

## **KJI NEWSLETTER**

### **September 2005**

This newsletter is published to fully inform the magistrates in Kosovo on the activities of the KJI. This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles from KJI Staff and external experts relating to issues of interest to judges and prosecutors working in Kosovo.

### **Non-discrimination and equal treatment in employment and occupation – the EU perspective\***

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#### **Introduction**

For many years the focus of EU action in the field of non-discrimination was on preventing discrimination on the grounds of nationality and sex discrimination. However, in the last years the EU has become an established leader in the fight against discrimination also on the basis of age, race and ethnic origin, religion, sexual orientation, and disability.

The object of this article is to provide a basic overview of developments in European anti-discrimination law and case-law. Since August 2004, Kosovo also has a comprehensive Anti-Discrimination Law (ADL) which is amongst the most progressive laws of this type in Central and Eastern Europe and in particular in the Balkans. The law is based on the EU Council Directives and establishes a set of legal obligations prohibiting discrimination on several grounds.

However, the adoption of such a novel law requires dedicated efforts to put legal provisions into practice. As important as it is, adopting of a specialised law is just an initial step to be followed by a comprehensive implementation strategy and action plan in order to improve the understanding of issues related to discrimination, to develop the capacity to tackle discrimination effectively and to promote the values underlying the fight against discrimination.

The non-discrimination field development is a long-term step-by-step process. The European anti-discrimination law and policy, the European Court of Justice (ECJ) case-law illustrate well the gradual yet increasing progress in this field in Europe. At national level, the EU member states, the candidate countries and the countries aspiring to become part of United Europe are adopting legislation to transpose the EU Directives, and cases invoking anti-discrimination laws are beginning to be heard by the domestic courts.

## Treaty provisions in the field of equality between women and men

One of the basic principles of EU action in the field of non-discrimination in employment is the so called principle of equal pay for equal work. According to Article 141 of the EC Treaty each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other compensation, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; and that pay for work at time rates shall be the same for the same job. Further, Directive 75/117 was adopted to implement the principle of equal pay.

The Council<sup>1</sup>, has to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

Generally, Article 141(3) of the EC Treaty provides the legal base for EU legislation on equal treatment of men and women in matters of employment and occupation. The main piece of legislation which has been adopted in this field is Directive 76/207, recently amended by Directive 2002/73, which Member States are required to transpose in national legislation by October 2005. This legislation implements the principle of equal treatment as regards access to employment, self-employment and occupation, including working conditions, and vocational training.

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers (the so called positive action/affirmative action or special measures).

### Anti-Discrimination Directives

In 1997 the Member States approved unanimously the Treaty of Amsterdam. Article 13 of this new Treaty granted the Community new powers to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>2</sup> Since the Treaty of Amsterdam came into force in 1999, new EC laws, or Directives, that have been enacted in the

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<sup>1</sup> After consulting the Economic and Social Committee.

<sup>2</sup> Paragraph 1 of Article 13 of the Amsterdam Treaty provides as follows: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

area of anti-discrimination are the Racial Equality Directive, 2000/43/EC, and the Employment Equality Directive, 2000/78/EC.

Council Directive 2000/43/EC implements the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation.

Equality principles at EU level have been always linked to the creation of the Common Market and to the development of the Community's social and economic goals. However, the two anti-discrimination Directives strengthen the human rights approach, namely a trend of defining equality as a fundamental right.

### **The principle rules in these two Directives are as follows:**

The Racial Equality Directive 2000/43/EC gives protection against discrimination in employment and training, education, social protection (including social security and healthcare), social advantages, membership and involvement in organizations of workers and employers and access to goods and services, including housing. It contains definitions of direct and indirect discrimination and harassment and prohibits the instruction to discriminate and the victimization. The Directive also allows for positive action measures to be taken, in order to ensure full equality in practice. According to the Directive victims of discrimination have a right to make a complaint through a judicial or administrative procedure, associated with appropriate penalties for those who discriminate. Limited exceptions to the principle of equal treatment are allowed, for example in cases where a difference in treatment on the ground of race or ethnic origin constitutes a genuine occupational requirement. The shifting of the burden of proof in civil and administrative cases provides that once an alleged victim establishes facts from which it may be presumed that there has been discrimination, it is for the respondent to prove that there has been no breach of the equal treatment principle.

The Employment Equality Directive 2000/78/EC implements the principle of equal treatment in employment and training irrespective of religion or belief, disability, age or sexual orientation in employment, training and membership and involvement in organizations of workers and employers. It includes identical provisions to the Racial Equality Directive on definitions of discrimination and harassment, the prohibition of instruction to discriminate and of victimization, on positive action, rights of legal redress and the shifting of the burden of proof. In terms of protection of persons with disabilities rights, the Directive requires employers to make reasonable accommodation to enable a person with a disability who is qualified to do the job in question to participate in training or paid labor. Again limited exceptions to the principle of equal treatment are allowed, for example, where the fundamental values of a religious organization need to be preserved, or where an employer legitimately requires an employee to be from a certain age group to be recruited.

## ECJ case-law

The ECJ case-law represents another source enriching the EU anti-discrimination law. By developing its case-law, the ECJ contributes to a new and inclusive concept of equality.

The EU has been traditionally very active in combating sex discrimination in areas that affect the operation of the market - in the economic and social field. The most significant ECJ jurisprudence has concerned employment, maternity, indirect discrimination and part-time work and also social benefits. The ECJ has also been active in attempts to stop indirect discrimination against women in the job market and has also looked at positive action to remedy structural discrimination.

Under jurisprudence developed by the ECJ, the general rule is that direct discrimination based on sex can never be justified. However indirect discrimination may be objectively justified if the measures used correspond to a genuine need, the measures are appropriate to achieving objectives and the measures are necessary to that end.<sup>3</sup>

The EU has focused on sex discrimination in the workplace – especially with regard to equality of pay, benefits, and opportunity. The landmark Case 43/75, *Defrenne v Sabena* [1976] ECR 455 is the case in which the ECJ established the unacceptability of direct sex discrimination with regard to wages.

Discrimination with regard to pregnancy constitutes one sub-set of discrimination on the basis of sex. Regarding recruitment, in Case C-177/88, *Dekker v Stichting VJV* [1990] ECR I-3941, the ECJ held that an employer's decision not to employ an applicant who was pregnant, although she was the best person for the job, constituted direct discrimination on the grounds of sex. In Case 438/99, *Jiménez Melgar v Ayuntamiento de los Barrios* [2001] ECR I-6915, the ECJ held that the decision not to renew a fixed-term contract due to pregnancy also constituted direct sexual discrimination. Regarding dismissal on grounds of pregnancy, in Case 32/93, *Webb v EMO Cargo (UK) Ltd.* [1994] ECR I-3567, the ECJ held that employees may not be dismissed when they become pregnant, even if they were hired in part to cover the maternity leave of another worker.

The scope of protection against discrimination during pregnancy can also extend to maternity pay issues. In Case 342/93, *Gillespie and others v Northern Health and Social Services Board* [1996] ECR I-0475 the ECJ held that a woman's pay might be reduced while she was actually on maternity leave, although not so low as to undermine the purpose of maternity leave.

A related element of protection addresses the status of contractual terms during leave. In Case C-136/95, *Thibault* [1998] ECR I-2011, the ECJ held that a woman on maternity leave is entitled to any pay increases that she would have received had she been at work. Regarding illness during pregnancy, In Case C-66/96, *HK (for Hoj Pedersen) v Faellesforeningen for Danmarks Brugsforeninger (for Kvikly Skive)* [1998] ECR I-7327, the ECJ held that if workers are

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<sup>3</sup> See Case 170/84, *Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.

generally entitled to full pay during illness, the same provision must extend to pregnant women for illnesses related or unrelated to pregnancy.

Finally, one of the most critical issues in employment discrimination on the basis of pregnancy is the determination of what constitutes a comparator for pregnant women. In Case 32/93, *Webb v EMO Cargo (UK) Ltd.* [1994] ECR I-3567 discussed above, the ECJ stated that the situation of a woman who finds herself incapable, by reason of pregnancy, of performing the task for which she is recruited should not be compared to that of a man incapable for medical or other reasons. The ECJ held that pregnancy is not in any way comparable to a pathological condition and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify dismissal of a woman without discriminating on grounds of sex.

A greater proportion of women tend to work part-time due to traditional family responsibilities. The ECJ held that different treatment on the basis of part-time status may thus indirectly discriminate on the basis of sex.<sup>4</sup> The ECJ also stated that intent to discriminate is not necessary for a finding of discrimination, and many cases of indirect discrimination occur without any intent to discriminate.

As to the concept of Positive Action in Case 407/98, *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539, the ECJ reiterated that it considered automatic priority systems that neglected to look at candidates' individual characteristics unacceptable (it struck down a rule allowing female candidates with sufficient qualifications to be selected over male candidates, provided that the difference in qualifications was not so great that the selection would constitute a breach of objectivity).

In the light of EU anti-discrimination law latest developments, the magistrates in Kosovo currently face the important yet challenging task to work of enforcing the Anti-discrimination law. In doing so they are contributing to the establishment of a human rights culture and respect for the rights and freedoms of all without discrimination in Kosovo.

**\* *The material was presented at the Seminar on Labor Law conducted by the KJI in September 2005.***

## **Project Activities September 2005**

### Workshop on Minor Offences

On 13 September 2005 KJI held the first training session after the summer break. The Workshop is a continuation of a series of Workshops with the same title offered by KJI to the Minor Offences Judges. Participants looked at possibilities to reduce the workload at the Minor

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<sup>4</sup> Case 170/84, *Bilka Kaufhaus GmbH v Karin von Hartz* [1986] ECR 1607 and Case 184/89, *Helga Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297

Offences Courts by developing proposals supported by their practical experience for handling specific cases. Additionally the Legal Policy Division of the UNMIK Department of Justice presented the possible remedies to resolve the most common problems MOC judges face in handling cases under the UNMIK Regulation 2005/16 On the Movement of Persons Inside and Outside of Kosovo. Nineteen participants attended the session, held at the KJI premises in Prishtinë/Pristina. All of them were of Albanian ethnicity.

#### Seminar: Labour law

On 15 September 2005 the KJI organized a Seminar for judges, handling labour law cases. The seminar provided information about recent developments regarding labour legislation in Kosovo and in EU countries including anti-discrimination issues in relation to the employment and labour. Experts from the Supreme Court of Kosovo, Prishtinë/Pristina District Court and OMiK Department of Human Rights and Rule of Law presented the topics and facilitated the discussions on the aforementioned subjects. Thirteen judges attended the Seminar. Twelve of them were of Albanian ethnicity and one of them had minority ethnic background.

#### Round Table Discussion on the Criminal Procedure Code

On 20 September the KJI held a RTD on Criminal procedure Code for the Judges handling criminal cases and prosecutors from Pejë/Pec region. The subjects that were discussed at the RTD were focused on the calculation of punishments and interpretation of the aggravating and mitigating circumstances under the provisions of the Criminal Procedure Code of Kosovo. Distinguished Local and International Trainers from OSCE and Pejë/Pec Courts contributed to the discussion. The RTD took place in Pejë/Pec. Thirty one participants attended the RTD. One of them was of minority ethnic background, the rest were of Albanian ethnicity.

#### Training of Trainers

The Council of Europe (CoE) in collaboration with the KJI organized a follow up training for twenty selected judges and prosecutors. Amongst them two were of Serbian ethnicity the rest were of Albanian ethnicity. The first session started in September 2005 (*21 – 24 September 2005*). The next sessions are planned for October and November 2005. This is the third part of the training programme for local judges and prosecutors aiming to develop the specific training skills and to further upgrade the professional and legal knowledge of the future trainers in regard to the application of the European Convention on Human Rights. The training programme focused on some of the articles of the European Convention (i.e. art.2, 3, 5, 6, 8 and 10) and the jurisprudence of the Court in Strasbourg. International experts delivered presentations on the aforementioned topics. The Training of Trainers Took place at the KJI premises in Prishtinë/Pristina

### Seminar on International Judicial Assistance

KJI in collaboration with the Legal Policy Division, DOJ and Office of returns and communities, UNMIK organized a Seminar on the abovementioned topic for the judges, trying criminal cases and prosecutors from all the regions in Kosovo. The seminar aimed to survey through presentations and discussions the new provisions related to International Judicial Assistance and application of the respective legal instruments such as: Requests for extradition, repatriation of immigrants, requests for International Legal Assistance to Foreign Authorities (service of documents, rogatory requests), Execution of Judgments and the Transfer of Sentenced Persons, the principal features of the European Arrest Warrant (legal and practical aspects regarding its implementation), the International Arrest Warrant. Twenty three participants attended the Seminar. All of them were of Albanian ethnicity.

### **Forthcoming events**

#### Workshop on the Criminal Procedure Code – Protection of Witnesses and Victims

*Target group: Judges handling criminal cases and prosecutors*

The subjects that will be discussed at the Workshop will focus on criminal proceedings and on measures for protection of witnesses and victims. The training will offer an interactive discussion to the participants on the disputable issues in the aforementioned proceedings. Discussion will focus mainly on examining the casework and specific procedure for court hearings on criminal cases when special protection to the witnesses and victims is needed. The Workshop will take place at the premises of KJI in Prishtinë/Pristina.

*Planned date: 27 September 2005*

#### Workshop on Property Rights

*Target Group: Judges trying property related cases*

During the thirds quarter of 2005, KJI is planning to organize a training session for the civil law judges from the region of Prishtinë/Pristina. The workshop will be the fifth one after the training organized in Prizren, Gijlan/Gnijlane, Mitrovicë/Kosovska Mitrovica and Pejë/Pec. The participants will discuss the competences of the regular courts and the Kosovo Trust Agency (KTA) and the legal aspects of ownership right.

*Planned date: 29 September 2005*

#### Seminar on CCP: Cooperation during the Pre-trial Proceedings

*Target group: judges and prosecutors*

On 6 October Kosovo Judicial Institute organizes a Seminar on the abovementioned topic that aims to clarify and contribute to the harmonization of the court practice concerning the conduct and impact of the Pre-trial proceedings under the Criminal Procedure Code. Target groups of the Seminar are judges trying criminal cases and prosecutors. The Seminar would provide the

participants with an opportunity to discuss the obstacles they face in their routine work concerning the pre-trial proceedings and to explore possibilities to improve the cooperation between the judges, prosecutors and police during the pre-trial phase. Experts from judiciary, prosecutorial service as well as from the KPS are invited to present relevant topics at the Seminar.

*Planned date: 6 October 2005*

#### Seminar on Judicial Ethics

*Target group: judges and prosecutors*

KJI in collaboration with the Kosovo Judicial and Prosecutorial Council (KJPC) will continue to organize series of training sessions in all the five regions in Kosovo focused on the practical aspects of judicial ethics. The training aims to give a deeper look into the position of the judge as a single decision maker or as a decision maker in the panel. The seminar will highlight the responsibility of the judge in regard to the Rule of Law and social order in the context of the newest amendments of the Codes of Ethics and Professional Conduct.

*Planned date: 11 October 2005*

#### Workshop on Commercial Law

*Target group: judges hearing civil and commercial cases.*

The Workshop will present to the participants the most common dilemmas in the judicial practice related to Commercial contracts, Transactions and particularly Commercial Agreement on Sell of Goods. KJI will invite as trainers some of the outstanding practitioners in the field of Commercial Law in Kosovo. The Workshop aims to initiate a professional discussion between the judges hearing Commercial cases from all the instances in order to facilitate the harmonization of the court practice on the Commercial cases.

*Planned date: 13 October 2005*

#### Workshop on the Execution of Criminal Sanctions

*Target group: Judges and Prosecutors*

The KJI will organize a workshop on Criminal matters for the judges trying criminal cases and prosecutors. The workshop will focus on the Execution of Criminal Sanctions under the applicable law in Kosovo. The participants will be given an opportunity to hear presentations on the main procedural issues. Distinguished legal professionals – judges from District and Supreme Courts will present different cases giving a possibility for discussion on the specific problems regarding the conduct of Execution of Criminal judgements.

*Planned date: 18 October 2005*

#### Training of Trainers

*Target group: selected judges and prosecutors who will become trainers on the European Convention on Human Rights*

The KJI in collaboration with the Council of Europe (CoE) will continue to organize a follow up training for twenty selected judges and prosecutors in October and November. This is the third

part of the training programme for local judges and prosecutors aiming to develop the specific training skills and to further upgrade the professional and legal knowledge of the future trainers in regard to the application of the European Convention on Human Rights. The training programme in October will focus on the next articles of the European Convention (i.e. art. 5, 6, 8 and 10) and the jurisprudence of the Court in Strasbourg. International experts will deliver and assess the training.

*Planned dates: 19 – 22 October 2005*