Record Card

File number	8024/2014/VOP
Area of law	Discrimination – labour and employment
Subject	remuneration termination of employment
Type of finding	Report of discrimination found – Section 21b
Result of inquiry	Discrimination found
Relevant Czech legislation	99/1963 Coll., Section 133a 262/2006 Coll., Section 52 (1)(c) 198/2009 Coll., Section 1 (1)(c), Section 2 (3), Section 4 (3), Section 5 (1), Section 6 (1), Section 6 (3), Section 7 (2), Section 10 89/2012 Coll., Section 2957
Relevant EU legislation	78/2000/EC, Art. 6 (1), Article 17
Date of issue	26 January 2016
Date of filing	17 December 2014

Headnote

(I) The legislature must observe Article 6 (1) of Council Directive 78/2000/EC when stipulating permissible forms of differences of treatment on grounds of age. Employers are obliged to stay within the limits imposed by national legislation, i.e. by Section 6 (1) of the Anti-Discrimination Act, or alternatively to subsume the difference of treatment under Section 6 (3) of the Anti-Discrimination Act. The Anti-Discrimination Act does not allow employers to make the decision to lay off employees under Section 52 (1)(c) of the Labour Code based on the fact that they receive old age pension, even if such procedure would favour female employees with minor children.

(II) Affirmative action in the sense of Section 7 (2) of the Anti-Discrimination Act adopted by private entities must meet the statutory conditions. Termination of employment by notice inconsistent with the prohibition of discrimination on the grounds of age thus cannot be justified as affirmative action with respect to younger female employees with minor children.

(III) If the employee proves that the employer failed to pay out bonuses to the employee immediately after the employee had refused to accept an agreement on termination of the employment or expressed his or her objections to being laid off due to alleged discrimination, this is sufficient to shift the burden of proof in the sense of Section 133a of the Code of Civil Procedure. For the suspicion of discrimination to be refuted, the employer must prove that it had other relevant reasons not to grant the benefits.

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

Document:

Brno, 26 January 2016
File No.: 8024/2014/VOP/EN

8027/2014/VOP/EN
Report on inquiry
in a case of discrimination on grounds of age upon termination of employment by notice (laying off employees)

In late 2014, I was contacted by Ms. Z. S. and Ms. M. Š. (hereinafter also the "complainants"), who used to work as judicial officers at the X court. They stated that they had been discriminated against by their former employer on the grounds of their age. Since the contents of the complainants' complaints are similar and the complainants know each other and are familiar with each other's situation, I decided to address the established facts in one report.

Ms. S stated that she had worked for the X court for 38 altogether; Ms. Š had worked there for 25 years. According to the submitted employment contracts, the complainants as judicial officers were responsible especially for "independent decision-making to the statutory extent in all aspects of administration of justice in criminal, civil and administrative cases".[1] The complainants stated that they had worked in the distraint unit.

On 25 September 2014, the complainants were allegedly summoned to the office of their superior, Vice-President of the X court Mr. A. B., who informed them that the court did not receive enough money for remunerations and the Y court thus ordered the X court to lay off all working pensioners. After that, he presented the complainants with agreements on termination of employment, which they refused to sign. They stated that the Vice-President of the court tried to talk them into signing and threatened that he would keep transferring them between departments until they decided to leave of their own accord, or that he would dismiss them himself. Ms. Š stated that she had subsequently been called into the office of the head of the distraint department; in this meeting, she was very hurt by the remark of the Vice-President of the X court Mr. A. B., who allegedly stated: "I hope you don't want to keep working until you die; you have your pension, stay at home." After that, there was allegedly another attempt to talk Ms. Š. into signing the agreement on termination of employment, this time by the President of the X court Mr. C. D.; the relevant meeting was reportedly also attended by A. B. and the head of the court administration Ms. E. F. Immediately after that, the complainants were laid off for reasons of redundancy on 2 October 2014. In the notice of termination, the employer stated that the redundancy resulted from decision of the employer on the redundancy of two judicial officer jobs, Ref. No. Spr 2956/2014 (also dated 2 October 2014).

According to the complainants' statements, apart from themselves, one other colleague of an advanced age (born in 1950) was also laid off, where this colleague also had refused to accept the agreement on termination of employment. Subsequently, the agreement was accepted by other employees – working pensioners; according to the complainants, some of them were pressured into doing so, some accepted voluntarily. The complainants named four of those colleagues.

The complainants believe that the redundancy was a pretext and the real reason was their retirement age. Ms. S. submitted a copy of a document of 1 December 2014 whereby the X court initiated a selection procedure to recruit a judicial officer. She stated that the employment contract had allowed the employer to transfer her to another unit; this would not have been a problem for her as she had experience in other fields as well. Ms. Š. stated that her former area of responsibility, chamber 79 EXE, and all her former work had been assumed by judicial trainee Mgr. H. K., referring to the schedule of work for 2015.

Both complainants expressed their objections to the termination by notice. Ms. S contacted the X court twice in writing (letters of 7 November 2014 and 7 January 2015); she also sent a letter directly to the President of the X court on 18 December 2014. Ms. Š. informed the employer of her objections to the termination in writing on 10 November 2014.

The complainants also stated that the employer paid out extraordinarily high benefits in December 2014. The benefits were paid out to every employee in the distraint unit apart from the complainants and their colleague who had also refused to sign the agreement on termination of employment. They considered this conduct as the employer's punishment for not having wanted to terminate their employment by agreement.

Ms. S. lodged an action for annulment of the termination of employment by a notice; at the time of issuance of this report, the first hearing is yet to be ordered.

A – Subject of inquiry

In the case at hand, I focused on assessment of the alleged discrimination by the X court as the employer on grounds of age, because the law confers on me the competence to act in matters concerning the right to equal treatment and protection against discrimination.[2]

B – Findings of fact

Based on the complainants' complaints, the head of the equal treatment department contacted the President of the X court Mr. C. D. and asked him to provide his comments.

B.1 Insufficient funds for remuneration

In the introductory part of his comment, the President of the court completely dismissed the complainants' interpretation as arbitrary and subjective. He stated that the Y court (especially the head of the court administration Mr. G. H.) had announced approximately in mid 2014 that there would be a sharp drop in the volume of budgeted funds for remuneration as compared to 2014 and that it would be up to the court's administration to determine the specific measures. The X court opted not to reduce the remuneration of all employees; the President of the court described the

adopted measures as follows: "The individual Vice-Presidents of the court were ordered to find out which employees in their departments were employed for a fixed term and which of them were indispensable and their contracts would be renewed, and which employees would be laid off due to a lack of funds. They were simultaneously ordered to inspect the workloads of the employees in their units and identify employees that would be redundant due to a low workload and redistribution of work."

The President of the court noted that the complainants had worked in a unit headed by Vice-President of the court Mr. A. B., who had made an audit of the personnel and found that "there [had been] a significant decrease in the number of received cases in the distraint unit – as compared to the previous years, the decrease [had amounted] to 85% (from 10,000 received cases in the previous years to 1,000 received cases in 2014) and it had thus been possible to reduce the number of judicial officers in the department." Mr. B. had the option to lay off either Ms. R. H. (36 years of age, one minor child aged 6) and Ms. Z. S., who was already 64 and who had been eligible for old age pension already from 4 January 2009 and had actually collected the pension from 1 March 2009. In this connection and in view of the Government Strategy for Gender Equality in the Czech Republic for 2014-2015, the priorities and procedure of the Ministry of Justice of the Czech Republic when striving for equal opportunities for women and men in 2014 and their implementation by the Y court and the subordinated courts, it was inappropriate and impossible to terminate the employment of R. H., also due to gender reasons, as it is generally known that mothers with minor children have a very vulnerable position in the labour market, due to frequently having to care for a family member, among other reasons. Therefore, Mr. B. proposed that his unit should lay off complainant S., who had received old age pension for years and who thus had the certainty of at least some income, unlike unemployed mothers of minor children. The decision to lay off Ms. M. Š. (among other decisions) was based on the same reason [emphasis by the author], where the number of received cases also had dropped significantly in the distraint department and the choice was between her and JUDr. R., mother of three minor children, who was returning to work after her maternity leave, and judicial officer A. B., mother of 2 minor children."

The President of the court dismissed the discrimination alleged by the complainants. He stated as follows: "An employer is legitimately entitled to monitor which employees are eligible for pensions, or already collect pensions and work and the same time, and whether these employees are considering to terminate their employment and if so then when approximately they intend to do so. The President of the court made the respective enquiries both with the administrative staff and with the judges. All this was done to provide for the operation of the court from the personal, material and financial perspective, as necessary under Section 127 of Act No, 6/2002, on courts and judges."

B.2 Takeover of the complainants' tasks

According to the statement of the President of the court, the tasks of complainant Z. S. were assumed by judicial officer R. H. and the complainant's working position ceased to exist. As regards the statement that the tasks of Ms. Š. had been assumed by judicial trainee Mgr. H. K., the President of the court stated that she had been

transferred from the Y court to the X court in August 2014. Since 1 January 2015, Mr. B has been her supervisor. She is a judicial trainee, she is less than 30 years old, she has not passed her judicial examinations yet; within her preparations, she had served for about half a year in the relevant unit, C; she would work in units E, or rather E and P, for another six months and, in addition to that, she was permanently discharging certain tasks in Cd. According to the President of the court, "she has definitely not been recruited by the present court to replace complainant Š".

B.3 Response to the written objections to the termination by notice

As regards the complainants' objections to the termination by notice, the President of the court stated that there had been no reason to argue with the complainants about the reasons for the termination in writing, since the reasons had already been properly communicated and explained by the Vice-President of the court. The President only replied to Ms. S., who had expressly insisted that her employment should continue, where the President had stated that he considered the termination valid and acknowledged her objections.

B.4 Termination of employment of other employees

The President of the court notes that the complainants failed to acknowledge the fact that the court ceased to employ 38 people from 1 January 2014 to 28 February 2015 and only nine of these people were over 60 years of age. From mid 2014, when the reduction in the funds for remuneration of the employees in 2015 became known, the court ceased to employ 24 people, of which eight were over 60 years of age. He further states: "If we concentrate on terminations in the positions of judicial officers, including the complainants, then a total of 10 judicial officers were laid off from 1 January 2014 to 28 February 2015; an agreement on termination was reached in 5 cases, two cases involved expiry of a term, one judicial officer handed in her notice and two employees were laid off by the employer. Of these judicial officers, seven were from 26 to 40 years of age, three were over 64 years of age. It is thus absolutely clear that there occurred and occurs no discrimination on grounds of age." The President of the court supplemented his statements with a table including details on terminations of employment from 1 January 2014 to 28 February 2015, specifically the names, ages and positions of the relevant employees as we as the dates and reasons of why the employment terminated.

Apart from the above, it follows from the table that the employer laid off four employees in the relevant period, of which two were the complainants, one was their colleague – a judicial secretary of a similar age, who was in the same situation as the complainants, according to their statements (i.e. she had refused to sign the agreement on termination of employment, was laid off due to redundancy and did not receive benefits in December 2014) and one was an employee of 35 years of age, who had worked as an executor. This employee was laid off on 31 March 2014 and the reasons are unclear from the table. The complainants and the judicial secretary of a retirement age were all laid off as of 31 December 2014. The other employees were either terminated by agreement, expiry of the agreed term or due to their appointment as judges.

B.5 Selection procedure to recruit a judicial officer

According to the statement of the President of the court, a selection procedure to recruit a judicial officer was announced in December 2014 because an existing employee of the court had handed in her notice, effective from 31 January 2015. She informed the employer accordingly in November 2014 and it was thus possible to announce the selection procedure immediately. The President of the court noted that the position had then been assumed by an existing employee of the court who had worked as a recorder and her re-assignment thus had not increased the total number of the court's employees. The President failed to respond to the question why the employer had not offered this working position to any of the complaints; he merely stated that neither of them had applied for the position.

B.6 Bonuses

Based on the enquiry as to which employees had not received extraordinary bonuses in December 2014 and why the bonuses had not been paid to the complainants, the President of the court described the system of remuneration at the institution and stated the following: "In December 2014, bonuses were not paid to 6 employees, including both complainants. As regards the complainants, I had no reason to modify the proposal of the competent Vice-President. There had always been significant differences in the amounts of the bonuses in units P, E and D and it was not unusual that bonuses were not granted at all."

As regards the specific situation of Ms. S, the President of the court noted that since he had had information on massive non-compliance with the working hours, he could have dismissed her on a summary basis. The President of the court stated that Ms. S. had been misstating the time she had spent working for a long time; however, he had ultimately decided "for a more sensitive option of termination by notice, with a severance pay, but without a bonus".

B.7 Objection based on allegedly superfluous inquiry by the Defender

In conclusion of his statement, the President of the court expressed his conviction that "the entire situation [had] probably resulted from the complainants being surprised and taken aback by the termination, and [were] now trying to induce the impression of discrimination, relying on their age." Since Ms. S has lodged an action and the matter will be subjected to court review, the President of the court believes that my inquiry is superfluous at the present time.

C – The Defender's assessment of the case

By way of introduction, I would like to note that I do not consider the issuance of this report as superfluous or redundant, as hinted by the President of the court. In the sense of Section 21b of the Public Defender of Rights Act, my tasks involve issuing of reports and recommendations regarding topics related to discrimination and providing methodological assistance to discrimination victims. I am therefore obliged to assess the presented case from the viewpoint of potential violation of the

prohibition of discrimination and the right to equal treatment; furthermore, this report can be used as documentary evidence in the court proceedings.

C.1 Contradictions in descriptions of the facts of the case

The employer described some of the facts differently than the complainants. For example, the employer stated that it could have terminated the employment of Z. S. by summary dismissal and the termination by notice for reasons of redundancy had actually been selected as a less harsh option. This statement has been rejected by the complainant in her comment on the action for annulment of termination of employment by notice, which she supplemented in the file.

Furthermore, the complainants allegedly did not receive bonuses due to having rejected the agreements on termination of employment. The employer did not submit an overview of bonuses paid to employees in December 2014, but it stated that it had not paid bonuses to six employees, including the two complainants.

Since I am limited in taking of evidence, I am not able to determine whether the above statements are true – this can be done in court. I will thus base my report especially on facts that seem proven.

I consider it proven that, when deciding which employees should be laid off, the employer took into account the fact that the complainants were collecting old age pension. In other words, the granted old age pension was in fact the reason why the employer ultimately decided to lay off the complainants instead of some other employees. The employer stressed in this respect that other employees that had come into consideration had been women with minor children whose position on the labour market had thus been difficult.

I further consider it uncontested based on the information obtained that the employer announced a selection procedure to recruit a judicial officer in December 2014. The complainants did not apply for the position and the employer did not offer the position to them.

The key question for my assessment is whether or not an employer may take the granted old age pension into consideration when deciding which employees will be laid of if this means favouring other employees – mothers of minor children.

C.2 Right to equal treatment in the area of labour law

Under Section 2 (3) of the Anti-Discrimination Act,[3] direct discrimination means an act or failure to take action, where one person is treated less favourably than another in a comparable situation. Such less favourable treatment must be motivated by grounds explicitly listed in that provision. Those grounds include age. Both complainants have reached retirement age; the fact that the complainants collect old age pension (i.e. a benefit under the social security scheme immediately linked to reaching a certain age) and thus are sure to receive some income played a key part in the termination of employment, or rather the decision of whether the employer would lay off the complainants or some other employees.

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. The “area of employment and service relationships and other dependent activities, including remuneration”, in which the alleged discrimination of the complainants occurred, is listed under subparagraph (c). This condition has thus been fulfilled.

In connection with the case, I would also like to quote the definition of remuneration under Section 5 (1) of the Anti-Discrimination Act: “For the purposes of this 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.” This means that the prohibition of discrimination, based *inter alia* on age, applies to all components of a salary, both claimable and non-claimable.[4]

From among other forms of discrimination defined in the Anti-Discrimination Act, I consider it necessary to mention retaliation (victimisation). According to Section 4 (3) of the Anti-Discrimination Act, retaliation means unfavourable treatment, punishment or placing at a disadvantage in consequence of exercise of rights under the Act. This provides protection against any vengeful acts consisting in adopting measures to take revenge against a person who exercised his or her rights under the Anti-Discrimination Act.[5]

C.3 Permitted forms of differences of treatment on grounds of age

The Anti-Discrimination Act incorporates the legal regulations of the European Union, including Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereinafter the “Directive”), which is of paramount importance in the present case. Article 6 (1) of the Directive stipulates that “Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary”.

The forms of permissible differences of treatment are stipulated in Section 6 (1) of the Anti-Discrimination Act:

“Discrimination does not occur is case of differences of treatment in access to employment or occupation on grounds of age if

(a) there is a requirement of minimum age, professional experience or time of employment that is necessary for proper discharge of the job or occupation, or to access certain right and obligations associated with the job or occupation; or

(b) proper discharge of the job or occupation requires expert training with a duration that is disproportionate to the date when the person applying for the job or occupation will reach retirement age under a special law.”

In line with the cited provision of the Directive, forms of permissible differences of treatment on grounds of age can also be partly subsumed under Section 6 (3) of the

Anti-Discrimination Act, which states that discrimination does not occur in case of differences of treatment in labour matters if there is an objective reason consisting in the nature of the discharged work or activities and the relevant requirements are proportionate to the nature of that work or activities. This means that even if alleged discrimination in an employment relationship occurs based on a protected characteristic, the discrimination does not necessarily have to be prohibited if the differences of treatment are justified by the nature of the work or activities and the relevant requirements are proportionate to the nature of that work or activities.

Article 6 (1) of the Directive includes a non-exhaustive list of permissible forms of differences of treatment on grounds of age,[6] i.e. it does not prevent the legislature from defining forms of permissible differences of treatment other than he above in a legal regulation. It follows from the case law of the Court of Justice of the European Union (hereinafter “CJ EU”) that the above Article of the Directive “gives Member States the option to provide, within the context of national law, that certain forms of differences in treatment on grounds of age do not constitute discrimination within the meaning of that directive if they are ‘objectively and reasonably’ justified.”[7]

However, employers are obliged to stay within the limits imposed by national legislation, i.e. by Section 6 (1) of the Anti-Discrimination Act, or alternatively to subsume the difference of treatment under Section 6 (3) of the Anti-Discrimination Act, which must be interpreted narrowly.[8]

In the case at hand, the employer stated that, deciding on which employees to lay off for reasons of redundancy, it had had the option to either lay off the complainants (collecting old age pension) or other employees – mothers of minor children. In its decision, the employer favoured the employees with minor children, because the complainants were sure to receive at least some income (old age pension). The above clearly shows that the reason why the complainants, rather than some other employees, were laid off was their retirement age. It must be assessed whether the case involves any of the permissible forms of differences of treatment under the Anti-Discrimination Act.

Section 6 (1) of the Anti-Discrimination Act concerns access to employment or occupation rather than termination of employment and thus the above conduct of the employer can only be justified if the conditions under Section 6 (3) of the Anti-Discrimination Act are met.[9] However, the employer justified the differences of treatment by the income from old age pension and did not submit any reason consisting in the nature of the discharged work (material professional requirement) associated with age that would prevent the complainants (but not their younger colleagues) from discharging the work in the future. The case thus does not involve the general form of permissible differences of treatment and it is not necessary to examine whether or not the termination of the complainants’ employment by notice followed a legitimate goal and met the requirement of proportionality.

Moreover, it is difficult to imagine any material professional requirement on the work of a judicial officer that would justify differences of treatment on the grounds of higher age. For illustration, I would like to refer to a decision in which the CJ EU addressed in detail the maximum age limit of 30 years stipulated for employees in the fire service by the Regulation of the Land of Hesse on the careers of officials in the

operational divisions of the professional fire services. The CJ EU noted that "the concern to ensure the operational capacity and proper functioning of the professional fire service constitutes a legitimate objective".[10] However, the Czech legislature has not stipulated any age limit for the performance of work of judicial officers; furthermore, any age limit would have to be in line with EU law.

It is not my statutory competence to evaluate whether the employer met the conditions for termination of the complainant's employment for reasons of redundancy as required by the Labour Code.[11] In any case, the employer may not discriminate against employees when deciding which of them would be laid off for reasons of redundancy. Given the right to equal treatment, I reached the conclusion that taking account of the retirement age in case of termination of employment definitely does not meet the requirements for any of the permitted forms of discrimination defined in the Anti-Discrimination Act. It follows from the established facts that, beyond reasonable doubt, the employer directly discriminated against the complainants on grounds of their retirement age by terminating their employment by notice.[12]

C.4 Assessment of favouring of female employees with minor children

It follows from the employer's line of argument that it considers the prioritising of employees – mother of minor children as favouring this group vulnerable on the labour market. The Anti-Discrimination Act stipulates in Section 7 (2) that "[a]ction aimed at preventing or balancing out disadvantages following from a person's membership in a group of people defined by one of the reasons listed in Section 2 (3) and at ensuring equal treatment and opportunities for such a person shall not be considered discrimination". Typical examples of "affirmative action" include efforts to meet certain quotas, where even this goal can be attained in several ways, e.g. by actively seeking employees who are members of certain group, or by providing certain advantages to a defined group of people.[13] However, there is a difference between affirmative action by the State and by other entities; affirmative action by the State is subject to the requirement of constitutionality, while affirmative action by private entities must meet the statutory requirements.[14]Termination of employment by notice inconsistent with the prohibition of discrimination on the grounds of age thus cannot be justified as affirmative action with respect to younger female employees with minor children.

The employer's procedure also cannot be reasonably justified by the Government Strategy for Gender Equality in the Czech Republic for 2014-2020 (hereinafter the "Strategy"), because this strategic document provides a framework for implementation of the gender equality policy in the Czech Republic, but does not stipulate any binding obligation to favour younger women with minor children over women in the retirement age in the area of labour law. The Strategy primarily lays down one of the priorities of the Czech Government – gender equality. Furthermore, the problems in the area of gender equality on the labour market and trade, as identified in the Strategy, involve low employment rate and high unemployment rate in some age categories and groups including senior citizens and single mothers as well as the high number of women at risk of poverty, especially in certain age categories.[15] Therefore, the Strategy aims not only at mothers of minor children, but also at older women, who are also among the vulnerable groups.

C.5 Assessment of the failure to pay out benefits

As stated above, there are conflicts in the individual parties' views as regards the extraordinary benefits paid out in 2014. It follows from Section 1 (1)(c) in conjunction with Section 5 (1) of the Anti-Discrimination Act that this Act applies to the area of remuneration for work, including non-claimable components of salary.

If the employer did not pay benefits to the complainants because they had rejected the agreements on termination of employment (or objected to their termination on the grounds of retirement age), this constitutes discrimination in the form of retaliation. The body of the offence of retaliation includes three premises: unfavourable treatment, exercise of the right to equal treatment and a cause-and-effect relationship between the above.

In the present case, unfavourable treatment may have consisted in the failure to pay out benefits to the complainants.

The second premise consists in previous exercise of the right to equal treatment by the victim. I have already concluded when inquiring into another case[16] that since the Anti-Discrimination Act does not specify the manner of exercise in any detail and given the aim of this concept, specifically to protect discrimination victims from secondary harm (victimisation), it is sufficient if the right to equal treatment is exercised in any manner, even informally. The refusal to terminate the employment by an agreement, or expressing objections to termination on the grounds of age, can thus be considered as exercise of rights under the Anti-Discrimination Act.[17]

The last premise consists in the existence of a cause-and-effect relationship between the unfavourable treatment and exercise of the right to equal treatment. In other words, it must be determined whether the complainants received no benefits exclusively due to their refusal to terminate their employment by agreement, or due to expressing their objections to the termination, as the case may be.

Given my limited options as to taking of evidence, I am not able to determine with certainty whether or not the employer also discriminated against the complainants in the form of retaliation. However, given the chronology of the events, it may be possible that the complainants received no benefits in December 2014 due to their "uncooperating attitude" towards the termination of their employment. I have reached the conclusion that the allegation and proof submitted by the complainants to the effect that they had not received benefits in December 2014 is sufficient to shift the burden of proof in the sense of Section 133 of Act No. 99/1963 Coll., the Code of Civil Procedure, as amended. The employer will thus have to prove that it had reasons not to pay out the benefits to the complainants other than their refusal to sign the agreement on termination of employment, or the fact that they expressed their objections to the notice of termination by the employer, as the case may be.

C.6 Related procedural issue

In my research paper Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice,[18] which included also monitoring

of court and administrative decisions in the area of discrimination, I found that there are problems related with the issue of shifting the burden of proof in case of notices of termination by the employer for reason of redundancy under Section 52 (1)(c) of the Labour Code.

While refraining from assessing whether or not the conditions for the employer's notice of termination for reasons of redundancy have been met in the present case, I would like to outline the problem of deciding which employees are redundant in connection with the shift of the burden of proof in court proceedings. If an organisational change affect several employees while only some of them are redundant, it is up to the employer to select the specific employees. However, the employer may not make the choice based on a discriminatory criterion.[19] I have found that courts generally do not tend to address the question of why the given employee was selected. It would however be necessary to change the above practice in order to prove that the employer was not guilty of discrimination. It follows from the research that the courts do address objections to discrimination and try to either confirm or disprove the objections in other ways. For example, in one of the judgements[20] provided for the research, the judge examined the age structure of other employees laid off and the age structure of the employer's employees to address an objection to discrimination on grounds of age.

The above procedure does not seem universally applicable.[21] However, I am convinced that it has been sufficiently proven in the present case that the employer selected the relevant employees due to their retirement age and its procedure does not qualify as any of the permissible forms of differences of treatment under Czech law (see Sections C.3 and C.4 of this Report). I am not aware of the age structure of the court's employees, but the fact that, as of 31 December 2014, the employer only terminated the employment of the complainants (Ms. S. aged 64 and Ms. Š. aged 65) and of a judicial secretary aged 64 corresponds to the declared intention of the employer to lay off employees who had income from old age pension and to favour younger female employees with minor children.

C.7 Claims following from the Anti-Discrimination Act and EU law

This Report may serve as a basis for initiation of court proceedings on the grounds of alleged discrimination or for mediation proceedings under Act 202/2012 Coll., on mediation and amending certain laws (the Mediation Act). Pursuant to Section 10 of the Anti-Discrimination Act, the complainants may claim that the respondent refrains from discrimination, eliminates its consequences and provides reasonable satisfaction. Given the lack of clarity caused by the subsidiarity of pecuniary satisfaction under Section 10 of the Anti-Discrimination Act, I consider it important to tackle the issue of claims of discrimination victims in the light of the EU law in more detail.

The right to equal treatment protects the dignity and autonomy of people.[22] Protection is thus extended not only to non-discriminatory access to vital needs such as employment, housing and education,[23] but also to the personal rights and dignity of people affected by discrimination.[24] Non-proprietary harm, i.e. violation of dignity, can be compensated either by an apology or by pecuniary satisfaction. The wording of the Anti-Discrimination Act is based on the classical interpretation of

protection of personal rights, allowing pecuniary satisfaction only in serious violations.[25] However, Section 10 of the Anti-Discrimination Act must be interpreted in line with EU law.[26] I therefore consider it necessary to take account of the conclusions of the Court of Justice of the European Union, which has repeatedly tackled the interpretation of the anti-discriminatory directives that have informed the Anti-Discrimination Act.

Pursuant to Article 17 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Member States are obliged to lay down a system of sanctions for violations of the prohibition of discrimination, where these sanctions must be effective, proportionate and dissuasive.

The nature of the sanctions was addressed by the Court of Justice of the EU e.g. in the Feryn case, where it noted that Member States are obliged to adopt "measures which are sufficiently effective to achieve the aim of that directive and to ensure that they may be effectively relied upon before the national courts in order that judicial protection will be real and effective" even if there is no specific victim of the discrimination.[27] The Court of Justice of the European Union also tackled the nature of the sanctions for violations of the prohibition of discrimination. In case a State imposes a sanction for violation of discrimination in the form of compensating the incurred harm, the granted compensation must ensure real and effective judicial protection, it must have a real dissuasive effect and must be proportionate to the incurred harm.[28] Mere apology cannot meet the requirements on effective transposition.[29] Moreover, pecuniary satisfaction also has a preventive and punitive nature in case of violation of personal rights.[30]

Therefore, I believe that when determining the manner of remedy of discriminatory acts pursuant to Section 10 of the Anti-Discrimination Act, account should be taken of the dissuasive effect of the selected manner of compensation. Pecuniary satisfaction thus should be a regular part of decisions on discrimination because the punitive function is prioritised under EU law.[31]

I consider it appropriate to point out other alternatives as regards the claims of discrimination victims. Specifically, Section 2957 of the Civil Code[32] stipulates that the manner and amount of reasonable satisfaction must expiate circumstances worthy of special attention, such as the fact that harm was incurred as a result of discrimination. It therefore remains a question whether the courts should interpret Section 10 (2) of the Anti-Discrimination Act in the light of EU law and Section 2957 of the Civil Code, or perhaps to directly apply Section 2957 of the Anti-Discrimination Act, as Section 10 (2) of the Anti-Discrimination Act can be considered obsolete given the new provisions under the Civil Code.

D – Conclusions

Based on the above findings and considerations, I reached the conclusion that, beyond reasonable doubt, the X court as the employer directly discriminated against the complainants in the sense of Section 2 (3) of the Anti-Discrimination Act, because it laid them off for reasons of redundancy on the grounds of their retirement age.

As regards the failure to pay out benefits for December 2014, the allegation and proof of the fact that the complainants' did not receive any benefits for the relevant period suffices to shift the burden of proof to the respondent, i.e. the employer, pursuant to Section 133a of the Code of Civil Procedure. In order to refute the suspected discrimination, the employer will have to prove that it had relevant reasons not to pay out the benefits to the complainants other than their refusal to sign the agreement on termination of employment, or the fact that they expressed their objections to the notice of termination by the employer due to discrimination on grounds of age, as the case may be.

I am sending the Inquiry Report to the President of the X court, Mr. D, and to the complainants. If any of the parties wishes to comment on my findings, they should do so within 30 days of delivery.

Mgr. Anna Šabatová, Ph.D., signed
Public Defender of Rights

[1] Agreement on Amendment to Employment Contract of 30 December 1992, Ref. No. Spr 83/93, as amended and supplemented on 9 April 2001, and Agreement on Amendment to Employment Contract of 5 June 1991, Ref. No. Spr 1697/91, as amended and supplemented on 9 April 2001.

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

[3] 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.

[4] the Court of Justice of the European Union ruled in the judgement of 26 June 2001, Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG [2001] ECR I-04961, that equal remuneration must be ensured not only based on overall assessment of all performances provided to employees, but also for each individual part of the remuneration. This means that it is necessary to compare both claimable and non-claimable components of salary. Mere comparison of claimable components of salary does not suffice.

[5] BOUČKOVÁ, P., HAVELKOVÁ, B., KOLDINSKÁ, K., KÜHN, Z., KÜHNOVÁ, E., WHELANOVÁ, M. Antidiskriminační zákon (Anti-Discrimination Act). Commentary. 1st edition. Prague: C. H. Beck, 2010, ISBN 978-80-7400-315-8, p. 190.

[6] "Such differences of treatment may include, among others:
(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."

[7] Judgement of the Court of Justice of the European Union of 5 March 2009, The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform, C-388/07, para 65.

[8] KVASNICOVÁ, J., ŠAMÁNEK, J. et al. Antidiskriminační zákon (Anti-Discrimination Act). Commentary. 1st edition. Prague: Wolters Kluwer, a.s., 2015. ISBN 978-80-7478-879-6, pp. 228 and 233-234.

[9] This provision defines the general form of permissible differences of treatment in the area of labour law applicable to all discrimination grounds in the sense of Section 2 (3) of the Anti-Discrimination Act.

[10] Judgement of the Court of Justice of the European Union of 12 January 2010, Colin Wolf v. Stadt Frankfurt am Main, C-229/08, para 39.

[11] Act No. 262/2006 Coll., the Labour Code, as amended.

[12] Eligibility for old age pension is based on an age limit and the measure cannot, by definition, affect other persons and, therefore, the present case involves direct discrimination, rather than indirect. For more details cf. KVASNICOVÁ, J., ŠAMÁNEK, J. et al. Antidiskriminační zákon (Anti-Discrimination Act). Commentary. 1st edition. Prague: Wolters Kluwer, a.s., 2015. ISBN 978-80-7478-879-6, pp. 174-175.

[13] For the sake of completeness, it is necessary to add that, in the area of access to employment and occupation, Section 7 (3) stipulates the condition that it is not possible to favour a person whose qualities in terms of discharge of the job or occupation do not exceed the qualities of the other persons being assessed simultaneous.

[14] KVASNICOVÁ, J., ŠAMÁNEK, J. et al. Antidiskriminační zákon (Anti-Discrimination Act). Commentary. 1st edition. Prague: Wolters Kluwer, a.s., 2015. ISBN 978-80-7478-879-6, p. 248.

[15] Office of the Government of the Czech Republic Government Strategy for Gender Equality in the Czech Republic for 2014-2020. p. 15.

[16] Public Defender of Rights' Report on Inquiry of 17 June 2015, File No. 211/2012/DIS/VP, available at: http://eso.ochrance.cz/Nalezene/Edit/2906.

[17] In the cited case (File No. 211/2012/DIS/VP), I also reached the conclusion that if protection against retaliation is to be effective in practice, i.e. if it should create an environment in which people are not afraid to exercise their rights, the prohibition of retaliation cannot apply only to situations where the right to equal treatment has actually been violated. Any interpretation leading to conclusions contradictory to the

above would significantly diminish the protection of discrimination victims, because the prohibition of retaliation would depend on the legal assessment of the preceding acts and such issues are often very unclear and complicated.

[18] Public Defender of Rights [online]. Brno: © The Office of the Public Defender of Rights [retrieved 18 January 2016]. Available at: www.ochrance.cz. Path: Home/Discrimination/Research/Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice.

[19] BĚLINA, M., DRÁPAL, L. et al. Zákoník Práce (The Labor Code.) Commentary. 2nd edition. Prague: C. H. Beck, 2015. ISBN 978-80-7400-290-8, p. 323.

[20] Judgement of the Regional Court in Ostrava of 6 August 2013, Ref. No. 16 Co 232/2013 - 78.

[21] For more details, see the cited research.

[22] Cf. BOUČKOVÁ, Pavla; HAVELKOVÁ, Barbara; KOLDINSKÁ, Kristina; KÜHN, Zdeněk; KÜHNOVÁ, Eva; WHELANOVÁ, Markéta. Antidiskriminační zákon (Anti-Discrimination Act). Commentary. Prague: C.H. Beck, 2010. ISBN 978-80-7400-315-8, p. 13. Also the opinion of Advocate General Maduro in case C-303/06, Coleman, para 9-11, cited therein.

[23] Cf. Section 1 (1) of the Anti-Discrimination Act.

[24] Cf.: "In case of discrimination, this concerns especially violations of the right to human dignity, because the message of discriminatory acts actually is that the victim belongs in a group of citizens that is not worthy of equal treatment." KVASNICOVÁ, Jana, ŠAMÁNEK, Jiří et al. Antidiskriminační zákon (Anti-Discrimination Act). Commentary. Prague: Wolters Kluwer, a. s., 2015. ISBN 978-80-7478-897-6, p. 285.

[25] Cf. the wording of Section 10 (2) of the Anti-Discrimination Act: "If the remedy under paragraph (1) [i.e. refraining from discrimination and elimination of its consequences and provision of reasonable satisfaction in the form of an apology] does not seem sufficient, especially because the discrimination significantly harmed the reputation or dignity of a person or his or her position in the society, the person is also entitled to compensation of non-proprietary harm in money."

[26] For the issue of the interpretation conforming to EU law cf. WHELANOVÁ, Markéta. Účinky unijního práva ve světle judikatury Soudního dvora EU (Effects of EU Law in the Light of the Case-Law of the Court of Justice of the EU). Správní právo (Administrative Law). 2011, volume. 44, No. 6. ISSN 0139-6005, pp. 74-89.

[27] Judgement of the Court of Justice of the European Union of 10 July 2008, C-54/07, Firma Feryn.

[28] Paragraph 25 of the Judgement of the Court of Justice of the European Union of 22 April 1997, C-180/95, Draehmpaehl.

[29] This conclusion was reached by the Court of Justice of the European Union in the Judgement of 10 April 1984, C-14/83, Sabine von Colson and Elisabeth Kamann, para 23: "although full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained."
The Court of Justice of the European Union further elaborates on this conclusion in paragraph 28: "if a Member States chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law, in so far as it is given discretion to do so under national law."
The above decisions relate to the interpretation of Article 6 of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. However, this provision is comparable to Article 15 of the Directive, which is relevant in the present case. On the other hand, the provision interpreted in the Draehmpaehl decision allows broader interpretation. Consistent with BOUČKOVÁ, Pavla; HAVELKOVÁ, Barbara; KOLDINSKÁ, Kristina; KÜHN, Zdeněk; KÜHNOVÁ, Eva; WHELANOVÁ, Markéta. Antidiskriminační zákon (Anti-Discrimination Act). Commentary. Prague: C.H. Beck, 2010. ISBN 978-80-7400-315-8, p. 296.

[30] Judgement of the Constitutional Court of 6 March 2012, File No I. ÚS 1586/09, para 36.

[31] This opinion is confirmed also by the jurisprudence, cf. BOUČKOVÁ, Pavla; HAVELKOVÁ, Barbara; KOLDINSKÁ, Kristina; KÜHN, Zdeněk; KÜHNOVÁ, Eva; WHELANOVÁ, Markéta. Antidiskriminační zákon (Anti-Discrimination Act). Commentary. Prague: C.H. Beck, 2010. ISBN 978-80-7400-315-8, p. 300-301. Indeed, the both the Directive and case law of the Court of Justice of the EU mention sanctions.

[32] Act No. 89/2012 Coll., the Civil Code.