



**CONSILIUL PENTRU PREVENIREA ȘI ELIMINAREA DISCRIMINĂRII
ȘI ASIGURAREA EGALITĂȚII**

**СОВЕТ ПО ПРЕДУПРЕЖДЕНИЮ И ЛИКВИДАЦИИ ДИСКРИМИНАЦИИ И ОБЕСПЕЧЕНИЮ РАВЕНСТВА
COUNCIL ON THE PREVENTION AND ELIMINATION OF DISCRIMINATION AND ENSURING EQUALITY**

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**DECISION
of 21 August 2018
case No. 21/18**

Members of the Council present at the deliberative hearing of the Council:

Ian FELDMAN – chairman
Svetlana DOLTU – member
Andrei BRIGHIDIN – member
Victorina LUCA – member

having examined, in a public hearing, written and oral submissions of the
Petitioners: T.C., T.P., L. B., V. P., D. C., represented by their attorney Arina Țurcan
Respondent: Ministry of Health, Labour and Social Protection, Directorate of Social Assistance, Youth and Protection of the Family from Anenii Noi and
deliberated in a public hearing, regarding the following

I. Subject matter of Petition

Direct associative discrimination (disability) in exercise of the right to labour. Indirect associative discrimination (sex and disability) in exercise of the right to labour.

II. Admissibility of Petition

The petition complies with the requirements set forth in art. 13 of the Law on ensuring equality No. 121 from 25.05.2012 and does not attract application of exceptions to inadmissibility stipulated in the par. 42 of the Law on the activity of the Council for prevention and elimination of discrimination and ensuring equality No. 298 from 21.12.2012.

III. Submissions by Parties

Petitioners' submissions

- 3.1 The Petitioners, a group of mothers of children with disabilities, who are employed as personal assistants for their children, alleged discrimination in their exercise of the right to work, due to unpaid extra hours of work and vacation time.
- 3.2 The Petitioners note that, in conformity with their individual employment contracts, they work as personal assistants for 30 hours weekly, each day 6 hours, during a work week of 5 days. However, they mentioned that, *de facto*, they take care of their disabled children 24 hours per day, but the additional 138 hours of work are unpaid, while other employees are paid additional salary for overtime. The Petitioners affirm that pursuant to their individual employment contract they should have a 28 days paid vacation time, plus 4 days. In reality, they cannot exercise their right to an annual vacation time, because the state does not ensure replacement for the position of personal assistant during the annual vacation time and on a local level, there are no services of the *Respiro* type.
- 3.3 Thus, the Petitioners consider that their right to work, which includes the right to vacation time and paid over-hours at work, is infringed. The Petitioners compare themselves to other employees in the sphere of social protection (e.g. **social workers**) who benefit from the right to paid vacation time, daily rest and paid overtime at work. The Petitioners consider as discriminatory the provisions of the GD No. 314 from 23.05.2012 on the approval of the Framework Regulation on organisation and functioning of the Social Service „Personal assistant” and of the minimum quality standards, which does not

include provisions to guarantee equal employment conditions for personal assistants, equal to other employees.

- 3.4 At the same time, the Petitioners claim there is a lack of express provisions in the legislation and a deficient practice in ensuring vacation time for personal assistants, which creates disadvantages mainly to women. The Petitioners note that according to statistical data, of the total number of personal assistants, 79,5 % are women. The GD No. 314 from 23.05.2012 on the approval of the Framework Regulation on the organisation and functioning of the Social Service „Personal assistant” and of the minimum quality standards contains apparently neutral provisions, regarding the working time and rest time for the personal assistant, however these provisions treat less favourably first of all the women who take care of their children with severe disabilities, since the rate of men employed as personal assistants is of 21%.

Submissions of the Ministry of Health, Labour and Social Protection

- 3.5 The Respondent notes that the position of personal assistant has been created by Law No. 60 from 30.03.2012 on the social inclusion of persons with disabilities. This service is aimed towards persons with severe disabilities, who require permanent care, accompanying and supervision from another person. The purpose of this service was to facilitate the process of integration of persons with severe disabilities into society by offering necessary assistance and care to these persons. This service is performed by a personal assistant that is employed by the local territorial social work department. The Governmental decision No. 314 from 23.05.2012 adopted the Framework Regulation on organisation and functioning of the Social Service „Personal assistant” and minimum quality standards.

- 3.6 In compliance with the provision from par. 40 and 41 of this Regulation, a personal assistant may be employed for a maximum of 40 working hours per week for one beneficiary, and during the vacation of the personal assistant or in cases when the latter cannot carry out his duties, the service provider is obliged to ensure a replacement of his/her personal assistant to the beneficiary or provide another service accordingly. Based on p. 60 of the Minimum Quality Standards for the service of personal assistance, one beneficiary may be assisted, based on his/her needs, by several personal assistants simultaneously. At the same time, it mentioned that employment law applies to the position of personal assistant. The Directorate of Social Assistance, Youth and Family Protection, as service provider, is charged with the duty to implement these provisions,

Submissions of the Directorate of Social Assistance, Youth and Family Protection from Anenii Noi

- 3.7 The Petitioner notes that an individual employment contract is concluded at the employment of a person as a personal assistant, which stipulates the conditions regarding the working and rest conditions. The Respondent affirmed that in 2017 all Petitioners had the annual vacation.
- 3.8 The Respondent informs further that when leaving for vacation, the personal assistant shall file a declaration of own liability, in which he/she indicates who shall assist the beneficiary during the vacation time (another member of the family or a trustworthy person). Also, they mentioned that during this period (paid annual leave) the personal assistant is not provided with a replacement and neither is the beneficiary ensured with another type of relevant service, due to lack of budgeted financial resources.
- 3.9 At the same time, it is brought to the Council's attention, that in the region 92 personal assistants are employed, for whom 2238,6 thousand lei are budgeted every year. In the waiting list there are another 118 persons. The rayon Council lacks the financial means to supplement the funds for carrying out of this service.

IV. Relevant national and international law

- 4.1 **The Constitution of the Republic of Moldova, in art. 16 par. (2)** guarantees the right to equality, and all the citizens of the Republic of Moldova are equal before the law and public authorities, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property or social origin; **art. 43 par. (3)** All employees shall have the right to social protection of labour. The measures of protection shall bear upon labour safety and hygiene, working conditions for women and young people, introduction of a minimum wage per economy, weekly rest and annual paid leave, as well as difficult working conditions and other specific situations.
- 4.2 **Law on ensuring equality No.121 from 25.05.2012 in art. 1 par. (1)** stipulates that the purpose of this law is to prevent and combat discrimination and to ensure the equality of all persons on the territory of the Republic of Moldova in the political, economic, social and cultural spheres of life, regardless of race, colour, nationality, ethnic origin, language, religion, sex, age, disability, opinion, political affiliation or any other similar criteria; **art. 2** defines discrimination as any distinction, exclusion, restriction or preference in the rights and freedoms of an individual or a group of individuals, as well as the support of the discriminating behaviour based on real or supposed criteria stipulated in the current law; direct discrimination as unfavourable treatment of a person based on any of the prohibited criteria in the situation comparable to another person; discrimination by association - any act of discrimination committed against a person who, although not a part of a group identified on the grounds provided for in this law, is associated with one or more persons belonging to such groups of persons; indirect discrimination – any provision, action, criteria or practice, which appear as neutral, but which are aimed towards less favourable treatment of a person comparatively to another person on the grounds stipulated in this law, except for the cases when this provision, action, criteria or practice shall be justified by a legitimate aim and if the means for achieving this aim are proportional, relevant and necessary; **art. 3** envisages that subject to discrimination may be natural persons and legal entities form private and public spheres; **art. 7 par. (1)** any distinction, exclusion, restriction or preference, based on criteria established by the present law, which result in limitation or infringement of equality of chances or less favourable treatment at employment or dismissal from work, related to direct employment or continuous training shall be prohibited. Prohibition of discrimination based on sexual orientation shall apply to both the area of employment and seeking of employment.
- 4.3 **Law on social inclusion of disabled persons No. 60 from 30.03.2012 in art. 2** stipulates the definition of the disabled person – a person with physical, mental, intellectual or sensory disabilities which in interaction with various impediments/obstacles may hinder their full and effective participation in society on an equal basis with others; *personal assistance* – individualized care services (in areas of social protection, employment, health, education, information, access to infrastructure, etc.) that meet the need for mobility and other needs of the child or adult with severe disabilities who require support in the process of integration into society, offered within an individualized programme of rehabilitation and social inclusion and the initial or complex assessment; **art. 53 par. (1) let. b)** personal assistance services - for people with severe disabilities that require care, accompanying and constant supervision from another person in their integration in society (in the area of social protection, labour, healthcare, education, information, access infrastructure, etc.), as recommended in the individual programme of rehabilitation and social inclusion and in compliance with the complex evaluation of the person / family, performed by the social worker employed at the town hall and the multidisciplinary team; **par. (3)** the personal assistance service is performed by the personal assistant; **par. (4)** the local public administrative authorities are in charge of employment of the social workers and personal assistants, in conformity with the legislation in force; **par. (6)** The Regulation on organisation and functioning of the in-home caregiving social services and personal assistance services, and the workload of the social workers and personal assistants shall be approved by the Government.
- 4.4 **Labour Code No. 154 from 28.03.2003 at art. 56 par. (1)** provides that the individual employment contract shall be signed based on the agreement between the employer and employee. Concluding an employment contract may be preconditioned by specific requirements (election procedure, competition etc.); **art. 112 par. (1)** the right to paid

annual leave is guaranteed to all employees; **par. (3)** any employee working based on an individual employment contract is entitled to an annual paid leave; **art. 118 par. (1)** the annual leave shall be provided on an annual basis according to the program, as set forth in art.116. The employer has the obligation to ensure the necessary measures to allow the employees to use their annual leave during every calendar year.

3.10 **Law on social assistance No. 547 from 25.12.2003 at art. 15 par. (1)** provides that the social assistance is performed by: let. a) the social assistant; let. b) social worker; let. c) specialized professional parental assistant; let. d) specialised parent-educator; let. e) personal assistant.

3.11 **Framework Regulation on organisation and functioning of the Social Service „Personal assistant” and minimum quality standards, adopted by Governmental decision No. 314 from 23.05.2012, at par. 4** stipulates the definition of the beneficiaries of this service – persons with severe disabilities, including children with severe disabilities, who fulfil the criteria of eligibility, as listed in the Instruction annexed to this Regulation; the service providers – the local public administrative authority of the second tier and of the Balti municipality, and public associations, foundations, private non-profit institutions, registered in compliance with the legislation, carrying out their activities in the social sphere; **par. 39** after finalizing of the initial training course by the candidate for the position of personal assistant, the service provider shall conclude with the candidate an individual employment contract; **par. 40** a personal assistant may be employed for the maximum amount of 40 working hours per week to assist a beneficiary; **par. 41** during the paid leave of the personal assistant or in cases when he/she temporarily cannot fulfil his/her duties, the service provider has the duty to ensure for the beneficiary the replacement of the personal assistant or provide another type of service as needed; **par. 60** the personal assistant may work for a maximum amount of 40 working hours of assistance per week per beneficiary. One beneficiary may, depending on his/her personal circumstances, be assisted by several personal assistants simultaneously; **par. 61** a personal assistant shall be employed initially for a trial term, in compliance with the law. During the trial term, the service provider shall observe the activity of the personal assistant and take notice of the opinion of the beneficiary.

4.5 **Framework Regulation on the organisation and functioning of the Social Service „Respiro” and on the minimum quality Standards, approved by the Governmental Decisions No. 413 from 14.06.2012 at par. 4** stipulates the following definitions 1) *the social service „Respiro”* – a specialized service, that provides social assistance services, support, caregiving and supervision 24 hours per day to persons with severe disability, within specialized centres or other types of social services, to ensure that families, relatives or other persons who provide caregiving may take a leave of maximum 30 days per year; 2) *the beneficiaries of the Service* – persons with severe forms of disability, selected based on the criteria of selection of beneficiaries to have access to the Service’s assistance, as envisaged in this Regulation; 3) *the applicant to the assistance provided by the Service* – the parent, the legal representative, the members of the family, the relative, the person involved in the constant care of the person with severe disability, who files a request for the provision of assistance by the Service; 4) *service provider* – the local public administrative authority of tier two and of the Balti municipality, and public associations, foundations, private non-profit institutions, registered in conformity with legislation, activating in the social sphere; **par. 8** the purpose for creation of the Service is to provide specialised assistance for the duration of 24 hours per day to persons with severe disabilities, for a term of maximum 30 days per year, in order for the families, relatives or other persons who take care of the disabled persons to benefit of a period of rest; **par. 27** for the assessment of the eligibility to be admitted to the use of the Service, the applicant shall file a written request addressed to the social worker of the community, to the service provider or to the territorial social assistance subdivision of the administrative-territorial unit, of the territory where the applicant resides, has domicile or is located; **par. 29** the social worker, the service provider or, depending on the case, the specialist in charge of the territorial division of social assistance shall receive a request of the applicant, containing the documents listed in par. 28 of this Regulation, and shall refer it to the multidisciplinary team of specialists for performing a complex evaluation. The social worker of the community or the responsible specialist shall request the applicant

who registered a request to prepare the documents listed at par. 28 of this Regulation, in case these are lacking or incomplete; **par. 30** the multidisciplinary team of specialists shall assess the documents provided by the applicant within a meeting and performs the complex assessment. In case the service provider is a public association, the multidisciplinary team of specialists shall be set up by the local public administrative authority with which this association has concluded an agreement of cooperation in providing the Service; **par. 31** afterwards, the Multidisciplinary team of specialists will refer the request of the applicant, accompanied by the documents and complex assessment results to the territorial social assistance entity; **par. 32** the territorial structure of social assistance, jointly with the service provider, after examining the file, shall decide within a term of maximum 3 days, if the applicant qualifies for the use of the Service, based on the criteria of eligibility set forth for the beneficiaries of the Service, as noted in the Annex to this Regulation.

4.6 The Framework Regulation of the Service for in-house caregiving and the Minimum quality standards, approved by the Governmental Decisions No. 1034 from 31.12.2014 at par. 40 the employment of personnel shall take place by entering into a written individual employment contract, and shall be legalized by an ordinance (resolution, disposition, decision) of the chairperson of the Service, issued in compliance with the contract.

4.7 The International Covenant on the economic, social and cultural rights, at art. 2 par. 2. The States Parties to the present Covenant act to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; **art. 7** The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

V. In conclusion, the Council retains for review the following

5.1 From the materials of the case, the Council establishes that it must pronounce itself regarding the existence of the following alleged facts:

- i. Direct discrimination by association (disability) in exercise of the right to work;
- ii. Indirect discrimination by association (sex and disability) in exercise of the right to work.

Regarding the direct discrimination by association (disability) in exercise of the right to work

5.2 The Council reiterates that both the national legislation (art. 15 par. 1 and art. 19 of the Law No. 121 on ensuring equality), and the jurisprudence of the European Court of Human Rights (amongst many other cases, see the case of D. H. and others vs. Czech Republic par. 82-84, par.177, case of Chassagnou and others vs. France par. 91-92, Timishev vs. Russia par.57) envisages the special rule on reversal of the burden of proof in anti-discrimination cases, and namely: once the applicant has shown that there has been a difference in treatment, it is then for the Respondent to show that the difference in treatment could be justified.

5.3 The Council notes that in compliance with the provisions of the Law on ensuring equality, as discrimination by association is considered any discriminatory treatment committed against a person who, albeit not a part of a group possessing protected characteristics, is associated with one or more persons belonging to such groups of persons.

5.4 Based on the allegations from the petition, in order to establish a presumption of direct discrimination by association, the Petitioners had to present evidence of acts which shall comprise the following elements:

- a) less favourable treatment of a person (exclusion, differentiation, etc.) in the exercise of a right;
- b) applied comparatively to another person (group of persons);
- c) in an analogous or comparable situation with the Petitioner;

d) against a protected characteristic.

5.5 After examining the case files, the Council retains for review the differential treatment of the personnel of the social assistance services¹ in exercise of their right to work (regarding the paid leave and failure to pay for overtime). Also, the Council notes that this treatment is grounded on the protected characteristic of disability.

Regarding the rest leave

5.6 The Respondent, the Ministry of Health, Labour and Social Protection, notes that the employment of the personal assistants shall be performed in compliance with the provisions of the employment law. The Respondent, the Directorate of Social Assistance, Youth and Family Protection from Anenii Noi, notes that all Petitioners benefited from the annual paid leave, in compliance with the conditions of their individual employment contracts for a period of 32 days.

5.7 From the analysis of the case files, the Council notes that the situations of both categories of employees under scrutiny (social workers and personal assistants) may be juxtaposed for comparison. Thus, regarding the existence of a differential treatment, the Council notes that both the employment of the social worker and of the personal assistant shall take place by entering a written individual employment contract². Accordingly, both categories of employees shall have the right to rest in compliance with the Labour Code. Also, the Council retains for review that in case of both a personal assistant and a social worker, the maximum allowed amount of paid hours for assisting a beneficiary is of 40 hours per week.³ Hence, the Council dismisses the allegations regarding a differential treatment in the area of paid leave of these two examined categories of employees.

5.8 With regard to the manner by which these provisions are enforced, the Council retains that the law provides for a personal assistance that certain actions shall be carried out regarding to them by the service provider. Thus, in compliance with par. 41 of the Framework Regulation on the organising and functioning of the social service „Personal assistant” and the minimum quality standards adopted by Decision No. 314 from 23.05.2012, during the period of leave of the personal assistant and in cases he/she cannot carry out his/her functions, the service provider has the obligation to provide a replacement for the personal assistant or provide another relevant service. At the same time, the Council notes that in the spectrum of social services, designed to respond to such situations (the period of paid annual leave of personal assistants), the social service „Respiro” is the response. This is a specialized service, which offers social assistance, support, caregiving and supervision for 24 hours per day for persons with severe disabilities, within specialised centres or other types of social services, so that the families, relatives or other persons who are caregivers may benefit from a rest of maximum 30 days per year.

5.9 After examining the files of the case, the Council notes that the Directorate of Social Assistance, Youth and Family Protection from Anenii Noi did not comply with these provisions. Based on the submissions of this agency, the Council draws the conclusion that the practice of the Directorate is to request that the personal assistants sign declarations of personal liability, by which they shall identify the person that will simply replace the personal assistants who are officially on leave, however, *de facto*, it is still them who continue to provide caregiving. These are the only conditions in which the personal assistant may have a period of rest. At the same time, the Council take notice of the fact that during this period the beneficiary does not get another service pursuant to his/her needs, but is left in the care of the person identified to provide caregiving based on this practice.

¹ art. 15 of the Law of social assistance No. 547 from 25.12.2003. The employees of the social assistance service: a) the social assistant; b) **the social worker**; c) the specialised parental professional; d) specialized parent-educator; e) **personal assistant**.

² par. 40 from GD No. 1034 and par.39, 61 from GD No. 314

³ par. 60 from GD No. 314 and par. 40 from GD No. 1034

- 5.10 The Directorate noted that this situation is created due to the lack of financial resources allocated for the implementation of the normative provisions. During the hearing of the Council, the representative of the Directorate has also stated that it intends to develop the service „Respiro” (at the moment of examining the petition it had not yet been set up) by transferring 4 places out of 18 places of the Centre for the rehabilitation of the children with disabilities to supply this Service.
- 5.11 The Council, while taking notice of these explanations, mentions that in practice a situation is created when the personal assistants, although legally considered on paid annual leave, in reality continue to take care of the beneficiaries. This situation has arisen because the service „personal assistant” is not sufficiently funded to comply with all the quality standards set by the law. Thus, in general, the employee does not effectively benefit of a leave, because the circumstances force him/her to continue to work. In such conditions, we cannot affirm that the right to rest is effectively guaranteed. By juxtaposing the revealed situation to the elements of discrimination, the Council establishes the existence of a differential treatment of the personal assistants during practical applicability of the normative provisions which guarantee the right to paid leave. By comparison, the social workers are not obliged to write a declaration by which they shall identify a person who will take care of his/her beneficiaries, nor do they find themselves in the constraint to work during their annual leave.
- 5.12 After clarifying these, the Council has reached the conclusion that there is an incorrect application of the legislative provisions regarding the procedure of providing annual leave to personal assistants by the Directorate of Social Assistance, Youth and Family Protection from Anenii Noi, which constitutes a discriminatory treatment of these persons by their association with their beneficiaries, who are persons with severe disabilities.

Regarding the payment for the additional working hours (overtime)

- 5.13 By analysis of this section of the petition, the Council retains that the allegations of the Petitioners that social workers get paid their overtime are declarative only, because they did not substantiate this allegation by any material evidence. The Council notes that in order to establish a presumption of a differential treatment, it is necessary to present at least a minimum set of evidence that could substantiate an allegation. The Council proceeded to examine the allegations regarding the paid rest, it has examined the legislative framework regarding the services provided by both categories of employees and did not identify unjustified differentiation.
- 5.14 The Council notes that the maximum amount of working hours of assistance per beneficiary is of 40 hours, for both categories and for none of the categories the payment of overtime at work is envisaged.
- 5.15 At the same time, taking into account that the Petitioners are also parents of beneficiaries, accordingly as any other parent, besides their paid activity, they also have the responsibility to take care of their children, without being paid for these hours. The Council considers that this pretence (to be paid for 24/24 caregiving) is exaggerated, especially as art.105 par. (3) of the Labour Code stipulates that additional work time cannot result in extension of the working day with over 12 hours. Accordingly, there are no legal provisions to provide for the payment of the additional hours, in the amount stipulated by the Petitioners.

Regarding the indirect discrimination by association (sex and disability) in exercise of the right to work

- 5.16 The Petitioners alleged that the the society of the Republic of Moldova is a patriarchic society and in most cases it is mothers who will opt to get employed as personal assistants for their children. The Petitioners mention that based on the data presented by the Ministry of Health, in the Republic there are circa 2300 personal assistants, of which 79,5% are women. In these circumstances, the Petitioners affirm that, due to policy gaps of the state, the mothers of the children with disabilities suffer, because their right to benefit of favourable work conditions is infringed.
- 5.17 The Council took notice of the information submitted by the Directorate of Social Assistance, Youth and Family Protection from Anenii Noi, that of the total number of 92

employed personal assistants, 90% are women. Thus, by continuing the logical reasoning exposed in par. 5.12, the Council concludes that the faulty practice which harms women, performed by the Directorate of Social Assistance, Youth and Family Protection from Anenii Noi exists.

Thus, being guided by the provisions set forth in art. 1-3 and art. 15 par.(4) of the Law on ensuring equality No. 121 from 25.05.2012, in conjunction with par. 61 of the Law on the activity of the Council on the prevention and elimination of discrimination and ensuring equality No. 298 from 21.12.2012,

THE COUNCIL DECIDES

1. Acts alleged in par. 5.2 – 5.12 constitute direct discrimination by association (disability) which hinders the exercise of the right to rest of the personal assistants.
2. Acts described at par. 5.13 – 5.15 do not constitute direct discrimination by association (disability) in exercise of the right to work of the personal assistants.
3. Acts alleged at par. 5.16 – 5.17 constitute indirect discrimination by association (sex and disability) in exercise of the right to rest of the mothers –personal assistants.
4. The Council recommends that the Directorate of Social Assistance Youth and Family Protection from Anenii Noi sets up the „Respiro” service in its region.
5. The Council recommends to the Rayon Council of Anenii Noi to ensure progressive implementation of the personal assistance service, by taking into account the need to allocate financial resources for the replacement of the personal assistance in the cases when he/she cannot temporarily carry out his/her duties.
6. The decision is communicated to the parties and is publicly accessible on the webpage www.egalitate.md.
7. The decision may be appealed in an administrative court, in compliance with the provisions of the par. 65 of the Law No. 298 from 21.12.2012 on functioning of the Council on prevention and elimination of discrimination and ensuring equality and the Law on administrative courts No. 793 from 10.02.2000.

Members of the Council who voted this decision:

Ian FELDMAN – chairman

Svetlana DOLTU – member

Andrei BRIGHIDIN – member

Victorina LUCA – member