

Prohibition of Discrimination and Prevention from Abuse at Work: As a Right and an Obligation - Serbian Legislation

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Abstract The topic of this paper is a review of the changes that have affected the world of work, deviations that have occurred due to these changes and also the need to invest more effort in creating and maintaining a healthy working environment. In modern business operating conditions, the expectation of a guaranteed employment has disappeared and it has been replaced with a requirement for an employee to prove himself/herself again and again on the competitive and demanding market. The fear of losing their jobs, quite demanding tasks that also carry greater personal responsibility, the pressures due to which competition among employees is created, which, if not channelled, has no driving power but causes a distrust among colleagues and personal insecurity - are a sure way to mobbing and discrimination. In the context of European integrations, there has been great progress in improving the legal and institutional framework for fight against discrimination in the Republic of Serbia. The dynamics of passing the anti-discrimination laws has an upward trajectory, indicating that the harmonization of national normative framework in the field of protection against various forms of discrimination gained its due attention. The prohibition of discrimination and the prevention of abuse at work are subject to the regulation of the parent Labour Law and a special Law on Prevention of the Abuse at Work. With the formation of the normative framework, prevention has an important factor in the suppression of mobbing and discrimination, as well as creation of social conditions conducive to the establishment of the system of values in which equality and mutual tolerance represent values that society consciously accepts and where differences among people are appreciated and understood as its wealth and potential for development.

Keywords Law, Discrimination, Abuse, Prohibition, Protection

1. Introduction

Most people spend a significant part of their lives at work; it is a fact about which there is almost no disagreement. New technologies require of an individual to "keep up" with the progress of information technology, it is difficult or almost impossible to fulfil, given the rapid pace of technological progress. Inevitable changes in the sphere of work also assume the introduction of new working hours - flexible working hours and new forms of work - teamwork. It is obvious how much the above statement affects the change of relations and atmosphere in the workplace. However, we see that flexible working hours actually mean not having limited working hours, since, practically, people work all day. New forms of work include completely new relationships with co-workers and even more with superiors, which can easily lead to a deterioration of human relationships and the general working climate. Are individuals, employers or the state ready for the changes that have affected the world of work? Or have they been taken by surprise by them? There is hardly any business or other organization that has a ready strategy to respond to this challenge (Bilbija, 2014, pp. 385-386). The individual, therefore, has to find a way how to solve new situations at work, in order to cope with the newly established relations and conflicts with colleagues, and eventually, conflict with himself/herself. The fear of losing their jobs, quite demanding tasks that also carry greater personal responsibility, the pressures due to which competition among employees is created, which, if not channelled, has no driving power but causes distrust among colleagues and personal insecurity - are a sure way to mobbing and discrimination. Passive conduct of the employer can be sustainable only in the short term. The pressures that business should not be guided only by the interests of the shareholders are getting bigger and socially responsible business practice represents a sphere where the interests of capital owners collide with the interests of the community, an unlimited economic growth and equitable

and sustainable development. The importance of the problem is represented by the fact that the socially responsible business practice has become the subject of international standardization and that the European Union conditions trade with countries that have joined it or intend to do so particularly by this (Prelević, 2011, pp. 36-55).

Weapons of the state are laws - first of all, normative framework - passing of laws, both general and special, and then the creation of the conditions for their implementation. Passing the law does not solve the problem itself. If the application of the law fails, we talk about the law which remains a "dead letter".

2. The Normative Framework in the Republic of Serbia

The provisions of more substantive and procedural laws in the Republic of Serbia regulate the world of work, i.e. the rights, obligations and responsibilities arising from employment. Let us start with the act of the highest legal power. The Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006), Article 60 stipulates that everyone has the right to be respected as individuals at work, the right to safe and healthy working conditions, necessary protection at work, limited working hours, daily and weekly rest, paid annual leave, fair remuneration for the work and the legal protection in case of termination of employment. No one can waive these rights.

Achieving full harmonization of labour legislations of the Republic of Serbia with international standards of the United Nations, the International Labour Organisation, the Council of Europe and the European Union, requires a high degree of legislative involvement. The dynamics of labour law is indisputable. The current Labour Law (Official Gazette of RS, no. 24/05, 61/05, 54/09, 32/13 and 75/14) was repeatedly amended, last time in July 2014. Judging by its formal appearance, the legal framework of the Republic of Serbia has already been moving towards European integrations for twenty years. Thus, by getting involved in the market affairs, a new legal framework of the Serbian economy should include new ownership and institutional environment, whereby many obstacles must first be removed and a number of assumptions created (Vasiljević, 2014, pp. 13-34).

Labour law is particularly sensitive to the changes occurring in the sphere of economics. This particularly applies to economic and financial crises, which face the countries with the need to reduce costs and solve the problem of mass unemployment and employers with challenges of business continuity, restructuring and collective dismissals. Although the economic crisis may be a legitimate reason for changing employment legislation in order to limit costs, these changes may not have the effect of employees' excessive insecurity and violation of their basic social rights (Kovacević, 2014, pp. 501).

Labour Law has the status of a general law; it is applicable to all employees and all employers, meaning that in the

absence of special legislation it applies fully and immediately, whereas, if an area is regulated by a special law, it is applicable in a partial and subsidiary manner.

Positive labour legislation in the Republic of Serbia includes special laws governing labour relations in state bodies and public sector, such as the Law on Labour Relations in State Bodies (Official Gazette of RS, no. 48/91, 66/91, 49/99-other law, 34/01 -other law, 39/02, 49/05-Decision of the Constitutional Court of the Republic of Serbia, 79/05-other law, 81/05-correction of other law, 83/05-correction of other law and 23/13 - Decision of the Constitutional Court), The Law on Civil Servants (Official Gazette of RS, no. 79/ 2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009 and 99/2014), Law on Salaries of Civil Servants and employees (Official Gazette of RS, no. 62/2006, 63/2006, 115/2006, 101/2007, 99/2010, 108/2013 and 99/2014), The Law on Salaries in Government Agencies and Public Services (Official Gazette of RS, no. 34/2001, 62/2006, 63/2006, 116/2008, 92/2011, 99/2011, 10/2013, 55/2013 and 99/2014). Further, the Law on Peaceful Settlement of Labour Disputes (Official Gazette of RS, no. 125/04 and 104/09), Law on Volunteering (Official Gazette of RS, no. 36/10), Law on State and Other Holidays in the Republic of Serbia (Official Gazette of RS, no. 43/01, 101/07, 92/11) represent special laws regulating certain aspects of the world of work. Also, the fields of safety and health at work are legally regulated. (The Law on Safety and Health at Work, Official Gazette of RS, no. 101/05).

In the context of European integrations, there has been great progress in improving the legal and institutional framework for fight against discrimination in the Republic of Serbia. The dynamics of the passing of anti-discrimination laws has an upward trajectory, indicating that the harmonization of national normative framework in the field of protection against various forms of discrimination gained the due attention. The rule on prohibiting discrimination was registered in all the international documents on human rights, as well as in the constitutions of almost all countries of the world. The Constitution of the Republic of Serbia contains a general constitutional norm on the prohibition of discrimination (Art. 21), which establishes that before the Constitution and the law, everyone is equal and everyone has the right to equal legal protection, without discrimination, that any discrimination, direct or indirect, is prohibited, on any grounds, particularly based on race, sex, national origin, social origin, birth, religion, political or other belief, property status, culture, language, age, mental or physical disability. Gender equality is guaranteed by Article 15, and the prohibition of discrimination of national minorities is regulated by Article 76 of the Constitution of the Republic of Serbia.

The general anti-discrimination law in the Republic of Serbia was adopted in 2009. Thus, Law against Discrimination (Official Gazette of RS, no. 22/09) regulates the general prohibition of discrimination, forms and cases of discrimination, as well as the procedures for protection against discrimination, and it establishes the Commissioner

for the Protection of Equality, as an autonomous state body, independent in performing the tasks set forth by the law. In its Article 16, the Law prohibits the discrimination in the field of labour, i.e. the violation of equal opportunities for establishing employment or exercising, on equal terms, all the rights in the field of labour, as the right to work, to a free choice of employment, the right to be promoted in service, to professional training and vocational rehabilitation, to equal pay for work of equal value, to just and favourable conditions of work, to holidays, to education and membership in the union. Then, to a group of anti-discrimination laws also belongs the Law on Gender Equality (Official Gazette of RS, no. 97/08) which, by Article 11, obliges the employer to ensure equal opportunities and treatment in connection to the exercise of labour rights from employment and based on work in accordance with the law governing the labour to all employees regardless of the gender. Law against Discrimination of Persons with Disabilities (Official Gazette of RS, no. 33/06) Articles 21-26, prohibits discrimination because of disability in respect of establishing an employment and employment.

At this point it is necessary to mention the Law on Protection of Personal Data (Official Gazette of RS, no. 97/08), which prohibits the collection, use and processing of "particularly sensitive data", which is a common case of violation of privacy, when, under the "verification" of working abilities, the check of personality is performed, regarding religion, political or other beliefs, social and family status (particularly with women in childbearing age). Labour Law, Article 26, protects the same rights, but selectively, only with establishment of the employment. In view of the above stated, the Law on Protection of Whistle-blowers was passed (Official Gazette of RS, no. 128/2014). The commitment of the Republic of Serbia for a decisive fight against corruption, which involves the creation of a regulated normative framework, system development and strengthening of institutions as a prerequisite for an effective fight against corruption, requires the adoption of a comprehensive law that regulates the field of the protection of whistle-blowers. The lack of coherent regulation of this issue through a number of different laws, none of which included, in a comprehensive manner, all issues related to the protection of whistle-blowers, used to represent a big deficiency in the former approach to this matter.

3. The Law on Prevention of Abuse at Work

The term *mobbing* is an English term derived from the word *mob* (noun) – a large group or crowd of people who are angry or violent or difficult to control, the word *mobbish* (adjective) – disorderly, lawless, vulgar and *to mob* (verb) – to crowd around and jostle or annoy, especially in anger or excessive enthusiasm. From the previously mentioned words, the term *mobbing* was derived meaning – bullying of an

individual by a group in any context; emotional abuse in the workplace by co-workers, subordinates or superiors, to force someone out of the workplace through rumour, innuendo, intimidation, humiliation, discrediting and isolation. Etymologically speaking, the English word *mobbing* originated from the Latin phrase *mobile vulgus* - crowd (scum) on the move, mob rule. The ancient root in the Latin language leads us to the ancient Rome. It was recorded that during the political struggles in the ancient Rome, the opponents sometimes used (corruptible) city crowd (*vulgus*) directing them to move (*mobile*) against the other party, to shout insulting paroles or to otherwise abuse them psychologically.

Professor *Heinz Leyman*, a Swedish psychologist of German origin, was the first to use the English word "mobbing" in order to designate hostile behavior of the employees in the workplace. According to him, psychological abuse in the workplace refers to a hostile and unethical communication which is being systematically directed by one or more persons, mostly towards one single individual who is, due to abuse, put in a helpless situation from which he /she cannot defend himself/herself. Greater interest for the concept of abuse in the workplace was noted in the Scandinavian countries during the 1980s, when professors *Leyman* started systematically and scientifically to research and investigate mobbing as a specific behavior and a specific, deviant form of communication in the workplace. His work is the result of studying direct and indirect forms of conflicts in the workplace and empiric work in various organizations where he encountered the phenomenon of mobbing.

It is not disputed that the legislation of the Republic of Serbia has implemented a multitude of quality regulations, which protect the life and health of workers, however, the *bona fides* with their implementation is disputable. As for the practical aspects of the implementation of the said rights, there is an obvious stagnation. In practice, we face the most primitive forms of threats to all aspects of human rights at work (*Kovačević-Perić*, 2011, pp. 564). The adoption of the Law on Prevention of Abuse at Work and the adoption of the Regulations on the rules of conduct of the employer and employees regarding the prevention and protection of employees (Official Gazette of RS, no. 62/10) in the Republic of Serbia, the conditions for operationalization of protection against mobbing were created.

Abuse at work is often called "the disease of modern communication" at work. However, this phenomenon is not a modern attainment. Abuse at work or mobbing is, as a phenomenon, much older. Mobbing has always existed in the relations of communication at work, only the global flows provided favourable conditions for its momentum (*Kovacevic-Peric*, 2011, pp. 553). As a result, *comfortable working environment* against a *hostile working environment* became the object of attention of the scientific community and the legal regulations.

As a legally and economically superior side in the employment relation, it is the employer's obligation to create

a healthy and safe working environment. The employer is obliged, in order to create the conditions necessary for a healthy and safe working environment, to organize work in such a manner that prevents the occurrence of abuse at work and in relation to work, and to provide the employees with such working conditions that they will not be subjected to abuse at work or in relation to work by the employer, person in charge nor other employees with the same employer. The employer is responsible for the damage that the responsible person or employees in performing harassment cause to another employee with the same employer. An employer who has compensated the damage caused by the responsible person or an employee shall be entitled to ask that person or employee to repay the amount of the damages paid. The responsibility of the employer for damages caused by his/her employee, as well as his/her right and duty to, upon the payment of damages to a third party, address with the reimbursement request to the employee who had caused the damage, is governed by the provisions of the Labour Law and the Law on Contracts and Torts. The difference is that both the compensated "third" party and the person who caused the damage - are employed with the employer.

Therefore, any form of abuse at work and in relation to work is prohibited, as well as the abuse of right to protection against abuse.

Abuse is any active or passive behaviour towards an employee or group of employees with the employer that is repetitive and which has an aim or represents the violation of dignity, reputation, personal and professional integrity, health, status of the employee and which causes fear or creates a hostile, humiliating or offensive environment, deteriorates working conditions or causes the employee to isolate himself/herself or makes the employee to terminate the employment, work contract or other agreement at his/her personal initiative. Also, the abuse is considered to be the encouragement or incitement of others to such behaviour. An employer in capacity of a natural person or a person authorized by the employer with the status of a legal entity, an employee or a group of employees with the same employer who perform the described abuse, i.e. incite or encourage the others to do so, are considered to be the perpetrators of the abuse.

The first obligation of the employer is to inform the employee, in writing, before he/she starts working, about the prohibition of abuse and the rights, obligations and responsibilities of both the employee and the employer concerning the prohibition of abuse. Concerning this matter, it is also the employer's obligation to, in the aim of identifying, precluding and preventing the abuse, implement measures of informing and training employees and their representatives to identify the causes, forms and consequences of abuse. This preventive measure is completely new legal solution, and how much importance is given to prevention by the law can be seen in the fact that the penal provisions provide that the neglecting of this obligation constitutes an offense punishable by a fine.

Contrary to the determined obligation for some, for the others there is – the right. And vice versa. Therefore, an employee is entitled to be informed, in writing, about the prohibition of harassment and the rights, obligations and responsibilities of the employee and the employer concerning the prohibition of abuse. An employee is entitled to be provided with the protection by the employer of the conduct constituting an abuse. On the other hand, an employee is obliged to refrain from conduct that constitutes an abuse and conduct that constitutes an abuse of the right to protection against harassment. An employee who performs the abuse, as well as employee who abuses the right to protection against abuse is responsible for the disrespect of work discipline, i.e. for the breach of the work duty. Abuse of the right to protection against abuse is performed by an employee who is aware or must have been aware that there have been no reasonable grounds for the initiation of the proceedings for protection against abuse and who launches or initiates this proceedings with the aim to acquire for himself/herself or another person a pecuniary or non-pecuniary benefit or to inflict damage to another person.

An employee who becomes aware of such conduct for which it is reasonable to believe that it constitutes abuse, has the right to initiate proceedings for the protection against abuse by notifying the person authorized for the submission of the request for the initiation of this proceedings, as provided in Art. 12. I would agree with the interesting comment of this law where the Einstein's quote was used: "The world is a dangerous place to live; not because of the people who are evil, but because of the people who don't do anything about it". An employee has the right, but not the obligation, to initiate proceedings for protection against abuse, but he/she cannot do it independently, or without the consent of the employee who is considered abused. This measure could be a good one, designed to stop abuse, often at the very beginning, without an adverse effect occurrence, but in particular, current working conditions it can hardly come to life (Kićanović, 2011, pp. 33).

4. The Procedure for Protection against Abuse with the Employer

Very important features of this procedure are the urgency and secrecy. If the responsible person as the legal entity, i.e. employer in the capacity of a natural person is not charged with the abuse, an employee who believes that he/she is subjected to abuse submits a reasoned request to initiate proceedings for protection against abuse directly to that person. With the written consent of the employee who believes to be exposed to abuse, the request may also be submitted by a representative of the union, person in charge of health and safety at work, employees' representative for safety and health at work or Committee for Safety and Health at Work. We have already stated that also in the case when the responsible person as a legal entity is charged with abuse,

i.e. employer with the status of a private entity, the employee who finds that he/she is exposed to the harassment may submit a request for the initiation of the mediation proceedings directly to that person. However, he/she does not have to do this, but he/she may, without submitting a request to initiate mediation proceedings with the employer, initiate proceedings before the competent court. The deadline is the same as the deadline for initiating the proceedings for protection against abuse with the employer, which is six months from the date when the abuse happened, whereby the period begins to run from the date when conduct constituting abuse was last performed.

The employer is obliged to propose to the parties in dispute the mediation, as a way of resolving a dispute, within three days since receiving the reasoned request for the initiation of proceedings for protection against abuse. An employee who believes to be exposed to abuse, an employee who is charged with abuse and a representative of the employer, i.e. the employer and the employee who believes to be exposed to abuse have the deadline of three days to reach an agreement on appointment or choice of a person to conduct the mediation proceedings.

The mediator or a person who enjoys the confidence of the parties in dispute can be chosen from a list of mediators maintained by the employer - in accordance with a collective agreement or with the body, organization or institution for mediation - in accordance with the law. The mediator may also be selected from a list of mediators of social and economic council made on a proposal from the social partners, as well as from the list of citizens' associations whose objectives are focused on the mediation affairs, i.e. protection against abuse. A mediator is a neutral person who mediates between the parties in the dispute to resolve their controversial relationship; he/she is required to act independently and impartially.

The mediation proceeding is conducted in a way that the mediator helps the parties in dispute to reach an agreement. In the mediation proceedings, at the request of the parties in the dispute, a representative of the union can participate. The parties may agree on how the mediation proceedings will be conducted, and if the parties fail to reach an agreement on how to implement the proceedings, the mediator will conduct the mediation proceedings in a way that he/she considers appropriate, given the circumstances of the disputed relationship and interests of the parties in the dispute, which means that he/she can organize joint and separate meetings with the parties in the dispute, as well as with the consent of one party convey and present proposals and attitudes on specific issues to another party. The mediator may make suggestions for the possible ways to resolve the dispute, but he/she cannot impose a solution to the parties in the dispute.

Mediation proceeding is ended within eight working days from the date of appointment, or selection of a mediator (the deadline for completion of the mediation proceedings can be extended to maximum of 30 days for justified reasons) in one of the following three ways:

1. by the conclusion of a written agreement between the parties in the dispute;
2. by the decision of a mediator, after consultation with the parties, that the proceedings is to be discontinued, as further proceedings is not justified or
3. by the statement of a party in the dispute on withdrawing from the further proceedings.

In the case of the referred cease and desist, as well as in case that the parties in the dispute do not appoint or choose a mediator, it is considered that the mediation proceedings has failed. When a mediator was not specified or selected, it is employer's obligation to notify the disputed parties that the mediation proceedings have failed, and in other cases the notification is the obligation of the mediator.

Desirable completion of the mediation proceedings is the achievement of an amicable settlement, i.e. finalisation of a written amicable agreement between the parties. Such an amicable agreement particularly contains measures aimed at the cessation of behaviour that represents abuse, i.e. exclusion of the possibility of continuing such behaviour. The effect of the agreement reached in the mediation proceedings depends on the will of the disputed parties, if the agreement covers settlement of behaviour in their mutual relationship. The agreement may contain recommendations to the employer in terms of eliminating the possibility of continuation of the abuse (transfer of the employee to a different work environment or other measures concerning the status and rights of the parties in the dispute), that an employer can accept if they are in accordance with the law and his/her business policy.

The employer shall, if the mediation proceeding fails, and there are reasonable grounds to suspect that the abuse was committed or that the right to protection against harassment was abused, initiate the proceedings for establishing the responsibility of the employee for the disrespect of work discipline, i.e. the breach of the work duty, in accordance with the law. In this case, in addition to the sanctions set by law, an employer may warn the employee, may impose a measure of suspension from work of four to 30 business days without wage compensation or a measure of the permanent relocation to another work environment - to the same or other duties, i.e. workplace, in accordance with the law. If the employee who, due to the exercise of abuse, was imposed some of these measures, commits an abuse once again within six months, the employer may terminate his/her employment contract, i.e. impose a measure of the termination of employment, in accordance with the law.

The law also stipulates measures for the prevention of abuse until the completion of the proceedings, if the employee who considers himself/herself exposed to the abuse, according to the opinion of the occupational health services, is threatened by direct danger to the health or life or if he/she is in danger of occurrence of irreparable damage (transfer to a different work environment of an employee who has been charged with abuse to the same or other duties, i.e. workplace or suspension from work with compensation of salary, in accordance with the law), i.e. it stipulates the

right of an employee, who in the opinion of the occupational health services is threatened by direct danger to the health or life, to refuse to work if the employer does not take any measures to prevent abuse until the completion of the proceedings. A mediator may also submit to the employer the initiative for the determination of measures to prevent abuse until the completion of the proceedings, if he/she finds that there is the risk of occurrence of irreparable damage to an employee who believes to be exposed to abuse.

The protection of participants in the proceedings is a prerequisite for its successful implementation. Art. 27. Law on Prevention of Abuse at Work has determined it as follows: initiation of the proceedings for protection against abuse, as well as participation in the proceedings cannot be the basis for: placing an employee in a less favourable position with regards to the exercise of rights and obligations regarding work, initiation of the proceedings for determining disciplinary, financial and other responsibilities of the employee, termination of employment contract or termination of employment or other contractual relationship on the basis of work and declaration of the employee as a surplus of the employees, in accordance with the regulations governing the work. An employee who presents to the competent state authority the violation of the public interest established by law, caused by the employer, and who reasonably suspects that he/she will be exposed to abuse also has a right to this protection, while the employee, who in compliance with the law establishes that he/she abused the right to protection against harassment, does not have the right to this protection.

According to the data presented at Interactive Seminar of the Republic Agency for Peaceful Settlement of Labour Disputes, which was held on December 26th 2014 since implementation of the Law on Prevention of Abuse at Work, as much as 90% of cases conducted by this agency have had abuse at work as their subject of dispute. At the same time, the number of pending cases for abuse of the right to protection from harassment at work and cases whose subject is the protection from abuse at work are equal by percentage. The presented data indicate that the legal solution on simultaneous prohibition of abuse at work and prohibition of abuse of harassment was justified. We should note here that the new Law on the Protection of Whistle-blowers in addition to the prohibition of whistleblowing prevention, Art. 3, paragraph 1, stipulate that any form of false whistleblowing case should be prevented and sanctioned. Thus, the provisions of Art.11 prescribe that the abuse of whistleblowing is performed by a person who:

- 1) submits information for which he/she knew it was untrue;
- 2) in addition to requests for treatment in connection to information by which whistleblowing is performed, searches unlawful benefit.

5. Judicial Protection

Protection against harassment at work can be achieved

before the competent court. An employee who is not satisfied with the outcome of the proceedings for protection against abuse with the employer, may seek judicial protection, or file a complaint against the employer because of abuse at work or in connection with the work before the competent court within 15 days after delivery of the notice that the mediation proceedings has not been successful

There is no doubt that the conclusion of a written agreement between the disputed parties is the desirable outcome of the mediation proceedings with the employer. In addition to achieving an agreement, the costly, complex, lengthy court proceedings is avoided and the most important effect is reflected in the fact that all participants build a different approach to the decision - consensus that they themselves have accepted. From the standpoint of motivation for the acceptance and implementation of decisions, immeasurable capital of the mediation as a form of peaceful settlement of the dispute is a decision that the parties in the dispute reached together, behind which there is no compulsion, but voluntary acceptance and shared responsibility for its implementation.

Besides the fact that in case of the harassment at work or in relation to work, the lawsuit is filed against the employer, with the burden of the status of a passively legitimized party, the employer must also suffer the burden of proof in court proceedings. Namely, according to Article 31 of the Law, if during the proceedings the prosecutor made it probable that the abuse was committed; the burden of proof that there was behaviour that represents abuse is on the employer. The success of the employer in court proceedings depends on whether or not he/she is going to be able to prove a negative fact, that something - in this case the abuse at work - does not exist.

This represents an exception to the classic rules about the burden of proof *actori incumbit probatio*, as it is known to the current Law on Civil Procedure (Official Gazette of RS, no. 72/2011 and 55/2014). Namely, the provisions of 231 prescribe the following: if the court on the basis of presented evidence cannot establish some fact with certainty, on the existence of the fact the rules about the burden of proof shall be applied. The party that claims to have a right bears the burden of proving the facts that is essential for the development and realization of the right, unless otherwise is stipulated by law. A party who challenges the existence of a right bears the burden of proving the facts which prevented the formation or exercise of rights, or which due to the law ceases to exist, unless otherwise is stipulated by law. Thus, each party bears the burden of proving the fact that is by substantive law in its favour (Kozar, 2011). However, under the influence of anti-discrimination laws, the traditional rule about the burden of proof is suffering more and more exceptions (Bilbija, 2015, pp. 14-18). Perhaps it is not a "*probatio diabolica*" but for the employer it will be devilishly difficult to, if during the proceedings the prosecutor made it credible that the abuse was performed, prove non-existence of the relevant facts that the mobbing really occurred. In these court proceedings, even the party

that succeeds in it cannot be called a winner. In expert literature it is emphasized that "in the societies of the highly industrialized Western world, workplaces remained the only battlefields where people can "kill" each other without any risk of being brought to court because of this" (Lubarda, 2010, pp. 767). According to the legal definition, mobbing is a systemic, not individual and sporadic harassment of individuals at work. As for the conditions of continuity, there are attitudes that it is questionable that the legal definition requires repetition of abuse. Namely, according to the current legal definition, with "one-time mobbing" there is no duration, frequency and continuity, which are constituent elements of the actions of harassment at work. In this case we could talk about the conflict. The difference between conflict and mobbing is not what is being done and how, but in the frequency, duration and intention. The conflict usually exists between employees with symmetrical relationship in the hierarchy and in most cases it is short-lived. Mobbing is performed systematically and deliberately, and the performer is usually trying to set up or has a psychological domination over the victim (Kovacevic-Peric, 2010, pp. 222). It is not excluded that the conflict precedes the mobbing and that by solving the conflict the occurrence of mobbing is actually prevented. With mobbing, fear paralyzes the victim, and encourages the abuser. Emotional strengthening of the victim is the first step in the fight against this fear. "*I stopped being silent and getting away, I told her that what she was doing was mobbing and I put on the notice board the newspaper article about mobbing.*" (Psychological abuse in the workplace: analysis of the operation of Victimology Society of Serbia Service info and support to victims in 2008, Tripković, 2009, pp. 25). In the same way, the recourse to any other person who enjoys his/her trust is questionable. Namely, the victims of abuse often mentioned that almost no one, in the workplace and in the family, believed them or even found them guilty for the situation in which they were (Tripković, 2009, pp. 24).

Starting from the legal definition of damage as a violation of the legally acknowledged interests, as a harmful action causing the violation of somebody's subjective rights or interests, the development of the phenomenon of the non-pecuniary damage was restrained due to the traditional Roman law, the civil law notion of the damage as solely pecuniary category thus equating the notion of damage with the losses of property nature such are *damnum emergens* and *lucrum cessans*. Adjudicating compensation for the non-pecuniary damage is one of the most important achievements of the science of civil law.

Compensation of non-pecuniary damage is stipulated in the Provisions of articles 199-205 of the Law of Obligations. For suffered physical pain, mental pain, for impairment of life activities, disfigurement, violation of reputation, honor, freedom or personal rights, death of someone close as well as for fear the court will, if found that the circumstances of the case, especially the intensity of pain and fear and their duration justify that, adjudicate a just financial compensation, independently from the compensation for pecuniary damage

or in case of its absence. When deciding on the claim for compensation for non-pecuniary damage, as well as on the amount of money to be paid as compensation, the court will take into account the importance of the right that had been violated and the purpose of that compensation. Also, the court will be cautious of the possibility, and make sure to prevent it, that the compensation might serve aspirations which are not compatible with the nature and social purpose of the compensation.

Besides that, in the case of violation of the personal rights, the court might order, at the expense of the defendant who had caused the damage, publication of the verdict; that is the corrective, or the court might order the person who had caused damage to withdraw the statement which caused the damage, or something else by means of which it is possible to achieve the purpose of the compensation.

Thus, according to the Law of Obligations, the non-pecuniary damage is considered to be the physical pain, mental pain and fear.

Taking into account the goal of mobbing, that mobbing aims or represents the violation of dignity, reputation, personal and professional integrity, health, position of the employee and it causes fear or creates hostile, degrading or insulting surrounding, aggravates the working conditions etc. It can be concluded that the experienced physical pain is not a kind of the non-pecuniary damage suffered by the victim of mobbing but those are the experienced mental pain and fear.

Mental pain suffered for violation of honor and reputation is among the most common forms of non-pecuniary damage in cases of mobbing. Honor is defined as a subjective category and as an opinion that a person has about himself/herself as a member of a certain social environment or social group, whose values he/she has accepted; and the reputation represents the opinion that the environment has and the public opinion about the person and it is an objective category. The characteristic actions violating the honor and reputation are, among others, negative comments about the personal characteristics of an employee; imitating the voice, gestures and the way an employee moves; humiliation of an employee in abusive and degrading words; unduly and intentional disabling an employee to express his/her opinion and unduly interrupting an employee while speaking; addressing an employee with shouts, threats and insults; verbal assaults, mockery, gossiping, making up stories, spreading lies about an employee in general and concerning his/her private life.

Mental pain suffered for violation of freedom or personal rights are also forms of non-pecuniary damage in cases of mobbing. A person has always been the most interesting interest to himself. Freedoms or personal rights represent the whole set of rights and freedoms, which can further be classified as political, civil, economic and social, cultural etc. Freedom and personal rights can be violated by either restriction or denial of the previously mentioned.

Characteristic actions of violation of freedom and personal rights are harassment of an employee by phone calls and other means of communication, unless it is in connection to

the working process and the work an employee does; unduly subtraction of the means necessary for work; intentional and unduly isolation of an employee from other employees by avoiding him/her and termination of communication with him/her and all other attacks on a possibility of adequate communication and maintaining social relations; unduly and profuse control of communication with colleagues and movements of an employee etc.

Fear is considered to be one of the most unpleasant human experiences. It is, by rule, caused by a feeling of immediate endangering peril. For the intensity of fear there is a whole scale of feelings, from being worried and afraid to strong affects, such as “mortal fear”, “horror” etc. Taking into account that mobbing means long-term and systematic chicanery behavior of mobber which causes fear, hostile environment etc. and that, thus, the victim of mobbing experiences constant fear over a longer period of time, there is a situation in which a mobber literary *keeps the victim in constant fear*. From the previously mentioned, it can be concluded that the vertical mobbing is especially convenient for such a behavior of the mobber, since the subordinate employee justifiably fears for the existence of his/her job. In the current business and economic environment, fear from being fired and fear for bare existence (personal and the existence of one’s family) on one hand, and on the other hand the power which the mobber (manager, boss, director) gains from his/her superior position, easily and widely open the door for mobbing.

6. Prohibition of Discrimination in Labour Law

We can all agree that the work is complex and complicated phenomenon and is one of the most universal features of human beings. As such, the work is the subject of: philosophy, economics, law, sociology, psychology, medicine, political science and others sciences. The term work, which has several meanings, most often understands as a job, or the paid work. Decent work, as an idea and as a target was presented by the International Labour Organization in 1999. In this sense, decent work is defined as a productive jobs that protect worker’s rights, in which the work can make a decent living, and where there is adequate social protection of workers. Decent work is a prerequisite of sustainable development based on a just, inclusive and equitable society, and which supports and encourages the creation of additional jobs in that respect and enforce workers’ rights, gender equality, social protection and social dialogue.

The right to decent work is the same as the right to a dignified life.

The prohibition of discrimination is regulated by provisions of articles 18-23 of the Labour Law.

The Law prohibits direct and indirect discrimination against persons seeking employment and employees as well in respect to their sex, origin, language, race, skin colour, age, pregnancy, health status or disability, nationality, religion,

marital status, family commitments, sexual orientation, political or other belief, social background, financial status, membership in political organizations, trade unions or any other personal quality. Direct discrimination means any practice caused by some of stated grounds through which a person seeking employment or an employee is put in a more unfavourable position in comparison to other persons in the same or in a similar situation, and indirect discrimination exists when a certain seemingly neutral decision, criterion or practice puts or would put a person seeking employment or an employee in a more unfavourable position in comparison to other persons due to particular quality, status, orientation or belief with respect to all stated grounds of discrimination.

Discrimination is prohibited with respect to terms of employment and selection of job candidates: labour terms and all labour relations rights: education, qualification and specialization; advancement at work and the termination of employment contract, and the provisions of the employment contract affirming the discrimination under some of the stated grounds of discrimination are void.

Provisions of Article 21 of the Labour Law specifically prohibit harassment and sexual harassment of persons: harassment means any undesired behaviour on the basis of any reasons stated above, aiming at or presenting the violation of dignity of person seeking employment, as well as of an employed person, and which causes fear or creates a hostile, degrading or offensive environment, and sexual harassment means any verbal, non-verbal or physical behaviour aiming at or presenting the violation of dignity of person seeking employment, as well as of an employed person, in the sphere of sexual life, and which causes fear or creates a hostile, degrading or offensive environment.

In Article 22 the legislator did not miss to regulate what is not considered as discrimination. Hence, distinguishing, exclusion or giving priority regarding a specific job is not considered as discrimination, if the nature of a job is such, or if a job is performed in such conditions that the characteristics relating to some of the grounds of discrimination do amount to the real and decisive condition for performing the job, and where the purpose intended to be achieved through the above said is justified.

The first effects of anti-discrimination laws are reflected in Article 22, paragraph 2, specifying that provisions of the law, general act and an employment contract relating to special protection and assistance to specific categories of employees are not considered discrimination. Namely, before the Law on amendments to the Labour Law of July 2014, listing specifically the categories of employees to which such assistance and protection refer to, Article 22, paragraph 2 of the Labour Law listed women in the course of maternity leave and leave for tending the child, special care for the child, and now it specifies that the provisions of the law, general act and an employment contract relating to special protection and aid to one more category of the employed – disabled persons, are not considered discrimination. The Law on the Prevention of Discrimination of Disabled Persons was adopted back in 2006. The present

Labour Law was adopted earlier, in 2005; however, the former amendments of the same year, 2005, then of 2009 and 2013 did not encompass provisions through which it was specified that special protection of disabled persons was not considered discrimination.

Major effects of anti-discriminating laws are reflected in the amendment to Article 23 of the Labour Law dealing with the burden of proof.

Namely, provisions of Article 23 specified that a person seeking employment, as well as an employed person, in the events of discrimination may institute proceedings before a competent court for the compensation of damage, in conformity with the law. Now it is specified explicitly that a person may institute proceedings before a competent court for the compensation of damage from an employer, and it also states explicitly the following: if in the course of the proceeding the prosecutor makes it likely that the discrimination was committed, the burden of argumentation that there was no behaviour as such to present the discrimination shall be borne by the defendant.

7. Conclusions

There are lots of sociological researches that warn us of living in the world shaken by sense-making crisis and where things are changed at incredible speed and constantly, where lots of our old beliefs are not valid anymore, yet there are no new ideas that would lead forward. In the western society that we are aiming at, speaking in general, there is crisis: business stress is dominant in view of business while in private lives people experience erosion of their family, moral and religious beliefs (Nikić, Nikić, Vukobrat, Vučetić-Čirić, 2011, pp. 87). 87). In modern business conditions, the expectation of a guaranteed job has disappeared and it has been replaced with a requirement that the employees again and again prove themselves on the competitive and demanding market. A new market demands the cooperation to a greater extent and more flexible labour arrangements. Complications come along with the cooperation, especially in work teams which by default develop much closer connections than it used to be the case in the past. Employees are expected to interact, both professionally and socially (G.Nikić, P.Nikić, S.Vukobrat, M.Vučetić-Čirić, pp. 85). 85).

Those are the facts that cannot be ignored. They also imply the facts that are related to one economy in transition such as in Serbia and neither can they be ignored. The words of Marx, that a worker is a commodity that, if lucky, can find its buyer, are more popular now than at the time when they were uttered. In such a socio-economic environment it is easier to lose a job than a "button" (Simonović, 2010, pp. 34). Aware of that fact, many workers in Serbia "accept" to be victims of discrimination, mobbing in order to keep their jobs and of two evils, whether to suffer or to be fired, they choose the first as the lesser one. Generally speaking, it is not easy to repel discrimination at work. There are two primary

reasons for that: 1.) because the discrimination as a punishable conduct is practiced typically in disguise and 2.) because it is an exceptionally adaptable social phenomenon. Under new social-economic circumstances in the world, that carry the burden of economic crisis, unemployment and various forms of intolerance, employers express great subtlety and "creativity" in finding the methods for invisible discriminating treatment of employees (Jašarević, 2012, pp. 82). 82).

Importance of working out and implementing a good prevention policy regarding the prevention of work abuse is taken seriously only after the employer faces the dealing with it by applying measures of secondary and tertiary protection against work abuse. The fulfilment of compulsory duty to arrange the work, for the purpose of creating conditions that are necessary for safe and sound working ambience, in a manner through which work abuse and work-related abuse is prevented and the employees are provided with working conditions in which they will not be exposed to work abuse and to work-related abuse, results in financial costs and additional engagement which, in turn, will not bring profit in traditional terms. Cherishing the individual right of employees to express their opinion at workplace during working hours, workshops and education, additional specialization of some of the employees, are considered as excessive additional engagement and financial cost. The informing of employees about rights that they may claim, which would be conducted under auspices of the employer, would mean a simultaneous informing of superiors as well or at least a sign that they agree with it and that they welcome the informing of the employees about those rights. Individuals, who are aware of the above stated necessity, experience difficulties in justifying such demands and in urging relevant factors to invest time and money in it. Investing in the prevention against all forms of discrimination means an investment, rather than expense. The facts that corporate social responsibility has become the subject of international standardization, promoting the idea that without people and their potentials there are no organizations and their successes either, and that human resources are the most important of all important resources of an organization are not new anymore.

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