Veřejný ochránce práv
OMBUDSMAN

File. No.: 6862/2016/VOP/HB Ing. A.
Ref. No.: KVOP-19300/2017
Date 11 August 2017

Headnotes:

I. In general, it is up to the discretion of the service body whether it will perform individual evaluation of a public servant's work results in order to determine his/her personal extra pay (Section 149 (2) of the Service Act) in the period prior to the first service evaluation of the public servant.

II. In a situation where there is a disproportion between the amount of personal extra pay of servants whose amount of the personal extra pay was determined on the basis of the results of their service evaluation (Section 149 (1) of the Service Act) and servants who have not been evaluated in such a way and, at the same time, these servants perform work of equal value (Section 110 of the Labour Code), the service body must perform evaluation of public servants whose service has not yet been evaluated and in respect of whom the service body possesses enough information to perform the individual evaluation. On the basis of this evaluation, the service body must determine the amount of personal extra pay of said servants. Otherwise, it would infringe on the principle of equal treatment of public servants.

III. If the service body makes decisions in proceedings concerning the service (Section 159 (1) of the Service Act) of public servants who were employed by the administrative authority prior to entering into the service relationship, it cannot entirely omit the continuity between the terminated employment and newly established service relationship.

Dear Madam,

I am responding to your complaint, in which you contacted me in relation to the conduct of your employer (later the service body). You believe that after you returned from your parental leave, your employer did not give you a position corresponding to your employment contract and also that your employer erred when it did not increase the amount of your personal extra pay. You associate this conduct with your maternity and consider it discriminatory.

The law gives me competence *inter alia* in the area of the right to equal treatment and protection against discrimination.[1] Your complaint gave rise to a suspicion of

1 Section 1 (5), in conjunction with Section 21b of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended.

discrimination within the meaning of the Anti-Discrimination Act,[2] and therefore, given the scope of my statutory powers, I am competent to deal with it. However, since you decided to defend against the conduct of the service body in court[3], I do not consider it efficient to initiate an inquiry pursuant to Section 14 of Act No. 349/1999 Coll., on the Public Defender of Rights. In relation to the competence in matters concerning the right to equal treatment and protection against discrimination stipulated, *inter alia*, by the law[4], I am sending you this statement as part of methodological assistance to victims of discrimination, in which I merely summarise the information I received from you in dealing with the complaint, and a legal assessment of the matter, which I reached on the basis of said information. I did not invite the service bodies to make a statement; therefore I base my opinion only on the documents you have submitted to me within our communication. You may use this opinion before the court as documentary evidence.

Simultaneously, please be advised that the Anti-Discrimination Act prohibits any punishment of an employee who enforces the right to equal pay in court. Should you face any pressure in your current employment due to the administrative action you filed, inform the employer that such conduct is prohibited by law. You may also request additional assistance from me.

I consider that the documents I have been presented with give rise to **a strong suspicion that your employer committed discrimination against you in the area of remuneration.**[5] I describe this conclusion in more detail below.

Facts

You were employed at a ministry as from 1 October 2008. The employment was concluded for a fixed term; later it was changed to an indefinite term. You performed your work at the Department of EU Funds, the section of administration of payment requests and inspections. You state that since the beginning, you received personal extra pay in the amount of CZK 4,000 and a regular motivational bonus in the amount of CZK 5,000 per month. In early 2014, you took maternity leave and later a parental leave. During your absence at the workplace, your employer has undergone an organisational change in accordance with Act No. 234/2014 Coll., on public service, as amended. Within the initial systematisation[6], your position was also defined as a service position. According to information from your employer, your service position was transferred under the Department of Infrastructure and Spatial Plan within a later individual change to the systematisation. On 1 April 2016, you returned to work after ending your parental leave. After your return, your employer negotiated with you on your work assignment. On 20 April, you accepted the offer for transfer to the Department of EU Funds, section of payments and monitoring; you assert that this was done under duress. Since then, you

2 Section 1 (1), in conjunction with Section 2 of Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws (the Anti-Discrimination Act), as amended.

3 You lodged an action with the Municipal Court in Prague on 12 June 2017, File No.: 6 Ad 17/2017.

4 Section 1 (5), in conjunction with Section 21b of the Public Defender of Rights Act.

5 In this opinion, I address only the area of remuneration.

6 Section 184 (1) of Act No. 234/2014 Coll., on public service.

have performed work within said department. Since your return from the parental leave, you have been receiving a monthly personal extra pay in the amount of CZK 4,000.

On 8 April 2016, you have lodged an application to be admitted into service relationship and assigned to service position at the Department of EU Funds, section of inspections and irregularities. The first-instance service body rejected your application and you contested that decision by an appeal. The Deputy Minister of the Interior for public service (hereinafter the "appellate body") cancelled the decision and referred the matter back to the first-instance service body. You were ultimately admitted into a service relationship and assigned to a service position of Ministerial Counsel at the Department of EU Funds, section of payments and monitoring, by a decision of the first-instance service body[7] of 8 September 2016. Furthermore, in its decision, the first-instance service body determined your pay in the total amount of CZK 28,340, which consists of a pay tariff in the amount of CZK 24,340 and personal extra pay in the amount of CZK 4,000. On 1 October 2016, you entered into a service relationship. On 1 November 2016, your pay was increased by a decision of the service body[8], but the change only applied to the pay tariff in relation to your assignment into the 6th pay rate; the personal extra pay remained unchanged.

You appealed against those decisions as disagreed with your assignment to the Department of Payments and Monitoring and with the determination of the amount of your personal extra pay. In its decision[9] of 4 April 2017, the appellate body dismissed your appeal and confirmed the decision of the first-instance service body.

The principle of fair remuneration and equal treatment of public servants

The prohibition of discrimination and the principle of fair remuneration are enshrined in the Charter of Fundamental Rights and Freedoms[10]; the prohibition of discrimination is regulated in more detail by the Anti-Discrimination Act as the general legal regulation on the right to equal treatment and other regulations. The Public Service Act[11] provides for equal treatment and prohibition of discrimination against public servants in Section 98, which refers to the provisions of the Labour Code.[12] Pursuant to Section 16 (2) of the Labour Code, any discrimination in labour-law relationships, as defined by the Anti-Discrimination Act, is forbidden.

[2] Under Section 3 (3) of the Anti-Discrimination Act, direct discrimination means an act or failure to take action, where one person is treated less favourably than another in a comparable situation for reasons specified by the law. These reasons also include sex,

7 Decision of the State Secretary of the Ministry xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, Ref. No.: 131/2016-010-PAM/29.

8 Decision of the State Secretary of the Ministry xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, Ref. No.: 131/2016-010-PAM/37.

9 Decision of the Deputy Minister of the Interior for public service, RNDr. Josef Postránecký, Ref. No.: MV-162756-10/OSK-2016.

10 Article 3 (1) and Article 28 of Resolution of the Presidium of the Czech National Council No. 2/1993 Coll., promulgating the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic.

11 Act No. 234/2014 Coll., on public service.

12 Act No. 262/2006 Coll., the Labour Code, as amended.

where discrimination on the grounds of maternity is also considered discrimination on the grounds of sex pursuant to Section 2 (4). In order for a situation to qualify as discrimination in the sense of the Anti-Discrimination Act, the disadvantaging must occur in one of the areas listed in Section 1 (1) of the Anti-Discrimination Act. Under subparagraph (c), we can find the area of employment relationships, service relationships and other dependent activities, including remuneration. Pursuant to Section 5 of the Anti-Discrimination Act, remuneration means any performance, in money or in kind, provided to a person within dependent activities either repeatedly or on a one-off basis, directly or indirectly.

It follows from the above that the service body must not place you at a disadvantage in the provision of personal extra pay in relation to your maternity.

The nature of personal extra pay

In general, personal extra pay is a non-claimable component of pay which allows the employer to reward the quality of work and performance of individual employees. After personal extra pay has been granted to an employee, it becomes a claimable component of the employee's pay which the employer is obliged to provide to the employee in the determined amount. The employer may decrease or revoke the granted personal extra pay, but may do so only if there is a change in the prerequisites and conditions based on which was the employee granted the personal extra pay.[13]

Personal extra pay represents an option enabling to differentiate pay and motivate and reward individual public servants, as the remuneration of public servants is closely linked to set pay scales. By adopting the Public Service Act, the legislature set a certain degree of transparency in the system of determination of personal extra pay for employees who perform work in public service. For these employees, personal extra pay is determined on the basis of the result of their service evaluation.[14]

Service evaluation is performed annually during the first quarter of a calendar year for the previous calendar year[15] in respect of those employees who performed public service for a period longer than 6 months in the previous calendar year.[16] Since you were admitted into the service relationship on 1 October 2016, your first service evaluation should be drawn up in the first quarter of 2018 (evaluation for 2017). Until then, your personal extra pay may be increased using the procedure pursuant to Section 149 (2), which stipulates that extra pay may be granted to a public servant, and increased, decreased or revoked based on a proposal submitted by the superior employee until the employee's first service evaluation. However, the service body has not made use of this option yet and your personal extra pay has thus remained at CZK 4,000; according to information provided by the Ministry, the average personal extra pay of a public servant in the position of

13 This opinion was expressed, *inter alia*, by the Supreme Court in its judgment of 20 December 2007, Ref. No.: 21 Cdo 3488/2006, available at: www.nsoud.cz.

14 Section 149 (1) of the Public Service Act.

15 Section 155 (2) of the Public Service Act.

16 Section 7 of the Government Regulation No. 134/2015 Coll., on the details of service evaluation of public servants and relation of the result of service evaluation to personal extra pay of public servants.

Ministerial Counsel in the 13th pay grade at the Department of EU Funds amounts to CZK 12,043. Thus, your personal extra pay is CZK 8,043 lower than average.

Evaluation of the procedure of the service body by the appellate body

In its decision, the appellate body found that the service body had proceeded in accordance with the Public Service Act when it had determined the amount of personal extra pay in accordance with payslip valid as of the date immediately preceding the date of commencement of the service relationship.[17] Furthermore, the appellate body pointed out that the service body had not erred when it had not increased your personal extra pay in its decision in which it had decided on commencement of your service relationship because the process pursuant to Section 149 (2) of the Public Service Act could not be used in relation to a former employee as of the date of commencement of service relationship.[18]

Beyond the scope of the above and as you also lodged an appeal against the decision on pay[19] of 1 November 2016 (i.e. after the commencement of your service relationship), the appellate body also commented on whether the service body should have proceeded pursuant to Section 149 (2) of the Public Service Act after the commencement of your service relationship. The appellate body stated that given the subsidiary application of the Labour Code in terms for remuneration of public servants[20], Section 131 of the Labour Code, which states that employees who achieve very good work results over a long period of time or who perform working tasks within a greater scope than other employees may be provided with personal extra pay in an amount of up to 50% of the pay tariff of the highest pay rate within the pay grade to which the employee is assigned, shall be used by analogy in increasing the personal extra pay pursuant to Section 149 (2) of the Public Service Act. Simultaneously, in the opinion if the appellate body, the conditions specified in Section 6 of Government Regulation No. 134/2015 Coll., on the details of service evaluation of public servants and relation of the result of service evaluation to personal extra pay of public servants (hereinafter "Government Regulation No. 134/2015 Coll.") must be taken into account by analogy in the given procedure.

The appellate body concluded that for there to be a reason for an increase in the personal extra pay by the procedure pursuant to Section 149 (2) of the Public Service Act, the public employee would have to achieve good results of work over a long period of time. According to the appellate body, the file material does not indicate any such fact and the fact alone that the average amount of personal extra pay in your department is higher than the amount of your personal extra pay does not justify adjusting your personal extra pay to match said amount. The appellate body also stated that it was not competent to assess the amount of personal extra pay prior to the commencement of your service relationship, as the determination of this amount was a matter of a private-law relationship between you and your employer; it also stated that the decision on pay had been contested one month after you had been admitted into the service relationship; the

17 Procedure under Section 198 (1) of the Public Service Act.

18 Under Section 198 (5) of the Public Service Act.

19 Decision Ref. No.: 131/2016-010-PAM/37 of 1 November 2016.

20 Section 144 (1) of the Public Service Act.

appellate body did not consider that a sufficient time period for the first-instance body to perform relevant assessment of your working capabilities.

Therefore, it can be concluded that the appellate body (1) did not address the failure to increase your personal extra pay in the period between your return to employment after your maternity leave and the commencement of your service relationship as it is not competent to address private-law relationships; (2) it found the determination of your personal extra pay within the decision on your admission into service relationship to be in accordance with procedure pursuant to Sections 198 (1) and (5) of the Public Service Act; and (3) it concluded that the failure to increase your personal extra pay within the decision on pay of 1 November 2016 was justified as at the time when the decision was issued, you were in public service for one month only; therefore, your superior did not have enough time to assess the results of your work.

The Public Defender of Rights' assessment of the case

As noted above, the employer may decrease or revoke the granted personal extra pay, but may do so only if there is a change in the prerequisites and conditions based on which was the employee granted the personal extra pay. The employer must inform the employee in writing of the change (update the payslip) and provide justification not later than on the date when the change comes into effect.[21] After an employee returns from maternity (or parental) leave, these reasons can never exist on the part of the employer as during his/her absence, the employee did not perform work, and therefore the employer could not assess the quality of employee's work.

Nature of "financial motivation"

Determination of the nature of financial motivation which you received every month prior to commencement of your maternity leave is material for answering the question of the amount of your personal extra pay after your return from the parental leave. If this motivation had the character of personal extra pay, your employer should have included it in the total amount of your personal extra pay after your return to work. Should your employer only do so in cases of employees who were present at the workplace during your maternal and parental leave and did not do so in your case, such conduct could give rise to a suspicion that your employer committed discriminatory conduct on the grounds of your maternity. As I cannot reliably determine the amount of your personal extra pay prior to you leaving on the maternity leave (or whether said financial motivation can be considered personal extra pay) from the submitted supporting documents, I cannot comment further on the matter. The matter has to be resolved in court.

However, I can evaluate the subsequent procedure of your employer/service body on the basis of available materials. If we put aside the question of whether the amount of your personal extra pay after your return from parental leave was determined correctly, there is no doubt that for a whole year, you have been receiving personal extra pay whose amount is disproportionate to personal extra pay of your co-workers who work in similar positions.

21 Procedure pursuant to Section 136 of the Labour Code

Time required for the service body to evaluate work results in order to determine personal extra pay

I completely agree with opinion of the appellate body that the employer is authorised to evaluate the performance of individual employees in order to determine the personal extra pay. There is no doubt that the employer requires time for such considerations. The period of time for the employee to prove his/her qualities is always individual. It will be different e.g. for a new employee who usually requires time to become acquainted with a new environment and work tasks and for an employee who interrupted the performance of work due to maternity/parental leave but worked for years for the employer prior to the interruption.

After your return from parental leave, you started working in another department and it is thus likely that your direct superior also changed. It is difficult for me to say how much time your superior needed to evaluate your work. In order to approximately determine the time required for this purpose, I consider that the rules governing service evaluation may be used by analogy, including especially Section 7 of the Government Regulation No. 134/2015 Coll., which stipulates that evaluation shall be performed in case of employees who performed public service for a period of over 6 months during the last calendar year. If the period of 6 months is determined as sufficient for systemic evaluation of all public servants (i.e. even those who had no prior experience with work similar to public service), I cannot see any reason why this period should not suffice for individual assessment of your work results.

I cannot agree with the arguments of the appellate body[22] that the period between your admission into the service relationship and the contested decision on pay lasted for only one month, which the appellate body does not consider sufficient for the first-instance body to perform relevant assessment of your working capabilities. In general, I understand that the appellate body is not competent to intervene in a private-law relationship between an employee and an employer; the service body cannot entirely omit the continuity between the terminated employment and newly established service relationship in cases of service relationships of employees who were employed with service body in an employment relationship pursuant to the Labour Code prior to the effective date of the Public Service Act. It is true that the nature of the relationship between you and the service body materially changed by your admission into the service relationship (in particular, the relationship is now governed by public law), yet the nature of work performed by you did not change. Thus, at the time when the above decision was issued, the service body had information on the quality of your work for a period of 7 months that had lapsed since your return from the parental leave. The fact that for 6 out of these 7 months you were in an employment relationship does not change anything about the applicability of information on your working capabilities during this period. Opposite conclusion is purely formalistic.

If the appellate body had taken into consideration, in its assessment of the procedure followed by the service body in decision-making on the amount of your personal extra pay

22 Arguments of the appellate body on the decision contested by appeal Ref. No.: 131/2016-010-PAM/37 of 1 November 2016.

on 1 November 2016, the period when you were in an employment relationship after your return from the parental leave, it would have reached the conclusion that at the time when the decision was issued, the service body should have had enough information to come to a relevant conclusion regarding your working capabilities pursuant to Section 131 of the Labour Code.

Discrimination

It follows from the above interpretation that the service body would commit discrimination in the area of remuneration if it treated you less favourably than another person in comparable situation on grounds of your maternity. In disputes on discrimination, one of the most difficult tasks usually is to find a suitable comparator – a person in a similar situation. However, in your case there indeed is a suitable comparator, specifically Ing. arch. B., who worked at the Ministry as a substitute for you during your maternity (later parental leave from 10 November 2014 to 1 June 2015. Within the payslip of 10 November 2014, your substitute was not granted any personal extra pay; in the payslip of 23 February 2015, he was granted personal extra pay in the amount of CZK 4,000 and, on 1 April 2015, his personal extra pay was raised to CZK 11,500. In my position, I simply cannot compare the quality of your work and the quality of work of Ing. arch. B., but it is unquestionable that a period of 3.5 months was sufficient for the employer of Ing. arch. B. (i.e. your employer and future service body) to evaluate his work pursuant to criteria set out in Section 131 of the Labour Code and, following another period of 1.5 months, it had enough information to further increase the personal extra pay.

It can therefore be concluded based on the available supporting documents that the service body is treating you less favourably when it requires disproportionately more time to evaluate your working performance in order to determine the personal extra pay than the amount of time it required in the case of your substitute during your maternal (later parental) leave. There is a strong suspicion that this treatment is related to you maternity. As the preparation of evaluation of the quality of an employee's work is closely related to determination of the amount of personal bonuses (remuneration pursuant to the Anti-Discrimination Act), it can be concluded that the service body may have committed discrimination against you on the grounds of your maternity by failing to perform evaluation of the results of your work to this date and, if applicable, by failing to adjust the amount of your personal extra pay in accordance with the results of said evaluation using the procedure pursuant to Section 149 (2) of the Public Service Act.

Conclusion

In evaluating the question of whether the service body should have increased your personal extra pay through the procedure pursuant to Section 149 (2) of the Public Service Act, the appellate body determined that where this provision is applied, Section 131 of the Labour Code should also be referred to by analogy and, at the same time, the percentage limits determined in Section 6 of Government Regulation No. 134/2015 Coll. should also apply. Based on grammatical interpretation of Section 149 (2) of the Public Service Act and Section 131 of the Labour Code, it can be inferred that these provisions determine a possibility (not an obligation) for the service body to increase the personal extra pay of public servants whose first service evaluation has not yet been drafted. Given the

subsidiary use of the Labour Code in the area of remuneration in a service relationship, Section 110 of the Labour Code, which stipulates that all employees of an employer performing the same work or work of the same value are entitled to the same pay, cannot be omitted.

It can therefore be concluded that in general, it is up to the discretion of the service body whether it will perform evaluation in order to determine the personal extra pay within the meaning of Section 149 (2) of the Public Service Act. In a situation where there is a disproportion between the amount of personal extra pay of employees who have already been evaluated pursuant to Section 149 (1) of the Public Service Act and employees who have not been evaluated in such a way and, at the same time, these employees perform work of equal value within the meaning of Section 110 of the Labour Code, **the service body must perform evaluation of public servants** whose service has not yet been evaluated and in respect of whom the service body possesses enough information to perform the individual evaluation.

Due to the fact that personal extra pay constitutes remuneration within the meaning of the Anti-Discrimination Act and its provision is closely related to evaluation of an employee's work, the effect of anti-discrimination legislation on this issue cannot be omitted in interpreting the above regulations. Since the service body has required in your case (as indicated by the information collected) disproportionately more time to evaluate your working performance in order to determine the personal extra pay than the amount of time it required in the case of your substitute during your maternal (later parental) leave, then in my opinion, there is a strong suspicion that **the service body committed discrimination against you on the grounds of your maternity by failing to perform evaluation of the results of your work and, if applicable, by failing to adjust the amount of your personal extra pay in accordance with the results of said evaluation** using the procedure pursuant to Section 149 (2) of the Public Service Act.

Dear Madam, I hope that this opinion will help you to further enforce your rights. In court proceedings regarding cases of discrimination (even in administrative justice), the burden of proof is shifted. This means that should you indicate such facts before the court from which it could be inferred that discrimination occurred on the part of the defendant (administrative authority), the defendant would be obliged to prove that the principle of equal treatment was not violated[23]. The service body would be obliged to prove that there are relevant facts justifying that it has not yet evaluated you in order to determine the personal extra pay within the meaning of Section 149 (2) of the Public Service Act or that it did perform the evaluation but found no reason to increase your personal extra pay. In such a case, the service body would have to prove that the quality of your work does not correspond to the quality of work of your colleagues who perform similar work and receive higher personal extra pay. I believe that the facts mentioned by you could be sufficient to shift the burden of the proof.

At this point, I am closing your case with the above summarisation. Should you require further explanation of the above or should you manage to resolve the situation in the meantime, please contact the authorised employee of the Office of the Public Defender of

23 Section 133a of Act No. 99/1963 Coll., the Code of Civil Procedure, as amended.

Rights, Mgr. Hana Brablcová by telephone at 542 542 251 or by e-mail at hana.brablcova@ochrance.cz. If I could assist you in this or any other future matter on the basis of my competence, please do not hesitate to contact me again with a new complaint.

Yours sincerely,

Mgr. Anna Šabatová, Ph.D., signed
Public Defender of Rights
(this letter bears electronic signature)