Univerzitet u Beogradu
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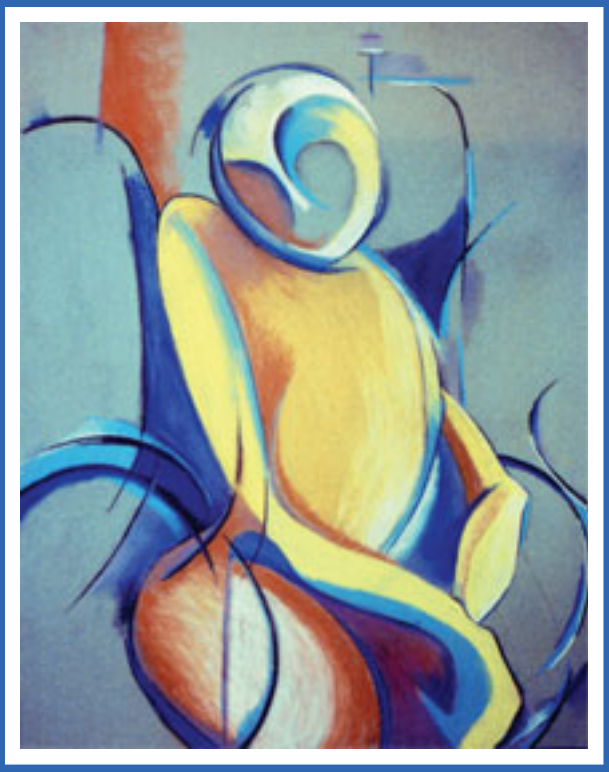
UKRŠTENA DISKRIMINACIJA ŽENA I DEVOJČICA SA INVALIDITETOM I INSTRUMENTI ZA NJIHOVO OSNAŽIVANJE

INTERSECTIONAL DISCRIMINATION OF WOMEN AND GIRLS WITH DISABILITIES AND MEANS OF THEIR EMPOWERMENT

Ljubinka Kovačević / Dragica Vujadinović / Marco Evola (ur./eds)



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SOCIOLOŠKA PERSPEKTIVA / SOCIOLOGICAL PERSPECTIVE

Doc. Dr. Mila Petrović,
Assistant Professor,
Union University Faculty of Law (Serbia)

LEGAL STATUS OF EMPLOYEES WITH DISABILITIES CAUSED BY WORK INJURIES OR OCCUPATIONAL DISEASES IN THE REPUBLIC OF SERBIA – LAST AMONG EQUALS?

Abstract

This paper deals with the status of the employees whose health was impaired due to a work injury or due to an occupational disease. It is a notorious fact namely, that people whose health is impaired and who, because of that, are incapable to work to a certain extent (totally or in part), have to face some smaller or greater difficulties on a day to day basis. Those persons who are totally incapable for work in the Republic of Serbia, in that sense, depend on the functionality of the social insurance system. This therefore calls for an adequate social insurance policy of the state. On the other hand, those persons in the Republic of Serbia whose work incapacity is partial, find themselves in a position which implies them facing different obstacles at the labour market. The latter being the constant struggle to acquire the status of an employed person, as well as the struggle to mantain such a status without further consequences to their health or their work capacity. These struggles, however, are the kind of struggles that cannot and should not be entirely left to these persons. That is why it is up to the state to put them in a position that is relatively similar to that of the other persons. Whether the Republic of Serbia has succeeded in that, or whether it is another one in a series of omissions by the Serbian legislator (which also goes for the matter of functionality of the social insurance system), is a question to which this paper should provide certain answers. From the gender perspective this paper is, however, also particularly relevant due to the newly emerged situation caused by the COVID-19 pandemic. Women represent a predominant part of the frontline work force within the healthcare, as well as the social protection and trade activities. Those activities however, it is a notorious fact, also imply high risk of an infection, thus making these women more prone to contagion, and at an increased risk of facing the consequences of the COVID-19 disease (some sort of disability being one of them). We'll, therefore, in part, also explore how can the current situation in Serbian legislative potentially affect them in this respect, in these unusual times.

Key words: *The Republic of Serbia; Work injury; Occupational disease; Disability; Discrimination.*

I INTRODUCTION

Disability, be it partial or total, certainly presents an obstacle for the normal daily life of an individual – which hence also implies his/her ability to work and earn money, and, therefore, to provide a decent life for himself/herself and his/her family. And while in the Republic of Serbia persons with partial incapacity for work have to struggle to acquire the status of an employed person or to retain such a status without further deterioration of their already impaired health, persons who are fully incapable to work (total incapacity), on the other hand, strive for the possibility to continue to live a life worthy of a human being with compensation which social insurance is supposed to provide them. This, after all, is also the reason why the state should take the appropriate steps in order to help these persons accomplish these aspirations. The latter not only in principle, but in reality as well, and in the best possible way (in accordance with the economic and other possibilities of the state). In other words, the state cannot topple the burden of this struggle entirely onto the shoulders of persons with disabilities, but has to make an attempt to put them in a position that is relatively similar to that of persons without such health problems. This again, on the other hand, implies the existence of appropriate legal regulative (designed in such a way that enables its adequate exercise), along with the will for it to be exercised – and sometimes it is precisely that political determination, i.e., the lack of that will, that is the reason why the formal legal deficiencies do exist. In this sense, the question raised in this paper is in which way and, if successful, to what extent, did the Republic of Serbia approach this issue.

II WHAT IS DISSABILITY ACCORDING TO SERBIAN REGULATIONS?

It was mentioned earlier that disability, in one part, also implies the reduced capacity or, in worst cases, total incapacity to perform work and earn a living. In this sense, the working capacity of a person with a disability will depend on the degree of the disability of the individual in question, which will define what and how much that person can or cannot do. In other words, the capacity to work, in its part, in addition to certain knowledge and skills, also has to include the appropriate psychophysical ability of the employee to perform his/her work tasks on a daily basis. It is therefore consisted of that "what one person can do, what one person knows, and what one person wants."[1] This, of course, does not mean that every single employee is absolutely healthy, nor that the health capacity of each individual employee will be the same. Therefore, for example, an employee who has to perform high risk tasks has to meet special requirements such as: impeccable heart function, certain lung capacity, stable nervous system, etc.[2] Also, an employment

1 Predrag Jovanović, 'Radnopravni tretman zdravstvene, radne sposobnosti i ličnog integriteta zaposlenih', *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 3, 2014, 39.

2 Zoran Ivošević and Milan Ivošević, *Komentar Zakona o radu*, 5th edition (2018), 211.

relationship can be established with a person who has a certain disability while, according to the logic of things, it can also not be excluded that the health condition of an employee changes or worsens even after he/she has established an employment relationship without making him/her totally incapable for work. Again, on the other hand, the fact is that sometimes the capacity to work can be completely absent due to the severity of the disability as such – thus causing the need for a response from the state or, more precisely, the mandatory social insurance system. Thus, in other words, disability can be the basis for exercising various rights – that is, both those in the sphere of labor law and those within the framework of mandatory social insurance. In this respect, however, due to peculiarities of the Serbian legislative system,[3] disability, in the sense of the legislations that regulate the labour law position of employed persons in the Republic of Serbia and the position of persons who seek employment, is not the same thing as disability in the sense of the regulations on mandatory pension and disability insurance.

Therefore, in accordance with the Law on Pension and Disability Insurance (LPDI),[4] disability as such exists only then when the insured person suffers a complete loss of his/her capacity to work, that is, when a professional military person suffers a loss of his/her capacity for professional military service or when a police officer suffers a complete loss of work capacity for his/her professional performance of police duties, and all of this due to changes in the state of health due to a work injury or an occupational disease, as well as due to an injury or a disease which are not caused by work, which, as such, cannot be eliminated by treatment or medical rehabilitation.[5] In other words, this Law defines disability as a complete incapacity for work, and only such a degree of incapacity for work can be the basis for the protection provided within the framework of pension and disability insurance in case of disability.[6] Thus, due to the fact that not every degree of disability as such creates total incapacity to work, this directs such persons to a further labour active life – which therefore entails certain labour law protection.[7] Such protection is primarily

3 Which will be explained in the following text.

4 *Official Gazette of RS*, No. 34/2003, 64/2004 – decision CCRS, 84/2004 – other law, 85/2005, 101/2005 – other law, 63/2006 – decision CCRS, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019 – decision CCRS, 86/2019 and 62/2021.

5 LPDI, art. 21.

6 Contrary to the current solution, in earlier Serbian legislative, disability was divided into three categories for a long period of time. The first category of disability, therefore, implied total work incapacity, while the remaining two categories (second and third) were reserved for persons who, despite the disability, still had certain work capacity. More on this subject in: Mila Petrović, *Radnopravna i socijalnopravna zaštita zaposlenih od povreda na radu i profesionalnih bolesti* (2020), 310-317.

7 It is important to say however that, even though it is the state of fact that the shift of the remaining capacity to work into the framework of labor law certainly can contribute to the extension of the working life of an individual who is not completely incapable of working, it is indisputable as well that, in this way, he/she is also deprived of the right to a wage compensation due to his/her reduced ability to earn a living, as well as – in certain cases, the right to a disability pension – which are the rights that were guaranteed by previous legislations. Ljubinka Kovačević, 'Zapošljavanje lica sa invaliditetom' in Drenka Vuković,

provided by the Labor Law (LL),[8] that is, its referring provision which guarantees special protection to persons with disabilities,[9] and its provisions which establish the prohibition of discrimination (either indirect or direct) of persons seeking employment and employees with regard to disability.[10] The same Law also represents the legal framework for regulating the employment of such persons.[11] However, LL does not define neither the term of disability nor the term of a person with a disability. On the other hand, the Law on Occupational Rehabilitation and Employment of Persons with Disabilities (LOREPD)[12] (as a special law that regulates issues such as: incentives for employment in order to create conditions for the equal inclusion of persons with disabilities in the labor market, assessment of their work capacity, obligation of employing them, etc.),[13] contains the definition of a person with a disability. Thus, a person with a disability, in the sense of the LOREPD, is defined as "a person with permanent consequences of physical, sensory, mental or psychical impairment or a disease that cannot be eliminated by treatment or medical rehabilitation, and who faces social and other limitations that affect the work capacity and the possibility of employment or maintaining employment, and who does not have the opportunity or has reduced opportunities to join the labor market under equal conditions and to apply for employment with other persons."[14] In terms of this regulation, therefore, a person with a disability is not a person who is completely incapable of working.

Nevertheless, the partial work capacity of permanent type in such a person is a factor that affects his/her possibility to get an employment or to keep such an employment. This, on the other hand, is the reason why it is necessary to apply the principle of positive discrimination, which will bring such a person to at least a seemingly equal position with other persons. The consistent application of the principle of equal opportunities and equal treatment, namely, would be completely unfair if certain categories of persons, such as

Mihail Arandarenko (eds), *Socijalne reforme – sadržaj i rezultati* (2011), 201. In this sense, the fairness of such a solution can certainly be subjected to a more detailed review.

8 *Official Gazette of RS*, No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014. 13/2017 – decision CCRS, 113/2017 and 95/2018 – authentic interpretation.

9 LL, art. 12, para. 4.

10 LL, art. 18-20. The issue of discrimination in connection with employment and the labour relationship as such is also regulated by the Law on Prevention of Discrimination against Persons with Disabilities (*Official Gazette of RS*, No. 33/2006 and 13/2016) – in the following text: LPDPD, art. 21-26.

11 This due to the fact that: „a person with a disability establishes the employment relationship under the conditions specified by this Act, unless otherwise specified by a special law." LL, art. 28.

12 *Official Gazette of RS*, Nos. 36/2009 and 32/2013 and 14/2022 – other law.

13 LOREPD, art. 1.

14 LOREPD, art. 3. A similar definition is contained in the LPDPD, according to which persons with disabilities are "persons with congenital or acquired physical, sensory, intellectual or emotional disabilities who, due to social or other obstacles, do not have opportunities or have limited opportunities to participate in the activities of society on the same level as others, regardless of whether they can perform the mentioned activities with the use of technical aids or support services. LPDPD, art. 3.

persons with disabilities, were to be treated as persons who do not have such disabilities (or another feature that puts them at a disadvantage compared to the others).[15] Therefore, positive discrimination appears as a legitimate corrective to the principle of non-discrimination, and in this sense it implies making exceptions in certain areas of work, such as employment, in order to achieve full equality of persons who are in a fundamentally unequal position in relation to other persons – when a legitimate interest for that exists.[16]

The presented differences in disability as a basis for exercising a certain right, again, are also the reason why the term "disabled worker" is often used in theory. In that sense, the scope of that term, as such, implies both those persons who, due to certain biological or occupational causes, may be *completely incapable to work (total incapacity),* as well as those persons who are faced with *reduced prospects of finding and keeping a job (partial incapacity)*.[17] Again, depending on the fact whether the disabled worker belongs to the first or the second category, we have seen, it also further depends whether he will rely exclusively on the protection provided by the regulations governing the issue of mandatory social insurance, or on the protection provided within the framework of labour law. Such a sharp division in Serbian legislative is actually a consequence of one of the more radical changes in the field of pension and disability insurance, which consisted in the definitive cancellation of all rights on the basis of the remaining working capacity (partial working capacity). Such a process did not happen "overnight" and it lasted for a relatively long time (around 7-8 years),[18] and it definitively ended in the year of 2003, when the right to requalification or additional qualification and the right to assignment, i.e. to employment at an another appropriate full-time job, as well as to the related fees on that basis, were abolished.[19] After that, the remaining working capacity ceased to be the basis for the eventual exercise of rights from pension and disability insurance and disability, in this sense, began to imply exclusively "complete loss of working capacity due to changes in the state of health caused by a work injury, occupational disease, injury out of work or disease, which cannot be eliminated by treatment or medical rehabilitation."[20] And while such a solution did not affect the already existing

15 Branko Lubarda, *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu* (2013), 139.

16 Predrag Jovanović, 'Aktuelni aspekti principa zaštite zaposlenih', *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 3, 2011, 146.

17 Predrag Jovanović, 'Zaštita invalida u radnoj sredini', *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 3, 2015, 936.

18 More on the process of abolishment of the rights based on the remaining capacity to work within the framework of pension and disability insurance in: Mila Petrović (2020), *op. cit.*, 315–317.

19 Ljiljana Radifković, Dunja Važić and Danijela Rajković, *Komentar Zakona o penzijskom i invalidskom osiguranju* (2003), 22.

20 Law on Pension and Disabillity Insurance (*Official Gazette of RS*, No. 34/2003), art. 21. The presented solution of the Serbian legislator is actually a product of the financial burden that was caused by a large number of disabled pensioners at the beginning of the second millennium (32.2% of the total number of pensioners in Serbia), as a result of attempts to overcome the problem of surplus labor from the 1990s by "sending" employees

users – to whom a certain conversion of the rights based on the previously existing second and third categories of disability into other appropriate rights has been made,[21] it certainly made it impossible to further acquire rights on that basis. Previously said, because the loss of work capacity began to be valued in relation to any job, and not in relation to "one's job" as it was done before, due to what disability began to imply a permanent, total loss of work capacity, which is related to any job whatsoever.[22]

Therefore, today the rights that can be acquired within the framework of pension and disability insurance based on the occurrence of the risk of disability, are guaranteed only in the event of the occurrence of total disability. Such emergence of total incapacity for work is also the cause of the termination of the employment relationship *ex lege* and, from then on, the possibility of further employment does not exist.[23] Thus, in these cases, there is also no more room for further labour law protection. In other words, in the year of 2003, it was definitively defined (except for the already existing beneficiaries – who still enjoy, based on their remaining capacity to work, both the rights provided within the social insurance and the right to appropriate labor law protection)[24] that the rights within the mandatory social insurance system based on disability as such can be realized only on the basis of the onset of total incapacity for work, thus leaving persons partially capable of work exclusively to the protection provided by labor law.[25]

III WHAT ARE WORK INJURIES AND OCCUPATIONAL DISEASES IN ACCORDANCE WITH THE SERBIAN REGULATIONS?

In the Republic of Serbia, a work injury is defined as "an injury of the insured that occurs in spatial, temporal and causal connection with the performance of work on the basis of which he/she is insured, which is caused by immediate and short-term mechanical, physical or chemical effects, sudden

into a disability retirement. More on this subject in: Senad Jašarević, *Social security law – Serbia* (2016), 89.

21 More on this subject in: Ljiljana Radifković, 'Novine u Zakonu o penzijskom i invalidskom osiguranju', *Radno i socijalno pravo*, No. 4-7, 2003, 208-209, 218-219.

22 Radifković, Važić and Rajković, *op. cit.,* 27-28.

23 Namely, in accordance with the LL, an employee's employment relationship is terminated regardless of his/her will and the will of his/her employer if, in the manner prescribed by law, it is established that the employee has lost his/her work capacity (and that on the day of delivery of the legally binding decision on determining the loss of his/her capacity to work). See: LL, art. 176, para. 1.

24 The LOREPD also covers persons who were, in accordance with the legislation on pension and disability insurance, determined with a category of disability, i.e., remaining working capacity. LOREPD, art. 4, para. 2, subpara. 5.

25 LOREPD thus guarantees a number of different rights to persons with disabilities (as they are prescribed by this law), such as the right to employment under general or special conditions, the right to encouragement of the employment of these persons, etc. LOREPD, art. 6.

changes in body position, sudden load on the body or other changes in the physiological state of the organism."[26] In other words, a work injury always has to be a consequence of some external event of limited duration, which is related to the work that the person performs (an accident at work).[27] Such a causality between a sudden external event related to work and the health damage itself is also a *conditio sine qua non* for this qualification, as only an injury, disease or damage that is really the result of an accident at work can be qualified as a consequence of work.[28] In this sense, an injury caused in the manner presented, and which the employee suffers while performing a job to which he/she is not assigned, but which he/she performs in the interest of his/her employer, as well as an injury that the insured person suffers during the regular trip from home to work and vice versa, will also be considered as a work injury.[29] Also, an injury on the trip undertaken for the purpose of carrying out official duties (work-related trip), as well as an injury on the trip undertaken for the purpose of accession to work, will also be considered as a work injury.[30] The same thing goes for the disease of the insured that occurred directly or as an exclusive consequence of an accident or force majeure during the performance of the work on the basis of which he/she was insured, or in connection with it.[31] Additionally, an injury suffered by the insured person in the manner prescribed by the law, and in connection with the exercise of the right to health care on the basis of the occurrence of a work injury or an occupational disease, will also be considered as a work injury.[32] And, finally, the same goes for the injury suffered: during the action of rescue or defense against natural disasters or accidents, during a military exercise or during the performance of other obligations in the field of defense of the country, in a work camp or competition, and in other jobs and tasks of general interest.[33]

Occupational diseases, on the other hand, are the product of long-term exposure to harmful substances and processes at work and not a consequence of an isolated and short-term event of the sudden type. Thus, in accordance with the LPDI, occupational diseases are the diseases that arose during the insurance period and that were caused by long-term direct influence of processes and working conditions at workplaces, i.e., the jobs that the insured

26 LPDI, art. 22, para. 1. Law on Health Insurance (*Official Gazette of RS*, No. 25/2019), art. 51, para. 3.

27 Work injury, as an institute, implies „any personal injury, disease or death resulting from an occupational accident." An occupational accident, on the other hand, is „an unexpected and unplanned occurrence, including acts of violence, arising out of or in connection with work which results in one or more workers incurring a personal injury, disease or death." International Labour Organization, *Sixteenth international conference of labour statisticians – report of the conference* (1998), 75.

28 Konstatinos Kremalis, *Social security law in Greece*, 2nd edition (2015), 112.

29 LPDI, art. 22, para. 2-3. 33O, art. 51, paras. 4-5.

30 LPDI, art. 22, para. 3.

31 LPDI, art. 22, para. 4. 33O, art. 51, para. 6.

32 LPDI, art. 22, para. 5.

33 LPDI, art. 23.

performed.[34] Similarly, occupational disease is defined by the Law on Health Insurance (LHI) as a disease that occurred due to prolonged exposure to harmful effects in the workplace.[35] The requirement of long-term exposure to harmful effects at work is also completely logical, due to the fact that many occupational diseases are completely identical to those diseases that arose as a result of factors that are in no way related to the work that the employee performed.[36] However, on the other hand, given the fact that the damage caused to the employee's health in the case of an occupational disease can manifest itself after a long period of time has passed, and even when the labor law relationship between the employee and the employer has long been terminated (unlike work injuries where damage occurs, as a rule, immediately), determining the causal link between the performance of work and the disease itself can be a challenge. The Serbian legislator therefore found the answer to such difficulties in the creation of a list of diseases in which there is a pronounced and proven occupational causality, which makes them eligible to be qualified as occupational diseases. In author's opinion, however, the essential flaw of this system is the impossibility of qualifying a certain disease as an occupational disease if it has not found its place on this list, even if the disease in question is a disease that actually is a product of work.[37] Admittedly however, this observation may not actually have any significance, since in the Republic of Serbia, occupational diseases are not reported in practice at all.[38] This practice of non-reporting of occupational diseases, again, is a product of the inadequate policy of the Serbian legislator, which not only does not encourage their reporting, but actually prevents their qualification almost entirely.[39] This, therefore, also implies some other consequences, such as *lesser rights that are provided within the framework of social insurance* and the *lack of possibility to form an adequate preventive policy in terms of the protection of health and safety at work*. The same also goes for *the matter of possible demands for an*

34 LPDI, art. 24, para. 1.

35 LHI, art. 51, para. 7.

36 Occupational illness in OECD countries*, https://www.oecd.org/els/emp/4343111.pdf.*

37 More on this subject in: Mila Petrović, 'Pravni režim povrede na radu i profesionalnog oboljenja u domaćem i u uporednom pravu', *Strani pravni život*, Vol. 63, No. 1, 2019, 107-110.

38 Not one case of an occupational disease was reported to the Labor Inspectorate in 2020 and 2019, while only one occupational disease was reported in 2018 (Izveštaji o radu/ Plan inspekcijskog nadzora, *https://www.minrzs.gov.rs/sr/dokumenti/ostalo/izvestaji-o-radu/plan-inspekcijskog-nadzora*). At the same time, in Germany, the status of an occupational disease was confirmed in tens of thousands of reported cases (Occupational diseases (ODs), *https://www.dguv.de/en/facts-figures/ods/index.jsp.)* Again, it is perhaps more expedient to compare the Serbian situation to the one in Croatia, where 137 cases of occupational diseases were registered in 2018, 135 in 2019, and 264 in 2020. See: Registar profesionalnih bolesti – hzzzsr, *http://www.hzzzsr.hr/wp-content/uploads/2021/05/Registar-profesionalnih-bolesti-za-2020.pdf.* Anyhow, what is indisputable, and what can also be seen here, is that the problem certainly exists.

39 More on this problem in: Bojan Urdarević and Mila Petrović (2021)*, Izveštaj o stanju radnih prava u Srbiji za 2021. godinu*, *http://www.centaronline.org/sr/publikacija/1874/izvestaj-o-stanju-radnih-prava-u-srbiji-za-2021-godinu.*

appropriate compensation for the damage caused at the employer for whom the employee works (or for whom he/she used to work) and because of whom he/she was exposed to the harmful effects that caused the disease.

IV WHICH RIGHTS FROM EMPLOYMENT RELATIONSHIP BELONG TO WORKERS WHO HAVE BECOME DISABLED DUE TO A WORK INJURY OR AN OCCUPATIONAL DISEASE IN THE REPUBLIC OF SERBIA?

In the previous part of the text, it was clarified that the term disabled worker, as such, implies both those persons who are *completely incapable to work (total incapacity),* as well as those persons who are faced with *reduced prospects of finding and keeping a job (partial incapacity).* Since, as already explained, the employment of the first group of disabled persons ends *ex lege,* labour law protection can only be provided to the second group, i.e., persons who are faced with reduced prospects of finding and keeping a job. Such protection for these persons is guaranteed above all by the Constitution of the Republic of Serbia (RS Constitution),[40] in the part where it speaks about special protection at work and about special working conditions that, in accordance with the law, are being enabled for the disabled.[41] This linguistic construction, if considered more carefully, includes both disabled employees who have entered an employment relationship as such, as well as disabled employees who became disabled during their employment. Such disability again, according to the logic of things, can be both the product of performing work, as well as the product of a certain disease or an injury that is not related in any way to the occupational activities of the employee. In other words, the shown special protection is guaranteed to all persons who have become disabled workers, regardless of the cause of such health deterioration. In addition, the legislator goes a step further, by providing special protection in the field of labor relations to "employees with health disturbances"[42] as well, in which, unlike persons with disabilities, there is only the possibility of the occurrence of a disability.[43] This policy of the Serbian legislator though, is relatively well-established, since earlier regulations also knew of a somewhat similar institute, then named as "danger from the occurrence of disability".[44] Anyhow, in accordance with the current regulations, an employee with health disturbanc-

40 *Official Gazette of RS*, No. 98/2006.

41 RS Constitution, art. 60, para. 5.

42 LL, art. 81, para. 2 and art. 101.

43 On the difference between persons with health disturbances and persons with disabilities in: Radoje Brković and Bojan Urdarević, *Radno pravo sa elementima socijalnog prava* (2020), 171.

44 Predrag Jovanović, 'Posebna radnopravna zaštita pojedinih kategorija radnika', *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 4/2015b, 1483.

es, which have been determined by the competent health authority, cannot perform tasks that would cause a deterioration of his/her health condition or dangerous consequences to his/her environment.[45] The employer, on the other hand, *is obliged to provide that that same employee, as well as an employee with a disability, may perform his/her work tasks according to his/her work capacity.*[46] After all, such a solution is in accordance with the provision of the same regulation (LL), which decisively prohibits discrimination against persons seeking employment, as well as the employees, for reasons of their health condition, i.e. disability.[47] However, the special protection which is guaranteed in this way completely loses its purpose when it is noted that in the following text of the LL, the legislator prescribes that, if the employer *cannot provide suitable work for such persons in accordance with their working capacity,* such employees shall be considered as redundant.[48] The situation becomes visibly worse upon further reading of the text of the law. This because the legislator guarantees priority for entering into employment contract to other employees whose employment relationship was terminated due to the fact that they have been declared as redundant (this within three months from the date of termination of the employment relationship), without providing the same guarantee to disabled persons and persons with health disturbances whose employment relationship has been terminated for being declared as redundant.[49] At the same time, as Jovanović correctly observes, the provision according to which if the employer *cannot* provide a job for a disabled person, he can declare that disabled person redundant and terminate his/her employment contract, completely nomo-technically deviates from the provision in which it is said that the employer is *obliged* to ensure the performance of work for a disabled person.[50] In this way, not only did the legislator put the disabled workers in the same position as that of the other employees when the employer is unable to provide them with a suitable job, but he essentially put them in a less favorable position than the one that the other employees are in. Such a solution is therefore not only unfair, but it also completely contradicts the principle of positive discrimination of persons with disabilities when it comes to their employment – as it should, in its essence, indirectly imply the stimulation of employers to preserve the employment of such persons.[51] The entire injustice of the presented situation is perhaps the most obvious when we talk about persons whose health impairments or disabilities are actually the product of work, that is, the result of a work injury or an occupational disease. After all, accidents at work are often the product of an inadequate organization of work

45 LL, art. 81, para. 2.

46 LL, art. 101.

47 LL, art. 18.

48 LL, art. 102, para. 2.

49 LL, art. 182, para. 1.

50 Predrag Jovanović, 'Pozitivna diskriminacija (s osvrtom na oblast rada)', *Radno i socijalno pravo*, No. 1, 2018, 15.

51 *Ibid.*, 14-16.

at the employer, as well as unsafe practices.[52] The fact that LOREPD guarantees certain advantages in employment of persons with disabilities (within the meaning of this Law) and that it tries to encourage their employment, does not therefore diminish the tragicomic nature of this entire issue.

V THE POSITION OF VICTIMS OF WORK INJURIES AND OCCUPATIONAL DISEASES IN THE COMPULSORY SOCIAL INSURANCE SYSTEM OF THE REPUBLIC OF SERBIA

Protection against work injuries and occupational diseases (as well as protection against injuries and diseases not related to work), within the framework of mandatory social insurance, is provided both within the framework of health insurance (the right to health care and financial compensation), as well as within the framework of pension and disability insurance (the right to a disability pension, the right to a family pension, the bodily impairment compensation and the right to compensation for assistance and care of another person). Work injuries and occupational diseases, however, traditionally, in the mandatory social insurance system of the Republic of Serbia, do have a certain preferential (privileged) treatment in relation to injuries and diseases that are not caused by work. Generally speaking, such a practice is not uncommon and it is justified by various reasons such as: 1) the high value which society places on work; 2) the fact that employees are obliged to obey their employers and the latter have ultimate control over conditions in the workplace and matters of safety and 3) the need to provide an incentive for people who carry out dangerous but essential work.[53] Again, the fact that such a practice is not uncommon does not simultaneously mean that it is universal, nor that it is not subject to debate. Thus, at one time, its fairness was questioned by Lord Beveridge as well, who considered this kind of preference of the employed over the unemployed as an "anomaly of treating equal needs differently."[54] The position of opponents of preferential treatment of such injuries and diseases, that is, of the employed over the unemployed, is therefore essentially that the financial needs caused by a certain injury or a disease are the same regardless of the fact if they were caused by work or not. For that reason, the benefits within the social insurance system should be made dependent exclusively on the needs of the victims, that is, on the seriousness of the injury or the disease itself.[55] In the end, essentially,

52 Valentina Forastieri, 'Prevention of psychosocial risks and work-related stress', *International Journal of Labour Research*, Vol. 8, No. 1-2, 2016, 18.

53 Chris Parsons, 'Liability rules, compensation systems and safety at work in Europe', *The Geneva Papers on Risk and Insurance*, Vol. 27, No. 3, 2002, 359.

54 William Beveridge, *Social insurance and allied services: report by Sir William Beveridge* (1942), 38.

55 See: Gerhard Wagner, 'Tort, social security, and no-fault schemes: lessons from real-world experiments', *Duke Journal of Comparative & International Law*, Vol. 23, No. 1, 2012, 34-35.

there are certainly plenty of reasons for and against the application of such preferential treatment, and the author will not go into them in this paper.

The mentioned preferential treatment of work injuries and occupational diseases within the social insurance system of the Republic of Serbia is again reflected in the various benefits that their victims can count on. Thus, an employee who has suffered a work injury or who has suffered from an occupational disease does not need any previous mandatory health insurance period (which is a prerequisite for exercising rights from this insurance in other cases)[56] while, when it comes to the compensation due to the temporary incapacity for work, he/she can count on 100% of the basis for wage compensation.[57] Additionally, if the insured person's disability occurred precisely because of a work injury or because of an occupational disease, he/she can exercise the right to a disability pension regardless of the length of insurance period and regardless of his/her age,[58] while the right to the bodily impairment compensation is prescribed exclusively for the case of a work injury and an occupational disease. Namely, bodily impairment, in accordance with the regulations, exists when the insured person, i.e. the person who is provided with rights in the event of bodily injury caused by a work injury or an occupational disease, suffers a loss, significant damage or significant disability of certain organs or parts of the body – which hinders the normal activity of the organism and requires greater efforts in achieving life's needs, regardless of whether it causes disability.[59] In other words, bodily impairment does not constitute incapacity for work and must not be confused with disability. Thus, a person's capacity for work can be fully preserved even if he/she has a bodily impairment due to a work injury or an occupational disease.[60] A similar solution, for example, can be found in Italian law, according to which an em-

56 Such previous insurance period, in other cases, amounts to three months continuously or six months with interruptions in the last 18 months before the beginning of exercising the rights from the mandatory health insurance, starting with the day when the status of an insured person was acquired in accordance with the law, and for which contribution was paid. LHI, art. 50, paras. 1-3.

57 In other cases (injury or disease outside of work), this type of compensation is significantly lower (65% of the wage compensation basis). LHI, art 95, para 1-2. Additionally, while in the case of a work injury or an occupational disease, the insured person can count on such compensation for the entire duration of the temporary incapacity for work (even after the termination of the employment relationship), in other cases (injury or disease outside of work) such period will be shorter and will last only for the duration of the employment relationship, that is, for the period in which the insured would actually receive wage in accordance with labor regulations. LHI, art. 77, paras. 3, 5.

58 When it comes to a disability caused by an injury or disease outside of work, on the other hand, the insured person acquires the right to a disability pension upon fulfillment of other, additional conditions: 1) if he/she has not reached the age prescribed as a condition for exercising the right to an old-age pension in accordance with the appropriate provision of LPDI, with the additional requirement of having completed five years of insurance period; 2) if the disability occurred before the insured person reached the age of 30, if he/she fulfills the corresponding cumulative requirements regarding age at the time of disability, as well as the length of the insurance period. See. LPDI, art. 25-26.

59 LPDI, art. 37.

60 More on the nature of this compensation in: Mila Petrović (2020), *op. cit.,* 303-305.

ployee can exercise the right to certain social security benefits in the event of a biological injury which, as such, entails the loss of physical or mental faculties of the person which can be legally assessed, and which are, by their nature, independent of the victim's capacity to earn money (e.g. disfigurement).[61] All in all, the benefits that are provided within the framework of mandatory social insurance to insured persons who have suffered a work injury or an occupational disease are not negligible. However, the path to exercising these rights is not always easy. It is, namely, full of thorns, challenges, and sometimes (unfortunately) looks more like a "dead end" than a path.

This claim is especially true when it comes to occupational diseases which, if the above statistics are to be believed in, do not exist in the Republic of Serbia. The practice of non-reporting of occupational diseases in the Republic of Serbia as such, is the product of various factors. First, employers are in no way encouraged to report occupational diseases. A determined occupational disease for the employer is, first of all, a source of various expenses. This starting with the right to the compensation of wages in cases of temporary incapacity for work (which, in accordance with the regulations, is provided at the employer's expense for the entire duration of the temporary incapacity for work, for as long as the employment relationship of the insured lasts),[62] up to the compensation for damages suffered by the employee due to a work injury or an occupational disease.[63] The preposterousness of the entire situation is particularly obvious when it is taken into account that the legal basis for overcoming such a problem already exists, and for a long time at that,[64] since the formation of a special insurance scheme against these two social risks could imply certain privileges both for employers as well as for employees.[65] An additional obstacle is the procedure of determining the occupational disease itself as well. The legislator can thus be held responsible for an unallowable legal gap that actually prevents occupational medicine doctors from determining the existence of an occupational disease, since no relevant regulation regulates the question of who can make a diagnosis of an occupational disease, nor the question of who bears the costs of such diagnostics,[66] while the costs of occupational medicine are not covered by

61 Simonetta Renga, *Social security law in Italy* (2010), 93.

62 LHI, art. 101, para. 3. In the opinion of the author, this solution calls into question the very nature of this benefit – since, even though it is a right guaranteed by the legislation on health insurance, it is, on the other hand, usually a right that is provided out of the pocket of the employer.

63 Law on Obligations (*Official Gazette of SFRY,* Nos. 29/78, 39/85, 45/89 – decision CCY, 57/89, *Official Gazette of FRY*, n. 31/93 and *Official Gazette of RS*, No. 18/2020), art 189, para. 1, art. 190. LL, art. 164.

64 Law on Safety and Health at Work (*Official Gazette of RS*, Nos. 101/2005, 91/2015 and 113/2017 – other law), art. 53.

65 More on this subject in: Mila Petrović, 'Compensation of work injuries and occupational diseases – a comparative approach', *Strani pravni život*, Vol. 63, n. 4/2019, 105-107; Petrović (2020), *op. cit.,* 278-279.

66 Petar Bulat and Milan Petkovski, *Bezbednost i zdravlje na radu: projekat Povećanje kapaciteta i jačanje uloge regionalnih organizacija civilnog društva za poboljšanje uslova rada i socijalnog dijaloga sa javnim institucijama – Studija Srbija* (2018), 64.

health insurance.[67] In this way, occupational medicine doctors can start the process of determination of an occupational disease only on the basis of the regulations that regulate the matter of pension and disability insurance, that is, more precisely, on the basis of the request of the Fund for Pension and Disability Insurance, and this for the purpose of exercising rights within the framework of pension and disability insurance. Certainly, both the employer, as well as the employee, can embark on the "adventure" of determining the occupational disease at their own expense, by contacting the Institute of Occupational Medicine of Serbia on their own initiative[68] which, according to the logic of things, is not a realistic solution. Namely, bearing in mind the high costs of such diagnostics as well as all other costs that a determined occupational disease implies for the employer, it is difficult to even consider the possibility of the employer deciding on this move. On the other hand, the employee will not be able to use this option precisely because of the diagnostics costs – regardless of whether he/she can justifiably believe that his/her disease is a consequence of performing work for his/her employer. This whole situation, moreover, is the cause of additional problems that, in a way, draw attention to a sort of "vicious circle" caused by this kind of oversight of the legislator.

First of all, the key assumption of an adequate preventive occupational safety and health strategy is having clear knowledge regarding the number of accidents and diseases, their severity and causes, as well as the workplaces and industries where they occurred.[69] Therefore, since such data, certainly at least in terms of occupational diseases,[70] are not available in the Republic of Serbia, it is unrealistic to expect that a possibility to determine adequate incentives for employers' economic investments in the prevention of occupational diseases exists.[71] This situation, on the other hand, creates a suitable ground for the "growth and development" of various occupational diseases which, again, as a rule, will not be determined. Furthermore, the impossibility of qualifying a certain disease as an occupational one, will deprive these persons of both the preferential treatment they would be entitled to within the framework of mandatory social insurance, as well as the right to sue employers for compensation of the damage caused to them by such a disease. Thus, the "short end of the stick" in this whole story, as expected, will almost always go to the employees. This entire situation, again, as it was shown by

67 LHI, art. 110, 131.

68 More on the Institute of Occupational Medicine of Serbia at *http://www.imrs.rs/*.

69 International Labour Organisation, *Improvement of national reporting, data collection and analysis of occupational accidents and diseases* (2012), 3.

70 It should be borne in mind that work injuries, that is, serious work injuries, as well as work injuries with a fatal outcome, are much more difficult to conceal (which certainly cannot be said for minor injuries).

71 More on the matter of economic incentives for investments in prevention of work injuries and occupational diseases in: Mila Petrović, 'Prevencija povreda na radu i profesionalnih oboljenja – pojam, troškovi i ekonomski podsticaji za ulaganje u prevenciju', *Pravo i privreda*, No. 7-9, 2019, 679-690.

the COVID-19 pandemic, could possibly also be the cause of gender unequal practices in exceptional cases – which will be discussed in more detail below.

VI PERSONS WITH DISABILITY CAUSED BY THE COVID-19 DISEASE, AS A CONSEQUENCE OF INFECTION WITH THE SARS-COV-2 VIRUS AT WORK

The COVID-19 pandemic has opened a number of questions for jurists. Specifically in the field of labor and social law, these issues were particularly tricky and started with the question of how to organize work so that the standards of safety and health at work are respected in the best possible way,[72] and ended with the question of whether it is possible to qualify the consequences of getting sick with COVID-19, as a consequence of work (where the virus infection originated from work). The last question, at the same time, turned out to be a particularly delicate one in the practice of the Republic of Serbia and, at least to the knowledge of the author, it has not been given a concrete answer to to this day.

Namely, the qualification of the COVID-19 disease as a work injury or as an occupational disease carries a lot of questions with it. On one hand, for a person to become infected, a short period of exposure to the SARS-CoV-2 virus is sufficient – which supports the characterization of the infection as a form of occupational accident that resulted in COVID-19 as a work injury.[73] On the other hand, in support of the qualification of COVID-19 as a type of occupational disease, speaks the practice of recognizing certain infectious diseases as occupational, regardless of the fact that they are not the result of long-term exposure to harmful effects at work.[74] After all, even in comparative law, such problematics has led to a very varied practice – from the quali-

72 That led to the expansion of the practice of working at home and, consequently, to some new open questions for the jurists in the Republic of Serbia. See: Bojan Urdarević and Aleksandar Antić, 'Neka otvorena pitanja u pogledu rada kod kuće za vreme pandemije virusa *Covid-19* u Republici Srbiji', *Radno i socijalno pravo*, No. 2/2020, 32-38. Later, after the discovery of the vaccine, the question of the possibility of establishing mandatory vaccination (especially in activities that were at increased risk of infection) was raised, which again led to, from a legal point of view, extremely questionable pressures on employees and to a very controversial practice. More on this subject in: Mila Petrović, 'Obavezna vakcinacija protiv kovida-19 u radnoj sredini – ključni radnopravni aspekti', *Radno i socijalno pravo*, No. 2, 2021, 19-52.

73 We have already seen that the cause of a work injury has to be an external event, of limited (short) duration, which is related to the work performed by the employee. We have also seen that the disease of the insured, which occurred directly or as an exclusive consequence of an accident or force majeure during the performance of work on the basis of which the insured person is insured or in connection with it, can also be qualified as a work injury.

74 This, for example, is the case with Hepatitis B and AIDS which, as diseases caused by blood-borne viruses, make healthcare workers particularly vulnerable. See. Mirjana Aranđelović and Jovica Jovanović, *Medicina rada* (2009), 205-207, 209.

fication of this disease as a work injury, through its qualification as an occupational disease, up to the possibility for it to be qualified as both, depending on the period of exposure to the virus, as well as the activities in which the employee works.[75]

The lack of practice in this regard in the Republic of Serbia has also led to the dissatisfaction of employees in those activities that were particularly affected by the epidemiological situation. For that reason, some of the trade unions have repeatedly appealed for the amendment of the Rulebook on the Determination of Occupational Diseases (Rulebook),[76] by adding COVID-19 to the list determined by it.[77] Such a, from a formal legal point of view, essentially unnecessary amendment however,[78] one has to admit, would perhaps represent a step that would definitively determine the direction of practice regarding the qualification of this disease as a consequence of infection with the SARS-CoV-2 virus in the working environment. However, this can only be a matter of debate, since such an amendment was not made. The lack of practice in this regard, again, potentially led to discrimination of employees who fell ill with COVID-19 precisely due to performance of their work and who, in connection to that, had suffered some serious health deteriorations (e.g., if they became incapable to work any further).[79] Additionally, it possibly even led to further deepening of the differences within that group.

In the Republic of Serbia, after the outbreak of the COVID-19 disease, and during the state of emergency, which was declared for the purpose of being able to fight against the epidemic more efficiently, civil requisition (an obligation of work) was introduced in the healthcare.[80] This measure, although necessary at the given moment, was, at the same time, carried out in a completely contro-

75 More on this subject in: Mila Petrović, 'Oboljenje kovid 19 – povreda na radu ili profesionalna bolest?', *Strani pravni život*, Vol. 66, No. 1, 2022, 43-58.

76 *Official Gazette of RS*, No. 14/2019.

77 Inicijativa za hitnu dopunu propisa i klasifikovanje *COVID–19* virusa profesionalnom bolešću, *http://www.sindikatlfs.rs/inicijativa-za-hitnu-dopunu-propisa-i-klasifikovanje-covid-19-virusa-profesionalnom-bolescu/.;* Zahtev za izmenu i dopunu Pravilnika o utvrđivanju profesionalnih bolesti kako bi se bolest Kovid-19 proglasila kao profesionalno oboljenje zaposlenih u zdravstvu, *https://www.smsts.org.rs/2021/10/07/zahtev-za-izmenu-i-dopunu-pravilnika-o-utvrdjivanju-profesionalnih-bolesti-kako-bi-se-bolest-kovid-19-proglasila-kao-profesionalno-oboljenje-zaposlenih-u-zdravstvu/*. This due to the fact that only the diseases found on the list contained within the Rulebook have the possibility of being qualified as occupational.

78 Since paragraph 50 of the Rulebook (in the section of the Rulebook which deals with diseases caused by biological agents) provides the possibility of such a qualification, even though COVID-19 per se is not on the list. This due to the fact that it mentions "diseases caused by direct contact with other biological agents at work which are not previously listed and for which there is scientific/literal evidence or for which there is evidence from practical experiences."

79 Bearing in mind the fact that, as already mentioned, in the case of a disability caused by a work injury or an occupational disease, social insurance rights are to be exercised on more favorable terms.

80 Decree on Measures during the State of Emergency (*Official Gazette of RS*, No. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020, 60/2020, 126/2020 – decision CCRS), art. 3a.

versial manner, i.e., with potential violations of the labor rights of healthcare employees.[81] In this way, women found themselves in a particularly vulnerable position, since they make up the majority of the frontline workforce within the healthcare,[82] while it can be justifiably suspected that a large part of them, in fear of losing their jobs, worked even in cases when adequate safety and health protection measures at work were not applied.[83] Therefore, it is legitimate to expect that they were also more susceptible to infection – although such statistical data are not available for the territory of the Republic of Serbia. However, this conclusion can be supported, in a way, by the statistics that are available in this regard for some other countries. In that sense, greater representation of women in the healthcare has reflected on the number of requests for recognition of COVID-19 as a consequence of work for the purpose of obtaining the right to social insurance benefits in Italy,[84] Germany[85] and Croatia.[86] Moreover, the whole situation is not helped by the fact that women in the Republic of Serbia also make up the majority of the workforce in other activities that have also proven to be high risk activities for contracting COVID-19.[87] Therefore, bearing in mind that the practice in the Republic of Serbia has not yet taken a stand regarding the eventual qualification of the COVID-19 disease as a work injury, that is, as an occupational disease, it can be reasonably expected that

81 Again, this is not surprising, bearing in mind the fact that civil requisition as such, is an institute primarily governed by military regulations and not by labor regulations, as well as that it has a peculiar nature, i.e., that it cannot be considered to be an employment relationship. More on this subject in: Sarita Bradaš, Mario Reljanović and Ivan Sekulović, *The impact of the COVID-19 epidemic on the position and rights of workers in Serbia with particular reference to frontline and informal economy workers and multiply affected worker categories* (2020), 21-23.

82 Women make up as much as 76.75% of employees in the healthcare. Marijana Pajvančić, Nevena Petrušić, Sanja Nikolin, Aleksandra Vladisavljević and Višnja Baćanović, *Rodna analiza odgovora na Kovid-19 u Republici Srbiji* (2020), 115.

83 After all, the pandemic has produced a lack of personal protective equipment at work on a global level. Talha Burki, 'Global shortage of personal protective equipment', *The Lancet/Infectious diseases*, Vol. 20, No. 7, 2020, 785–786. *https://doi.org/10.1016/S1473-3099(20)30501-6*.

84 In the period between the first of March and the 31 of October of the year of 2020, the ratio between requests submitted by women and the number of requests submitted by men, was 45.914: 19.890. Alessandro Marinaccio, Adelina Brusco, Andrea Bucciarelli, Silvia D'Amario and Sergio Iavicoli, 'Temporal trend in the compensation claim applications for work-related COVID-19 in Italy', *La Medicina del Lavoro*, Vol. 112, No. 3, 2021, 224.

85 Among the reported cases of people suffering from COVID-19 in the healthcare, in the period up to May 25, 2020, a significant majority of those affected were women (73%). Albert Nienhaus and Rozita Hod, 'COVID-19 among healthworkers in Germany and Malaysia', *International Journal of Environmental Research and Public Health*, Vol. 17, No. 13, 2020, *https://doi.org/10.3390/ijerph17134881*.

86 Hrvoje Lalić, 'COVID-19 as occupational disease in healthcare workers: a brief review of cases in the Clinical Hospital Centre Rijeka, Croatia', *Archives of Industrial Hygiene and Toxicology*, Vol. 72, No. 3, 2021, 241.

87 They make up as much as 76.75% of employees in the social protection activities, while in the trade activities the share of women in the number of employees is 55.23%. Pajvančić, Petrušić, Nikolin, Vladisavljević and Baćanović, *op. cit.*, 115.

women employed in certain activities (such as the healthcare) have been placed in a particularly disadvantageous position. This in light of the fact that they will not be entitled to the mentioned preferential treatment within the social insurance, which they would have the right to if such a disease was to be qualified as a work injury or an occupational disease. The unfairness of this position is probably visible the most in those cases where the disease itself produced serious consequences to the health of the employees (disability followed by total incapacity for work). In this way therefore, within an already particularly vulnerable category (the disabled), in the conditions inherent to the COVID-19 disease epidemic an additional vulnerable subgroup (diseased women) was potentially created.

Admittedly though, for some employees (including the ones who work in activities which proved to be the most vulnerable ones, and which mostly employ women) some benefits have been granted. This, however, primarily in the public sector and regarding the right to a wage compensation on the basis of temporary incapacity for work. Namely, some of the special collective agreements in certain activities within the public sector (such as healthcare and social protection), have established the entitlement of the employees (the ones with disabilities included) to an increased compensation on the basis of temporary incapacity for work.[88] However, the reason which makes this practice particularly important for this part of the research is the fact that, according to the LHI, in the event of prolonged incapacity for work caused by an illness or an injury, and at the latest after the expiration of every six months of continuous incapacity for work, i.e. if the insured has been incapacitated for 12 months with interruptions in the last 18 months, the obligation exists for that person to be referred to the disability commission which will determine if that persons has suffered the loss of working capacity or not.[89] Because of that, therefore, if the incapacity which resulted from the COVID-19 disease has not yet been determined in an employee that works within those particular activities within the public sector (in some of which women employees make up the majority) which are covered by such collective agreements, he/she will at least have the right to a compensation of wages he/she would practically be entitled to if he/she suffered a work injury or an occupational disease. However, this practice proved to be a controversial one. This, due to the fact that the introduction of the Conclusion of the government,[90] which essentially represents the legal basis for this practice, raised the question of the potential discrimination of the employees who work in the private sector, as well as the discrimination of the employees who were not vaccinated against COVID-19.[91]

88 Special collective agreement for health institutions whose founder is the Republic of Serbia, an autonomous province and a local government unit, (*Official Gazette of RS*, Nos. 96/2019 and 58/2020 – Annex I), art. 101a; Special collective agreement for social protection in the Republic Serbia (*Official Gazette of RS*, Nos. 29/2019 and 60/2020), art. 64a.

89 LHI, art. 80, para. 2.

90 Conclusion of the Government of the Republic of Serbia, 05 No. 53-3008/2020-2, (*Official Gazette of RS*, Nos. 50/2020 and 46/2021).

91 More on this subject in: Urdarević and Petrović (2021).

VII CONCLUSION

The position of disabled workers, that is, of those persons who are *completely incapable of working*, as well as of those persons who are *faced with reduced prospects of finding and keeping a job*, in the Republic of Serbia is, at first glance, regulated in detail. However, there are many omissions when it comes to legislative, due to which, a seemingly adequate formal legal protection of these persons, in practice can prove to be discriminatory and unfair. Not only that are disabled people who are not completely incapable of working deprived of social security benefits, but they are, at the same time, also placed in a fundamentally unequal position in their working environment (which goes against the principle of positive discrimination, which should also include stimulation of employers to preserve the employment of these persons). On the other hand, due to omissions, that is, due to legal gaps in the legislations concerning social insurance, the preferential treatment that that same system is supposed to provide to persons who have become completely incapable to work precisely due to performance of their work tasks, is also seriously questioned. This, in turn, further leads to other consequences, such as the impossibility of establishing an adequate preventive safety and health policy at work, as well as the impossibility of employees demanding compensation for damages caused in this way from their employers. In this sense, employees, as usual, in the end in practice become a "collateral damage" of exactly those regulations that should, in principle, provide them with protection. The epidemic of the COVID-19 disease only thus placed an additional burden on the already insufficiently functional system, potentially creating an additional vulnerable subgroup (disabled women) within an already particularly vulnerable category (the disabled). This, considering the fact that the most worrisome subject of the research, where the probable consequences for the disabled women may be felt, is definitely the pension and disability insurance in which, due to the COVID-19, a danger of particular discrimination in relation to this group lies.

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Doc. dr Mila Petrović,
Docentkinja,
Pravni fakultet Univerziteta Union u Beogradu (Srbija)

PRAVNI POLOŽAJ ZAPOSLENIH SA INVALIDITETOM PROUZROKOVANIM POVREDAMA NA RADU ILI PROFESIONALNIM BOLESTIMA U REPUBLICI SRBIJI – POSLEDNJI MEĐU JEDNAKIMA?

Apstrakt

Predmet ovog rada jeste položaj zaposlenih sa trajnim zdravstvenim posledicama prouzrokovanim povredom na radu ili profesionalnom bolešću. Naime, notorna je činjenica da se lica čije je zdravlje pogoršano i koja zbog toga u određenoj meri nisu radno sposobna (u potpunosti ili delimično) svakodnevno suočavaju sa određenim poteškoćama manjeg ili većeg obima. U Republici Srbiji, tako, lica koja su potpuno nesposobna za rad zavise od funkcionalnosti sistema socijalnog osiguranja, a što nameće zahtev za odgovarajućom politikom socijalnog osiguranja. S druge strane, lica čija je nesposobnost za rad delimična (preostala radna sposobnost), suočavaju se sa različitim preprekama na tržištu rada – od borbe za zaposlenje do borbe da se status zaposlenog lica održi bez daljih posledica po njihovo zdravlje ili radnu sposobnost. Ovakva borba opet ne može i ne treba u potpunosti biti prevaljena na pleća takvih lica, zbog čega je zadatak države da ih stavi u poziciju koja je relativno slična onoj u kojoj se nalaze ostala lica.

Normativni okvir u Republici Srbiji, s druge strane, u tom smislu ima mnogo propusta, zbog čega se naizgled adekvatna formalnopravna zašti-

ta ovih lica u praksi može pokazati kao diskriminatorna i nepravedna. Ne samo da su lica sa preostalom radnom sposobnošću lišena prava na davanja u okviru penzijskog i invalidskog osiguranja po tom osnovu, već se ona istovremeno u radnoj sredini nalaze u suštinski nepovoljnijem položaju u odnosu na ostale zaposlene. S druge strane, zbog pravnih praznina koje postoje u propisima kojima se uređuje socijalno osiguranje, ozbiljno se dovodi u pitanje i preferencijalni tretman koji bi taj sistem trebalo da pruži licima koja su postala potpuno nesposobna da rade, upravo, zbog izvršavanja svojih radnih zadataka. Epidemija bolesti *COVID-19* samo je stoga dodatno opteretila već ionako nedovoljno funkcionalan sistem, potencijalno stvarajući dodatnu ranjivu podgrupu (žene sa invaliditetom) u okviru već posebno ranjive grupe (osobe sa invaliditetom).

Ključne reči: *Republika Srbija; Povreda na radu; Profesionalna bolest; Invalidnost; Diskriminacija.*

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