



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 from 24 October 2018 case No. 95/18

Members of the Council present at the deliberative hearing:

Ian FELDMAN – chairman
Svetlana DOLTU – member
Andrei BRIGHIDIN – member
Victorina LUCA – member
Evghenii Alexandrovici GOLOȘCEAPOV – member

Having examined, in a public hearing, written and oral submissions of the
Petitioner: XXXXXXXX
Respondents: chancellors of the district Council XXXX, XXXXX rayon,
Deliberated in a closed hearing regarding the following.

I. Subject matter of the Petition

Discrimination at work based on maternity status.

II. Admissibility of the 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

Petitioner's submissions

- 3.1 The Petitioner notes that since YYYYYY she has worked as the secretary of the local Council of the XXXX community, from the XXXX rayon. On YYYYYY she gave birth to a child and took maternity leave. On XXXX she filed a request with the local Council of the Pervomaiscoe community for getting reappointed into the position, based on a part-time working programme. On xx.xx.xxxx and xx.xx.xxxx the local Council of the Pervomaiscoe community issued the decisions No. x/x and the decisions No. x/x by which it rejected the request of the Petitioner to recommence the employment, with the motivation that the child did not yet reach the age of 1 year.
- 3.2 The Respondents did not present their written submissions regarding their position regarding the facts alleged in the Petition.

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.
- 4.2 **Law on ensuring equality No.121 from 25.05.2012 at 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 treatment based on real or supposed criteria stipulated by this law; **art. 3** envisages that subject to discrimination may be natural persons and legal entities form private and public spheres; **art. 4** forms of severe discrimination: **let. a)** promotion or practicing of discrimination by public authorities; **let. e)** discrimination perpetrated against two or several persons; **let. f)** discrimination perpetrated twice or repeatedly; **art. 7 par. (1)** any distinction, exclusion, restriction or preferential treatment, based on criteria established by the present law, resulting in limitation or attack against the equality of employment or dismissal from a job, both while performing the main activity at work and also during professional training shall be prohibited. Prohibition of discrimination based on sexual orientation shall apply to employment and seeking of employment stages; **par. (2)** as discriminatory shall be considered the following actions of an employer: **let. b)** unjustified refusal of employment of a person; **let. g)** any other action which is against the law.

- 4.3 **Law on the public function and the legal status of civil servants No. 158 of 04.07.2008 in art. 51 par. (1)** Suspension of a civil servant's service relation implies suspending the performance of duties by the civil servant for a certain period of time and suspending the remuneration by the public authority he/she works for; **par. (2)** Suspension of a service relation can occur in circumstances that do not depend on the will of the parties, upon agreement of the parties or at the initiative of one of the parties.; **art. 52** an employment relation shall be suspended in conditions which do not depend on the will of parties as follows: **let. c)** maternity leave; **art. 55 par. (1)** If the reasons that caused suspension of the service relation no longer exist or, as the case may be, at the end of the period for which the suspension was approved, the civil servant shall be legally reappointed to the public position held before suspension or to a vacant equivalent public position if the one held before does not exist, with the exception of the situation when the public authority was disbanded. If there is no vacant equivalent civil service position in the public authority, upon civil servant's written consent, he/she shall be reappointed to an inferior public position, and in case of authority disbandment or if the civil servant does not accept the transfer, he/she shall be dismissed under the provisions of art. 63; **par. (2)** Reappointment of the civil servant to the public position held before the expiration of the suspension period shall be done upon the civil servant's request, filed at least 14 days prior to the requested date of reappointment; **par. (2¹)** reappointment of the civil servant in conditions envisaged in par. (1) and (2) shall be carried out by the means of an administrative act, issued by the person/entity with the legal competency to appoint employees.
- 4.4 **Labour Code of the Republic of Moldova No. 154 from 28.03.2003 in art. 8 par. (1)** provides that within the framework of labour relations the principle of equality of all employees operates. Any direct or indirect form of discrimination of the employee on the basis of sex, age, race, colour, ethnicity, religion, political convictions, social origin, place of residence, disability, HIV infection, memberships of trade unions or participation in trade-union's activity, and also on other criteria which have not been connected to professional qualities of the worker are forbidden; **art. 97 par. (2)** an incomplete working programme can be established also subsequently to the employment, under the agreement between the worker and the employer. Upon the request of a pregnant woman, an employee, who has children under the age of ten in his/her care or disabled children (including for whom he/she is an appointed guardian) or an employee who is taking care of a sick member of the family in conformity with a medical conclusion, the employer is obliged to establish an incomplete working day or incomplete working week for him.
- 4.5 **Law on ensuring equal opportunities for women and men No. 5 from 09.02.2006 in art. 5 (1)** stipulates that in the Republic of Moldova, women and men enjoy equal rights and freedoms and are guaranteed equal opportunities to exercise these rights and freedoms; **par. (2)** The promotion of a policy or the performance of actions that do not

ensure equal opportunities between women and men shall be deemed discriminatory and shall be removed by the competent public authorities, in accordance with the legislation; **par. (4)** Actions that restrict or exclude in any aspect the equal treatment of women and men shall be deemed discriminatory and are prohibited; **art. 9 par. (1)** The state guarantees equal rights and opportunities, as well as equal treatment of women and men, in employment; **art. 11 par. (2)** Despite compliance with the conditions, the refusal of employment, enhancement of professional skills, or promotion of persons of a certain sex shall be deemed ungrounded if made under the following pretexts: **let. c)** existence of family obligations; **par. (3)** The employer bears the obligation to prove lack of intention of direct or indirect discrimination of a person who considers himself/herself to have been discriminated against.

- 4.6 **UN Convention on Elimination of All Forms of Discrimination against Women (in force for the Republic of Moldova since 31.07.1994) in art. 11 par. 1** States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: **let. a)** The right to work as an inalienable right of all human beings; **let. b)** The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; **par. 2** In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: **let. c)** To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.

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

- 5.1 Based on the case files, the Council shall pronounce itself on the existence of a discriminatory action based on maternity status in the sphere of labour.
- 5.2 Thus, 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. Thus, based on existing allegations, in order to confirm the presumption of direct discrimination, the Petitioner had to present arguments for substantiation of the following constituting elements:
- a) Less favourable treatment (exclusion, differentiation, refusal etc.) in exercise of a right set forth in the law;
 - b) Applied against persons in a similar situation;
 - c) Based on a protected characteristic.
- 5.3 After examining the circumstances of this case, the Council notes that the presumption of discrimination has been established. The Council retains for review that the Petitioner, who is on childcare leave, requested to be reappointed to her previous workplace based on a part-time working program. The Council has established that the request of the Petitioner has been rejected based on the fact that her child is too young. The Council retains for review that the refusal to reappoint the Petitioner is based on her parental responsibilities, associated with the maternity status.
- 5.4 In compliance with art. 15 par. (1) of the Law on ensuring equality No. 121 from 25.05.2012, the burden of proof in substantiating that acts were not discriminatory shall be transferred to the person, against which the allegation of perpetrating a discriminatory act exists. The Council proceeds further to establish whether an objective and reasonable justification of the discriminatory treatment exists.

- 5.5 The Council has established that the Petitioner, prior to suspension of the employment relation due to childcare leave, had the position of secretary of the local Council. Thus in compliance with art. 14 par (2) let. u) of the Law on local public administrative authorities No. 436/2006, the local Council shall appoint, based on a competition performed in conditions as provided by the Law on The public functions and legal status of the civil servant No. 158/2008, the secretary of the Council, shall suspend and cease, as set forth in the Law, the employment relation with the secretary and shall delegate to the mayor the function of evaluation of his/her professional performances.
- 5.6 The Council took notice of the positions expressed by the chancellors during the meeting of the community Council on xx.xx.xxxx, when the request for the reappointment of the Petitioner was examined. From the minutes of this meeting, the Council retains for review the following statements: *"the child in not yet 1 year old, he could get sick and she will need a sick leave (...) it is better that the mother is rearing him at home (...) in the village there are enough people, so we should not be too concerned that there will be no one to do the work"*. The Council established during the meeting from xx.xx.xxxx, that the request of the Petitioner was examined, and by the decision No. 41/1 issued on xx.xx.xxxx the request was rejected based on a similar reason (namely that the child had not reached the age of 1 year).
- 5.7 The Council, during a meeting carried out in the community for ensuring a reasonable accommodation of the Petitioner, has requested the present chancellors to provide an objective argument for the refusal of employment reappointment of the Petitioner. These displayed a conduct which was not consistent with their public status and also showed a lack of respect for the Petitioner and the members of the Council.
- 5.8 The Council retains for review that in compliance with art. 55 par. (2) of the Law on The public function and legal status of civil servants No. 158/2008, the reappointment of the civil servant to the previously held office prior to the expiration of the period of suspension of the working relation shall be performed at the request of the employee, based on a written request filed with at least 14 days prior to the reappointment. The Council has established that the Petitioner requested to be reappointed in the position previously held by her as a civil servant, namely as The secretary of the local Council of the XXXX community from XXXX rayon, prior to the expiry of the term of 3 years of childcare leave, by filing a request as set forth in the Law.
- 5.9 The Council notes that there is no legal justification for the denial to reappoint a person into a previously held position based on ongoing maternity leave. The Council has established that the members of the Local Council of the Pervomaiscoe community of the Drochia rayon acted contrary to the legislation. The Council took notice that as ground for the refusal, provided by some chancellors of the local Council, was that *the child is too young, and the mother should raise him at home, also that the mother might need to take sick leave*. The Council notes that the Respondents in this case used discriminatory prejudiced conduct towards the maternity status.
- 5.10 The Council emphasizes that the care and rearing for a small child cannot be considered as an objective and reasonable argument to substantiate the refusal of employment of a person. Such hypothesis that maternity is affecting the professional performance or that the family responsibilities of the person may result in diminishing of the working productivity of an employee are merely negative prejudices which slow down the process of balancing the professional and family lives. These prejudices must be avoided and combated.
- 5.11 The Council took notice of the fact that, during the examination of The case, on xx.xx.xxxx, the local Council of the XXXX community of the Drochia rayon annulled the decision No. x/x from xx.xx.xxxx, and the Petitioner was, accordingly, reappointed to her position.
- 5.12 The Council notes that the people who have experienced the humiliating experience of discrimination continue to feel its moral negative effects even after such treatment has ceased. Discrimination bears a negative effect not only upon the victim, but on the society as a whole, by generating various malfunctions. Thus, the Council informs the Petitioner, that based on art. 18 par. (1) let. d) of the Law on ensuring equality No. 121 from 25.05.2012 she is entitled to file a civil action in the court to request the compensation of

the moral and material damage caused by the discriminatory conduct. Also, the Council draws the attention of the Petitioner to her right to file a separate complaint regarding any victimisation – and resulting negative consequences, which might follow as a result of filing this petition or of the decision issued by this Council.

Thus, being guided by the provisions set forth in art. 1, 2, 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. The alleged acts constitute discrimination on the grounds of maternity and sex in the sphere of labour.
2. The local chancellors of the XXXX community of the XXXX rayon shall present their public apology to the Petitioner, during the next meeting of the local Council of the XXXX community of XXXX rayon.
3. The local chancellors of the XXXX community of the XXXX rayon shall act exclusively based on due diligence to avoid use of prejudice in their subsequent activity.
4. The local chancellors of the XXXX community of the XXXX rayon shall inform the Council, within a term of 10 days after the receipt of this decision, about the measures taken or planned for the enforcement of the recommendations set forth in this decision.
5. The decision is communicated to the parties and is publicly accessible on the webpage www.egalitate.md.
6. The decision may be appealed in an administrative court, in compliance with the provisions of par. 65 of Law No. 298 from 21.12.2012 on the functioning of the Council on the 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 the decision:

Ian FELDMAN – chairman

Svetlana DOLTU – member

Andrei BRIGHIDIN – member

Victorina LUCA – member

Evghenii Alexandrovici GOLOȘCEAPOV – member