Record card

File number	75/2011/DIS
Area of law	Discrimination – healthcare
Subject	Others
Type of finding	Report on a case where discrimination was not found – Section 21b
Result of inquiry	Discrimination not found
Relevant Czech legislation	20/1966 Coll., Section 8 (d), Section 26 (2) 2/1993 Coll., Section 1 285/2002 Coll., Section 2 (b) 378/2007 Coll., Section 4 (6), Section 67 (4) 198/2009 Coll., Section 1 (1)(h), Section 2 (3), Section 7 (1)
Relevant EU legislation	TFEU, Article 57
Date of issue	24 October 2011
Date of filing	21 March 2011

Headnote

I. When assessing the suitability of a blood donor (or a plasma donor), it is necessary to distinguish between the individual's sexual orientation and his/her sexual behaviour. High risk sexual behaviour is not pre-determined by sexual orientation.
II. If a potential blood donor is rejected with reference to his/her sexual orientation, this can therefore be considered direct discrimination in the sense of Section 2 (3) of the Anti-Discrimination Act. However, if an individual is rejected because his/her sexual behaviour objectively entails high risks, his/her rejection as a plasma donor can be considered legitimate.

Note: The headnote is not necessarily included in the Defender's opinion.

Document:

Brno, 24 October 2011
File No.: 75/2011/DIS/AHŘ

Inquiry report
Rejection of a plasma donor based on his sexual orientation

A. Content of the complaint

On 21 March 2011, I was contacted by complainant X. Y. He complained, in substance, about the approach taken by a physician at the Ch. Blood Donor Centre (hereinafter the "Donor Centre") who had refused to include the complainant in the plasma donation programme, arguing that, being homosexual, the complainant was permanently unsuitable as a donor.

B. Findings

In his pleading, the complainant indicated facts giving rise to a suspicion that the physician, or rather the Donor Centre, may have discriminated against the complainant within the meaning of the Anti-Discrimination Act.[1] Therefore, I initiated an inquiry into the matter. We approached the Donor Centre with a request for a statement on the situation and the general practice applied in selection of suitable plasma donors. The inquiry yielded the following information.

I. Complainant

The complainant stated that he had wanted to become a plasma donor to obtain a financial reward. He thus visited the Donor Centre. After he filled in the donor form, the complainant discussed the information indicated in the form with a physician, who asked questions to ascertain the complainant's sexual orientation, among others. X. Y. informed the physician that he was homosexual. Based on this, he was designated as a person permanently unsuitable as donor. The complainant subjectively feels that such treatment is demeaning, *inter alia,* due to the fact that he allegedly had his blood tested for antibodies to sexually transmitted infections prior to visiting the Donor Centre. The test was negative. He wonders why his sexual orientation should render him permanently unsuitable as a plasma donor. Subsequently, the complainant also submitted a copy of the filled-in form to supplement his complaint. One of the questions is as follows: "For men: Have you ever had sex with men?" The complainant gave an affirmative answer to this question as well as to the question: "Do you often have sex with non-regular sexual partners?" The complainant wished to remain anonymous. Given the sensitive nature of the matter at hand, I decided to respect his wish.

II. Donor Centre

A statement on behalf of the Donor Centre was provided by the head physician, MUDr. P., MBA. By way of introduction, he stated that "blood and plasma donations are governed by national and EU legislation focusing especially on the safety of blood transfusion products and blood derivatives", in particular from the perspective of the recipient's safety. According to MUDr. P., said legislation provides binding procedures for the selection of suitable donors, where blood and plasma donations are "entirely voluntary and subject to strict selection criteria, and cannot be enforced".

There are professional procedures for the selection of suitable donors laid down in the implementing decrees to Act No. 378/2007 Coll., on pharmaceuticals,[2] and in guidelines issued by a professional association. As to the donor selection procedure applied in the Donor Centre, he stated that each potential donor had to fill in an entry form, also including questions identifying any potential high-risk behaviour on the part of the donor.[3] The definition of a high risk behaviour on the part of the donor is provided in one of the guidelines of the Transfusion Medicine Society of the Czech Medical Association of J. E. Purkyně, and includes homosexual anal sex.

The potential donor's medical condition is then assessed by a physician, who also discusses the donor's answers with him/her. The suitability of the donor is assessed prior to each collection. MUDr. P. conceded that questions to ascertain the donor's

sexual orientation and promiscuity were asked in both the written form and the interview with the physician. Information on male potential donors' sexual orientation was important due to the high risk of possible transmission of diseases, especially the HIV. The sexual practice used by men who have sex with men – anal sex – was important, because "resistance of the rectal mucosa against mechanical stress is low, which leads to small injuries that significantly increase the risk of transmission of blood-borne infections." MUDr. P. supplemented his statement with statistical data collected on HIV transmission by the National Institute of Public Health. This data shows that there were 157 new cases of HIV infections in 2009, where 131 of the infected people were men and 26 were women. The dominant manner of transmission between men was "homosexual/bisexual" intercourse.

III. Other sources

The question of blood and plasma donations by homosexuals, or rather by men who have had sex with men, has also been addressed abroad and, therefore, some other sources were also analysed within the inquiry. These include especially an opinion of the Dutch Equal Treatment Commission, which addressed a similar case in 2008.[4] Furthermore, information was retrieved from the UK National Health Service's Blood and Transplant Portal, and from documents published by SaBTO – Advisory Committee on the Safety of Blood, Tissues and Organs (hereinafter the "SaBTO"). From among Czech sources, I used the guidelines of the above-mentioned Transfusion Medicine Society of the Czech Medical Association of J. E. Purkyně.

C. Legal analysis

To analyse the case from the legal perspective, it is primarily necessary to determine whether plasma donations can actually be assessed from the viewpoint of the Anti-Discrimination Act. This is because only the Anti-Discrimination Act allows to ascertain whether or not Mr. X. Y.'s right to equal treatment has potentially been violated. The considerations outlined below lead me to believe that the prohibition of discrimination contained in the Anti-Discrimination Act also applies to blood and plasma donations. My opinion is reasoned as follows:

I. Anti-discrimination legislation in the Czech Republic and in the European Union

First of all, it must be said that the Anti-Discrimination Act implements in the national law the duties following from the anti-discrimination directives of the European Union (hereinafter the "EU"). Therefore, in case of any doubt, the provisions of the Anti-Discrimination Act should be interpreted in the light of the EU legislation.

The Dutch Equal Treatment Commission categorised blood donations as a "service". The same categorisation was also used by the SaBTO in the recently published "Donor Selection Criteria Review"[5] The definition of a "service" is thus wider in the European context[6] than on the national level. According to Article 57 of the Treaty on the Functioning of the European Union[7], services are – within the meaning of the Treaties – performances normally provided for remuneration, where direct remuneration between the recipient and provider of the service is not required.[8] The above also applies to donations of blood and its components and, in that scenario,

the transfusion facility must be considered the service provider. The service then consists in collection and distribution of human blood for healthcare purposes. A thus-described service can be subsumed under a wider definition of healthcare as a system of care for human health.

In addition to the line of argument presented above, this legal opinion is also based on the currently applicable legal regulations governing blood donations. In the sense of Section 8 (d) of Act No. 20/1966 Coll., on care for public health, as amended (hereinafter the "Public Health Act"), blood donations are one of the methods to secure care for public health. The collection of blood is carried out and organised by healthcare facilities as part of healthcare; the collection may compromise the health of neither the donor nor the recipient of the material (Title One, "Healthcare" of the Public Health Act, Section 26 (1) and (2)).

The status of a transfusion centre as a healthcare facility follows from Section 4 (6) in conjunction with Section 67 of the Pharmaceuticals Act; the duties of its operators, including safety measures to be implemented with respect to the donors, are specified in Section 67 (4) of the Act.

Regarding the legal regime of blood and plasma donations, these are not considered parts of the human body, tissues or cells.[9] The Pharmaceuticals Act stipulates in Section 2 (2)(n) that human blood and its components processed to be transfused to humans for the purposes of therapy or prevention of a disease are considered "transfusion products" and, as such, they are considered medicinal products. Therefore, any disposal thereof is governed by the Pharmaceuticals Act.[10] It must also be kept in mind that blood collection and diagnostics are paid for through the public health insurance system.[11]

Considering all the above, I believe that the prohibition of discrimination in access to healthcare on the grounds of sexual orientation, as laid down in the Anti-Discrimination Act, does apply to the selection of blood donors.

II. Legal regulations governing the selection of blood and plasma donors

When considering the legal framework for blood and plasma donations and the selection and suitability of donors, it is necessary to also take account of EU law. Specifically, it is necessary to consider the directives[12] transposed into national law by virtue of the Pharmaceuticals Act and the Human Blood Decree.[13] This is because, as indicated in the recitals of one of the directives: "The extent to which human blood is used therapeutically demands that the quality and safety of whole blood and blood components be ensured in order to prevent in particular the transmission of diseases."[14] The responsibility for ensuring safety of the collection of blood and its components is borne by the transfusion facility.[15]

All applicable legal regulations, including the Human Blood Decree, speak relatively broadly as to the suitability of donors. However, the goal is clear: safety for both the blood donor and the recipient. Leaving aside the assessment of the risks for the donor, one can consider that a suitable blood donor is a person in relation to whom the health risks for the recipient of the blood (or its components) are minimised. Such risks can never be ruled out completely, not even with the current state of medical

science.[16] To minimise the risks as far as possible, the facilities use a combination of testing the donor's blood by diagnostic methods (where the tests are aimed, *inter alia*, at revealing sexually transmitted diseases) and excluding high risk groups of donors (persons providing sex for money, promiscuous people, intravenous drug users, etc.). To verify that a potential donor does not fall within any of the high risk categories, each person is subjected to detailed questioning on his/her medical condition, medical history and social behaviour, including sexual behaviour, prior to being included in the list of donors. Even though the information that must be elicited from donors is listed in Annex 2, part B of the Human Blood Decree[17], there are no further specifications of the suitable questions and no definitions of high risk sexual activities.

The Donor Centre stated that a more specific definition of high risk behaviour could be found among the cited guidelines of the Transfusion Medicine Society of the Czech Medical Association of J. E. Purkyně. Guideline No. STL2007_03 of the Transfusion Medicine Society of the Czech Medical Association of J. E. Purkyně of 1 March 2011, version 4 (2011_03), stipulates that there is an increased risk of infection among men who have had sex with men, and their regular sexual partners. No consequences were derived directly from the sexual orientation of the donors.

III. Right to equal treatment and prohibition of discrimination

The question I aimed to answer in the inquiry was whether or not the Donor Centre had violated the complainant's right to equal treatment. In the case at hand, the complainant perceived discrimination in that he had been rejected as plasma donor due to his sexual orientation. It is thus necessary to examine primarily the role of Mr. X. Y.'s sexual orientation in him being rejected. Regarding this case and the general legal framework of the prohibition of discrimination, I note as follows:

The Anti-Discrimination Act prohibits direct and indirect discrimination, where the term "discrimination" also includes victimisation, incitement and instruction to discriminate, and harassment (Section 2 (2)). Direct discrimination entails situations where a person is treated less favourably than another person in a comparable situation based on the prohibited discrimination grounds, including sexual orientation.[18] However, different treatment in healthcare on the grounds of sexual orientation is not considered discrimination where it is objectively justified by a legitimate goal and the means of achieving this goal are proportionate and necessary (Section 7 (1) of the Anti-Discrimination Act).

The copy of the form filled-in by the complainant, which I had at my disposal for the purposes of my inquiry, does not contain any question directly concerning the donor's sexual orientation. Nonetheless, the form does aim to ascertain the potential donor's sexual behaviour (promiscuity, sex between men). This is in line with the requirements on transfusion facilities under the above-mentioned EU directives and national law.

Mr. X. Y. acknowledged in the form that he had had non-regular sexual partners and that he had had sex with men. Later, he specified this by stating that he did not have one regular sexual partner, but that he did not consider himself promiscuous. Within the oral evaluation of the form, a question was asked regarding the complainant's

sexual orientation in connection with the acknowledged sex with men. MUDr. P. from the Donor Centre also indicated sexual orientation as a risk factor in his statement.

It is precisely this comment by MUDr. P. that shows the general problem of mixing up sexual behaviour and sexual orientation. These two are, understandably, related; however, high risk sexual behaviour is not pre-determined by sexual orientation. In other words: The fact that someone is gay does not mean that he engages in high risk sexual activities. To think otherwise means to feed prejudices about sexual minorities. If sexual orientation of an individual is automatically associated with an increased risk without any assessment of the particular circumstances of the individual's health and life style, this certainly touches his/her dignity, a value protected by anti-discrimination legislation.[19]

In order to better illustrate the difference between the two categories, I would like to make a brief non-legal comment. Professional literature defines sexual orientation as an individual's orientation to partners of either the opposite or the same sex.[20] However, this does not mean purely sexual attraction, but rather an intimate attraction in a broader sense. Therefore, people attracted to people of the same sex need not engage in homosexual activities and, *vice versa*, people who experienced or experience intercourse with people of the same sex need not consider themselves homosexual.[21] Therefore, intercourse between men does not necessarily result from sexual orientation of the respective men, but may only be an experiment that, as is often the case, will not be repeated in the future.

It follows from the above that the physicians should be interested exclusively in any high risk sexual behaviour of the individual, even if this category currently includes sex between men – which is understandably associated with homosexuality – and that exclusively high risk sexual behaviour should be considered a reason for rejecting a donor.[22] Rejecting an individual as a blood (plasma) donor for his/her sexual orientation thus represents direct discrimination.

However, while assessing the individual Mr. X. Y.'s medical circumstances and risks, we cannot ignore the fact that he was a high risk donor regardless of his sexual orientation, as he acknowledged that he had non-regular sexual partners. In this connection, I would like to point out that I am not competent to assess whether this question is clearly formulated and subsequently properly explained by the physician in the interview with the potential donor. Nonetheless, I consider it legitimate that a person in respect of whom there is objectively (i.e. based on his particular characteristics rather than prejudice) not sufficient certainty that the relevant blood derivative will be sufficient was rejected. The minimisation of the health risk for the recipient (as well as the donor) is a prime concern according to the legal regulations analysed above. Furthermore, it must be borne in mind that there currently exists no diagnostic method allowing one to rule out with the maximum possible degree of certainty the presence of any infectious disease agents in the collected blood, especially not in early stages of the diseases. Therefore, it is not possible to rely fully on medical diagnostics of the material collected from the donor and the safety of the material is thus also ensured, *inter alia*, by rejecting groups of donors that involve high risks.

D. Conclusion

When assessing the suitability of a blood donor (or a plasma donor), it is necessary to distinguish between the individual's sexual orientation and his/her sexual behaviour. High risk sexual behaviour is not pre-determined by sexual orientation. If a potential blood donor is rejected with reference to his/her sexual orientation, this can therefore be considered direct discrimination in the sense of Section 2 (3) of the Anti-Discrimination Act. However, if an individual is rejected because his/her sexual behaviour objectively entails high risks, which Mr. X.Y.'s sexual behaviour did, his/her rejection as a plasma donor can be considered legitimate.

JUDr. Pavel V a r v a ř o v s k ý, signed in his own hand
The Public Defender of Rights

[1] Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws (hereinafter the "Anti-Discrimination Act").

[2] I.e. Act No. 378/2007 Coll., on pharmaceuticals and on amendment to certain related laws, as amended (hereinafter the "Pharmaceuticals Act").

[3] He specified that the term "high risk behaviour" was defined in one of the guidelines of the Transfusion Medicine Society of the Czech Medical Association of J. E. Purkyně accessible at http://www.transfuznispolecnost.cz/dokumenty.php.

[4] Opinion No. 2007-85 of 31 March 2007.

[5] SaBTO – Advisory Committee on the Safety of Blood, Tissues and Organs: Donor Selection Criteria Review. p. 43. Available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_129909.pdf

[6] Cf. Tichý, L., Arnold, R., Svoboda, P., Zemánek, J., Král, R. Evropské právo. (*European Law.)* 3rd edition. Prague: C. H. Beck, 2006. p. 505 - 506.

[7] Celex 11957E

[8] Cf. ECJ judgment in Case 352/85 Bond van Adverteerders, in Tichý, L., Arnold, R., Svoboda, P., Zemánek, J., Král, R. Evropské právo. (*European Law.)* 3rd edition. Prague: C. H. Beck, 2006. p. 506.

[9] Section 2 of Act No. 285/2002 Coll., on donation, collection and transplantation of tissues and organs and on amendment to certain related laws, as amended: "For the purposes of this Act, the following terms shall have the respective meanings: (...)

(b) tissues and cells mean the component parts of human body, including remains resulting from surgeries, as well as hematopoietic stem cells obtained from bone marrow or the peripheral and umbilical cord blood, with the exception of organs, blood and its components, sex cells, embryonic and fetal tissues and

organs, hair, nails, the placenta and waste products of body metabolism (hereinafter the 'tissue') (...)"

[10] As the legal regimes of donations of blood and its components can be considered identical for the purposes of this inquiry, any mentions of blood donations in the text below can also be applied to donations of blood plasma.

[11] Cf. Section 16a (1) in conjunction with Section 3 (e) and Section 30 (2)(e) of Act No. 48/1997 Coll., on public health insurance, as amended.

[12] Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components, and Commission Directive 2004/33/EC implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components.

[13] Decree of the Ministry of Health No. 143/2008 Coll., on setting more specific requirements on ensuring the quality and safety of human blood and its components, as amended (hereinafter the "Human Blood Decree").

[14] Recital 1 of Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and its components.

[15] Section 67 (4) of the Pharmaceuticals Act.

[16] This is due to the existence of the "window period" during which it is almost impossible to detect the virus in the blood collected from the donor. The period occurs especially early after the individual has been infected. For details, cf.: SaBTO – Advisory Committee on the Safety of Blood, Tissues and Organs: Donor Selection Criteria Review. p. 43. Available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_129909.pdf

[17] "Information provided by the donor shall include

(a) information unambiguously identifying the donor (name(s), surname(s), birth Id. No., address of residence), contact details, and

(b) information on the medical condition and medical history of the donor based on a personal interview with an authorised medical professional, recorded in the donor's form; the information shall contain important aspects that can help identify and reject persons the collection from whom could represent a health risk for others, for example of transmission of diseases, or an unreasonable health risk for the donor himself/herself."

[18] Cf. Section 2 (3): "Direct discrimination shall mean an act, including omission, where one person is treated less favourably than another person is, has been or would be treated in a comparable situation, on grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or opinions."

[19] Article 1 of the Charter of Fundamental Rights and Freedoms: “All people are free and equal in their dignity and in their rights. Their fundamental rights and freedoms are inherent, inalienable, unlimitable, and irrepealable.”

[20] Atkinson, R. L. et al. Psychologie. (*Psychology*.) 2nd updated edition. Prague: Portál, 2003. p. 701.

[21] Ibid., p. 376.

[22] Cf. also the information provided by UK’s National Health Service: http://www.nhs.uk/Conditions/Blood-donation/Pages/Who-can-use-it.aspx