerous behaviour as well as to the immediate notification of an accident or injury occurring in connection with the performance of the work.

3.3.2 Return to Work after Maternity, Paternity and Parental Leave

Other tools of gender diversity management include support for parents returning to work after maternity, paternity or parental leave. In the Slovak Republic's circumstances, the legislation in force on maternity leave exceeds by more than twice the minimum requirements for the duration of that leave laid down in the international and European documents by which the Slovak Republic is bound.¹²⁹ In the case of paternity leave, it's even more so.¹³⁰ Under Article 166 of the Labour Code, a woman is entitled to draw maternity leave of 34 weeks in respect of childbirth and the care of the child born. A woman who has given birth to two or more children at the same time shall be entitled to maternity leave of 43 weeks. A lone mother shall be entitled to maternity leave of 37 weeks. In relation to the care for a child, a man shall, from the day of the child's birth, be entitled to draw paternity leave of 28 weeks, while a single man shall be entitled to draw paternity leave of 31 weeks; in relation to the care for two or more children there should be a paternity leave of 37 weeks. Maternity leave is six weeks longer than paternity leave, because, in addition to childcare, the same is also provided in connection with the coping of the female body with pregnancy. Maternity leave of a woman and paternity leave of a man may, immediately, but not necessarily be followed up by parental leave to extend the care for the child in accordance with Article 166 (2) of the Labour Code. Parental leave shall be granted up to the age of 3 years or up to the age of 6 years of age of the child, if the child's health condition is in the long-term unfavourable. Parental leave granted for the purpose of increasing childcare within the whole legally guaranteed scope is used relatively

¹²⁹ The International Labour Organisation's Maternity Protection Convention No. 183 of 2000 concerning the Revision of the International Labour Organisation's Maternity Protection Convention (Revised) of 1952 (hereinafter referred to as the ILO Maternity Protection Convention) Directives Nos. 76/207/EEC on the implementation of the principle of equal treatment and 92/85/EC on the protection of mothers.

¹³⁰ Article 4 (1) of Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 on the work-life balance of parents and carers repealing Council Directive 2010/18/EU obliges Member States to grant paternity leave of at least 10 calendar days.

frequently in the Slovak Republic. However, one-sided gender-based inflexible approach of parental leave is being maintained on a permanent basis. Women are still mostly those who interrupt their careers and stay with the child on parental leave for as long as possible up to the age of three or six. Such an approach and the stereotype used only strengthens the employers' perception that, in the case of female employees, their long-standing absence shall be taken into account in the future. This, of course, may not be regarded as a very good basis for the application of gender equality in labour relations in a material sense. The structure of the parental leave legislation embodied in the provisions of Article 166 (2) *et seq.* of the Labour Code may not be rebuked for failure to observe the principle of formal equality as in accordance with the equal treatment principle both parents are (even concurrently) allowed to take parental leave, but father is not thereby motivated whatsoever to draw parental leave. By granting parental allowance to only one entitled party in connection with the Act no. 571/2009 Statutes only one parent is indirectly forced to take parental leave.

The above-standard length of maternity, paternity and, in particular, parental leave is not perceived positively by Slovak employers. Practical consequences consist in the primary problem for an employer – obligation to maintain on the part of the employer a specific position during a three or six-year absence of the employee which may be considered too rigid towards employers and too protective towards employees.¹³¹ However, the freedom of the employer to cancel that position during maternity/paternity /parental leave is not restricted whatsoever by any statutory provisions. It is a parent that faces uncertainty as to whether he or she will be able to exercise his or her right of return at all. The statutory regulation of working conditions for childcare employees is not so rigid as to not allow employers to respond flexibly to the needs of parents and to attract them to work before the expiration of the legally guaranteed length of maternity/paternity/parental leave. All one has to do is want. However, the practice of the authors suggests the opposite. In many cases, employees returning after, in particular, parental leave do not even have the opportunity to convince the employer of the profitability of their return, and the employment ends in many cases the day after their return. However, this has nothing to do with the concept of diversity or the promotion of equal opportunities policy in relation to employees with family responsibilities that we wish to address.

The statutory conditions for the return to work of a parent after maternity, paternity and parental leave are governed by the provisions of Article 166 (3) and subsequently Article 157 (1) and (2) of the Labour Code. Employees are required

¹³¹ BARINKOVÁ, M. *Sociálna ochrana zamestnancov so zodpovednosťou za rodinu. (Social protection of employees with family responsibilities)*. Košice : UPJŠ, v Košiciach, 2007, p. 112.

to notify their employer in writing, at least one month in advance, of their return to work. That obligation of theirs follows from Article 166 (3) of the Labour Code. They are thereunder obliged to notify their employer in writing of the expected commencement of maternity, paternity and parental leave, the expected date of interruption of such a leave as well as of any other changes concerning the commencement, interruption and termination of such a leave. The experts in the field are divided on the consequences of returning to work earlier. A. Jendrálová maintains that ... where a woman or a man wishes to return to work before the time originally requested has elapsed, it is not the employer's duty to oblige. The employer shall only be obliged to do so only if the maternity/paternity leave is interrupted lawfully pursuant to Article 168 (1) of the Labour Code.¹³² A. Chládková and P. Bukovjan understand maternity, paternity and parental leave as an employee's right, not as his/her obligation. Therefore, the employer should also respect and enable the employee to take up employment again at an earlier date.¹³³ We hold the view that the employer is not entitled to force the employee to take maternity/paternity/parental leave throughout the entire period. Another issue is the mere failure to comply with the one-month period laid down in Article 166 (3) of the Labour Code. The one-month period for the fulfilment of the employee's notification obligation must be regarded as a non-mandatory period. Non-compliance therewith shall not affect the right of the employee to return to work. An employee may not be penalised either in such a way that the information communicated to him/her is, in terms of date, changed so that the time period of one month be observed. Thus, if an employee notifies the employer on 15 October that he/she is returning to work on 1 November, the employer may not unconditionally insist on him/her returning only from 15 November. On the other hand, it is also unfair of an employee to announce his/her early return to work out of the blue. For example, on 29 September the employer is informed that an employee is taking up his duties again from 1 October, even though parental leave originally applied for was to be drawn until 31 December. The employee has the right to return earlier (*i.e.* an approved application for parental leave does not oblige the employee to not make a change), but has to take into account possible sanctions (potential damage) because the employer is not able to respond objectively

¹³² That is if maternity or paternity leave is interrupted as a result of the child being taken into care of a healthcare facility for medical reasons and the woman or man is going to take up employment again. In JENDRÁLOVÁ, A. Pracovnoprávna a sociálna starostlivosť o ženy, matky a zamestnancov starajúcich sa o deti. (Labor law and social care for women, mothers and employees taking care of children). In *Personálny a mzdový poradca podnikateľa* (Personnel and salary consultant for entrepreneurs), No. 6-7, 2004, p. 147.

¹³³ CHLÁDKOVÁ, A. – BUKOVJAN, P. *Zákoník práce v otázkách a odpovedích. Dovolená, Překážky v práci. (Labor Code in questions and answers. Vacation, Obstacles at work)*. Praha : Wolters Kluwer ČR, a. s., 2009, p. 112.

in such situations, e.g. because the employee's substitute has to finish his work things, the employee's return has to be processed *etc.* In this respect, an important element of diversity management is setting up communication between the employee and the employer on the issue of returning of the parent to work. The employer may make it clear that an earlier return than originally planned is not an obstacle, just like a non-compliance with the one-month deadline, but getting back to work takes some time and therefore may not be done overnight.

Article 157 (1) and (2) of the Labour Code requires that the employer place the female employee on return from maternity leave, the male employee on return from paternity leave and the female/male employee on return from parental leave in their original position and place of work. Only secondarily, where the assignment to the original position or place of work is not possible, the employer is obliged to assign them to another position corresponding to the employment contract, *i.e.* the type of work as therein agreed. Original work and place of work constitute a definition more specific than the type of work agreed in the employment contract, meaning the same job position in terms of both content and place of work. The inability to be assigned to the original work will most often relate to the fact that the work position has been abolished. Objectively, the employee's non-assignment to the original work position may not just be accepted simply because the job is done by a substitute employee with whom the employer has concluded an open-ended employment. In addition to the right to return to their original work position and place of work, they shall be guaranteed the right to be assigned to work under conditions not be less favourable to them than those which they enjoyed when maternity or paternity leave commenced. The female or male employee shall be entitled to benefit from any improvement in working conditions to which they would have been entitled if this important personal impediment to work had not been encountered. A female and male employee shall also have the right, after the end of parental leave, to retain all rights to the original extent which they had or which they had acquired at the time of taking such parental leave; these rights shall apply, including any changes resulting from legislation, collective agreement or usual practice in place with the employer. Those provisions correspond to the transposition of Article 15 of Directive 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) (hereinafter only referred to as Directive 2006/54/EC) and of Article 10 of Directive 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave (hereinafter referred to as Directive 2019/1158). The Labour Code and the directives cited do not further specify those employment rights and definition thereof

in terms of content is therefore left to the case law. The Slovak courts have not yet been able to deal with the interpretation of the rights to which the employee is entitled upon return from maternity and parental leave. The Court of Justice of the EU has already done so in a number of their judgments and it may be concluded from analysis thereof that the quality of the rights attached to maternity/paternity leave is different (pursuant to Article 166 (1) of the Labour Code) from that of the rights connected with taking parental leave (Article 166 (2) of the Labour Code).¹³⁴ This is what e.g. Article 144a of the Labour Code specifies. Article 144a of the Labour Code lays down precisely which periods of time are to be regarded as work, even though the work agreed in the employment contract does not actually take place. A distinction is made between periods treated as work, those which are not treated as work and, in particular, periods which are not treated as work for the purposes of leave. The period of maternity leave, as well as the period during which the employee takes paternity leave, shall be regarded as the performance of the work, whereas, parental leave under Article 166 (2) of the Labour Code is not be regarded as the performance of the work.¹³⁵ The applicability of Article 144a of the Labour Code is, in practice, most often identified in relation to the entitlement of parents to leave (Article 100 of the Labour Code). As maternity leave and paternity leave are regarded as periods of work, the right to leave accrues to the female/male employee. After the end of maternity leave, the employee shall be entitled to take, in addition to the leave not drawn prior to the maternity leave, the leave to which she became entitled to during the period of leave. The employment rights to take “ordinary” leave were in this context confirmed by the judgment of the Court of Justice of the EU in the Merino Gómez case, where the Court of Justice of the EU held that a female employee must be given the opportunity to take statutory leave to recover at a time other than that of maternity leave, even though the period of maternity leave overlaps with that of annual leave within the company, given the different purpose of those leaves.¹³⁶ If the employee did not take “ordinary” leave immediately following the end of maternity leave and continued to take parental leave, this, too, may not result in the loss of entitlement to “ordinary” leave. A national provision under which, after the end of parental

¹³⁴ See further: KAKAŠČÍKOVÁ, J. Pracovné podmienky zamestnancov so zodpovednosťou za rodinu vo svetle judikatúry Súdneho dvora Európskej únie. (Working conditions of employees with family responsibilities in the light of the jurisprudence of the Court of Justice of the European Union). In *Mílniky práva v stredoeurópskom priestore 2011: zborník z medzinárodnej konferencie. (Legal milestones in the Central European area 2011: proceedings of the international conference.)*. Bratislava : Univerzita Komenského v Bratislave, 2011, pp. 275-281.

¹³⁵ BĚLECKÝ, M. *Zákoník práce o ženách a pro ženy. (Labor Code about women and for women)*. Praha : VOX, a. s., 2008, p. 145.

¹³⁶ Decision of the Court of Justice of the EU of 18 March 2004 in the legal case of María Paz Merino Gómez vs. Continental Industrias del Caucho SA, par. 33.

leave, employees lose their right to paid ordinary leave acquired during the year preceding the birth of the child is contrary to Union law because... the rights to which the employee was entitled, or to which he/she became entitled upon commencement of parental leave, are maintained to the existing extent until the end of parental leave and are exercised after the end of parental leave.¹³⁷

The rights which employees had, or had acquired, at the time of taking parental leave are, in their original scope, specified further by the Court in the legal case of *Meerts*.¹³⁸ The Court held that the purpose of Annex 2 (6) to Directive 96/34/EC (the authors' remark: currently Article 10 of Directive No. 2019/1158) is to prevent the loss or restriction of rights arising from employment acquired or to be acquired by the employee at the commencement of parental leave and to ensure that, after the end of that leave, such employee is in the same situation with regard to his rights as before the beginning of that leave. The concept of the rights to which the employee was entitled or to which he became entitled at the time of taking parental leave are thereunder explained as all the rights and benefits, pecuniary or in kind, arising directly or indirectly from the employment, to which the employee is entitled in respect of the employer at the time of taking parental leave. These are altogether all the rights and benefits relating to working conditions. In the case of *Mrs Meerts*, this meant that she was entitled to a full-time severance allowance, which she would have received if she had not taken parental leave. Definition of the rights to be retained by an employee in connection with the taking of parental leave (under Article 166 (2) of the Labour Code) was modified by the Court in the legal case of *Lewen*.¹³⁹ In Article 32 of that court decision, the Court held that the Christmas allowances did not constitute a right which the employee was or became entitled to on the date on which parental leave within the meaning of Appendix 2(6) to Directive 96/34/EC began, because those Christmas allowances were not entitlements and were granted voluntarily by the employer after the beginning of that leave. According to point 40 of the *Gómez-Limón Sánchez-Camacho* decision,¹⁴⁰ the Court of Justice has clearly established that Appendix 2 (6) to Directive 96/34/EC does not govern the rights and obligations arising from the employment during parental leave. Those rights and obligations are covered

¹³⁷ Decision of the Court of Justice of the EU of 14 October 2008 in the legal case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols vs. Land Tirol*, par. 50.

¹³⁸ Decision of the Court of Justice of the EU of 22 October 2009 in the legal case C-116/08 *Christel Meerts vs. Proost NV*, par. 44.

¹³⁹ Decision of the Court of Justice of the EU of 21 October 1999 in the legal case C-333/97 *Susanne Lewen vs. Lothar Denda*, par. 24.

¹⁴⁰ Decision of the Court of Justice of the EU of 16 July 2009 in the legal case C-537/07 *Evangelina Gómez-Limón Sánchez-Camacho vs. Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) and Alcampo SA*, par. 40.

by Appendix 2 (7) (author's remark: currently Article 10 of Directive 2019/1158) regulated by the Member States and/or the social partners. That clause refers to national rules and collective agreements in order to define the extent to which the employee acquires rights towards the employer during parental leave. *"It is the duty of the national authorities and employers to recognise the rights already acquired and being acquired by employees at the commencement of parental leave and to ensure that they may continue acquiring rights after the end of parental leave as if they had not taken such leave."*¹⁴¹ This may for example mean that an employee who has drawn parental leave does not automatically receive the same bonuses and rewards (salary, wage) as an employee who has not taken parental leave and, for example, has been receiving education and training throughout the period and has therefore been granted, for example, a higher salary or other benefits.

The question of assessing these periods in order to include length thereof in the professional experience relevant to remuneration is indisputably linked to the preservation of employment rights during maternity/paternity and parental leave. Specifically, the Court of Justice of the EU dealt with the issue of inclusion of maternity leave period (Article 166 (1) of the Labour Code) in the calculation of the vesting period for promotion to the higher salary grade in case C-284 / 02 Sass,¹⁴² while the *obligation to include the period of maternity leave in the years of service was declared in decision on C-294 / 04 on Sarkatzis Herrero legal case.*¹⁴³ The court did, in the Sass legal case, clearly confirm that the inclusion of maternity leave resulting in a pay increase was intended to clarify the conditions for achieving a higher level of hierarchy and therefore fell within the scope of Directive 76/207 (currently Directive 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) and that Ms Sass was disadvantaged compared to a male colleague who started work on the same day as her because, by taking maternity leave, she reaches a higher grade later than that colleague. *"Thus, where national legislation provides for maternity leave in order to protect a woman's biological condition and her special relationship with the child during the period following pregnancy and childbirth, the Community legislation also requires, on the one hand, that the taking of that statutory protection leave does not interrupt the employment of the woman concerned or the enjoyment of the rights resulting from the same, and, on the other hand, that the exercise of the right conferred do not result in unfavourable*

¹⁴¹ Decision of the Court of Justice of the EU of 16 July 2009 in the legal case C-537/07 Evangelina Gómez-Limón Sánchez-Camacho vs. Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) and Alcampo SA, par. 36

¹⁴² Decision of the Court of Justice of the EU in the legal case C-284/02 Ursula Sass vs. Land Brandenburg of 18 November 2004.

¹⁴³ Decision of the Court of Justice of the EU in the legal case of Sarkatzis Herrero vs. Instituto Madrileño de la Salud (Imssalud) of 16 February, C-294/04.

treatment of that woman."¹⁴⁴ Similarly, in the legal case of Sarkatzis Herrero the Court confirmed that the taking of maternity leave may not have a negative impact on the future career development of the female employee and the calculation of her length of service, since the legitimate protection to which pregnant women and mothers are entitled must not entail disadvantages for them.¹⁴⁵

The analysis of Article 157 of the Labour Code in the light of the case-law cited has shown that there is relatively high legal protection for employees with family obligations upon their return to work. Depending on the length of maternity or parental leave after which female employees return to work, they are subject to additional legal protection measures. In particular, it is a matter of respecting the prohibition of women from carrying out certain tasks during the period of breastfeeding and for nine months after childbirth, and of creating conditions conducive to the fulfilment of their maternal tasks while carrying out at the same time their professional activities. An employee who is unable to work because of his health condition may not be assigned to cover the same by his employer, even if it is the type of work and the place of work agreed in the employment contract.¹⁴⁶ The employer may not, until the end of the ninth month following the childbirth, assign a breastfeeding employee or a female employee in the original job or place of work if such work is prohibited for her, whether on the basis of a general¹⁴⁷ or an individual prohibition on carrying out work justified by health reasons consisting in the person of a pregnant woman on the basis of a medical opinion. It is not, of course, acceptable that such a female employee should not be allowed to return to work. In such a case, Article 161 of the Labour Code imposes progressive obligations on the employer. In the first place, if the employer finds that the employee is carrying out work which she is prohibited to carry out, the employer is obliged to make a temporary adjustment to the working conditions which does not even have necessarily entail a change in the type of work or the place of work

¹⁴⁴ C- 284/02 Ursula Sass, par. 48.

¹⁴⁵ C-294/04 Sarkatzis Herrero, par. 47.

¹⁴⁶ Judgment of the Supreme Court of the Czech Socialist Republic of 30 March 1979, 5 CZ 12 / 79.

¹⁴⁷ The Labour Code does not specify the individual types of prohibited work and workplaces, but empowers the Government of the Slovak Republic to issue a regulation containing such lists. This is Government Decree No. 272 / 2004 Statutes, which establishes a list of works and workplaces which are prohibited to pregnant women, mothers until the end of the ninth month after childbirth and to breastfeeding women, a list of works and workplaces involving a specific risk for pregnant women, mothers until the end of the ninth month after childbirth and for breastfeeding women, and lays down certain obligations for employers in the employment of such women. In addition, Government Decree No. 356/2006 Statutes on protection of health of employees from risks connected with exposure to carcinogenic and mutagenic factors at work, Government Regulation No. 281/2006 Statutes on minimum safety and health requirements in manual handling of loads.

agreed in the employment contract, but the essence is to eliminate the harmful factor preventing a female employee from performing her work without endangering her health. If temporary adaptation of working conditions is not possible, the employer is obliged to temporarily reassign the female employee to another job within the framework of her employment contract which is suitable for her and for which she may receive the same remuneration as in the case of her present job (Article 162 (2), Article 55 (2b) of the Labour Code). A unilateral act by which an employer transfers a female employee to another job is subject to several statutory conditions. It must be a suitable job, which is one which corresponds to the medical fitness of the employee for work, taking into account her ability and qualifications within the meaning of Article 55 (5) of the Labour Code. At the same time, a female employee may earn the same salary in this other job as she did in her previous job. Again, this is a temporary measure, subject to the existence of reasons for the transfer of the female employee without the consent of the entity concerned.

The Labour Code does not provide for any period of time for the employer to decide on the reassignment of the female employee to another suitable job. We believe that the employer should do so without hesitation as soon as the facts giving rise to the reassignment are known. This is not only in the interests of protecting the health of the breastfeeding employee and the female employee until the end of the ninth month after childbirth, but also in the interests of the very employer. It is because the employee is entitled to refuse to perform unsuitable work for her and the employer may not whatsoever regard her conduct as a breach of work discipline. This follows from Article 47 (3) of the Labour Code according to which an employer may not treat as a failure to fulfil an obligation if the employee refuses to carry out work or to comply with an instruction which is contrary to general statutes or to good morals or which immediately and seriously endangers the life or health of the employee or of other persons.¹⁴⁸ If it is not possible to assign a female employee to another job within the type of work agreed in the employment contract, the employer shall also assign that female employee to another type of work, but such action by the employer is already subject to the consent of the female employee concerned (Article 162 of the Labour Code *in fine*). Woman's disapproval of her reassignment outside the framework of the employment contract often puts employers in the position of being unable to provide them with a job which, during or after pregnancy, meets strict criteria of suitability. Where the employer has no possibility of assigning the female employee to a full-time job

¹⁴⁸ The refusal to perform such work is not a breach of work discipline and thus a ground for dismissal for breach of work discipline. Judgment of the Supreme Court of the Czech Socialist Republic of 30 March 1979, 5 CZ 12/79.

or to another suitable job, in accordance with the provisions of Article 162 (4) of the Labour Code, the employer has no choice but to provide her with paid leave. In order to ensure that the breastfeeding employee or female employee is not disadvantaged by her condition, her earnings are also protected under law. If, after being transferred to another job, she earns less than earned so far without her fault, to compensate for the difference she shall be granted a compensatory benefit from sickness insurance,¹⁴⁹ subject to the conditions laid down by the Act No. 461/2003 on social insurance as amended (hereinafter referred to as the Social Insurance Act). The purpose of the benefit is to prevent material harm to female employees and to mitigate as far as possible the effects associated with the transfer to other work. *“Thus, there are three elements linked within the compensatory benefit – economic (maintaining the standard of living to date), health (protecting and caring for the health of woman and child) and social (for reasons of financial security, a woman has no reason to resist being transferred to another job).”*¹⁵⁰ The legal guarantee of the right of return of the parent to the original work and place of work does not exactly function as an incentive to return earlier. However, there are also institutes available in the Labour Code that have such potential. According to the authors, this is the possibility of postponing parental leave within the meaning of Article 166 (4) of the Labour Code and granting nursing breaks under Article 170 of the Labour Code.

3.3.2.1 Postponing Parental Leave

As we have mentioned, it is not necessary for parental leave to directly follow up with of maternity or paternity leave drawn, even though this is common in practice. The employee thus in classic cases returns to work on the day following the day on which his or her child turns three. If an employee were to care for a child with a long-term unfavourable health condition requiring special care, he/she would be required to start work again on the day following the child's sixth birthday. Article 166 (2) of the Labour Code interprets the employee's right to parental leave as an individual right of the parent with which the employer's obligation to grant parental leave is correlated if the parent requests the same from the employer. The granting of parental leave does not depend on the will of the employer and is not even dependent on the objective conditions prevailing in the workplace. It is up to the parent to what extent, when and if he or she at all requests parental leave. It is not the duty of the parent to take parental leave at all, it

¹⁴⁹ Until 1 January 2004, referred to as the compensatory maternity allowance.

¹⁵⁰ HALÍŘOVÁ, G. Ochrana těhotných žen a matek při změně pracovního poměru. (Protection of pregnant women and mothers when changing employment). In *Právní rozhledy (Legal perspectives)*. No. 11, 2003, p. 563.

is not his or her duty to completely draw parental leave to the extent legally recognised (up to three or six years of the child's age). At the same time, it is not the duty of the parent to take parental leave immediately following maternity and paternity leave. A parent is entitled to divide his or her parental leave into several parts, while at the same time respecting the statutory minimum length of one month (Article 166 (2) *in fine* of the Labour Code). Until 31 August 2011 scheduling parental leave of an employee was limited by the age limit of three and six years of age of the child. The employer was obliged to allow parents to take parental leave 'only' up to the age of three or six years of age of the child, regardless of whether the parent had taken all or just a part of the parental leave. The employee's right to the portion of parental leave not drawn simply ceased to exist just because of the legal fact that the parent himself/herself did not ask the employer to grant the same in its entirety. The parent's own act (failure to make one), resulted in his/her waiver of entitlement to the full legal scope of parental leave, which corresponds to the content of the right to parental leave and characteristics thereof as an individual right. Amendment to the Labour Code by Act No. 257/2011 Statutes introduced a new entitlement for employees and employers in connection with the taking of parental leave in Article 166 (4). In accordance with the provision quoted, the employer may agree with the employee that parental leave under Article 166 (2) of the Labour Code may at the longest be drawn until the day that the child turns five, while in the case of a child with a long-term unfavourable medical condition requiring special care, such leave shall at the longest last until that child turns eight. At same time, the maximum period during which that leave is taken shall only be granted to the extent that the same was not drawn in accordance with Article 166 (2) of the Labour Code. With effect from 1 September 2011, provided that the basic amount of parental leave is complied with, the scope of the employee's right of disposal (*i.e.* until when drawing parental leave may at the longest be scheduled on the part of the employee) shall be changed. The limit of three years of age of the child shall be brought to the limit of five years and the limit of six years of the child shall be brought to the limit of eight years. Failure to use up the entire amount of parental leave by the age of three or six years of the child may no longer result in the portion of parental leave not taken ceasing to exist. The parent is under Article 166 (4) of the Labour Code entitled to request the employer for postponing and drawing parental leave at a later date, *i.e.* in the period from three and five or between six and eight years of age of the child. There are several options of dividing parental leave and it is up to the employee to use (according to the legislator) the flexibility offered to take parental leave. However, the word emphasized – "does not have to" – means that, even if the employee requests the employer to postpone the parental leave for

a period from three to five or from six to eight years of age of the child, the law does not guarantee that his right to the portion of the parental leave not drawn will not cease to exist. The Slovak legislator *expressis verbis* does by construct – “the employer may agree with the employee....” – all of a sudden include another entity in the employee’s individual entitlement to take parental leave – the employer. It is up to the employer to decide whether and to what extent the employee will take parental leave over a period from three to five years and six to eight years of the child. The verbal link used – may agree – if construed literally, clearly indicates the right of the employer to not grant request of the employee for parental leave. We hold the view that the construct chosen by the legislator as regards the legal possibility of postponing parental leave under Article 166 (4) of the Labour Code is under certain circumstances contrary to the Slovak Republic’s obligations under EU law in respect of the employee’s minimum entitlement to parental leave, which is provided for in Article 5 of Directive 2019/1158.¹⁵¹

Let us imagine a model situation in which a female employee takes maternity leave and immediately afterwards parental leave up to the age of three years of the child. At the end of her parental leave, the child’s father asks his employer to grant parental leave. The employer fails to agree with the employed father to take parental leave after the third year of age of the child, with the reference that the employer is entitled to do so in accordance with Article 166 (4) of the Labour Code and that the employee could have taken parental leave in accordance with Article 166 (2) of the Labour Code where the employer would have been obliged to grant his request. We have doubts about where the four months of the minimum amount of parental leave that a Member State of the European Union is obliged to grant to employees (both parents) under the Article 5 of Directive 2019/1158 have disappeared. In accordance with Article 3 of the Directive quoted, Member States are authorised to determine the conditions of access to parental leave and the detailed rules for drawing the same, but they must always comply with the minimum requirements laid down in that Directive. A Member State may opt for a number of flexible arrangements for taking parental leave, taking into account the needs of both employees and employers. Parental leave may be drawn in parts (Article 166 (4) of the Labour Code), namely in periods of time (a few hours of working hours within a certain time range) and under a system of time credits (e.g. one month per year). The purpose of that provision of the Directive is to ensure that employees do not just have the right to enjoy the full duration of parental leave, but also

¹⁵¹ Member States shall take the necessary measures to ensure that every employee has an individual right to parental leave of four months before the child reaches a certain age, up to a maximum of eight years of age to be determined by each Member State or collective agreement. This age shall be determined in such a way as to ensure that each parent can effectively exercise his or her right to parental leave on the same basis.

to choose the various ways in which the same may be taken. That formulation of the provision concerned specifically points out the need to reflect the needs of both employers and employees when choosing any method. However, the total amount of leave must be at least four months, irrespective of the method chosen.

If we were to sum up and analyse the legal situation with regard to the taking of parental leave in the context of Article 164 (4) of the Labour Code, two regimes may be distinguished. Ad 1) The right of an employee to take parental leave before the child is three or six years old is not conditional on the consent or disagreement of the employer. The employer is always obliged to comply even with repeated applications for parental leave. Ad 2) Once a child has reached the age of three (six) years, the legal nature of the part of parental leave not drawn is changed from a legal entitlement to a claim dependent on the will of the employer. The agreement with the employer will determine when and if the rest of the parental leave will at all be taken. The objective facts result in the weaker bargaining position of the employee and the same in our view constitutes an obstacle to the practical use of the flexible method of taking parental leave. Linking parental leave to an agreement with the employer puts employees, from the point of view of their certainties, under pressure to take parental leave 'only' up to three (six) years of age of the child as they have absolutely no legal certainty to take parental leave between the third and fifth (six and eight) year of age of the child.

An agreement, as consent of the contracting parties, is the ideal solution to reflect freedom of action where the parties are mutually equal.

In labour law, the equality principle is not applied thoroughly and in all its aspects and therefore another interpretative rule must be used in case of the agreement under Article 166 (4) of the Labour Code since parents must not be forced to rely on the "good will" of the employer when exercising their right to postpone parental leave. The possibility of taking parental leave after the child is three or six years old, to the extent that it has not been taken before the age of three or six, linked to an agreement with the employer, must be interpreted in the light of the prohibition of abuse of right. To that effect, the agreement between the employer and the employee referred to in Article 166 (4) of the Labour means the normative concept, the broadest possible choice to take parental leave on the part of the employee and a flexible way of reflecting the specific job needs of the employer. We hold the view that the employer is not in particular entitled to fail to agree with the employee upon parental leave drawn after the third or sixth year of the child's age, if this would result in not taking parental leave within legal entirety thereof. Article 166 (4) of the Labour Code should in practice be interpreted as entitling the employer to regulate only the legal rules on the allocation of parental leave after the third or sixth year of age of the child. Such rules relate to the expected date of

commencement, interruption or termination of parental leave, but without the employer in any way impairing the right of the parent to exhaust the full legal scope of parental leave. The legal wording the employer shall agree that parental leave as referred to in Section (2) shall at the longest be granted until...¹⁵² The same shall be supplemented by the requirement of justification of the employer's decision as to the reasons why to regulate the allocation of the part of parental leave not drawn, by objective working (operational) circumstances. The benefit of Article 166 (4) of the Labour Code is definitely possibility for parents to flexibly divide parental leave into several parts as needed, but certainty may hardly be referred to as taking parental leave after the child's third or sixth year of age is linked to an uncertain outcome of an agreement with the employer. We believe that the adoption of this interpretation by employers fully corresponds to the diversity management concept and that presentation thereof will influence employees' thinking about when and how to take their parental leave. An appropriate time for a parent to return to work represents to a high degree individual and rigid approach to taking parental leave before the child turns three or six, and may be changed by the idea that the parent will not lose the time spent with the child at home, because there is an opportunity to postpone that time and use the same later.

3.3.2.2 Breastfeeding Breaks

Legal institutes designed for increased protection of female employees caring for children include work breaks specifically linked to breastfeeding. They are a typical example of how it is possible to work and, at the same time, meet the needs of a small child directly while working. In accordance with Article 170 (1) of the Labour Code, the employer is obliged to grant breastfeeding breaks to the mother who is breastfeeding her child, in addition to rest periods at work. In defining the subject of the entitlement, emphasis is placed on the mother breastfeeding her child, the eligible subject is then the biological mother, the mother who gave birth to the child. No other person feeding the baby may be so eligible.¹⁵³ The employer is only obliged by law to provide the female employee who breastfeeds her child with a statutory period of time if she exercises her right in the manner prescribed.¹⁵⁴ Again, it is necessary to fulfil the content of the concept

¹⁵² "May" is to be deleted from wording of Article 166 (4) of the Labour Code.

¹⁵³ BARANCOVÁ, H. – SCHRONK, R. *Pracovné právo. (Labour Law)*. Bratislava: SPRINT, 2006, p. 619.

¹⁵⁴ In addition to the employer's obligation to grant breastfeeding breaks, the employer is also obliged to partially create the conditions for the exercise of that right. Government Regulation No. 391 / 2006 Statutes, on the Minimum Safety and Health Requirements of a Workplace, obliges the employer, where the safety and health of workers so require, to create an easily accessible rest room for workers, while pregnant women and breastfeeding mothers must be able to rest there in a lying position.

of a breastfeeding employee in accordance with Article 40 (7) of the Labour Code. The legislation granting breastfeeding breaks is subject to quantitative elements: the number of working hours, the age of the infant and the number of children the mother is breastfeeding. Dependency of the number of breastfeeding breaks on the number of working hours and the age of the child is as follows: a mother who works a specified number of working hours weekly shall be granted two half-hour breastfeeding breaks for each child under six months. One half-hour breastfeeding break per shift shall be granted during the six months that follow. Breastfeeding breaks in the above extent are granted to one child and, therefore, if the mother breastfeeds twins or even more children, the number of breaks provided shall be multiplied accordingly. If the mother works part-time, but no less than half of the weekly working hours, she is entitled to a half-hour breastfeeding break for each child under six months. The specific nature of these breaks consists of the fact that the same is provided without prejudice to the remuneration of the person entitled. Unlike the breaks for rest and meals, breastfeeding breaks are included in the working hours of the woman and are paid for in the amount of average earnings of the employee. Breastfeeding breaks differ from breaks for rest and meals as the Labour Code does not confer entitlement thereto upon the expiration of a certain number of working hours and allows them to be combined and granted at the beginning or at the end of the shift.

In our opinion, the current legislation on breastfeeding breaks in force does not reflect developments in childcare. The regulation of breastfeeding breaks which only concerned women breastfeeding their children has already been included in the Act No. 58/1964 Statutes, on the Increase in the Care for Women and Pregnant Mothers and since then the party entitled has not whatsoever been changed or extended. Our current regulation perceives that institute primarily as a measure to protect the biological condition of a woman and her child. Breastfeeding is no longer the only necessary means of infant nutrition. A child may not just be taken care of by the physical mother who gave birth, but also by a female employee who adopted that child. In this context, the ruling of the Court of Justice of the EU in the *Roca Álvarez*¹⁵⁵ case is referred to very often. In this legal case, the Court of Justice of the EU ruled on discrimination against Spanish fathers as compared to mothers (discrimination on grounds of sex), on the grounds that the breastfeeding break was not directly granted to fathers performing dependent work in an employment, but the *conditio sine qua non* entitlement to the requested break was the mother's status as an employee. The legislation at issue admitted that the leave could be taken by either father or mother, but only

¹⁵⁵ Decision of the Court of Justice of the EU of 30 September 2010 in case C-104/09 *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA*.

provided ‘they are both employed’. The father could at the same time enjoy that entitlement instead of the mother only if she was employed. If the mother was not employed, the father of the child was not entitled to a breastfeeding break, even if he was employed. The Court of Justice of the EU held that the situations of an employed father employee and an employed mother of a minor child were comparable as regards the possible need to reduce working time for the purpose of childcare. In conclusion the Court reasoned that the legislation at issue (Art. 37 (4) of the Spanish Labour Code) constitutes discrimination on grounds of sex within the meaning of Article 2 (1) of Directive 76/207/EEC concerning mothers in the position of dependent worker and fathers in the same position. Although Article 2 (3) of Directive 76/207/EEC reserves to Member States the right to adopt provisions aimed at protecting the biological conditions of a woman during and after pregnancy, the special relations between a woman and her child during the period following childbirth, but in the Article 37 (4) of the Spanish Labour Code contested, the link between the breastfeeding break and the actual natural breastfeeding was gradually dissociated as a result of the legislative developments.¹⁵⁶

Reasoning that failure to grant the father of a child breastfeeding breaks under Slovak law is discriminatory within the meaning of the judgment of the Court of Justice of the EU in the *Roca Álvarez* case would be schematic and wrong. The fundamental difference between the Slovak and Spanish legislation on breastfeeding breaks lies in the purpose of that measure. Unlike the Spanish legislation, the legal construct of a breastfeeding break in the Slovak Republic expressly considers that measure as one to ensure protection of biological conditions of the woman at the time of maternity and protection of the special relationship between the mother and her child. The same, therefore, complies with Article 2 (3) of Directive 76/207/EEC, where breastfeeding breaks are not separated from the physiological fact naturally characteristic of biological mothers.

However, the decision in the legal case of *Roca Álvarez* could be inspiring to the Slovak legislator just because of the preservation of the supportive position of men in relation to the status of women in the exercise of their parental functions. A woman does not have to bear the burden of childbirth without being able to accept the help of the child's father. Granting the right to a break also in the case of “bottle feeding” promotes equality of opportunity between men and women at a time when the father may take equally good care of the child. An employed mother would then be allowed to retain her job without any negative consequences for childcare, for example, if she objectively cannot take a breastfeeding break granted (e.g., in case of excessive distance between her workplace and residence).

¹⁵⁶ Decision of the Court of Justice of the EU of 30 September 2010 in case C-104/09 *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA*, par. 28 and 29.

The infrequent practical use of breastfeeding breaks could trigger a change in the provision of Article 170 of the Labour Code, which may uselessly be perpetuating the traditional division of roles between men and women. We also hold the view that the employer may, as part of the diversity management, also extend the circle of parties entitled and recognise the right to take breaks to feed the child of mothers who are not breastfeeding or the fathers.

4 OTHER IMPLICATIONS OF DIVERSITY MANAGEMENT AND SEXUAL ORIENTATION

Various surveys,¹⁵⁷ the literature cited so far, and the practical implications of diversity management described prove that Slovak employers are trying to develop diversity in the workplace and eliminate discrimination, whether in recruiting new employees or in everyday life. Employers are actively engaged in gender diversity (including parental), diversity based on age, race, or disability. However, this is not the case with regard to sexual orientation.¹⁵⁸ Very few Slovak employers, and most frequently subsidiaries of multinational corporations,¹⁵⁹ take steps to integrate employees with a minority sexual orientation, or more broadly to integrate LGBT+ individuals¹⁶⁰ into their work environment. Several causes are at play. The subject-matter of employee diversity has not yet been sufficiently explored and obtaining information from persons with a minority sexual orientation is difficult.¹⁶¹ Individuals must first acknowledge their sexual orientation or gender identity in the workplace, but also in general, which may be a very sensitive topic for them, given not very tolerant social climate in Slovakia. Employees are afraid to inform their supervisor of their sexual orientation for fear of subsequent bossing (mobbing) in a certain form since their potential openness about their sexual orientation would affect their working life. It is common for such persons to develop strategies to avoid

¹⁵⁷ For example survey of Pride Bussines Forum [online]. [cit. 26. 10. 2023]. Available at: <https://www.pridebusinessforum.com/credit-suisse-2016-the-value-of-diversity/>.

¹⁵⁸ Sexual orientation means the sexual and emotional attraction to others and the behaviour associated therewith. Unlike a gender identity, an individual cannot influence his or her sexual orientation. See further in: THOMAS, T. R. – HOFAMMANN, D. – MCKENNA, B. – VAN DER MIESEN, A. – STOKES, M. – DANIOLOS P. – MICHAELSON, J. et RENDINA, J. Community attitudes on genetic research of gender identity, sexual orientation, and mental health. In *PLOS ONE*, No. 15(7), 1-15, 2020, ISSN 1932-6203. [online]. [cit. 26. 10. 2023]. Available at: doi:10.1371/journal.pone.0235608.

¹⁵⁹ For example Ikea, Accenture, Forum, IBM [online]. [cit. 26. 10. 2023]. Available at: <https://www.startitup.sk/4-firmy-ktore-sa-na-slovensku-neboja-vyrazne-podporovat-lgbt-komunitu/>.

¹⁶⁰ The abbreviation LGBT+ represents four groups of persons: lesbians (L), gays (G), bisexual (B) and trans (T) persons. The “+” symbol allows for the inclusion of further different definitions of one’s sexual orientation, gender identity or possible undefined sexual orientation.

¹⁶¹ PRIOLA, V. – LASIO D. – SIMONE, S. et SERRI, F. The Sound of Silence. Lesbian, Gay, Bisexual and Transgender Discrimination in ‘Inclusive Organizations’. In *BRITISH JOURNAL OF MANAGEMENT HOBOKEN: WILEY*, 2014, 9. 12. 2013, 25(3), 488-502. [online]. [cit. 26. 10. 2023]. Available at: doi:10.1111/1467-8551.12043.

revealing their sexual orientation, for example by changing the topic of conversation in the workplace or by leaving the place of conversation. Studies prove that such continuous efforts to adapt in the workplace impact health and productivity and lead to emotional exclusion based on shame, with consequences both for the individual and for their participation in the labour market. The number of documented discrimination cases based on sexual orientation is remarkably low. This is probably because the persons concerned are not willing to come out publicly. Lack of awareness of their rights may also constitute a possible reason.

The ultra-conservative attitude of the Slovak Republic, where there is no regulation of any legally recognised form of cohabitation between persons of the same sex, does not contribute to the atmosphere.¹⁶² The Slovak Republic's extreme path, where there is no legal means to formalise the association of homosexual people, raises doubts about the correctness and long-term sustainability or the acceptability of such a solution. The decisions of the European courts have already indicated something. The very absence of national means for the legal recognition of same-sex couples has already been the subject of decision-making, either by the European Court of Human Rights or by the EU Court of Justice. Reference may be made to the judgment of the European Court of Human Rights in the legal case of *Schalk and Kopf vs. Austria*. However, since Austria adopted the Registered Partnership Act in the course of the decision-making on the complaint, the European Court of Human Rights merely stated that 'given that at present it is open to the applicants to enter into a registered partnership, the Court is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 of the Convention'.¹⁶³ In the opinion of Advocate General N. Jääskinen, in the present case, a situation in which a Member State does not accept any form of legally recognised association open to persons of the same sex could be regarded as constituting discrimination linked to sexual orientation, since the principle of equality, combined with the obligation to respect the human dignity of persons with a homosexual orientation, may result in the obligation to recognise the long-term relationship of such persons within legally acknowledged obligation.¹⁶⁴ A significant decision concerning same-sex couples was made in

¹⁶² Of the 27 EU Member States, there are only six (including Slovakia) the law of which does not allow for registered partnership institute or which have not made marriage available also to persons of the same sex.

¹⁶³ Judgment of the ECHR of 24 June 2010, No. 30141 / 04, *Schalk and Kopf vs. Austria*, par. 103.

¹⁶⁴ Opinion of Advocate General Jääskinen delivered on 10 July 2010 in Case C-147 / 08 *Jürgen Römer vs. Freie und Hansestadt Hamburg*, Item 76. [online]. [cit. 26. 10. 2023]. Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=78681&pageIndex=0&doclang=SK&mode=lst&dir=&occ=first&part=1&cid=1843370#Footref38>.

the case of Oliari and others vs. Italy.¹⁶⁵ The European Court has reiterated in that legal case their assertion that same-sex couples are capable of establishing a stable and deep relationship, while feeling at the same time the need for legal recognition of their bond. In view of the unavailability of marriage in Italy, those couples have a particular interest, according to the Court, in being able to enter into a certain form of civil union connected with legal protection. On the basis of Article 8 (1) of the European Convention, the Court held that, in the circumstances which were fulfilled in the Oliari case, Italy had a positive obligation to act in such a way as to ensure, by means of adequate legislation, respect for family life also for those couples. Unless Italy does so, the European Convention is thereby infringed. The Slovak experts in the field took contradictory positions and the matter resulted in conclusion that the Oliari decision did not automatically create a legal obligation for the Slovak Republic to adopt legislation enabling registered partnerships between persons of the same sex, because there is a difference between the situation in Slovakia and that in Italy. The social, but above all legal context in Slovakia is different from that assessed by the European Court of Human Rights in the Italian case.¹⁶⁶

In any event, once the Slovak Republic decides to incorporate the registered partnership institute into its national rules, careful consideration, and comparison of domestic arrangements of the nations where this other form of legal family union already exists alongside marriage should precede such decision. The step is unthinkable without accepting conclusions drawn by the European courts in the cases of discrimination against registered partners and spouses, which have one thing in common. That is, the means used to protect marriage and family established by marriage must be appropriate and, at the same time, they must ensure that registered partnerships are not discriminated against in comparison to marriage. The distinction between registered partnership and marriage may not be justified solely by the special (constitutional) protection of marriage, and the institution of marriage may be protected without the need to put other ways of life at a disadvantage.¹⁶⁷ The level of labour relations have been affected by so far optional possibilities for diversity management – the situations addressed in the

¹⁶⁵ Judgment of the ECtHR of 21 July 2015, No. 18766/11 and No. 36030/11, Oliari and others v. Italy.

¹⁶⁶ See further in: KOCINA, P. Registrované partnerstvo ako integrálna súčasť práva na súkromný a rodinný život. (Registered partnership as an integral part of the right to private and family life). In *PROJUSTICE. Vedecko-odborný recenzovaný časopis pre právo a bezpečnostné vedy*. (PROJUSTICE. Scientific-professional peer-reviewed journal for law and security sciences). March, 2021. [online]. [cit. 26. 10. 2023]. Available at: <https://www.projustice.sk/rodinne-pravo/registerovane-partnerstvo-ako-integralna-sucast-prava-na-sukromny-rodinny-zivot>.

¹⁶⁷ *Decision of the German Federal Constitutional Court of 7 July 2009*. [online]. [cit. 26.10.2023]. Available at: http://www.bverfg.de/entscheidungen/rs20090707_1bvr116407en.html.

judgments of the Court of Justice of the EU in legal cases C-267/06 Tadao Maruko vs. Versorgungsanstalt der deutschen Bühnen of 1 April 2008 and C-147/08 Jürgen Römer vs. Freie und Hansestadt Hamburg of 10 May 2011.¹⁶⁸ In the case of Maruko, Mr. Maruko wanted to claim a survivor's (widower's) pension from an employer who operated the company's supplementary pension scheme of his deceased partner with whom he lived in a registered partnership. The employer refused the application of Mr. Maruko on the grounds that such pensions may be paid only to surviving spouses and that he was not married to the deceased. The Court of Justice of the EU recognised that the refusal to pay the pension was a less favourable treatment, namely that it was less favourable to the comparable sample – the married couples.¹⁶⁹ It remained for the national court to determine whether the surviving life partner was in a situation comparable to that of a spouse receiving the survivor's benefit provided for by the occupational social security scheme. At the same time, the grounds of the judgment (Paragraphs 66 through 73) laid down substantive criteria for verifying the existence of such comparable situation. The fundamental criterion concerned was the national German legislation of the registered partnership institute, which introduced several of the same rights and obligations for registered partners as for married couples. In the Römer legal case, the Court goes on to state that it is not necessary for situations to be identical. The Court also held that comparability shall not be examined globally and abstractly, but specifically and factually with regard to the benefit in question. In the present case, too, the Court found direct discrimination on the grounds of sexual orientation, as Mr. Römer (registered partner) was in a comparable situation with a married person and, therefore, the national Austrian legislation allowing for a different method of calculating the supplementary old-age pension which is more beneficial to couples is contrary to European Union law. The common conclusion drawn from the judgments in Maruko and Römer legal cases which may also be inferred from the judgment of the Court of Justice of the EU in the Dittrich

¹⁶⁸ The level of legal relations between spouses and registered partners in the Maruko and Römer cases is concerned new in the light of the new trends that the Court of Justice has started with these judgments in the field of recognition of the rights of registered partners. By those decisions, the Court departs from the trends in the decisions in Case C-249/ 96 Lisa Jacqueline Grant vs. South-West Trains Ltd and in Joined Cases C-122 / 99 P, C-125/99 P, D. and the Kingdom of Sweden vs. Council of the European Union. Compare: DOLOBÁČ, M. Zákaz diskriminácie na základe sexuálnej orientácie vo svetle rozsudku ESD „Lisa Jacqueline Grant“. (Prohibition of discrimination based on sexual orientation in the light of ECJ judgment “Lisa Jacqueline Grant”) In *Olomoucké debaty mladých právniků. Sborník příspěvků. (Olomouc debates of young lawyers. Collection of contributions)*, 2009, pp. 229-233.

¹⁶⁹ See also: Handbook on European Anti-Discrimination Law. European Union Agency for Fundamental Rights. 2010, p. 99. [online]. [cit. 26.10.2023]. Available at: http://www.echr.coe.int/NR/rdonlyres/F19FF5E7-3092-44B1-8DED-0CF19A3B4561/0/1SLK_FRA_CASE_LAW_HANDBOOK.pdf.

legal case,¹⁷⁰ is that if any “contribution” granted by national legislation (a widow’s pension in the case of Maruko, a supplementary old-age pension in the case of Römer, a contribution in the case of sickness in the case of Dittrich) may be subsumed into the notion of reward within the meaning as ascribed to that notion under Article 57 of Treaty on the Functioning of the European Union (formerly Article 141 of the Treaty Establishing the European Community), then Council Directive 2000/78/EC of 27 November 2000, establishing the general framework for equal treatment in employment and occupation, shall be applicable in the case at hand. As a result, this means that registered partners and spouses must be treated equally where they are in a comparable situation.

Taking into account the existing legislation and case law, the simplest way for the employer to introduce formal protection of a person with a minority sexual orientation and gender identity is implementation of anti-discrimination rules in company documents. The same may include a special emphasis on assistance and defence procedure for such a person. A relatively significant feature of the discriminatory treatment of employees with a minority sexual orientation or gender identity is the considerable victimisation of the employees concerned as compared to other protected grounds giving rise to discriminatory treatment. In many cases, those employees avoid socialising with colleagues in order to avoid “disclosing”. There also exists a risk that they could lose their jobs if they complain.¹⁷¹ It is therefore very important to reassure those people that there is no risk of persecution if they lodge a complaint. Out-of-court protection in respect of employment is covered under Article 13 (7) of the Labour Code. The employee shall be entitled to lodge a complaint with the employer concerning a breach of the equal treatment principle, non-compliance with the conditions and infringement of the rights and obligations arising from the employment; the employer shall be obliged to reply in writing to the employee’s complaint without undue delay, to remedy, to refrain from such a conduct and to remove the consequences thereof. The system for handling complaints by employers is usually contained in a separate in-house rule or usually forms a regular part of the working rules and regulations. Given the absence of any relevant legislation in this area, the possibilities for the employer to deal with employees’ complaints are different and, as a result, the very internal rules are, of course, different, too. However, notwithstanding this fact, certain key content elements of the complaint handling process by the employer under Article 13 (7) of the Labour Code may be identified. The essential procedural step normally regulated

¹⁷⁰ Judgment of the Court of Justice 6 December 2012 in Joined Cases C-124 / Karen Dittrich vs. Federal Republic of Germany, C-125 / 11, Robert KLINKE vs. Federal Republic of Germany and C-143 / 11 Jörg-Detlef Müller vs. Federal Republic of Germany.

¹⁷¹ MURA, L. Riadenie vs. vedenie ľudí = Management vs. leadership. In *Acta Oeconomica Universitatis Selye*, 3, No. 2 (2014), pp. 109-116.

under an internal rule is identification of the form of the complaint, contents thereof and, at the same time, the person who is entitled to receive the complaint from the employee on behalf of the employer as well as time limits set for the complaint to be dealt with. In the absence of regulation of any of these areas in the employer's internal regulation, the employee shall be bound solely by the provisions of Article 13 of the Labour Code, even if that regulation would contradict or alter that statutory provision. The employer shall at the same time be obliged to deal with that application on account of the higher law – labour protection of the employee. The investigation of a complaint constitutes the most important part of the process of dealing with an employee's complaint under Article 13 (7) of the Labour Code as a whole. In principle, the process should as a whole be governed by the transparency and objective investigation principle concerning the employee's complaint depending on the subject-matter thereof. The aim should be to truthfully establish the actual facts of the case or those of the conduct of the persons that form the subject of the employee's complaint and the compliance thereof with or conflict thereof with general statutes, the employment contract or collective agreement, or the employer's in-house rules. What may also be considered important is identification of the causes for the conduct or situation which forms the subject of the employee's complaint as well as of relevant connections having impact on the objective clarification of the case. In order to ensure the appropriate handling of the employee's complaint, no person against whom the complaint is directed, nor any person who is in any way prejudiced in relation to the person against whom the complaint is directed or against the matter which forms the subject of the employee's complaint should in any way be involved in the investigation and handling of that complaint. The participation of such persons may not only thwart objective investigation thereof but may also constitute grounds for a complaint by the employee filed against the handling of the complaint by the employer. It may similarly lead to the conclusion that frustration of the employee's complaint processing and denial of his/her right not only to lodge the very complaint, but also to refraining from such a conduct and remedying the consequences thereof is sought if the employee's complaint were to be upheld. As a general rule, the handling of the employee's complaint is concluded by drawing up of minutes which is the subject of subsequent discussions between the employer and the employee or representatives thereof. The subsequent procedure depends on the outcome of the employee's complaint handling *i.e.*, whether the same is justified and whether or not there has been a threat or breach of his or her right or interest protected by the law. In both cases, as soon as the minutes has been drawn up, the employee shall be informed of the outcome of the complaint handling *i.e.*, whether the same is justified or not. Where the complaint has been justified, the information shall also include draft measures to be taken by the employer to comply with the employee's request referred to in the complaint (depending on what the

employee has requested). Information on the outcome of the complaint does not usually include the sanctions against third parties imposed by the employer on other employees or on senior employees who have caused the employee's complaint to be founded (although the complainants have requested the same). This information, including with regard to the legal regime for the protection of personal data, is not open to employees and is exclusively a matter of the content of the employment between the employer and that third party. It is the obligation of the employer to ensure that, for example, the conduct concerned be abandoned, the consequences of the procedure are remedied, if still in existence, or that the employee be given sufficient moral satisfaction or compensation for non-material damage, if so agreed with the employer. Naturally, the employee may, on receipt of information on the complaint handling, consider whether or not such handling is appropriate to the facts of the case.

In addition to implementation of prohibition of discrimination on the grounds of sexual orientation or gender identity and the consistent regulation of the procedural defence of lodging a complaint, other instruments of diversity management in relation to this group of employees may also be identified. In Slovakia, the labour legislation addressing cohabiting employees in the sense of same-sex couples living in a partnership is scanty, but not entirely absent. Certain fundamental rights and obligations are granted to those employees through a family member status (under Article 40 (5) of the Labour Code), while others are so granted on the basis of a close person status (pursuant to Article 116 of the Act no. 40/1964 Statutes, the Civil Code, as amended).¹⁷² In its decision no. PL. ÚS 24 /2014-90 in this context, the Constitutional Court of the Slovak Republic also stated that through recognition, the State also favours other types of social coexistence of persons that is other than marriage. In Chapter 3.3, we already mentioned the employee's entitlement to paid leave on the death of their partner (Article 141 (2) (d) of the Labour Code *et seq*). Partners living in the same household are entitled to a leave from work when accompanying a family member (partner) to a healthcare facility (Article 141 (2) (c) of the Labour Code). They are, through a prism of care of a close relative protected them from immediate termination of employment (Article 68 (3) of the Labour Code). They are also entitled to have their working hours adjusted (Article 165 in conjunction with Article 164 of the Labour Code).¹⁷³ It is then up to each employer to make an internal rule as to whether or not a proof of cohabitation would be requested. It should be borne in

¹⁷² A close person is a direct line kin, a sibling, and a spouse; other persons in a family or similar relationship are deemed to be close to one another if the harm suffered by one of them is reasonably felt by the other as their own harm.

¹⁷³ OLŠOVSKÁ, A. – DIVÉKYOVÁ, K. – MÉSZÁROS, M. *Okamžité skončenie pracovného pomeru. (Immediate termination of employment)*. 1st ed. Praha : Wolters Kluwer ČR, 2019, p. 89.

mind that the formal record of cohabitation of same-sex couples is absent from our law. A situation in which a life-long partner has to prove to third parties that they are a close relative by means of statutory declarations, powers of attorney or various certificates from municipal authorities often creates a degrading situation.

In addition to the minimum labour standards described above, it is within the employer's power to take other tailor-made optional measures for employees with a minority sexual orientation. This may, for example, be a leave on the day of the conclusion of a registered partnership,¹⁷⁴ or the granting of a leave in connection with the birth of a child or the adoption of a child by one of the partners. According to other best practices in the area of diversity management, it is possible to internally focus on improving the overall perception of the relationship with LGBT+ employees, for example in the form of workshops, seminars, team-buildings, and trainings. Open discussion on this topic in the collective is an option in this regard, too. Externally, the employer may support their employees from this community by, for example, a marketing campaign, a product, a company rainbow logo, public support for an event organised by the LGBT + community, *etc.*

¹⁷⁴ Due to the possibility to enter into a registered partnership in the neighboring Czech Republic, citizens of the Slovak Republic also use this possibility, if from a legal point of view this act has no legal effects in Slovakia.

CONCLUSION

The subject of diversity has different connotations and specific manifestations, not only in the social sphere, but also within the framework of labour legislation and the labour market. The acceptance of the diversity of natural persons, their needs, or the life situations in which they find themselves should form the basis of any healthy working environment. Unfortunately, one may, however, quite repeatedly find, particularly in the Slovak Republic, that the approach of the legislator or of the labour relations subjects is insensitive and leads ultimately to different legal and labour disputes. There is clearly a lack of a certain degree of generosity and understanding of the differences resulting from objective or subjective reasons. This is not just the case from the point of view of the need to regulate the working and wage conditions of those employees, but also with regard to adjusting interpersonal communication among the employees themselves.

For reasons that are relatively incomprehensible, solving the problems of other natural persons are, in many respects, a burden that employers are trying to avoid in different ways. The selection of these persons denied within the selection procedures, implementation of various goal-directed organisational changes, but often also, for example, the failure to resolve conflicts at the workplace caused by inappropriate or offensive language, leads to the conclusion that the Slovak labour market in general rejects diversity. However, such approach is reactionary and contrary to the global and modern view of developing labour relations respecting each employee as a personality, taking into account their needs as an essential part of implementing the content of labour relations. However, this “Slovak” approach is also incorrect from the perspective that the state is to fulfil the essential functions and is required to act in public interest. We need to realise that diversity management does not just cover discrimination on the basis of sexual orientation or sex, even though the same constitutes an integral part thereof. Another important part is also the overall setting of working conditions for women caring for young children, who thereby fulfil their social role and comply with working conditions. Financial security during this period is a key prerequisite for the general interest of women in fulfilling their maternal mission. It is not acceptable, however, for a woman, on return from her maternity or parental leave, not to be guaranteed a job and to automatically become redundant for the employer simply because the employer has filled her post with another employee regardless of Article 48 (4) of the Labour Code or, alternatively, the employer is considering terminating the employment for the employee’s non-compliance with the requirements of the employer’s internal regulation, because during her maternity and parental

leave that regulation has been changed (for example, the job description and the requirements for filling the position have been changed). In our view, the employer should be legally obliged to give such woman a reasonable period of time to comply with those amended requirements.

However, the possible change of the approach described does not arise from the need for a fundamental change in the legal regulation, but from a mere change in the way in which the parties to the employment are set up. A higher degree of “diversity” of sensitivity does not result in substantially increased costs for employers, there is just a higher degree of humanity and understanding for the differences in each of us. The monograph submitted represents an element to start from.

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