United Nations CEDAW/C/65/D/66/2014

Convention on the Elimination of All Forms of Discrimination against Women

Advance unedited version

Distr.: General
21 November 2016

Original: English

Committee on the Elimination of Discrimination against Women

Communication No. 66/2014*

Views adopted by the Committee at its sixty-fifth session (24 October-18 November 2016)

Submitted by:	D.S. (represented by counsel, Vanda Durbakova, Center for Civil and Human Rights)
Alleged victim:	The author
State party:	Slovakia
Date of communication:	8 February 2013 (initial submission)
References:	Transmitted to the State party on 18 February 2014 (not issued in document form)
Date of adoption of decision:	7 November 2016

* The following members of the Committee took part in the consideration of the present communication: Gladys Acosta Vargas, Magalys Arocha Dominguez, Barbara Bailey, Niklas Bruun, Louiza Chalal, Náela Gabr, Hilary Gbedemah, Ruth Halperin-Kaddari, Yoko Hayashi, Dalia Leinarte, Lia Nadaraia, Theodora Nwankwo, Pramila Patten, Silvia Pimentel, Biancamaria Pomeranzi, and Xiaoqiao Zou.

Views under article 7 of the Optional Protocol

1. The author of the communication is D.S., a Slovak national born in 1971. She claims that she is a victim of discrimination on the grounds of gender and her marital and family status in violation of article 2(a) (c) and (e), read in conjunction with articles 1 and 11, paragraph 1a) of the Convention on the Elimination of All forms of Discrimination against Women. The Convention and its Optional Protocol entered into force for Slovakia in 1993 and 2000, respectively. The author is represented by Vanda Durbakova, attorney at the Center for Civil and Human Rights.

The facts as submitted by the author

2.1 The author was employed by the Slovak National Library (SNK) in Martin as a Research and Development worker in the Department of Biographical Research and Creation of Biographical Dictionaries within the National Biographical Institute (NBiU) between 15 September 1995 and 31 March.2008. The SNK is a State-run entity, funded by the Ministry of Culture.

2.2 In December 2001, with the consent of her employer, the author went on maternity leave which she combined with parental leave and after having had her two children, she resumed work on 10 January 2008.[1] Upon her return, she was informed by the Personnel Department that she had been ordered by the employer to take her accrued annual leave of 42 days which she had not taken during her maternity leave by 10 March 2008.

2.3 Whilst the author was on leave, the SNK was reorganized. At the beginning of 2008, the Head of SNK decided to reduce the number of employees in light of the projected budget cuts. The author's post was abolished.

2.4 On 20 February 2008, the director of NBiU notified the author by phone to immediately come to workplace. When she arrived at the library, the Director of NBiU, her Head of the department told her that she was dismissed effective as of 1 March 2008, as the department had to dismiss one person. During the conversation the Director stated that the decision to dismiss the author was partially due to the fact that she had two small children and had just come back from leave and further was the only one who was nobody's "protégé". On the same day, during her meeting with the Deputy Director of SNK from whom she wanted to know the actual reason/s for her dismissal given her social situation as a breadwinner for her two minor children, latter stated that the SNK was "not a social institute".

2.5 The author returned to the SNK on 25 February 2008 and requested that the Deputy Director of the SNK give her the decision on organizational changes, the collective agreement and 'an exact wording of the dismissal'. Her request was rejected and the Deputy Director who informed her that as from 1 March 2008, she was in anyway dismissed, made dishonouring comments, which the claimant felt impinged upon her personal dignity ("I don't poop in my pants because of you!").

2.6 On 4 March 2008, the author received a notice informing her that her post would be abolished as of 1 June 2008 and that the SNK could not offer her another post that would be appropriate for her. On 10 March 2008, the author signed an agreement on the termination of her employment pursuant to sections 60 and 63 of the Labour Law Code (redundancy) and her employment was duly terminated on 31 March 2008.

[1] The Slovak law provides for the maternity leave of 37 weeks for one child and for a parental leave for extended child case until the child is three years old.

2.7 The author claims that the Head and Deputy Head of her department decided to dismiss her as they doubted that she would be able to perform her job properly as a mother of two small children. They expressed concern about her ability to find a balance between work and family life. The Deputy Head also openly expressed concerns that the author would be frequently absent when her children fell sick. The author was also told by colleagues that the Deputy also stated this during a staff meeting.

2.8 On 1 April 2008, another person (a pensioner) was hired by the SNK to perform duties similar to those previously performed by the author. This person has since confirmed before the District Court that the work was practically the same as the one undertaken by the author. Another pensioner was also hired to support this employee in substantially the same duties as those carried out previously by the author. These appointments were made despite the fact that the employer told the author that her post had been abolished.

2.9 On 17 April 2008, the author complained to the Minister of Culture about the discriminatory treatment she felt she had suffered during her employment termination process. On 5 May 2008, the Ministry of Culture informed her that it was not authorized to deal with personnel matters and advised her to complain before a court. Her complaint was also sent for examination to the SNK.

2.10 On 15 May 2008, the General Director of SNK sent the author a letter of apology for the conduct of the Director and Deputy Director of her department during her employment termination process, noting that her supervisors' actions should have been more sensitive. However, she did not receive an apology for the discriminatory treatment and neither was any investigation launched into her complaint, to which no further response was received. On 19 January 2009, the author again unsuccessfully complained to the General Director of the SNK about the manner she has been treated.

2.11 On 4 August 2008, the author submitted a complaint to the Martin District Court. She argued that SNK had violated the principle of equal treatment in as much as the decision to declare her redundant was taken by the Director and Deputy Director of NBiU who respectively had told her that she was nobody's "Protégé" and that she would be all the time at home with sick children. The author further argued that after the termination of her employment, SNK had engaged two other persons to perform the tasks which had previously been performed by her. She alleged that the main reason for her dismissal was the fact that she was a mother of two small children, who had just returned from maternity and parental leave.

2.12 On 15 April 2010, the Martin District Court dismissed her complaint as ill-founded. It stated that as she had not sustained her burden of proof of prima facie discrimination, the burden of proof could not be shifted to the defendant. The court stated that it could not review an employer's reasons for designating an employee redundant and that the fact that someone else was employed to perform the author's duties did not have any bearing on her discrimination- related complaint. The court found that the employer's aim in reducing the budget was legitimate.

2.13 The author appealed the district court's decision with the Regional Court in Žilina, claiming that the District Court had erred in its assessment of law and fact. She claimed that the court had not properly applied the burden of proof as laid down in Section 11 para. 2 of the Anti-Discrimination Act, which shifts the burden of proof to the defendant once a prima facie case has been presented by the plaintiff. The regional court dismissed her appeal on 30 March 2011 having maintained the decision of the lower court. On 1 July 2011, the author complained to the Supreme Court, claiming that the regional court violated her right to a fair trial, but her complaint was dismissed as manifestly ill-founded on 25 September 2012. On 10 December 2012, the author complained to the Slovak Constitutional Court claiming that the lower courts' decisions

were arbitrary, unjustified and unsubstantiated. She also claimed a violation of her rights to a fair trial, effective remedy and non-discrimination as guaranteed under the ECHR, as well as a violation of her rights under article 2 c) and e) and article 11, paragraph 1 a) of CEDAW. On 6 February 2013, the Constitutional Court rejected her complaint, rejecting the author's arguments as groundless, and confirming the lower courts' decisions.

The complaint

3. The author claims that she was subjected to a form of gender-based discrimination by her employer who terminated her labour contract on prohibited discriminatory grounds. She claims that article 2.(a), (c) and (e) read in conjunction with articles 1 and 11 (1) (a) of the Convention has been violated as the State party failed to ensure effective protection of her as a woman against the gender-based discrimination she has been subjected to by the national tribunals and failed to take all appropriate measures to eliminate discrimination against women inter alia in the field of employment.

State party's observations on admissibility and merits

4.1 By Note Verbale of 29 September 2014, the State party transmitted its observations on admissibility and merits. The State party stated that it is committed to gender equality. In support, it enumerated domestic legislation which gives effect to its obligations under the international human rights treaties on the matter.

4.2 The State party further submits that it has no objection as to the admissibility of the communication.

4.3 As to merits, the State party observes that the author may have felt disadvantaged based on her sex and marital status after having had lost her employment. However, it claimed that a violation of the principle of equal treatment had not been proven in the proceedings before the court. The State party explained that the Slovak National Library had been objectively obliged to reduce the number of employees and increase work efficiency owing to budgetary necessity. Based on the composition of redundancies, which included nine women, thirteen men, three women with children and thirteen people of retirement age, it could not be assumed that gender-based discrimination occurred.

4.4 The State party contends that the employer was able to show in court that the decision to dismiss her was based on organisational change in relation to her work position rather than on her personal circumstances. It asserted that the SNK employs other women with minor children and also had attempted to retain the author on a part-time basis, but that she declined this offer. As the author signed an agreement to terminate her employment, the State party submitted that in fact the termination was in accordance with the will of the author.

4.5 As to the recruitment of a new employee who carried out some of the same work as the author, the State party referred to the SNK having shown in the proceedings before the courts that this only happened after the decision of the author to terminate her employment by agreement during the given notice period and was in any case not a permanent position but a short term contract.

4.6 The State party endorsed the view of its courts to the effect that there was a lack of sensitivity in the way the matter was dealt with by the employer and therefore welcomed the written apology issued by the employer to the author. Since, however, no one else was present during the exchange between the author and her employer, the State party does not accept that it had caused the author harm which could affect her professional life or reduce her dignity. Having said this, the State party concedes that the private nature of conduct does not make it excusable.

4.7 The State party also claims that since the author failed to meet her burden of presenting facts before the court which gave rise to a reasonable presumption of discrimination, the burden of proof did not shift to the defendant to prove that there had been no violation of the principle of equal treatment. The State party also averred that the author failed to specify which of her rights, exactly, were violated by the employer.

4.8 Further, on the issue of the shift of the burden of proof, the State party reiterates that this is an important tool in the fight against discrimination. In practice, it means that if the plaintiff submits to court such facts as give rise to a reasonable assumption that discrimination indeed occurred, the burden of proof in the proceedings is shifted to the defendant who is required to prove that there was no violation of the principle of equal treatment. The State party states that the essence of this legal instrument lies in the provision to the plaintiff of effective means of protection against discrimination by which the plaintiff is not compelled to provide evidence of the alleged conduct. However, the State party agrees with the view of the courts that this does not mean that the author is entirely exempted from the obligation to submit relevant facts in support of her claims. Pursuant to Section 11, paragraph 2 of the Anti-Discrimination Act, the shift of the burden of proof occurs only when the court may reasonably assume based on the facts presented by the plaintiff that the alleged violation occurred. It is not sufficient for a person who feels discriminated against to merely state the fact. The person should not only maintain but should also demonstrate that he or she has not been treated in a usual i.e. non-discriminatory way. The State party asserted that this interpretation is in line with the Explanatory Memorandum to the Anti-Discrimination Act, which states that in conformity with the provisions of the Directive it "activates" the plaintiff and shifts the burden of proof onto the defendant only when it is possible to assume from the evidence presented by the plaintiff that a violation of the principle of equal treatment could have actually occurred. The State party adds that these facts by their nature, especially by the very intensity of the intervention, and by the circumstances under which they occurred, must be so serious that the court may reasonably presume discriminatory conduct by the defendant.

4.9 The State party confirms that it had acquainted itself with the justification of the courts that the author did not sustain her burden of proof and thus the burden of proof was not shifted to the employer. The State party reiterates that the author did not present facts that would give rise to a reasonable presumption that discriminatory conduct by the employer occurred. It further states that the author failed to specify which of her specific rights had been affected by the employer's conduct.

4.10 The State party does not accept the contention by the author that she had been requested to prove before the courts facts such as the motivation of the employer, as the State party claimed that this is presumed in cases of unequal treatment. It also refutes the author's claim that the national courts incorrectly assessed both matters of facts and law. It considers that the author had ordinary and extraordinary remedies available and that she had used them actively. However it stated that neither the general courts nor the Constitutional Courts reached the conclusion that there had been a violation of the author's rights.

4.11 The State party asserts that the author had had access to fair domestic processes, which she had availed herself of and yet had been unsuccessful. It states that the right to a fair trial includes the right of a party to the reasoning of the judicial decision that clearly and unambiguously provides answers to all the relevant legal and factual issues related to judicial protection. However, it observes that the courts do not have an obligation to answer all questions raised by a party. The obligation extends only to answering those questions essential to the cause or to sufficiently explaining the actual and legal basis for the decision, without going into all the details provided by the parties. Reasons for the decision which

clearly explain the basis on which it was made are sufficient to ensure that fair trial standards have been observed.

4.12 The State party concludes that the domestic courts dealt with the author's claim in accordance with the purpose and meaning of the anti-discrimination legislation. The fact that she was not granted protection does not indicate a violation of her right to an effective remedy. It stated that general courts cannot violate the right to an effective remedy if they act in accordance with procedural rules.[2] Thus, the State party considers that there was no violation of the author's rights under the Convention.

Author's comments on the State party's observations

5.1 On 1 December 2014, the author submitted her comments on the State party's observations. She reiterates that the termination of her work contract violated the principle of equal treatment under domestic legislation.

5.2 She states that the termination caused her to suffer psychological pressure and humiliation. She underlines the fact that her superiors referred explicitly in conversation to the fact that having children and having just finished parental leave were the reasons for the termination of her contract. Her employer also made other inappropriate comments, said that the SNK was not a social institute and expressed doubts about her ability to balance work and family life. According to the author, this clearly indicates that sex and marital status played a key role in her dismissal. She asserts that organizational change was used as a pretext to hide the discriminatory nature of her dismissal.

5.3 The author reiterates that only she among those who were dismissed had small children and had just finished parental leave, contrary to the State party's submission. However if, as claimed by the State, other mothers in other departments were also terminated, the author claims that this does not exclude discriminatory conduct but rather strengthens the indication of discrimination.

5.4 The author refutes the State's submission that termination was at her initiative and in accordance with her will. She argues that the termination of the contract was made solely at the initiative of her employer. Termination was presented as the only option and she therefore signed the agreement.

5.5 She reiterates her previous statement to the effect that employing others to do her job after terminating her employment only served to highlight that her workload was not terminated, which had been the claim of the employer in justifying her termination. She states that this is a clear violation of her rights under domestic antidiscrimination legislation, but it was ignored by the domestic courts.

5.6 She further rejects the State's contention that she was offered a part-time work agreement by the employer, which was confirmed in testimony by her director during the court hearing on 11 February 2010. However, she states that any such unilateral change in her conditions of work would in any case have violated her right to equal treatment.

5.7 The author further asserts that the court's failure to effectively implement domestic antidiscrimination legislation by recognizing discriminatory treatment and providing her with an effective remedy caused her pecuniary damage in the form of legal fees as she was ordered to pay the court fees in the proceedings.

[2] The State party also adds that the author had the opportunity to seek a remedy before the European Court of Human Rights, which she did not avail herself of.

5.8 As to the State party's interpretation of the burden of proof under antidiscrimination legislation the author notes that the State's position is in violation of relevant EU directives and jurisprudence of international bodies including ECtHR, CJEU and UN Treaty Bodies. The author confirms that she had presented a prima facie case of discrimination to the court and therefore the burden of proof should have shifted to the employer as the defendant. The court failed to effectively implement this, which was compounded by the State party's unwillingness to identify and remedy that failure.

5.9 The author states that the necessity to identify and sanction gender based discrimination in employment is important not only to provide her with a remedy but also as a preventative measure to ensure that such acts do not happen in the future. She reiterates that her case should be seen in the broader context of traditional sex role stereotyping in the labour market, which is still widespread in Slovakia. She notes the State party's contention that measures have been adopted to prevent discrimination but maintains that the high incidence of discrimination indicates that the measures are ineffective or insufficient.

5.10 The author therefore claims that the State party failed to rebut her assertions and she therefore re-asserted the violation of her rights under article 2 (a), (c) and (e) read in conjunction with articles 1 and 11 (1) (a).

Issues and proceedings before the Committee concerning admissibility

6.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

6.2 The Committee notes that the State party has raised no objections concerning the admissibility of the author's submission. Having found no obstacles for the admissibility of the author's claims under article 2 (a), (c) and (e) read in conjunction with articles 1 and 11 (1) (a) of the Convention, the Committee finds them admissible and proceeds to their consideration on the merits.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information presented to it by the author and by the State party, in accordance with the provisions of article 7 (1) of the Optional Protocol.

7.2 The Committee notes the author's claims that she was dismissed on discriminatory grounds as a woman and a mother of 2 minor children who has just returned from the maternity and parental leave; that the employers' purported reason for dismissing her linked to the budgetary cuts, was false, since two other persons were engaged to perform her duties after her employment was terminated; and that the domestic courts failed to properly apply the Act on Equal Treatment in Certain Areas and Protection against Discrimination and the Anti- Discrimination Act when they failed to shift the burden of proof to the employer despite the fact that she has made a prima facie case of discrimination based on sex and marital and family status.. The Committee observes that the author's claims, as submitted before the Committee, have been considered by the domestic courts and therefore, relate in essence to an evaluation of facts and evidence by the domestic courts. The Committee recalls that it does not replace the national authorities in the assessment of the facts and evidence, unless such assessment was clearly arbitrary or biased due to sex or gender stereotypes or prejudice or amounted to a denial of justice. The Committee thus, has to establish whether the domestic judicial proceedings in the author's case were arbitrary and/ or amounted to a denial of justice.

7.3 In this context, the Committee notes that pursuant to Section 11 (2) of the Anti-Discrimination Act, the burden of proof is shifted to the defendant and latter has the obligation to prove that there was no violation of the principle of equal treatment if the facts submitted to the Court by the Plaintiff give rise to a "reasonable assumption" that the violation of the principle of equal treatment has occurred. The Committee takes note of the contention of the State Party that the court shall cause the burden of proof to be shifted only when it may reasonably assume based on the facts presented by the plaintiff that the alleged violation occurred and that these facts, by their nature, the intensity of the intervention, and by the circumstances under which they occurred, must be so serious as to lead the court to such assumption. The Committee has given due consideration to the submission of the State party that the budget cut was a legitimate reason to abolish the author's post and that the employer also abolished the posts which were occupied by nine other women, thirteen men, three women with children and thirteen people of retirement age, which therefore excluded the presumption of any discrimination. The Committee also takes note of the State party's contention that the two persons were hired to perform the author's tasks only after she had left and that their contract was of a temporary nature.

7.4 In the present case, the Committee observes that the author presented before the domestic courts, the same relevant facts presented before it in support of her claim, namely (1) that organisational changes happened during the time that she was forced to take her accrued leave of 42 days; (2) she was dismissed from her employment right after she came back from her maternity and parental leave; (3) that the news of her dismissal was given to her by the Head of her Department, the Director of NBiU; (4) she was informed that she would be dismissed since NBiU has to dismiss one person and that she was the only one who was nobody's "protégé"; (5) that the Deputy Director of SNK refused to give her details about the organisational changes, the collective agreement and the exact wording of her dismissal and made very condescending remarks to her; (6) the Deputy Director of NBiU commented that she would be all the time at home with sick children and that the actual reason for her dismissal as mentioned by her superiors was the fact that she had two small children who would often get sick and that she would not be able to combine her family and professional life. The author also presented unchallenged evidence to the effect that she received a letter of apology from the General Manager of SNK concerning the conduct and insensitive treatment meted to her by her superiors, the Director and Deputy Director of NBiU as well as the fact that two new persons were hired after her dismissal to perform her duties. The Committee notes that the domestic courts dismissed the first argument of the author on the basis that it was up to the employer to decide which positions to cut, and that this decision was based on a legitimate aim of reducing the budget, although the workforce after the redundancy amounted to 270 persons. The second argument put across by the author was dismissed on the ground of the personal nature of the conversation of the author with her superiors which only constituted some interference with the author's "personal sphere" not so intense as to cause any damage to her professional life. The other arguments of the author were simply dismissed as irrelevant to her claim of discriminatory treatment.

7.5 The Committee considers that even if the budget cut may have been considered a legitimate reason to abolish the post occupied by the author, the timing of her dismissal; the manner in which she was informed about her dismissal; the refusal to give her any details about the organisational change, the collective agreement and the exact wording of her dismissal; the remarks of her superiors which clearly indicated a discriminatory treatment against her and were of such a serious nature as to result in a letter of apology sent to her by no less than the General Director of SNK in addition to the fact that two other persons were hired to perform her job after her employment was terminated, called for a closer scrutiny by the national courts, more especially the court of first instance, the

District Court of Martin of the actual reasons underlying the author's dismissal and her allegations of discrimination and the violation of the principle of equal treatment. The Committee also observes that the District Court of Martin paid no heed to the fact that the two persons hired in 2008 to perform the author's tasks allegedly on a temporary basis, were still employed,, at the time of the court proceedings in 2010, i.e. 2 years after the author's employment was terminated. The Committee is of the view that no regard was paid to the failure of any satisfactory explanation from the employer regarding the alleged budgetary cut as the reason for the author's dismissal. The Committee is of the view that the national courts gave a narrow interpretation to Section 11, para 2 of the Anti-Discrimination Act when it failed to reverse the burden of proof. The Committee is of the view that from the evidence on record, there was more than a "reasonable assumption" that the principle of equal treatment had been violated. The Committee further notes that the courts' consecutive failures to effectively implement the Anti-Discrimination legislation, by reversing the burden of proof in favour of the author upon presentation of a prima facie case of discriminatory treatment by the employer and his préposé/s, constitute a violation of her right to an effective remedy and has the effect of denying her the possibility of appropriate satisfaction and reparation for damage suffered. In the light of the above, the Committee considers that the arguments presented by the author before the national courts were sufficient to make a prima facie claim of discrimination and that requesting additional proof of discriminatory behaviour by the employer put a disproportionate burden on the author. In the light of the information made available to it, the Committee concludes that by not shifting the burden of proof to the defendant, the State party violated the author's rights under article 2 (a), (c) and (e) read in conjunction with articles 1 and 11 (1) (a) of the Convention.

8. Acting under article 7 (3) of the Optional Protocol, and in the light of the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations under article 2 (a), (c) and (e) read in conjunction with articles 1 and 11 (1) (a) of the Convention, and recommends that the State party provides the author with an effective remedy:

(a) Concerning the author:

(i) Monetary compensation equivalent to the loss of income since the date when the author's employment was terminated as a result of an unjustified procedure;

(ii) Compensation for the moral damages the author suffered during the process of her dismissal, since she was a single mother with two minor children;

(iii) Compensation for legal costs and expenses incurred by the author in connection with the author's judicial proceedings.

(b) General:

(i) Ensure full implementation of the Anti-Discrimination Act, in particular Section 11 (2) thereof, ensuring that the complainants are not required to sustain a disproportionate burden of proof vis-à-vis the defendants;

(ii) Implement the Committee's recommendations with regard to discrimination in the field of employment, namely paras 28 and 29 of its 2015 Concluding observations.[3] More specifically, the State party should strengthen its labour inspectorates and impose sanctions for discriminatory treatment in relation to pregnancy and parental leave, among others;

[3] CEDAW/C/SVK/CO/5-6

(iii) Provide regular, gender-sensitive training on the Convention, the Optional Protocol thereto and the Committee's jurisprudence and general recommendations for judges, lawyers and law enforcement personnel, so as to ensure that stereotypical prejudices do not affect decision-making;

(iv) Take effective measures to ensure that the Convention is implemented in practice by all national tribunals and other public institutions, in order to provide for the effective protection of women against all forms of gender-based discrimination in employment.

9. In accordance with article 7 (4) of the Optional Protocol, the State party shall give due consideration to the Views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee. The State party is requested to have the Committee's views and recommendations translated into Slovak, to publish them and to have them widely disseminated, in order to reach all sectors of society.