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Research of the Public Defender of Rights – manifestations of discrimination in job offers

Introduction

Discrimination related to employment can have many forms: unequal remuneration, limited possibilities of career advancement, abuse of superior power etc. An act of discrimination in this area may first occur during the process of employee selection, which starts by publishing a job offer. Discrimination occurs if applicants are assigned unlawful and stereotypical characteristics that preclude them from applying for a job beforehand, already in offers. For individuals this means that they will not find a job for which they are qualified, which has serious negative consequences with respect to the importance of work in modern society.

The presented report with a legal analysis and the results of an empirical research of discrimination in job offers aims to map the situation in the area of job offered in the Czech Republic with respect to the right to equal treatment. It answers questions about the frequency of unjustified requirements of employers in offers, the most frequent causes of discrimination or the most frequent defective formulations. Since one of the tasks of the Public Defender of Rights is to act so that the actions of authorities are in compliance with legislation and the principles of good administration, particularly the legal analysis, which is a part of the research, should assist labour offices as well as the public in clearly identifying a discriminatory job offer.

The report is divided in two sections. The first section deals with the legal nature of discriminatory job offers, prohibited discriminatory reasons that appeared in offers and with specific cases that emerged from the research. The second section is devoted to summarizing the results of the empiric research of discrimination in job offers.

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Summary

1. The research showed that the occurrence of discrimination in job offers is not an isolated phenomenon in the Czech Republic: 16.9% of analyzed offers contained one or more discriminatory requirements placed on applicants.
2. Offers were discriminatory most frequently due to age (this unjustified requirement appeared in 11% of examined offers) and gender (this cause appeared in 7% of offers).
3. In the Czech language the so-called generic masculine, i.e. the masculine gender, is generally used to refer to both males and females. Thus offers are not discriminatory only on the grounds that the name of the position is in the masculine form.
4. A job offer which clearly shows that an employer is seeking only men or only women is discriminatory due to gender, provided the requirement of a specific gender is not necessarily related to the position to be filled.
5. A job offer intended only for younger persons or only for older persons as well as the establishment of minimum or maximum age limits as a job requirement is discriminatory, except for strictly defined exceptions.
6. Among others, requiring inadequately long work experience of an applicant may constitute indirect discrimination in job offers on the basis of age.
7. If an employer offers working in a young team as a benefit in an offer, it may discourage some older age applicants from taking part in the selection procedure. This is a case of indirect discrimination due to age.
8. Requiring excellent health condition or physical condition for the performance of work that does not necessitate such a requirement constitutes a breach to the prohibition of discrimination according to the Employment Act. At the same time, it might constitute discrimination of disabled persons according to the Anti-discrimination Act.
9. The requirement of Czech nationality of an applicant for job is discriminatory on the grounds of state citizenship and nationality.
10. An employer can require the knowledge of a language, including the Czech language. Nevertheless, the required level of the language has to correspond to the character of the position to be filled.

I) Legal section

1) Legal nature of an job offer

The publishing of an offer is in essence the first phase of establishing an employment relationship. By publishing a job offer by means of an offer, an employer declares that it intends to fill a job vacancy, simultaneously setting requirements placed on persons wishing to apply for the job position. However, a published offer is not an offer to conclude an agreement within the provision of Sec. 43a of Act No. 40/1964 Coll., the Civil Code, as amended, nor a public promise.[1] A published job offer of course does not constitute a legal right of anyone to the conclusion of an employment contract. In addition, nothing prevents an employer from not accepting anyone for the job position offered. The fact that job offer is not stipulated by law does not mean, however, that when offering a vacant position by means of public offer an employer does not have to observe any rules. A potential employer has to respect, among others, the principle of equal treatment and prohibition of discrimination, which is one of the main principles of labour law.

The provision of Sec. 12 (1) of Act No. 435/2004 Coll., on Employment, as amended, (hereinafter only "the Employment Act") prohibits parties to legal relationships from making job offers of discriminatory character. Breaching the prohibition and making a discriminatory job offer by an employer constitutes an administrative delict with the Employment Act. A labour office may impose on a person that is making a discriminatory offer a sanction in the form of a fine for the mentioned action.[2] Liability for an administrative wrong expires within a year of the day an authority learns of it, or within three years of the day it was committed.

The general concept of the prohibition of discrimination on the legislative level is defined in particular in Act No. 198/2009 Coll., on Equal Treatment and on Legal Means of Protection against Discrimination and on Amendments of some Laws (hereinafter only "the Anti-discrimination Act"). This law prohibits direct as well as indirect discrimination.[3]

The prohibition of discrimination according to the Anti-discrimination Act stems from an assumption that people may be treated in different ways on the basis of their individual characteristics and qualities and not on the basis of general characteristics, which are often connected with stereotypes and prejudices.[4]

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[1] C.f. Švestka, J., Spáčil, J., Škárová, M., Hulmák, M. a kolektiv Občanský zákoník I, II, 2nd edition, Prague: C. H. Beck, 2009, p. 133.

[2] Pursuant to Sec. 139 (1) (a) and Sec. 140 (1) (a), respectively, of the Employment Act, both a legal entity and an individual can commit this administrative delict. A sanction of up to CZK 1,000,000 may be imposed for this wrong (Sec. 139 (3) (a) and Sec. 140 (4) (a), respectively). This purpose is also confirmed by Sec. 7 (2) of the Anti-discrimination Act.

[3] Direct discrimination means an action when one person is treated in a less favourable way than another person is, has or would be treated in a comparable situation, due to a discriminatory reason. Indirect discrimination includes an action or an omission to act whereby a person is put at disadvantage compared to others on the basis of a seemingly neutral provision, criterion or practice on the grounds of some of the discriminatory reasons stated in Sec. 2 (3) of the Anti-discrimination Act.

[4] The EU law also honours the human right character of prohibition of discrimination conceived in this way – compare e.g. the statement of advocate general Maduro (opinion in case C-303/06) that the

One of the areas of relationships within the applicability of the Anti-discrimination Act is the area of the right to work and access to work pursuant to Sec. 1 (1) (a). The provision of Sec. 2 (3) of the Anti-discrimination Act contains a list of prohibited causes of discrimination; in the areas defined in the provision of Sec. 1 (1) of the Anti-discrimination Ac, discrimination means unequal treatment due to race, ethnic origin, nationality, gender, sexual orientation, age, disability, religion or belief or opinions.[5]

In the area of access to employment, discrimination is also prohibited by the Employment Act (Sec. 4). The prohibition of discrimination is historically of an earlier date that the Anti-discrimination Act; therefore it contains its own definition of direct and indirect discrimination as well as its own list of discriminatory reasons. It also recognizes claims of victims of discrimination that may be sought in a judicial proceeding. After the Anti-discrimination Act became effective, duplicities emerged, which significantly complicates the interpretation of discrimination in access to employment. The Anti-discrimination Act was designed as a general legal regulation but with respect to the fact that some institutes characterized in the Employment Act only in a general way are specified in the Anti-discrimination Act, it is complicated to determine which law represents *lex specialis*.

Further, job offers contain another problematic requirement – evidence of no criminal record of an applicant. According to legal regulations relating to employment, an employer may require evidence of no criminal record in case of some professions; however, this does not apply universally. In the section relating to the legal consideration of individual requirements in offer, the requirement of no criminal record, or more precisely the submission of a "clean" statement of criminal records, is not given a closer attention since the Defender's recommendation regarding this issue has been already issued.[6]

An order to for equal treatment in selecting employees is not absolute. According to Sec. 4 (3) of the Employment Act, a difference of treatment on the grounds of some of the generally prohibited reasons is not regarded as discrimination if it follows from the nature of the employment that this reason is a material and determining requirement for the performance of the employment. According to Sec. 6 (3) of the Anti-discrimination Act, a difference of treatment is permitted in selecting employees provided there is a material reason for it consisting in the character of employment that is performed and provided the applied requirements are proportionate.[7]

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values underlying the principle of equality stipulated in Article 19 of the Convention include human dignity and personal autonomy.

[5] In comparison to the discriminatory reasons in the Charter, this list is enumerative and therefore it cannot be potentially extended.

[6] See "Recommendation of the Defender regarding the requirement of a statement of criminal records as the determining criterion for employment", available at http://www.ochrance.cz/diskriminace/doporuceni-ochrance/.

[7] Fully comparable wording is contained further in Article 4 of Directive 2000/78/EC and Article 4 of Directive 2000/43/EC.

When is there a substantial reason entitling an employer to give different treatment?[8] The below-given situations include such exceptions:

- Gender is a prohibited reason for differentiation, i.e. preference of applicants of a given gender is discriminatory in case of most professions. However, there are certain professions for the performance of which it will be logical to reject a member of one gender, in particular in the area of sports or art. Logically, a woman will be rejected to join a professional male choir. In the given case, the male gender, or more precisely the character of male singing, is a decisive factor for the performance of work.

- With respect to the ethical code of a certain community, the church membership or religion of an applicant may constitute a substantial reason if the offered job consists in service to the given church or community.[9] With respect to the consideration of a substantial reason related to the ethical code of a religious community, it needs to be concluded that not all jobs for a given community or church (e.g. cleaning) need to be a priory connected with its ethical code.

- The Anti-discrimination Act further defines some situations where a difference of treatment due to age is justified. Pursuant to Sec. 6 (1) (a) of the Act, an employer may require, when necessary, a certain minimum age, professional experience or length of employment.[10] Logically, a certain age may be required for example for the performance of some constitutional or other public office positions.

- The law further provides that the aim pursued by a difference of treatment has to be justified and the requirement proportionate. Very good knowledge of a certain language is a typical problematic requirement. In general, it will be justified in a number of cases, in particular if the performance of work consists in contact with foreign customers, business partners etc. However, the Court of Justice of the European Union stated that the requirement of proportionality is not met by an employer that requires knowledge of a certain language to be proved by a diploma issued by a certain entity in some Member State.[11] Knowledge of a specific language at a certain level was also required in the examined offers. The evaluation of this requirement is therefore given further attention.

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[8] In German judicature, the concept of substantiality is perceived more as necessity. This is in accord with a postulate that a decision about a job applicant should be made on the grounds of discriminatory reasons only in the most necessary cases. C.f. Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. Antidiskriminační zákon. Komentář. 1st edition. Prague: C. H. Beck, 2010, p. 225.

[9] Similarly Sec. 6 (4) of the Anti-discrimination Act. For example, German courts issued judgments saying that if a position of a butcher in a kosher butchery needs to be filled, a Jewish origin or religion will be a legitimate requirement for the job.

[10] According to Sec. 6 (1) (b) of the Act, a rejection of an applicant whose age no longer allows him or her to complete education necessary for the performance of work is not discriminatory due to age. By the given provision, the wording of Article 6 of Directive 2000/78/EC was adopted.

[11] Such action is in violation of Article 45 (2) of the Treaty on the Functioning of the European Union, which ensures free movement for workers without any discrimination. A decision of the Court of Justice of EU C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA.*

- In accordance with Sec. 4 (4) of the Employment Act, discrimination does not occur in case of measures stipulated by law, which are supposed to prevent or counterbalance disadvantages resulting from affiliation of a person with a group defined by some discriminatory reason, or measures that are performed by labour offices to support and achieve equal treatment of men and women, of persons with disabilities and other disadvantaged groups.[12] However, the stated exception does not entitle an employer to favour an applicant who is for example disabled but his or her qualities (professional etc.) are not as high as the qualities of other considered applicants (c.f. Sec. 7 (3) of the Anti-discrimination Act).

[12] Sec. 8 (a) and Sec. 8a (d) of the Employment Act.

2) Legal assessment of the most frequent discriminatory offers

The following chapter contains description and analyses of offers that were labelled as discriminatory within the research.

a) *Offers containing discrimination on the grounds of gender of an applicant*

Gender is one of discriminatory reasons prohibited by both the Employment Act and the Anti-discrimination Act. Generally, therefore, a job offer may be labelled as discriminatory if it follows from an offer that it is intended only for men or only for women. This fact could follow directly from the job offer (*„I am looking for a man for the position of a technician"*), or it could be apparent in another way (*e.g. using only the feminine form in the job title*).

- **Gender in the title (text) of an offer**

In the vast majority of examined offers, the job title was given only in the masculine form. Therefore it was necessary to look into whether this fact alone is discriminatory. The conclusion is that it is not since *the so-called generic masculine* was mostly used, i.e. the use of the masculine form to refer both to men and women.[13] However, the use of both masculine and feminine names of a profession would be the most appropriate (e.g. *"I am looking for a [male] lawyer/[female] lawyer"*), or other indication that a profession is offered to anyone regardless of gender (e.g. *"I am looking for a man or a woman for the position of a technician"*). Since the generic masculine form is generally used in the Czech language (commonly also in legal regulations), it cannot be concluded without anything further that the use of only the masculine form in job offer would constitute discrimination.

However, if only the feminine form is used in a job title or in the text of an offer, the situation is different. This is because *the so-called generic feminine form*, i.e. a feminine gender to refer both to men and women, is not generally used. Therefore it is *a priori* apparent from such offer that the job offer is intended only for women. As a result, an offer in which an employer is obviously looking for *a [female] cleaner, a [female] shop assistant, a [female] assistant to a manager etc.* generally constitutes direct discrimination due to gender.[14]

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[13] An example of the use of a generic masculine form to refer to both genders can be found in Article 54 (1) of the Constitution of the CR, according to which "[male] President of the Republic is the Head of State". A masculine form is used to mark a constitutional office, which of course does not exclude women from running for the office.

[14] The profession of a nurse could be an exception. Act No. 96/2004 Coll., on Conditions of Obtaining and Recognition of Qualification for the Performance of Non-medical Health Professions and for the Performance of Activities Related to the Provision of Health Care and on Amendment of Certain Related Laws (the Non-medical Health Professions Act) uses the masculine form to name individual non-medical professions; however, it case of a nurse (general nurse) and a midwife the feminine form is used. The name of a position in the feminine gender therefore does not necessary have to discourage male applicants. Despite that it would be suitable to use the masculine equivalent too (male nurse) or state that both men a women are being sought.

♦ An employer is looking only for a man or a woman

A job offer is discriminatory on the grounds of gender if it indicates that a job is offered only to men or only to women. It is not important what phrasing an employer uses.

Example:
"I am looking for a man for the position of…",
"The position is suitable for women",
"The position is suitable only for men due to higher physical demands",
"I am looking for a [female] assistant to a director" (i.e. use of the feminine, see above).

If a job is offered only to one gender (i.e. the first and the fourth example), it constitutes direct discrimination (unless it is one of allowable forms of different treatment). If an offer states that the position is suitable for women (or for men), it is also directly discriminatory; even though an offer does not say without anything further that an applicant of the opposite sex may not apply, it is announced beforehand that a certain gender will be favoured in a selection procedure.

If an offer suggests that the job is more suitable for men due to higher physical demand (example No. 3), the offer is discriminatory in nature. If bigger physical strength is needed, it needs to be assessed individually (e.g. in the next stages of a selection procedure)[15] and not as the "average strength" of specific genders.[16] The argument of "higher physical demand" cannot be used with reference to women protection; although the protection of pregnancy and maternity is one of permitted forms of a difference of treatment, it needs to be interpreted rather narrowly (see further).

Not all differences in treatment due to gender need to constitute discrimination. A difference in treatment in access to employment does not constitute discrimination if there is a factual reason consisting in the character of performed work or activity, provided the applied requirements are proportionate to this character. According to Sec. 6 (5) of the Anti-discrimination Act, discrimination does not involve a difference in treatment applied for the purpose of protection of women due to pregnancy and maternity, provided the means to achieve the given objective are proportionate and necessary.

The first exception needs to be interpreted very narrowly.[17] Discrimination does not occur when gender is indeed a necessary requirement for the performance of work. Thus it is allowable to seek a person of a specific gender for some position if a person of the opposite gender cannot actually perform it; therefore, it is not

[15] C.f. also Bobek, M., Boučková, P., Kühn, Z. (eds.) Rovnost a diskriminace. 1st edition. Prague: C. H. Beck, 2007 p. 236.
[16] As a result, applicants of one gender would be excluded from a selection procedure beforehand even if they probably include individuals who would meet the requirement of physical strength while members of the other gender will be "admitted" to the next stages of the selection process although there are many individuals who will not meet the requirement of physical strength.
[17] See above

discrimination if an employer is seeking a woman for the position for a lingerie model etc. By contrast, the condition of “a necessary requirement” will not be met if an employer is seeking only women to promote goods in self-service wholesale stores, which is a position that can be undoubtedly filled by a man too.

The second stated exception protects women only during a maternity period and after giving birth. However, it cannot be interpreted as it being allowed not to employ women in general in a particular position connected with e.g. higher physical effort only by reference to the protection of possible future maternity. If disadvantages following from a certain employment affect both men and women (provided they are not pregnant) in the same way, the employment does not belong to the mentioned exception. A similar conclusion was expressed in several cases by the Court of Justice of the European Union (CJEU),[18] which stated that “*Article 2 (3) of Directive 76/207 does not allow women to be excluded from a certain type of employment solely on the ground that they ought to be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned.*”[19] Earlier it had concluded that it was not possible to exclude women from an employment connected with the use of weapons by referring to women protection, since such exclusion goes beyond the bounds of an exception.[20]

Summary:
With exceptions, a job offer can be regarded as discriminatory if addressed only to men or only to women. In particular the following problematic job offers appear:

- *“Company XYZ seated at K. is looking for a salesman (man)”.*
- *“Our idea of a suitable candidate: the position is suitable for men”.*
- *“The job is quite physically demanding and therefore it is more suitable for men”.*

While the use of the masculine form in a job title is not discriminatory, discrimination occurs if only the feminine form is used (e.g. [female] assistant to manager, [female] cosmetician, [female] hairdresser etc.)

If an employer is seeking persons of a certain gender, it is not discrimination if gender is a necessary prerequisite for the performance of work (e.g. a female role in a planned film).

b) Offers containing discrimination on the grounds of age

[18] It was with respect to EU law and judicial decisions of CJEU that the provision of Sec. 238 (1) of Act No. 262/2006 Coll., the Labour Code, as amended, prohibiting the employment of women in underground mining and in tunnel and gallery boring was repealed as of 24 April 2009 (i.e. upon denouncement of the Convention concerning the employment of women on underground work in mines of all kinds).

[19] Judgment of CJEU of 1 February 2005, in case 203/03, *Commission of the European Communities v. Republic of Austria,* paragraph 45.

[20] C.f. a judgment of CJEU of 11 January 2000, in case 285/98, *Tanja Kreil v. Bundesrepublik Deutschland.*

Age is a specific discriminatory reason since it changes in time independently of human will. The prohibition of discrimination on the grounds of age is aimed at protecting persons who are disadvantaged due to their age (be it younger or older). In job offers the age requirement appears in several forms.

> ***Example:***
> *"We are looking for a candidate of an age above (or below), or "we are looking for a young candidate",*
> *"We are looking for a candidate with a certain length of experience",*
> *"Working in a young team is offered as a work benefit".*

It follows directly from the first sentence that an employer is concerned with the age of job applicants while in the other two sentences this fact is (or may be) contained in the context.

- **Direct age requirement**

General prohibition of discrimination on the grounds of age assumes that a job offer is intended for job applicants regardless of age. Direct discrimination generally involves any job offer which indicates that a job applicant of a certain age or below a certain age is being sought. In case of discrimination due to age, there are also allowable forms of a difference of treatment in access to employment. Besides a general exception contained in Sec. 6 (3) of the Anti-discrimination Act[21], pursuant to Sec. 6 (1) of the Anti-discrimination Act, a difference of treatment on the grounds of age does not constitute discrimination:

- If the requirement of a minimum age, professional experience or length of employment is necessary for the performance of employment,
- If professional training is needed, which is however too long considering the date when the job applicant will reach retirement age,
- If it is applied for the purpose of protection of persons below 18 years of age.

Direct discrimination therefore involves offers in which *"a young candidate"* is being sought for the position of a top manager. Similarly, a job offer for the position of a telephone operator, according to which applicants should be below 35 years of age, will constitute direct discrimination on the grounds of age because an age limit is unjustified in this profession. As regards a minimum age limit, a job offer for the position of a manager requiring a minimum age of 20 years is discriminatory in a similar way. It is not apparent in this case either what should prevent a nineteen-year-old applicant who meets other requirements (e.g. education) from performing the same quality work as a twenty-year-old or a twenty-one-year-old applicant.

The Anti-discrimination Act nevertheless allows a difference of treatment for the purpose of protection of persons below 18 years of age, and does so even

[21] "*Discrimination is not a difference of treatment in cases of the right to employment, access to employment or profession, in cases of employment, service relationships or other employment activity provided there is a material reason for this consisting in the character of performed work or activity and the applied requirements are proportionate to this character.*"

beyond the scope defined by special legal regulations.[22] Therefore an employer may require a minimum age of 18 years provided this measure pursues the protection of younger persons (e.g. due to risks resulting from the character of work). Whether the exclusion of persons below 18 years of age pursues the protection of these persons in each specific case and whether such measure is adequate needs to be considered in each case separately.

- **Length of experience**

A minimum length of experience is often a requirement contained in job offers. The provision of Sec. 6 (1) of the Anti-discrimination Act enables a difference of treatment on the grounds of age in access to employment and profession provided professional experience *necessary* for the due performance of employment or profession is required. The necessary length of experience for a specific employment may be directly stipulated in a legal rule[23]. The "necessity" of experience needs to be probably interpreted within Article 6 (1) of Directive 2000/78/EC. The condition of professional experience needs to be objectively and reasonably justified by a legitimate objective and the means to achieve the objective need to be proportionate and necessary. In this respect, the most difficult thing to determine will be what experience is still proportionate and what is not. Therefore the criterion of the length of experience needs to be considered in each case individually.

For example, any experience required for light manual, non-qualified work (cleaning jobs etc.) could be disproportionate. On the other hand, the requirement of certain experience in a selection procedure for the position of a financial manager will be proportionate since it is a profession requiring a whole complex of abilities and experience connected for example with project management.

For example, the requirement of ten, fifteen or even more years of experience in a field is a priori problematic. In highly professional disciplines, experience achieved by such long practice may be justifiable but there is really only a minimum number of such positions. This does not rule out a justified preference of an applicant with experience at some stage of a selection procedure, apart from his or her other qualities and skills.

- **Benefit of a young team**

A number of offers mentioned an offer to work in a young team. Working in a young team is offered as a certain benefit (just as e.g. a longer holiday, a company car etc.). Thus it is not a kind of an employer's requirement imposed on a job applicant.

An employer explicitly does not exclude an employee of an older age since an employer of a lower age is not explicitly required; therefore this cannot constitute direct discrimination. On the other hand, an offer to work in a *"young team"* as a certain bonus or a *"benefit"* indirectly suggests that young applicants will be preferred

[22] This also means beyond the scope of protection contained in the provision of Sec. 243 to 247 of the Labour Code.

[23] E.g. for headmasters according to Sec. 5 (1) of Act No. 563/2004 Coll. on Pedagogical Staff, as amended.

to older applicants since by accepting an older applicant an employer would forfeit this "benefit" with respect to employees in the future (and would deprive the current employees of this benefit too, for that matter). Mentioning a "benefit" in the form of a young team of employees is inappropriate, to say the least, since it is capable of discouraging some of potential older-age applicants. Moreover, offering employment in a young team confirms prejudice and stereotype that working in a team with a higher average age does not present good professional fulfilment.

Summary:

A job offer is discriminatory if it is intended only for younger persons or only for older persons. A job should be offered regardless of the age of an applicant. Problematic job offers may look as following:

- *"We are looking for a young candidate for the position of a manager".*
- *"Are you young and active? Do you like challenges?"*
- *"Minimum age of 20 years".*
- *"We are seeking a candidate for the position of a 'telephone operator'. Age of up to 35 years".*
- *"Technician, part-time employment, experience of at least 20 years in the field".*
- *We offer: company telephone, 5 weeks of holiday, young team…"*

The requirement of professional experience is not discrimination if it is necessary for the performance of work; however, the length of experience needs to be proportionate to the character of the position to be filled.

If a "young team" if offered as a benefit in a job offer (just as a longer holiday, company accommodation etc.), the offer is indirectly discriminatory on the grounds of age. By accepting an older applicant, an employer would in fact deprive employees (including current employees) of this *"benefit".* Such offer is capable of discouraging some of older-age applicants.

c) *Offers containing discrimination on the grounds of family status*

According to Sec. 4 (2) of the Employment Act, any direct or indirect discrimination on the grounds of marital or family status or due to obligations to the family is prohibited. This discriminatory reason is therefore outlined very widely. Some of the examined offers breach the stated principle.

> ***Example:***
> *"Married couples or partners preferred"*
> *"Suitable for mothers on maternity leave…"*
> *"We are seeking preferably a married couple in retirement age in the neighbourhood of R. …"*
> *"Intended for women on maternity leave as extra income".*

Family circumstances of individual job applicants should not in any case have an impact on their being given employment or not. The mentioned choices of words are problematic because they declare preference of some applicants with respect to their family circumstances. In the first example, married applicants or partners are given priority. Applicants who are not applying as a married couple or partners are completely and unjustly excluded from the job offer or put at disadvantage. The second example is a similar case; work of seasonal character was offered and the employer stated in the offer that the work was suitable for mothers on maternity leave etc. The requirement that applicants be a married couple, moreover in retirement age and living in a certain locality, cannot be considered proportionate either. In addition, it possibly constitutes discrimination on the grounds of age.

We may conclude that whether an applicant is married, has children etc. cannot be the decisive factor for giving employment. Within the Employment Act, this constitutes breach of the prohibition of discrimination, which can be sanctioned by a labour office.

d) *Offers containing discrimination on the grounds of disability or health condition*

Disability is traditionally a highly protected prohibited reason at the level of EU law as well as at the level of national law. It is specific because it requires the adoption of various measures to equalize opportunities of persons with disabilities. Within the provision of Sec. 3 (2) of the Anti-discrimination Act, indirect discrimination on the grounds of disability also means failure to adopt adequate measures to ensure access to employment for a person with a disability. An employer is thus obliged to take action in a situation when he would be giving employment to a person with a disability provided the measure does not constitute a disproportionate burden.[24]

[24] Similar regulation is contained in Article 5 of Directive No. 2000/78/EC, establishing a general framework for equal treatment in employment and occupation. The provision of Sec. 3 of the Act serves as indication whether a specific case constitutes a disproportionate burden. The obligation to

The text of individual offers did not contain direct exclusion of applicants with disabilities. However, employers very often require good health condition. This is a requirement that could logically remove disabled applicants from selection procedures. Moreover, health condition is an explicit prohibited reason pursuant to the Employment Act (Sec. 4 (2) of the Act). In a number of cases, typically in case of physical, manual work, such requirement is justified (pursuant to Sec. 4 (3) of the Employment Act, a difference of treatment on the grounds of health condition is legitimate if the requirement of good health condition is necessary for the performance of work).

The requirement relating to health condition appears in offers in several modifications. Most frequently, good health condition or even excellent health condition is stated in the text as a condition for employment, or good physical condition is required. The mentioned criterion is quite often applied e.g. for the following professions: *technician, accountant, cashier, deputy shop manager, driver, warehouse keeper, gardener and others.*

In case of offers like these, it is problematic to determine what exactly is meant by good health condition, necessary for the employment. It cannot be concluded that requiring only absolutely healthy applicants as a condition for the performance of given work is proportionate (especially in case of cashiers, shop assistants etc.). The significance of an obstacle to the performance of work always needs to be considered in each case individually: otherwise, it is a breach of the Employment Act.

Summary:
An employer may not discriminate a job applicant on the grounds of health condition (according to the Employment Act) or disability within the Anti-discrimination Act. By requiring absolutely problem-free health condition in cases when it is not completely necessary, an employer eliminates the chance of persons with disabilities to get employment. For most light manual jobs the requirement of excellent health condition is excessive.

The following wording in particular appears:
"We require applicants with good health condition for the position of an accountant".
We are looking for a cashier. Requirements: flexibility, clean criminal record, excellent health condition".
"We need to fill the position of a warehouse keeper. Only for applicants without health problems".

e) Offers containing discrimination on the grounds of state citizenship

arrange an adequate measure needs to be most likely taken into account only in a situation when a relevant job applicant applies to take part in a selection procedure.

The provision of Sec. 4 (2) of the Employment Act prohibits, among others, discrimination on the grounds of citizenship. The prohibition of discrimination on the grounds of citizenship in essence follows the prohibition of discrimination on the grounds of national citizenship stipulated in the primary law of the European Union (namely in Article 45 of the Treaty on the Functioning of the European Union, which guarantees freedom of movement for workers within the Union, which entails, among others, the abolition of any discrimination based on state citizenship between workers of the Member States).

Example:
"A manager with Czech nationality is sought for the position of XYZ".

The Employment Act distinguishes citizenship and nationality, regarding them as different discriminatory reasons. Nationality as a discriminatory reason is independent of state citizenship (i.e. it does not protect foreign nationals but citizens of the Czech Republic against discrimination on the grounds of nationality in the territory of the Czech Republic). However, the requirement of Czech nationality in a job offer will a priori discourage job applicants, whether they are citizens of the Czech Republic with other than Czech nationality or foreigners residing in the territory of the Czech Republic. Similar job offers therefore constitute discrimination on the grounds of state citizenship pursuant to EU law (or pursuant to Sec. 4 (2) of the Employment Act) as well as on the grounds of nationality within Sec. 2 (3) of the Anti-discrimination Act. Job offers requiring Czech citizenship constitute discrimination on the grounds of state citizenship.

- **Knowledge of a language**

Knowledge of a certain language is a common requirement. This requirement is of course legitimate: the German language or the English language is for example required when an employer often communicates with foreign clients or works with foreign texts. The knowledge of the Czech language can be also legitimate. It is clear that a sales representative or a promoter of products has to know a language to be able to communicate with customers etc. For that matter, Article 3 of Regulation of the Council (EEC) No. 1612/68, on freedom of movement for workers within the Community enables to lay down conditions related to language skills required due to the character of the position to be filled.

The requirement of language knowledge at a certain level should correspond to the character of the position to be filled. It is legitimate if the knowledge of Czech at a native level is required in case of a sales representative, spokesperson, language teacher and so on, i.e. in occupations where working with a language or communication (e.g. with clients) is a substantial part of the scope of employment. Additionally, it is certainly legitimate to require good knowledge of Czech (at a communicative level) if an employee is expected to communicate often with other employees and a language barrier would hamper mutual collaboration. However, there are work positions where minimum knowledge of a language is imaginable (e.g. *a manual worker)*.

The level of required knowledge should correspond to the scope of work. For example, requiring an applicant to have a disproportionately high level of the Czech language with respect to the character of the position to be filled would constitute *indirect discrimination* on the grounds of state citizenship.[25]

Summary:

If a job offer states that a *person with Czech nationality is wanted,* it is discrimination on the grounds of nationality and state citizenship.

In general, requiring a certain level of knowledge of a language, including the Czech language, is not discrimination. However, the required level of the Czech language has to correspond to the character of the position offered.

[25] For example, if knowledge of the Czech language were required at a native level for the position of a cleaner.

II) Empiric section

1) Methodology of research

The research was carried out from 1 April to 7 April 2011. The main source of data was internet portal **www.prace.cz**, the biggest job advertising portal in the Czech Republic containing offers from specific employers, personnel agencies and labour offices. According to data of the Czech Statistical Office (CSO 2010), only less than a half of households had internet connection in 2009; however, it can be assumed that job seekers who do not have a computer with internet connection can use facilities at labour offices.

In seven days, a total of 12,044 offers were collected[26]. They were subsequently coded by coders trained by the lawyers from the Department of Equal Treatment of the Office of the Public Defender of Rights.[27] The frequency of unjustified requirements on the part of employers that can be labelled as discriminatory was monitored[28]: namely, discrimination could occur on the grounds of age, gender, state citizenship, family status, race, ethnic origin, sexual orientation, health condition, religion, belief or opinions etc.

Within each discriminatory reason, direct discrimination (when a certain person is treated less favourably than another person in a comparable situation, on the grounds prohibited by law) is distinguished from indirect discrimination (when a person is treated less favourably on the basis of a criterion which is seemingly neutral). An offer could be directly or indirectly discriminatory for various combinations of reasons.

A decision regarding the occurrence of discrimination on the grounds of gender was based on the fact that the use of the generic masculine form alone (a masculine noun denoting both men and women, e.g. a [male] employer, [male] workers etc.) is not discriminatory in itself. Only offers in which the generic masculine was used in a context which suggested that women were not welcome in the given position were regarded as discriminatory. By contrast, offers in which the names of positions were solely in the feminine form (*[woman] assistant, [woman] florist etc.*) were regarded as discriminatory.

To map the situation better, besides the presence or non-presence of discrimination due to gender, the use of gender in job titles and in offer texts (masculine/feminine/both/none) was also monitored within the research.

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[26] For comparison, we present the size of samples in other researches of discrimination in job advertising: e.g. Lorenzi-Cioldi, Buschini, Baerlocher and Gross (2010): sample size 4,727 offers; Daspro (2009): sample size 900 offers; Wu, Lawler, Yi (2008): sample size 872 offers; Hubálek, Zamboj (2007): sample size 30,000 offers; Leong, Tan, Loh (2004): sample size 1,122 offers; Polish Association of Law Education (2004): sample size 37,000 offers; McGoldrick, Arrowsmith (1993): sample size 2,585 offers.

[27] Lawyers from the Department of Equal Treatment of the Office of the Public Defender of Rights also made decisions about disputable cases that occurred during coding.

[28] In particular pursuant to Act No. 198/2009 Coll. of 23 April 2008, on Equal Treatment and on Legal Means for the Protection from Discrimination and on Amendments to some Laws, and according to Sec. 4 of Act No. 435/2004 Coll., on Employment, as amended.

Other monitored variables included the region where an offer was placed[29], the form of employment and the type of an advertised position according to the Classification of Occupations (KZAM)[30] created by the Czech Statistical Office.

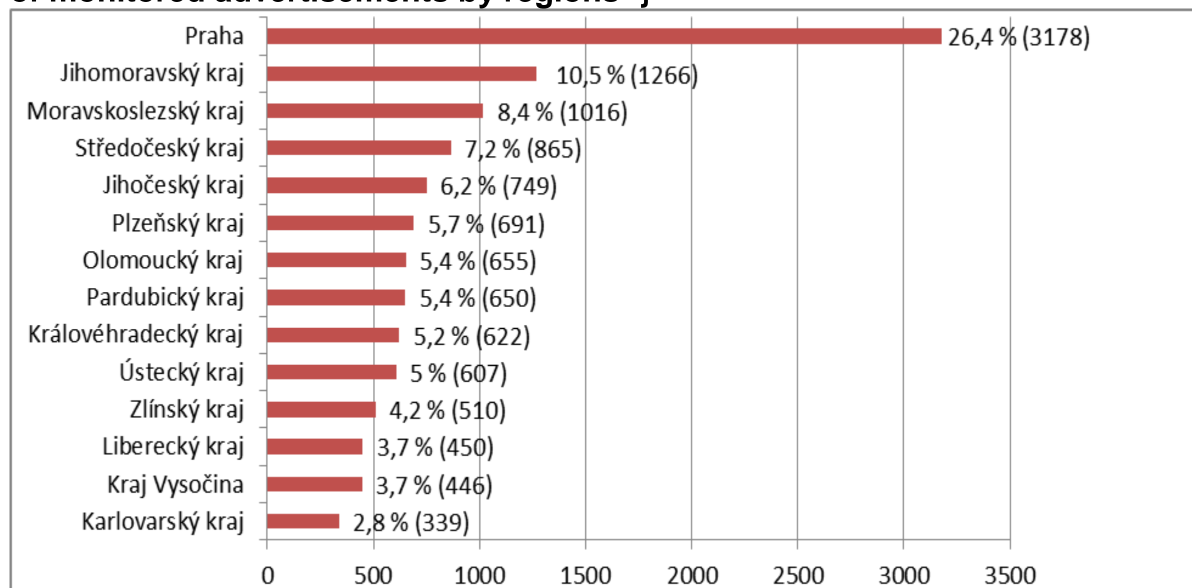
2) Results of research

When summarising the results of the research, we will first concentrate on the basic description of data (Chapter II. 3. a), then move on to the analysis of the frequency of occurrence of unjustified requirements (Chapter. II. 3. b) and conclude with an analysis of the frequency of occurrence of discriminatory offers according to regions, form of employment and type of employment (Chapter II. 3. c).

a) Basic description of monitored offers

A total of 12,044 offers were included in the research. As illustrated in Chart 1, the highest proportion, over 26%, was placed in the capital of Prague, followed by the South Moravian Region (less than 11%) and the Moravian-Silesian Region (over 8%). Fewest offers were from the Liberec Region and Vysočina (less than 4%) and from the Karlovy Vary Region (less than 3%).

Chart 1: Breakdown of monitored offers by regions { XE "**Chart 1\: Breakdown of monitored advertisements by regions**" **}**



[29] When an offer was placed in several regions, it was included in all relevant regions, or when it was placed all over the Czech Republic, it was included in all regions of the Czech Republic.

[30] A classification made up of ten main classes: 0 – army members; 1 – lawmakers, senior executives; 2 – research and professional workers; 3 – technical, healthcare, pedagogical workers and workers in related fields; 4 – lower administrative workers (clerks); 5 – operating workers in services and trade; 6 – qualified workers in agriculture, forestry and related fields; 7 – craftsmen and qualified producers, processors, repairmen; 8 – machine operators; 9 – unskilled and non-qualified workers. The No. 2 class includes employments usually requiring knowledge and skills corresponding to university education. The No. 3 class includes employments usually requiring knowledge and skills corresponding to full secondary or bachelor education. Five of the main classes (4, 5, 6, 7 and 8) include employments usually requiring knowledge and skills corresponding to secondary education. In case of No. 0 and 1 class the level of education is not defined.

As regards the representation of individual forms of employment, as illustrated in Chart 2, more than two thirds of the examined offers related to full-time employment, followed by an agreement to perform work/an agreement to complete a job (less than 15%) and work performed on the basis of the Identification Number (IČO)/Trade Licence Certificate (over 7%). In 10% of the offers, the form of employment was not specified (however, we can assume that it was full-time employment because this form of employment was most frequently represented).

Chart 2: Breakdown of monitored offers by form of employment { XE "**Chart 2\: Breakdown of monitored advertisements by type of employment**" **}**

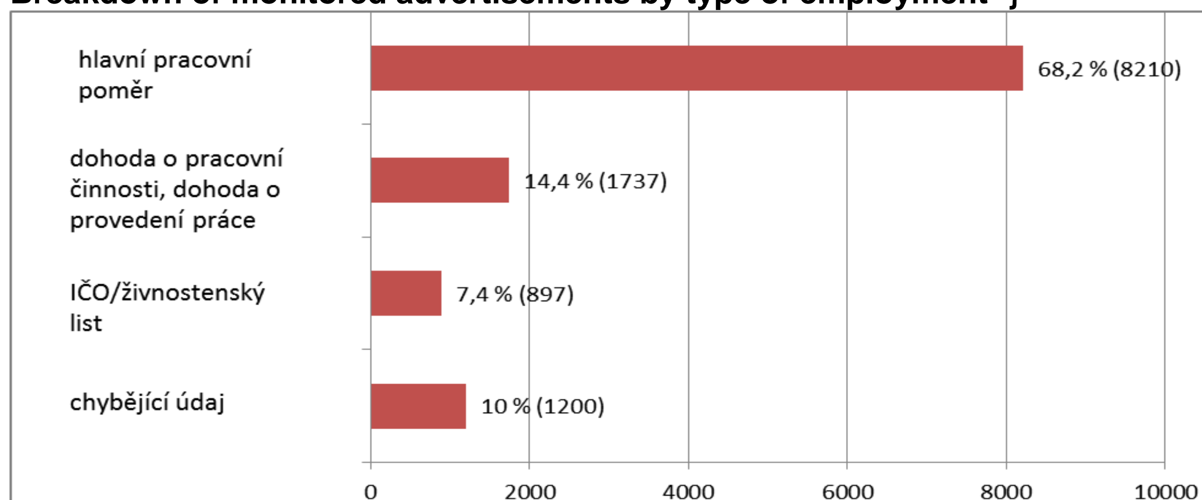
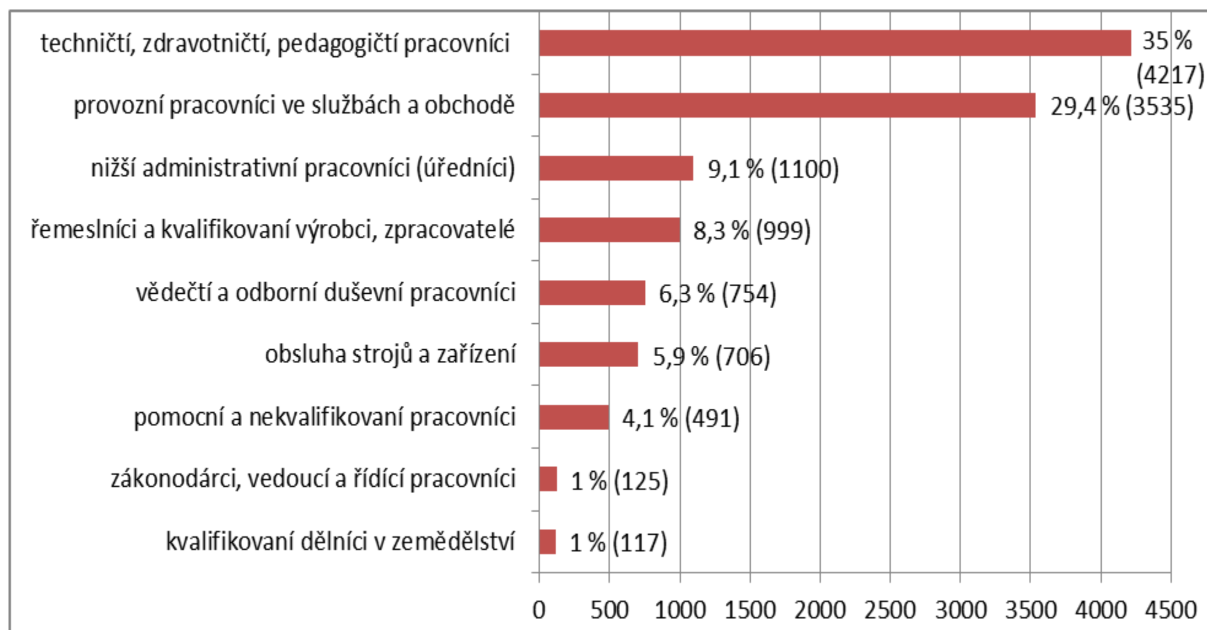


Chart 3 illustrates the composition of offers with respect to the type of employment (categorization according to KZAM). More than a third of advertised positions fell under the category of technical, healthcare and pedagogical workers, followed by operating workers in services and trade (less than 30%). The least represented categories included qualified workers in agriculture and then lawmakers and senior executives (each 1%).

Chart 3: Breakdown of monitored offers by type of employment { XE "**Chart 3\: Breakdown of monitored advertisements by type of employment**" **}**



b) Frequency of occurrence of unjustified requirements

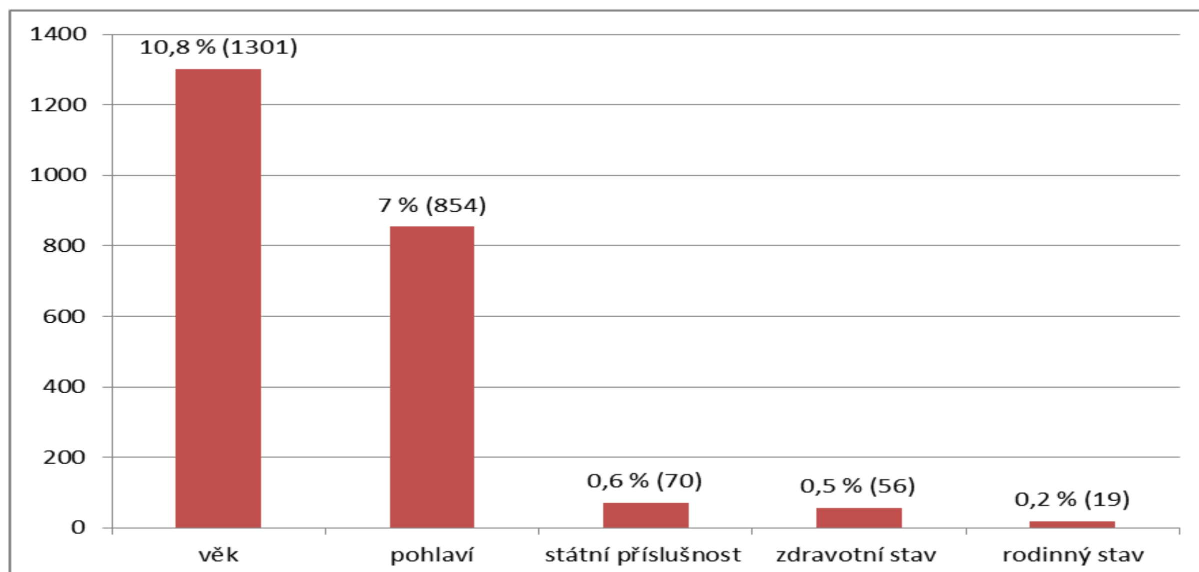
As can be seen in Table 1, the total share of offers that were found to be discriminatory reached less than 17 %. Therefore, over three fourths of the examined offers were found to be unobjectionable. This can be considered a positive result, in particular in comparison with a similar research regarding the same topic conducted four years ago by the Counselling Centre for Citizenship, Civil and Human Rights (Hubálek, Zamboj 2007): within this research, up to 42% of offers were regarded as discriminatory. The difference can be explained by a different methodology since the previous research automatically regarded all offers that used the generic masculine form as discriminatory.

Tab. 1: Frequency and share of discriminatory offers { XE "Table 1\: Frequency and share of discriminatory advertisements" }

	Frequency	**Proportion (%)**
Non-discriminatory offers	10,005	83.1
Discriminatory offers	2,039	16.9
Total	12,044	100

What were the most frequent discriminatory reasons? The result is illustrated in Chart 4: age was the most frequent unjustified requirement, appearing in almost 11% of the examined offers, followed by a gender requirement (appearing in 7% of offers). Other discriminatory requirements mentioned, i.e. state citizenship, health condition and family status, appeared only in a minimum number of offers (each in less than 1% of offers).

Chart 4: Representation of discriminatory reasons in monitored offers { XE "Chart 4\: Representation of discriminatory reasons in monitored advertisements" }



It needs to be noted that offers could be discriminatory on the grounds of several reasons (223 offers were discriminatory due to two reasons, 19 even due to three reasons). Therefore, if we add up all the individual discriminatory reasons, we arrive at a total of 2,300 reasons, although only 2,039 offers were discriminatory.

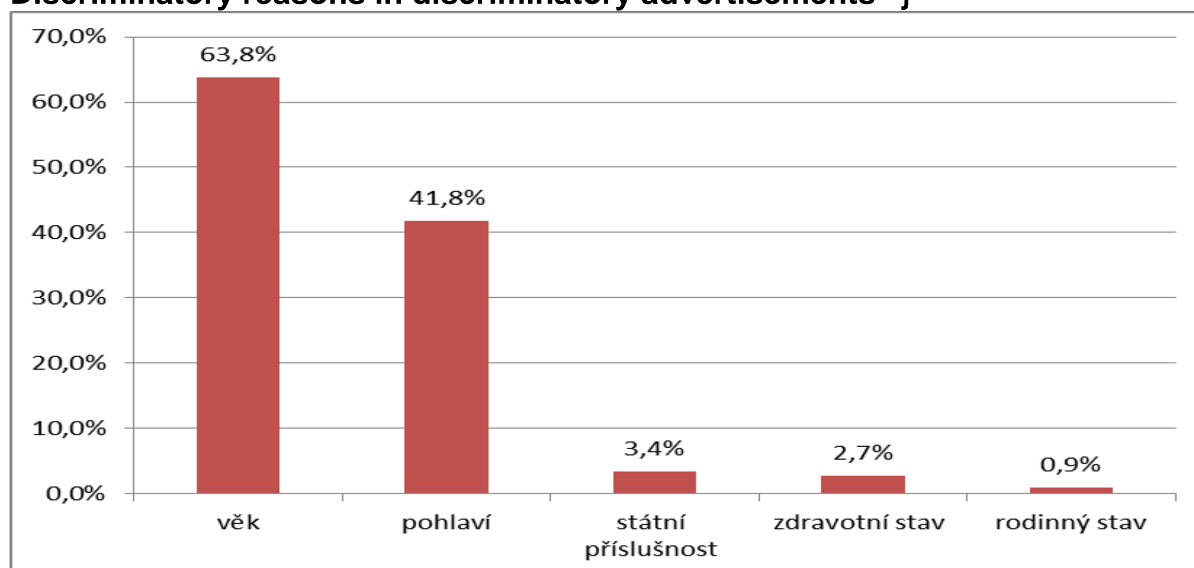
A more insight into the frequency of occurrence of discriminatory reasons with respect to direct and indirect discrimination is given in Table 2. Indirect discrimination due to age appeared most frequently, in 7% of offers. It was followed by direct discrimination due to gender (appearing in less than 7% of offers) and direct discrimination due to age (in less than 4% of offers). Other discriminatory reasons appeared only in a minimum number of offers under scrutiny (each in less than 1% of offers). With respect to differentiation between direct and indirect discrimination, it can be concluded that cases of direct discrimination were much more frequent: 61% of the established unjustified reasons were used within the context of direct discrimination (1,392 reasons) and only 39% within the context of indirect discrimination (908 reasons).

Table 2: Representation of discriminatory reasons in monitored offers (direct and indirect discrimination){ XE "**Table 2\: Representation of discriminatory reasons in monitored advertisements (direct and indirect discrimination)**" **}**

Discrim. reason	**Dir./indir. discrimination**	**Amount**	**Proportion (%)**
Age	direct d.	452	3.8
	indirect d.	849	7
Gender	direct d.	837	6.9
	indirect d.	17	0.1
Family status	direct d.	12	0.1
	indirect d.	7	0.1
State citizenship	direct d.	35	0.3
	indirect d.	35	0.3
Health condition	direct d.	56	0.5
Total		**2300**	

Another possible perspective on the representation of the most frequent unjustified requirements is provided in Chart 5. Of the total number of objectionable offers, almost 64% were discriminatory on the grounds of age and less than 42% on the grounds of gender. More than 3% were discriminatory on the grounds of state citizenship, less than 3% on the grounds of health condition and less than 1% on the grounds of family status.

Chart 5: Discriminatory reasons in discriminatory offers { XE "Chart 5\: Discriminatory reasons in discriminatory advertisements" }

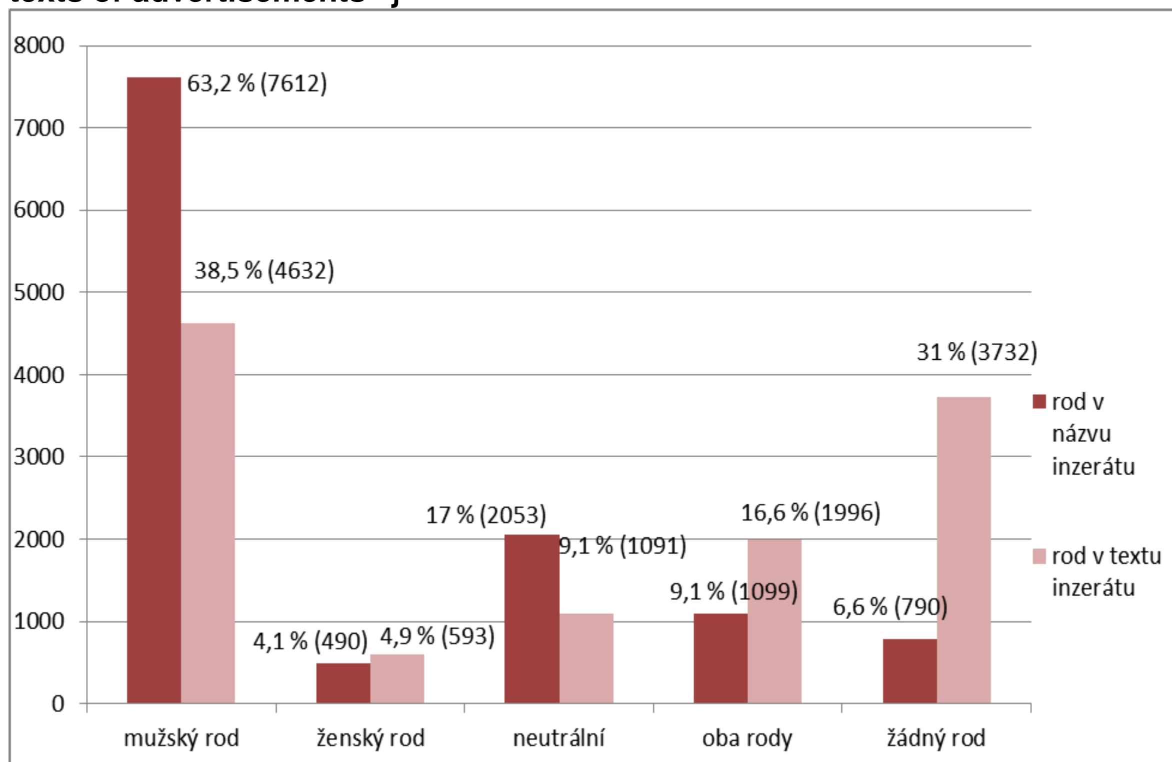


Besides the presence or non-presence of discriminatory reasons alone, another variable monitored was the gender used in titles and texts of offers. As illustrated in Chart 6, in almost two thirds of offer titles, the job title was in the masculine form (e.g. *[male] lawyer, [male] doctor* etc.). The second most frequent choice in offer titles was a neutral job title (e.g. receptionist, head, accountant), which appeared in 17% of offers. In less than 10% of offers both genders were used in the title (e.g. lawyer/[woman] lawyer, doctor/[woman] doctor), and less than 7% of offers avoided the use of gender-specific forms altogether (e.g. the job title was specified as an Emergency Fire Brigade or Creation and Implementation of Promotional Campaigns) and only slightly over 4% of offer titles were in the feminine gender.

A completely different picture emerges regarding the texts of offers. Job titles in the masculine form are most frequent again (less than 39%) but in comparison with offer titles, their proportion is lower by up to a third. On the other hand, there was a sharp rise in the proportion of offers that completely avoided the use of gender-specific forms in the job title (31%). In almost 17% of offers both genders were used, in over 9% of offers a neutral form was used and less than 5% of offers contained a job title in the feminine form.

The results show that in offer titles, job titles are in the masculine form in great many cases, which is probably a result of an effort to be brief. The texts of offers give more room, which makes it possible to avoid completely the use of gender-specific forms in a job title or use a neutral expression or a form that would represent both genders.

Chart 6: Gender in titles and texts of offers { XE "Chart 6\: Gender in titles and texts of advertisements" }

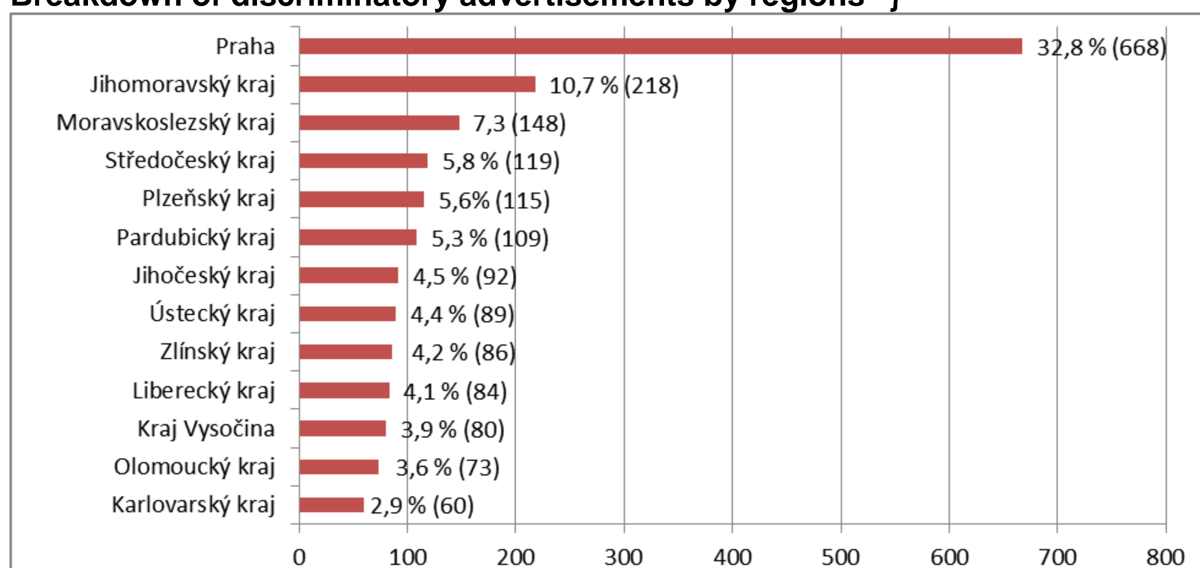


c) Frequency of occurrence of discriminatory offers according to regions, form of employment and type of employment

Furthermore, there is a question whether the proportion of discriminatory offers differs between individual regions, forms of employment and types of employment.

As demonstrated in Chart 7, almost a third of all discriminatory offers were placed in Prague. Less than 11% of discriminatory offers came from the South Moravian Region. Then the Moravian-Silesian Region followed with over 7% of offers. Fewest discriminatory offers were found in the Vysočina Region, the Olomouc Region (each less than 4%) and in the Karlovy Vary Region (less than 3%).

Chart 7: Breakdown of discriminatory offers by regions{ XE "Chart 7\: Breakdown of discriminatory advertisements by regions" }



With respect to the form of employment, most discriminatory offers, almost a half, appeared in the category of full-time employment. As shown in Chart 8, approximately a third of discriminatory offers concerned an agreement to perform work/an agreement to complete a job and 8% of discriminatory offers related to work performed on the basis of the Identification Number (IČO)/ Trade Licence Certificate[31]. In case of 10% of offers the form of employment was not specified.

[31] From the point of view of law, the "Trade Licence Certificate" is not regarded as an employment since it is not de jure a so-called employment activity – one of the basic features of an employer-employee relationship. A quasi employer and a quasi employee "as if" do business with each other but in fact employment is performed (often by means of the so-called "Švarcsystém" [individuals are officially self-employed but their relationship with the company that hired them has features characteristic of employment]), and therefore it was relevant to include these offers in the research too.

Chart 8: Breakdown of discriminatory offers by form of employment { XE "Chart 8\: Breakdown of discriminatory advertisements by form of employment" }

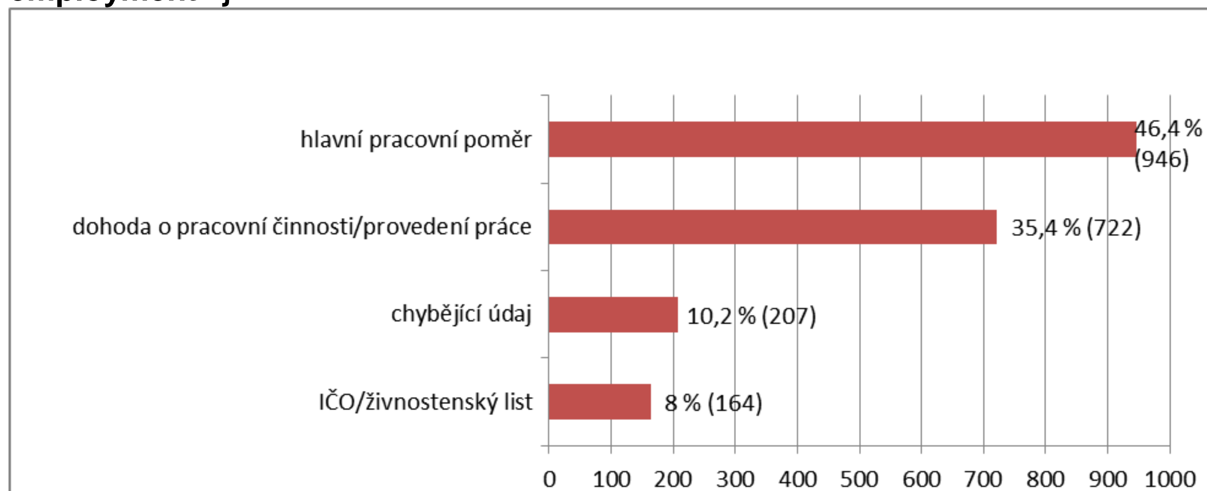
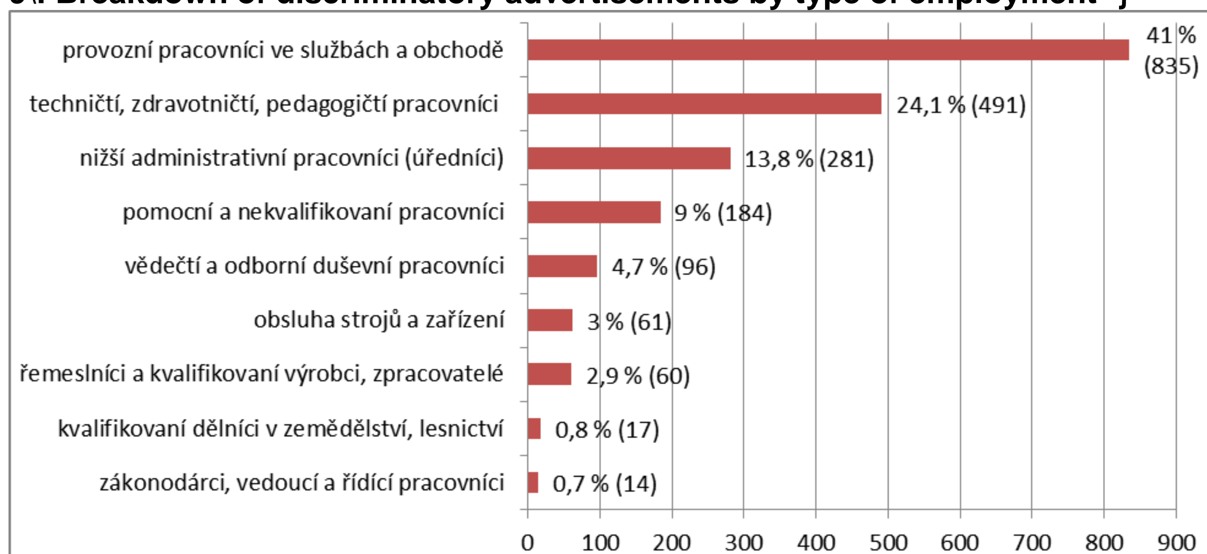


Chart 9 demonstrates the distribution of discriminatory offers according to the form of employment. Most objectionable offers, 41%, concerned positions in the category of operating workers in services and trade. Over 24% of discriminatory offers related to positions in the category of technical, healthcare and pedagogical workers and less than 14% of positions were in the category of lower administrative workers. On the other hand, fewest discriminatory offers came from the category of qualified workers in agriculture and forestry and the category of lawmakers and senior executives (each less than 1%). Given the level of knowledge and abilities required within relevant categories according to KZAM, we may conclude that discrimination appears more frequently in offers for positions requiring secondary education than offers for positions requiring university education.

Chart 9: Breakdown of discriminatory offers by type of employment { XE "**Chart 9\: Breakdown of discriminatory advertisements by type of employment**" **}**



3) Summary

The results of the presented research confirm that the occurrence of discriminatory job offers is not a rare phenomenon in the Czech Republic. The analysis of 12,044 offers from www.prace.cz showed that 16.9% of the offers under scrutiny contained one or more unjustified requirements. Offers were discriminatory most often on the grounds of age (this unjustified requirement appeared in 11% of examined offers) and gender (7% of offers). To a smaller extent, discrimination occurred on the grounds of state citizenship, health condition and family status (each in less than 1% offers).

With respect to differentiation between direct and indirect discrimination, we may conclude that cases of direct discrimination were much more frequent: of the unjustified reasons found, 61% were used in the context of direct discrimination and only 39% in the context of indirect discrimination.

With respect to the form of employment, most discriminatory offers, almost a half, appeared in the category of full-time employment. About a third of discriminatory offers involved an agreement to perform work/an agreement to complete a job and 8% of discriminatory offers concerned work performed on the basis on the Identification Number (IČO)/ Trade Licence Certificate.

With respect to the type of employment, we may state that most discriminatory offers, up to 41%, were for positions in the category of operating workers in services and trade. Over 24% of discriminatory offers related to positions in the category of technical, healthcare and pedagogical workers and less than 14% of positions were in the category of lower administrative workers. On the other hand, fewest discriminatory offers came from the category of qualified workers in agriculture and forestry and the category of lawmakers and senior executives (each less than 1%). This means that discrimination appears more frequently in offers for positions requiring secondary education than in offers for positions requiring university education.

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6) Annex: Codes used

Q1. Region

1. Capital City of Prague
2. Central Bohemian Region
3. South Bohemian Region
4. Plzeň Region
5. Karlovy Vary Region
6. Ústí Region
7. Liberec Region
8. Hradec Králové Region
9. Pardubice Region
10. Vysočina Region
11. South Moravian Region
12. Olomouc Region
13. Zlín Region
14. Moravian-Silesian Region

Q2. Type of employment according KZAM

0. Army members
1. Lawmakers, senior executives
2. Research and professional workers
3. Technical, healthcare, pedagogical workers and workers in related fields
4. Lower administrative workers (clerks)
5. Operating workers in services and trade
6. Qualified workers in agriculture, forestry and related fields
7. Craftsmen and qualified producers, processors, repairmen
8. Machine operators
9. Unskilled and non-qualified workers

Q3. Form of employment

1. Full-time employment
2. Part/time employment
3. Identification No. (IČO)/Trade Licence Certificate
4. An agreement to perform work/ an agreement to complete a job
5. Not available

Q4.1 Gender in offer titles

1. masculine
2. feminine
3. neutral
4. both
5. none

Q4.2 Gender in offer texts

1. masculine
2. feminine
3. neutral
4. both
5. none

Q5.1: Direct discrimination on grounds of gender

0. no
1. yes

Q5.2: Indirect discrimination on grounds of gender

0. no
1. yes

Q6.1 Direct discrimination on grounds of age

0. no
1. yes

Q6.2 Indirect discrimination on grounds of age

0. no
1. yes

Q7.1 Direct discrimination on grounds of family status

0. no
1. yes

Q7.2 Indirect discrimination on grounds of family status

0. no
1. yes

Q8.1 Direct discrimination on grounds of state citizenship

0. no
1. yes

Q8.2 Indirect discrimination on grounds of state citizenship

0. no
1. yes

Q10.1 Other discrimination (religion, sexual orientation, nationality...)

0. no
1. yes

Q10.2 Other discrimination (religion, sexual orientation, nationality...)