

**Headnotes:**

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- I. The provision of a collective bargaining agreement which makes different treatment of employees conditional on whether or not the employees have become eligible for old-age pension raises the suspicion of direct discrimination on the grounds of age. Such different treatment does not correspond to the elements of indirect discrimination under Section 3 (1) of the Anti-Discrimination Act because eligibility for old-age pension is related to attainment of pensionable age, in the light of which the relevant provision of the collective bargaining agreement is not seemingly neutral.
- II. If a collective bargaining agreement awards contractual severance pay only to those employees who have not become eligible for old-age pension and this different treatment lacks an objective ground given by the character of the work performed, this constitutes direct discrimination on the grounds of age.
- III. In matters of employment relationships, different treatment is permissible to the extent that it has objective grounds consisting in the character of the work performed and the requirements made are proportionate to the character of the work and not such that would pursue any legitimate aim. In protection against discrimination, Section 6 (3) of the Anti-Discrimination Act goes beyond Article 6 of Directive 2000/78/EC by narrowing down the scope of permissible different treatment.

Dear Madam,

I hereby respond to your request for legal assessment of the claim of your client, Ms D. B., for contractual severance pay. Ms B worked for 36 years for X (hereinafter the “employer”). The employer entered into a collective bargaining agreement with the trade union organisation, which provided for severance pay in excess of the employer’s statutory duty. Employees who have worked for over thirty years for the employer are eligible for severance pay in the amount of fourteen times the average monthly salary. However, the collective bargaining agreement removes from this eligibility those employees who have become eligible for old-age pension by the time when the employment relationship was terminated. These employees will receive only the statutory severance pay.

Ms B. considers the above provision of the collective bargaining agreement discriminatory and has therefore referred the matter to courts. The courts of first and second instance dismissed her claim with reference to the purpose of severance pay (bridging a distressing social situation) and contractual freedom as the main value of private law. The matter has been submitted to and is currently heard by the Supreme Court on the basis of an application for appellate review (in Czech *dovolání*).

After studying the case and on the basis of the underlying documents you provided, I concluded that the **contested provision of the collective bargaining agreement might violate the principle of equal treatment and might constitute discrimination on the grounds of age.**

With reference to my competence in matters of the right to equal treatment and protection against discrimination entrusted to me by Sections 1 (5) and 21b of the Public Defender of Rights

Act<sup>1</sup>, I hereby provide to you the following statement within the methodological assistance provided to victims of discrimination.

### Relevant provision of the collective bargaining agreement

The Labour Code<sup>2</sup> stipulates the minimum amount of severance pay. The parties to a labour-law relationship may increase severance pay by any amount. Jurisprudence has uniformly concluded that the prohibition of discrimination must not be violated when negotiating on higher severance pay. Thus, for example, the amount of severance pay may not be linked to attainment of any specific age by an employee.<sup>3</sup>

In the case brought by Ms B., paragraph 2.6.7 of the collective bargaining agreement is contested: “Eligibility for the severance pay under paragraph 2.6.2 [NB: *contractual severance pay*] arises for those employees who have not become eligible for old-age pension upon termination of the employment relationship.”<sup>4</sup>

The employer justified this limitation of payment of the contractual severance pay by the purpose of the limitation. According to the employer, severance pay serves to compensate for a gap in regular income. Persons who have become eligible for old-age pension are not threatened by a gap in regular income. Such persons can immediately begin to receive pension insurance benefits.<sup>5</sup>

### Claimed discrimination

I agree with the conclusions made by the courts of first and second instances in the case of Ms B. to the effect that contractual freedom is one of the fundamental principles of private law. On the other hand, contractual freedom is limited by the mandatory provisions of legal regulations. An act of private law may not be at variance with the law. Contractual freedom is further limited by the requirement for respecting good morals, public policy and right to protection of personal rights.<sup>6</sup> Consequently, human dignity must be respected also in private law.

The prohibition of discrimination in labour-law relationships and exemptions from that prohibition are regulated by Section 16 (2) and (3) of the Labour Code. A reference to the Anti-Discrimination Act is made in the above provisions.<sup>7</sup> The doubt which arose in the case of Ms B. was based on the question of whether the contested provision of the collective bargaining agreement was in accordance with the Labour Code and the Anti-Discrimination Act.

The prohibition of discrimination on the grounds of age is applicable in matters of employment relationships, including remuneration. Remuneration includes severance pay.<sup>8</sup> In labour-law

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<sup>1</sup> Act No. 349/1999 Coll., on the Public Defender of Rights, as amended.

<sup>2</sup> Act No. 262/2006 Coll., the Labour Code, as amended

<sup>3</sup> VYSOKAJOVÁ, Margerita *et al.* *Zákoník práce. Komentář. (Labour Code. Commentary.) In: ASPI version 2015 [legal information system]. Wolters Kluwer ČR [retrieved on: 16 April 2016].*

<sup>4</sup> The collective bargaining agreement dated 17 December 2013, entered into for the year 2014 between the employer and the trade union organisation.

<sup>5</sup> For more on this, see the employer’s letter addressed to Ms B. dated 14 October 2014.

<sup>6</sup> Section 1 (2) of Act No. 89/2012 Coll., the Civil Code

<sup>7</sup> 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

<sup>8</sup> This follows from Section 5 (1) of the Anti-Discrimination Act and CJ EU case-law (judgement of the Court of Justice of 27 June 1990, *Kowalska*, C-33/89, ECR I-2591).

relationships, it is prohibited to treat a person less favourably than another in a comparable situation on the grounds of the person's age.<sup>9</sup> Hence, if discrimination is claimed, it is first necessary to examine the following:

- whether the different treatment concerns persons in a **comparable situation**
- and whether the different treatment occurs on the grounds of **age**.

### Comparable situation

The collective bargaining agreement awards contractual severance pay to employees who have not yet attained pensionable age. Therefore, employees eligible for old-age pension and employees who are not eligible are treated differently. To answer the question of whether they are employees in a comparable position, it is necessary to take account of the purpose of the severance pay.

The Supreme Court has ruled several times that the purpose of severance pay is to help bridge a distressing social situation of a dismissed employee and to compensate the employee for the adverse impact of the employer's decision.<sup>10</sup> The commentary on the Labour Code by the collective of authors led by Professor Bělina is another source which emphasises the compensatory nature of severance pay.<sup>11</sup> The commentary on the Labour Code by the collective of authors led by Assistant Professor Vysokajová points out that indemnification (compensation) should be provided regardless of any other circumstances that may exist. In this respect, the commentary directly states that eligibility for severance pay arises notwithstanding whether the employee has become eligible for old-age pension.<sup>12</sup> Assistant Professor Galvas also discusses compensation for a unilateral decision of an employer, emphasising that the aim of severance pay is not to provide employees with social security.<sup>13</sup>

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<sup>9</sup> Section 1 (1)(c) and Section 2 (3) of the Anti-Discrimination Act

<sup>10</sup> For example, judgement of the Supreme Court of 17 May 2002, File No. 21 Cdo 1667/2001, No. 6/2002 Coll. of the Supreme Court, [www.nsoud.cz](http://www.nsoud.cz): "Severance pay is a one-off pecuniary contribution which is to help an employee **bridge an often difficult social situation** occurring because the employee has lost his or her existing job through no fault of the employee (for reasons on the employer's part). By awarding severance pay in the amount of twice the average earnings, the law intends to provide the employee with the pecuniary means (s)he would otherwise receive if the employment relationship continued for two more months. In this manner, severance pay is to **compensate an employee for the adverse consequences of organisational changes** and provide the employee with corresponding security to mitigate these effects, in the form of a one-off pecuniary contribution."

<sup>11</sup> "Severance pay represents a one-off pecuniary contribution aimed at helping an employee **bridge a social situation** (often difficult) **occurring because the employee has lost his or her existing job through no fault of his or her own** (for reasons on the employer's part or as a result of an unfavourable medical condition caused by an occupational injury, occupational disease or danger of an occupational disease, or due to reaching the highest permissible exposure). Severance pay is intended to at least partly **compensate (mitigate)**, through a one-off pecuniary contribution paid by the employer, **for the consequences** of termination of the employee's existing job and for the necessity to seek a new job or to commence some other gainful activity." BĚLINA, Miroslav *et al.* *Zákoník práce. Komentář. (Labour Code. Commentary.) 2nd ed. Prague: C. H. Beck, 2015. Extensive commentaries. ISBN 978-80-7400-290-8, p. 419.*

<sup>12</sup> "Severance pay, as a one-off pecuniary performance provided by the employer, represents a **form of indemnification for employment lost through no fault of the employee**. The employer is obliged to pay to the employee severance pay in connection with the termination of employment in cases where this is stipulated by law **notwithstanding any other circumstances that may exist** (i.e. whether and when the employee subsequently enters a new employment, whether the employee commences business activities or becomes eligible for old-age pension)." VYSOKAJOVÁ, Margerita *et al.* *Zákoník práce. Komentář. (Labour Code. Commentary.)* In: ASPI version 2015 [legal information system]. Wolters Kluwer ČR [retrieved on: 16 April 2016].

<sup>13</sup> "As follows from the currently applicable legal regulation of severance pay, **the purpose of severance pay is not to provide security to an employee** immediately after the termination of the employment relationship in defined cases and to

In my opinion, if the legislature intended to limit severance pay only to employees in a distressing social situation who have no other income at the time of dismissal, this would be expressly stipulated.<sup>14</sup> Logically, any such legal regulation would concern not just persons who receive old-age pension but also persons receiving disability pension, self-employed persons, persons in an employment relationship (parallel or newly established) and persons working on the basis of agreements on work performed outside an employment relationship. Therefore, the very wording of the Labour Code does not support the argument that severance pay is intended merely to bridge a distressing social situation.

Contractual severance pay agreed in excess of the statutory minimum represents a form of employee benefit. Severance pay increased on the basis of the number of years worked is then a loyalty benefit. Its purpose is to reward the employee for loyalty and for the duration of his or her employment.<sup>15</sup>

I personally consider that the purpose of severance pay is not only to help bridge a distressing social situation, but it can be seen primarily as **compensation for the unilateral termination of the employee's employment relationship by the employer. In addition, contractual severance pay operates as an employee benefit used by the employer to reward employee loyalty.** In this respect, an employee eligible for old-age pension is in a **situation comparable to the situation of an employee who is not eligible.** Each of them is equally prejudiced by the unilateral termination of the employment relationship by the employer (the degree of disruption of the contractual relationship and mutual trust of the parties is identical). Each of the employees should have an equal eligibility for an employee benefit and both should be rewarded for employee loyalty.

## Age

Eligibility for old-age pension arises after reaching a specified age. Thus, the contested provision of the collective bargaining agreement applies exclusively to elderly people. The Court of Justice of the European Union (hereinafter the "CJ EU") made a similar conclusion when ruling that eligibility for old-age pension was directly related to the age requirement.<sup>16</sup> The jurisprudence states the following on eligibility for old-age pension:

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compensate the employee for the loss of income from the existing employment. **It rather represents only a kind of 'indemnification', or compensation,** which the employer has the duty to provide to his employee for having terminated the employment relationship with the employee for defined reasons, which have in fact originated on the employer's part (organisational reasons, medical condition caused by an occupational injury or occupational disease, danger of occupational disease, reaching the highest permissible exposure). This conclusion is also supported by the legal regulation of the employee's duty to return the severance pay or a part thereof if the employee re-enters employment for the same employer after the termination of the employment relationship." GALVAS, Milan, Zdeňka GREGOROVÁ, Jan HORECKÝ, Jana KOMENDOVÁ and Jaroslav STRÁNSKÝ. *Pracovní právo (Labour law)*. 2<sup>th</sup> supplemented and revised edition. Brno: Masaryk University, 2015. ISBN 978-80-210-8021-8, p. 377.

<sup>14</sup> Similar to the Danish legislature, as follows from the case-law of the CJ EU: "Restricting the severance allowance to only those workers who, on termination of the employment relationship, are not entitled to an old-age pension to which their employer has contributed does not appear unreasonable in the light of the aim pursued by the legislature of providing increased protection for workers for whom it is very difficult to find new employment as a result of their length of service for an undertaking. Article 2a(3) of the Law on salaried employees also makes it possible to limit the scope for abuse by preventing workers who intend to retire from claiming a severance allowance which is intended to support them while seeking new employment." Judgement of the Court of Justice of 12 October 2010, *Ingeniørforeningen i Danmark acting on behalf of Ole Andersen v Region Syddanmark*, C-499/08, ECR I-9343, paragraph 34.

<sup>15</sup> ŠUBRT, Bořivoj. Zaměstnanecké výhody z pracovněprávního pohledu (*Employee Benefits from the Labour-Law Perspective*). In: ASPI version 2015 [legal information system]. Wolters Kluwer ČR [retrieved on 6 May 2016].

<sup>16</sup> "In the present case, Article 2a(3) of the Law on salaried employees deprives certain workers of their right to the severance allowance on the sole ground that they are entitled to draw, on termination of the employment relationship, an old-age

“If the criterion taken is inherently connected to a discrimination ground (for example, the criterion of ‘receiving old-age pension’ is related to age), this is not indirect discrimination but rather direct discrimination. A typical situation is an employer refusing to provide a benefit to employees who have become eligible for old-age pension. While the employer does not specifically operate with age, eligibility for old age pension is based on an age limit and the measure cannot, by definition, affect other persons.”<sup>17</sup>

Thus, the contested provision of the collective bargaining agreement treats persons less favourably on the basis of their age and as such it appears to be directly discriminatory (Section 2 (3) of the Anti-Discrimination Act).<sup>18</sup>

Discrimination is not deemed to exist in respect of labour-law relationships when different treatment is based on an objective ground consisting in the nature of the work performed and the requirements made are proportionate to the character of the work (Section 6 (3) of the Anti-Discrimination Act). Thus, for final assessment of the situation, it is necessary to examine whether the different treatment:

- was based on an **objective ground** consisting in the character of the work performed
- and the requirements made were **proportionate**.

### Objective ground

The employer justified the different treatment by income from old-age pension which ensures that the employees concerned do not have a gap in regular income.<sup>19</sup> However, this cannot be regarded as an objective ground **consisting in the character of the work performed**. The ground indicated by the employer could rather be assessed as an aim of employment policy or labour market as specified by Article 6 of Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (hereinafter “Directive 2000/78”). However, it should be emphasised that the relevant provision of the Directive was implemented into Czech legislation specifically through the Anti-Discrimination Act (Section 6 (1) and (3)), which goes beyond the framework of Directive 2000/78 in protection against discrimination and narrows down the possibilities of permissible different treatment. Under the Anti-Discrimination Act, different treatment in the area of labour-law relationships is such treatment that has an objective ground consisting in the character of the work performed and not treatment that would pursue any legitimate aim (Directive 2000/78).

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pension from their employer under a pension scheme which they joined before attaining the age of 50 years. It is apparent from the documents before the court that entitlement to an old age pension is subject to a minimum age requirement which, in Mr Andersen’s case, was set under a collective agreement at 60 years. That provision is thus based on a criterion which is inextricably linked to the age of employees. It follows that the national legislation at issue in the main proceedings operates a difference of treatment based directly on grounds of age for the purposes of Article 1 of Directive 2000/78 in conjunction with Article 2(2)(a) thereof.” Judgement of the Court of Justice of 12 October 2010, *Ingeniørforeningen i Danmark acting on behalf of Ole Andersen, v Region Syddanmark*, C-499/08, ECR I-9343, paragraphs 23 and 24.

<sup>17</sup> KVASNICOVÁ, Jana, ŠAMÁNEK, Jiří *et al.* Antidiskriminační zákon (Anti-Discrimination Act). Commentary. 1<sup>st</sup> edition. Prague: Wolters Kluwer, 2015. ISBN 978-80-7478-879-6, pp. 174-175.

<sup>18</sup> Indirect discrimination is not relevant because the given provision of the collective bargaining agreement is not laid down in such a manner as to be seemingly neutral (Section 3 (1) of the Anti-Discrimination Act).

<sup>19</sup> The employer’s justification does not appear illogical as there are also other groups of persons who do not have a gap in regular income when their employment relationship is terminated (for example, persons eligible for disability pension, self-employed persons). However, the provision concerned does not affect these categories.

The employer's claim that persons who do not have a gap in regular income should not receive contractual severance pay does not constitute an objective ground consisting in the character of the work performed. Thus, the contested provision of the collective bargaining agreement does not meet the first condition of permissible different treatment under the Anti-Discrimination Act. **Therefore, the general form of permissible different treatment is not applicable in the present case.** While in the case at hand it is no longer necessary to examine proportionality of the contested provision, I would like to at least outline my assessment of this second condition.

### Proportionality

The collective bargaining agreement links the limitation of payment of contractual severance pay to a mere eligibility for old-age pension and not to whether the pension is actually paid. However, the present regulation of pension insurance makes it possible to postpone the payment of old-age pension during the period when the person is carrying out gainful activities. The aim of the legal regulation is to motivate employees in pensionable age to leave the labour market later.<sup>20</sup> Thus, persons of pensionable age who remain in the labour market may have a gap in regular income if the pension is not paid by the time of termination of the employment relationship (expiry of the period of notice). The contested provision of the collective bargaining agreement unreasonably affects all persons who are eligible for old-age pension. It does not take into account whether an employee indeed begins to receive old-age pension or, to the contrary, decides to stay longer in the labour market. Therefore, I am convinced that the provision does not meet the second condition of permissible different treatment, either, and is hence **not proportionate**.

### Conclusion

Having assessed the case, I concluded that the **contested provision of the collective bargaining agreement might violate Section 16 (2) of the Labour Code and Section 2 (3) of the Anti-Discrimination Act.**

If the purpose of the severance pay is to indemnify an employee for unilateral termination of the employment relationship and reward the employee's loyalty, then the contested provision treats people in a comparable situation differently and is potentially discriminatory. No objective ground justifying different treatment on the basis of the character of the work arose from materials at my disposal. In addition, the different treatment is not proportionate. The contested provision thus cannot be classified as permissible different treatment pursuant to Section 6 (3) of the Anti-Discrimination Act.

If you would like to consult me on any further steps in litigation, please do not hesitate to contact me again; as the representative of a discrimination victim, you can receive further methodological assistance.

Sincerely,

Mgr. Anna Šabatová, Ph.D., signed  
(this letter bears electronic signature)

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<sup>20</sup>Government of the Czech Republic. Explanatory Memorandum on Act No. 306/2008 Coll., amendment to the Pension Insurance Act and Organisation and Implementation of Social Security Act. In: ASPI version 2015 [legal information system]. Wolters Kluwer ČR [retrieved on 20 April 2016].

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