

- ▶ Convention on the Elimination of all the Forms of Discrimination against Women (Art. 7th)
 - Equality on the access to a public employment
 - Non-discrimination of women, disabled and minorities

- ▶ International Covenant on Civil and Political Rights [Artº 25th, c)]

Introduction

The High Commissioner for Human Rights (United Nations) requested information from the Portuguese Ombudsman, on its quality as National Human Rights Institution, about its intervention in situations of discrimination on the right to political participation and access to public office and to public employment. On what concerns to the protection of the workers' rights, the complaint procedures and respective intervention are mainly related with situations of public employment, since the Portuguese Ombudsman does not usually intervene in private labor issues.

As primary sources are considered the Constitution of the Portuguese Republic (Constituição da República Portuguesa), the Labour Code (Código do Trabalho), General Labour Law in the Public Function (Lei Geral do Trabalho em Funções Públicas), the Community law and the International Conventions already referred, such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women.

We must underline that the national legislative framework ensures the right to non-discrimination of women, of disabled citizens, as well as all other persons from minorities, on the access to the public employment.

In this context we considered the last interventions of the Portuguese Ombudsman for public employment policies, under the right of complaint especially related on the following questions: Age; Residence (violation of the free circulation principle of the European Union workers); Disability/health risk; Gender (parenthood) ; Precariousness/treatment difference (remuneration/working time); Race/ethnic minorities/religion/sexual orientation.

I

Between 2010 and 2014 the Portuguese Ombudsman was requested to intervene in some situations that violated the access to the public employment on grounds of age. For example, with the introduction of restriction of applications to applicants with a degree completed after a certain date or conditioning the entry of workers to a maximum age limit. Such impositions promoted discrimination on grounds of age, in direct violation of the Directive 2000/78 / EC of the Council of 27.11.2000.

2

In some of the cases examined related to discrimination on grounds of age, the Government has accepted the recommendations of the Portuguese Ombudsman. This led to corrective procedures in order to rectify those situations of discrimination. In other situations, and because the violation of Labour Law may constitute a misdemeanor were reported to *ACT* - Authority for Working Conditions.

II

The right to free movement of workers within the Community with special focus on discrimination on grounds of nationality and /or residence has been appreciated by the Portuguese Ombudsman and has already led to statements.

Under this law is forbidden administrative practices which constrain the free movement of workers in the European Union, in particular by imposing the residence requirement criteria in national territory as a precondition for application (Article 2 of Regulation EU 492 / 2011 of the European Parliament and of the Council of 05.04.2011).

There have been also situations where admission to public employment was limited to citizens who are not natural from national territory. This limitation directly violates the constitutional command contained in Article 15, n. 1 and 2 of the Portuguese Constitution in conjunction with article 17, n. 1 and 2 of the General Labour Law in the Public Function. The article 28, n. 2 of the Agreement on the European Economic Area (in the Official Journal, No. L, 3/1/94) also prevents such discrimination.

The discrimination on the free movement of EU national workers has till now different evolution. There were situations in which, the administrative entity took into account the intervention of the Portuguese Ombudsman, correcting the earlier decision and allowing the access on equal terms to residents and non-residents applicants in Portuguese territory and non-nationals, at the date of the tender opening. In other cases (also in workers' recruitment process), the administration was not favorable to reconsider the candidate selection criteria.

III

The Portuguese Ombudsman also analyzes complaints involving discrimination of citizens with disabilities. The DL 29/2001, 3rd February, fixed employment quotas for persons with disabilities in public employers. The Ombudsman has been called into action and managed, on several occasions, to restore the violated law.

The Ombudsman also drew the attention of the legislator to the inadequacy or incompleteness of administrative orders (in the case of hiring teachers), which led to change and promote the legality and conformity to the Constitutional rule contained in Article 59, paragraph 2.

Despite the work of the Portuguese Ombudsman, the work safety rules have not always been respected by the government.

In one case in which the Ombudsman was called into action the complaint proceeded to a candidate with dyslexia. Dyslexia implies appropriate treatment for the provision of evidence for access to public employment. However, the government has shown little sensitivity in dealing with these situations where the "disability" does not claim positive discrimination in access to public employment, but puts the candidate at a disadvantage with regard to a certain requirement fulfillment for the selection. The intervention of the Ombudsman was positive in overcoming these difficulties.

4

IV

Discrimination based on gender, is often associated with protection in parenting and has been the subject of several interventions of the Portuguese Ombudsman.

In cases subject to consideration and in which they discussed the existence of situations of violation of law regarding discrimination based on gender, in particular, being concerned fundamental rights of a similar nature (right to maternity), entities, tend not complied with the decisions of the Ombudsman.

In such circumstances, the authorities frequently make restrictive interpretations of the law affecting female workers. For example, the cases in which breastfeeding implied the loss of regular attendance bonuses.

Also so happened regarding the hiring of teachers, in the case of renewal of fixed-term contracts. There were situations where teachers were not contracted again, because the educational administration claimed that the application requirements were not complied: lack of pedagogic continuity and performance assessment with a minimum score of Good, since it was not possible to evaluate (less than 180 days of effective work).

In such situations, the Portuguese Ombudsman has drawn attention to the fact that the maternity leave enjoyment does not determine the loss of any rights and is considered to be effective work. Despite repeated interventions, still remains situations of discrimination against women in the workplace, especially when comes the protection of parenthood.

Conclusion

The intervention of the Portuguese Ombudsman in the protection of equal rights and non-discrimination (in most cases following complaints by individuals) it is taking the government to review behaviors that violate the law. As National Human Rights Institution, the Ombudsman acts as human rights keeper.

International Covenant on Civil and Political Rights [Article 25th, c)]

On this matter the Portuguese Ombudsman, in promoting and defending the right of participation in public life, made the following initiatives:

1. Concerning the electoral subject and reaffirming the several recommendations previously made, the Ombudsman said to the Parliament:

1.1. In one of these recommendations, was underlined the sense of inclusion, on the several electoral laws and regulamentary statutes. To give the possibility to anticipate the vote for workers in public office going abroad on duty at the time of an election or a referendum. This recommendation was accepted.

1.2. Another recommendation, reaffirmed in 2010, was one intended to change the norm in the Electoral Law of the Parliament (Lei Eleitoral da Assembleia da República). That norm stated that the Portuguese citizens with another nationality cannot be candidates by the electoral circle of the territory of that nationality. The Ombudsman purpose was to restrict this ineligibility to the situations in which the national laws of that electoral circle gave to the Portuguese citizens also national of that State an advantage in acceding the public office post towards the Portuguese citizens non-nationals of that same State. This matter stays unchanged.

1.3. In the same initiative the Ombudsman made two new recommendations concerning the treatment disparity by the law to the applications for local authorities bodies by groups of citizens towards the treatment given to applications from political parties, concerning the exemption from the value added tax (Imposto sobre o Valor Acrescentado) and the use of their own distinctive symbol in the electoral campaigns and on the ballot papers. In this matter, the Ombudsman recommended the exemption of the value added tax to the applications made by groups of citizens and that these applications should be identified in the electoral campaigns and in the ballot papers through their own symbols.

There was no positive reply on these last two recommendations, so in January 2013 the Ombudsman renewed it, on these subjects.

Following this, was known of a parliamentary group initiative, a law project, aiming to host this Ombudsman's recommendation, mainly in the law treatment disparity on the applications made by groups of citizens. In May 2013, by parliamentary plenary meeting, this project was rejected. The Ombudsman is still monitoring this issue.

2. Still in 2012 was presented a claim to clarify, the passive electoral incapacity for mayors that already had seniority payments on that same functions. The Ombudsman answered that this clarification should be done by the Constitutional Court (Tribunal Constitucional).

However in 2013, year of local elections, other courts were asked by several initiatives, to clarify the situation.

The Ombudsman considered that the delay on the application analysis was damaging to the public interest, diverting the public debate on the local issues that should be resolved by local authorities and needed the citizens' attention. The Ombudsman made a recommendation to the Parliament asking to clarify passive electoral capacity for the local authorities, which was not accepted.