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The most frequent cases of workplace discrimination and how to avoid them:

practical guide for employers regarding equal treatment

Recommendations of the Public Defender of Rights 2023

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The most frequent cases of workplace discrimination and how to avoid them: practical guide for employers regarding equal treatment

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Mission of the Defender

Since 2001, the Defender has been defending individuals against unlawful or otherwise incorrect procedure of administrative authorities and other institutions, as well as against their inactivity. The Defender may peruse administrative and court files, request explanations from the authorities and carry out unannounced inquiries on site. If the Defender finds errors in the activities of an authority and fails to achieve a remedy, the Defender may inform the superior authority or the public.

Since 2006, the Defender has acted in the capacity of the national preventive mechanism pursuant to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Defender systematically visits facilities where persons are restricted in their freedom, either ex officio or as a result of dependence on the care provided. The purpose of the visits is to strengthen protection against ill-treatment. The Defender generalises his or her findings and recommendations in summary reports on visits and formulates standards of treatment on their basis. Recommendations of the Defender concerning improvement of the ascertained conditions and elimination of ill-treatment, if applicable, are directed both to the facilities themselves and their operators as well as central governmental authorities.

In 2009, the Defender assumed the role of the national equality body. The Defender thus contributes to the enforcement of the right to equal treatment of all persons regardless of their race or ethnicity, nationality, sex/gender, sexual orientation, age, disability, religion, belief or worldview. For that purpose, the Defender provides assistance to victims of discrimination, carries out surveys, publishes reports and issues recommendations with respect to matters of discrimination, and ensures exchange of the available information with the relevant European bodies.

Since 2011, the Defender has also been monitoring the detention of foreign nationals and the performance of administrative expulsion.

In January 2018, the Defender became a monitoring body for the implementation of rights recognised in the Convention on the Rights of Persons with Disabilities, also helping European Union citizens who live and work in the Czech Republic. The Defender provides them with information on their rights and helps them in cases of suspected discrimination on grounds of their citizenship.

The special powers of the Defender include the right to file a petition with the Constitutional Court, seeking the annulment of a secondary legal regulation; the right to become an enjoined party in Constitutional Court proceedings on the annulment of a law or its part; the right to lodge an administrative action to protect a

general interest or to file an application to initiate disciplinary proceedings with the president or vice-president of a court. The Defender may also recommend that a relevant public authority issue, amend or cancel a legal or internal regulation. The Defender advises the Government to amend laws.

The Defender is independent and impartial, and accountable for the performance of his or her office to the Chamber of Deputies, which elected him or her as the Defender. The Defender has one elected deputy, who can be authorised to assume some of the Defender's competences. The Defender regularly informs the public of his or her findings through the media, web, social networks, professional workshops, roundtables and conferences. The most important findings and recommendations are summarised in the Annual Report on the Activities of the Public Defender of Rights submitted to the Chamber of Deputies.

Foreword

I am often approached by employees who have experienced workplace discrimination. These are not isolated cases; the area of work and employment is regularly one of the most frequent areas of claimed discrimination. Discriminated employees contact not only the Defender, but also labour inspectorates and courts. However, even these complaints are only "the tip of an iceberg" – an earlier survey[1] showed that a significant number of employees who feel discriminated against do not address their situation by filing a formal complaint.

Discrimination against employees is often not motivated by malice. On the contrary, it may be a consequence of the employer's omission. For employers who have many duties laid down by the law in various areas, the prohibition of discrimination may be an incomprehensible or not very important rule.

I have therefore decided to issue this Recommendation[2] to employers who want to avoid discriminating against their employees – I believe this is true of most employers. I am firmly convinced that most employers care about employee satisfaction. A fair and respectful workplace free of discrimination is a key prerequisite for employees to be satisfied and to fully devote their attention to work.

I primarily base my Recommendation on the cases that I and my predecessors in the office have dealt with; however, I also take into account the decisions of Czech courts in discrimination cases and the decision-making of the Court of Justice of the European Union. The aim of the Recommendation is to draw attention to the most frequent situations where discrimination can occur and to provide guidance on how to prevent them. The Recommendation also includes specific tips on how to help improve the position of employees who are disadvantaged most often. The Recommendation takes into account, in particular, the provisions of the Labour Code regulating employment relationships, but it also applies analogously to agreements on work performed outside employment (agreement to complete a job, agreement to perform work) and to service relationships.

1. Survey Report of the Public Defender of Rights of 27 February 2015, File No. 46/2014/DIS, available (in English) at: https://www.ochrance.cz/uploads-import/ESO/EN_Discrimination_in_CZ_research_01.pdf.

2. I issue my recommendations in connection with the project "Reinforcing the activities of the Public Defender of Rights in the protection of human rights (with the aim of establishing a National Human Rights Institution in the Czech Republic)", No. LP-PDP3-001. The project is part of the Human Rights Programme financed from the 2014–2021 Norway grants through the Czech Ministry of Finance.

The present Recommendation deals with individual employment matters chronologically – from the recruitment process to the termination of employment. Each of the sections is accompanied by illustrative examples that make it easier to understand the basic principles and legal rules, as well as cases from the Defender's practice gathered over the past fourteen years.

I believe that the Recommendation will help employers ensure that their employees have a positive work experience, or contribute to an amicable resolution of any conflicts that may occasionally arise at the workplace despite all the efforts to prevent them.

JUDr. Stanislav Křeček
Public Defender of Rights

Brief recommendations for employers

Any discrimination in labour-law relationships is prohibited.

- When making any decisions about your employees / job seekers, avoid putting anyone at a disadvantage in view of a protected characteristic. Subject to certain exceptions, neither an employee nor a job seeker may thus be disadvantaged on the grounds of their ethnicity, race, nationality (in the sense of "national origin"; in Czech: "národnost"), sex/gender, sexual orientation, age, disability, religion, worldview and nationality (in the sense of "State citizenship"; in Czech: "státní příslušnost").
- Although there exist certain exceptions to the prohibition of discrimination, these are defined rather narrowly. Hence, carefully consider whether the exception truly applies to your case or whether you might be able to achieve your goal by other means. For example, if you are looking for a physically fit employee to do a physically demanding job, you need not choose only among men, even though on average, they tend to be more physically fit. The correct approach is to select the employee on the basis of non-discriminatory criteria – in this case, on the basis of the individual physical fitness of both male and female job seekers.
- Familiarise yourself with the concept of indirect discrimination – even the application of neutral criteria can result in a disadvantage for a group of employees protected by the principle of non-discrimination. Keep the prohibition of indirect discrimination in mind when setting rules (e.g. when setting the remuneration or selecting employees to be dismissed for redundancy).
- Do not let yourselves be influenced by stereotypes – it is crucial to acknowledge the possibility of stereotypical thinking and try to eliminate the influence of stereotypes (e.g. by involving more people with various life experiences in the selection of new employees).

Rejecting a job seeker solely because he/she belongs to a group defined by a protected characteristic is usually discriminatory. A job seeker may be rejected on the basis of a protected characteristic in cases where this characteristic (i.e. ground of discrimination) prevents or significantly hinders the job seeker from performing the given work for the employer. A driving school manager may therefore reject a job

seeker applying for the position of driving instructor if the job seeker is short-sighted. However, the manager may not refuse to hire a foreigner who speaks Czech with an accent, unless the accent makes it impossible to understand him/her.

- As a rule, protected characteristics may not play any role in the selection of a new employee. Exceptions to this rule are, for example, situations where the employee's appearance is important for the performance of the job (e.g. an actor for a particular part can be selected on the basis of age and ethnicity).

- Attention should be paid when employing citizens of the European Union, the European Economic Area and Switzerland. As a rule, they should have the same status in employment as citizens of the Czech Republic. Another problematic requirement is the requirement for the job seeker to have a registered permanent residence in the Czech Republic or a permanent residence permit. Job seekers who are third-country nationals may be rejected especially if they do not have free access to the labour market or a work permit.

- The job seeker's nationality should otherwise be irrelevant in the hiring process. However, a certain level of language proficiency (i.e. a characteristic typically associated with a particular nationality) may be used as a selection criterion if it is important for the performance of the work offered.

- Job seekers may be required to have a reasonable professional experience. An older job seeker may be rejected if he/she would need to undergo professional training to perform the job and the time for completing that training would be disproportionately long in view of the time when the job seeker reaches retirement age. However, this exception does not serve as a catch-all excuse for rejecting older job seekers – a job seeker may not be rejected because of the need to complete standard onboarding training.

- A disability may be a reason for rejecting a job seeker if it renders him/her medically unfit to perform the work offered, despite the necessary reasonable accommodations adopted. In principle, this fact should be established by a physician during the initial occupational medical examination (and only in some cases by the employer). In the case of job seekers with disabilities, you must always bear in mind the duty to take reasonable accommodations. Such accommodations may result in the job seeker being medically fit to perform the work offered or to participate in the selection procedure without difficulties.

- Avoid asking prohibited questions in job interviews. These include especially questions concerning the job seekers' privacy (e.g. questions about their family circumstances, sexual orientation, religion, pregnancy, political views, medical condition). As a general rule, you should not even seek this information from publicly available sources, typically by entering the job seeker's name into an internet search engine. There are certain exceptions to this rule, but you should always have a valid reason why you need that information.

- In order to avoid discrimination when recruiting new employees, the selection process should be adjusted accordingly. For example, multiple people should participate in the selection process. The ideal option is to involve persons with various life experiences. It is advisable to draw up a list of evaluation criteria in advance. You should make it clear to evaluators who are in a subordinate position (typically employees of the HR department) that discrimination is unacceptable in the selection of new employees.

- Be cautious when making public statements as well as when providing information on your website, for example. Statements such as that you would never employ a certain group of persons also constitute discrimination, even if you are not looking for any new employees at the moment.

Employers must also not discriminate when writing job offers. It is discriminatory if the wording of a job offer makes it clear that the employer does not want to employ a particular group protected by the principle of non-discrimination. This does not apply if the offer falls under one of the exceptions where an employer can select employees on the basis of a protected characteristic – in such a case, the requirement regarding, for example, the job seeker's gender may be stated in the offer.

- When advertising, avoid phrases such as "The position is suitable for Czech people only / we are seeking a new employee of Czech nationality", "We are seeking a male warehouse worker", "We are seeking a receptionist aged 20–40" or "We are seeking a warehouse worker. For job seekers without any health problems only."

- Be wary of wording that does not directly exclude a certain group of employees but may discourage them from applying. For example, if you list a young team as one of the benefits, older job seekers may feel that they are not welcome in the team. While such wording will not always violate the prohibition of discrimination (in the sense that you could be e.g. fined by the Labour Inspectorate), it is at least inappropriate. For the same reason, it is not appropriate to use exclusively masculine or feminine in a job offer. It is sufficient to state "We're seeking a new colleague" (in Czech: Hledáme nového kolegu nebo kolegyni) or similar.

- You can indicate in your advertisement that you have decided to reserve the position for a disabled employee.

- It is also possible, for example, to emphasise that the job is also suitable for parents on parental leave or parents of small children, or that you are happy to welcome older employees into your team.

The prohibition of discrimination must also be observed when setting working conditions.

- During employment, you commit discrimination if you unjustifiably set worse working conditions for a group of employees defined by a protected characteristic.

- Care should already be taken when deciding on the type of agreement to conclude with your employee. Some agreements are less favourable for employees and provide less stability. It is not acceptable to offer these contracts only to some employees if those employees are defined by a protected characteristic.

- A major interference with an employee's rights occurs if the employee is denied the possibility of promotion on the basis of a protected characteristic or if the employee is dismissed from a senior position on the basis of such a characteristic.

The remuneration system must also be set up in a non-discriminatory manner. Remember that the prohibition of discrimination applies not only to the determination of salary/pay/remuneration on the basis of a mutual agreement, but also to the provision of any other performance (typically employee benefits).

- The salary (pay/remuneration under a mutual agreement) is the basis of remuneration. To ensure that it is set in a non-discriminatory, fair and lawful manner, make sure to comply with the statutory criteria for its determination – salary and pay are provided on the basis of the complexity and difficulty of the work and the responsibility associated with the work, the difficulty of the working conditions, and the performance and results achieved. If you wish to apply criteria that are not explicitly listed in the Labour Code in Section 109 (4) when determining the salary, you must be able to justify the use of such criteria by showing how the criterion for determining the salary relates to one of the criteria listed in the above provision.

- The difference in salary cannot be justified by the fact that the employee managed to negotiate better salary conditions during a job interview.

- Discrimination in remuneration can occur when an employee returns from maternity or parental leave. When determining the salary of these employees, make sure that it corresponds to that of comparable employees. If, for example, salaries of all employees have been increased in the meantime, the salary of the returning employee must be also increased.

- The fact that an employee has a concurrent income in the form of an old-age or disability pension must not negatively affect their remuneration. Therefore, do not exclude these employees from receiving bonuses or other benefits.
- An "attendance bonus" is also problematic in the context of the prohibition of discrimination, so I recommend avoiding any similar benefits.

Some groups of employees are legally entitled to individual adjustments to their working conditions due to their specific needs.

- If you employ a person with a disability, do not forget to adopt reasonable accommodations to enable them to perform their work without any difficulties. If adopting such an accommodation is associated with financial costs, you ask for assistance from the State.
- The Labour Code also lays down the duty to make reasonable adjustments to the working conditions of employees with children. If this is feasible in view of your operations, it is advisable to try to accommodate the needs of these employees even beyond your statutory duty. This way you can keep good and loyal employees.
- It is also good practice for employers to respond to the specific needs of other employee groups (e.g. older employees, foreigners, LGBTIQ+ employees) and, where possible, adapt working conditions to their needs.

Employers have a legal obligation to ensure equal treatment of all employees, i.e. to actively prevent workplace discrimination and harassment, and to effectively address cases where such undesirable phenomena occur. Final responsibility for any discrimination or harassment usually falls with the employer.

- Find out what bullying, harassment and sexual harassment mean, and how these phenomena can manifest themselves at the workplace. Your task is to prevent any such incidents.
- Try to analyse the working environment. This may help you identify risks of discrimination or bullying. Regular interviews with employees or regular questionnaire surveys may be a suitable tool. Employees leaving the employer can often be a good source of information about the workplace environment, and it is thus recommended to conduct an "exit interview" with these employees.
- Focus on the selection and training of HR staff and senior employees. Senior employees should not only be experts in their field, but also capable managers. This means, among other things, that they have the personal qualities to lead a team in a way that prevents pathological phenomena such as bullying, or that they are competent to recognise such behaviour and prevent its continuation.
- Initial or regular training should at least briefly provide information on the prohibition of discrimination and indicate where employees can turn if they experience discrimination or bullying.
- Prevention also includes maintaining good workplace relations and company culture.
- By adopting a code of conduct, you clearly show your employees what values you stand for and that certain conduct is unacceptable at the workplace. It is useful to link the code of conduct to the employment contract.

The employer is required to investigate any complaints of discrimination and take appropriate action if they prove to be justified. However, a complaint should not be addressed only formally. An employee cannot be punished in any way for submitting a complaint.

- An employee's complaint must be investigated impartially, even though the employee will usually complain about conduct for which you are ultimately liable.
- A complaint should never be investigated by the employee whose actions form the subject of the complaint. However, this employee should be given the opportunity to comment on the criticised conduct.
- It may be a good idea to involve a person who is trusted both by you and the complainant.
- Depending on the seriousness of the criticised conduct and the credibility of the information provided in the complaint, it may be appropriate to consider expert assistance. The involvement of an external entity will also improve the employee's confidence in the impartiality of the investigation of their complaint. Assistance can be obtained, e.g., from a mediator, especially if an amicable solution to the dispute can be reached.
- At the employee's request, you are required to discuss an employee's complaint with a trade union organisation. In some cases, involving the union might be suitable even if the employee does not explicitly request so.
- Where a complaint concerns discrimination, it is usually necessary to find a suitable employee in a comparable position as the complainant (a comparator) in order to properly assess the complaint.
- If a complaint concerns bossing, you should not assess the relevance of the alleged facts solely on the basis of the statement provided by the supervisor concerned.
- Where a complaint concerns serious forms of bullying or harassment, it is advisable to adopt provisional precautionary measures to protect the potential victim before investigating the alleged facts as such.
- One of the possible courses of action for investigating a complaint is to confront the complainant with the employee whose conduct is the subject of the complaint. However, I recommend that you always carefully consider this approach. Confrontation may not be appropriate in cases of tense relationships or in some sensitive cases (e.g. sexual harassment).
- If you find during the investigation of the complaint that discrimination has indeed occurred, it is not appropriate to try to sweep the matter under the carpet. A completely inappropriate response to a complaint is to ignore or downplay the situation.
- Is an employee complaining about sexual harassment and you do not know how to handle the situation? For a lot of useful information about sexual harassment and tips on how to prevent it and how to check whether it is happening at your workplace, see the How to Prevent Sexual Harassment in the Civil Service handbook.[3] While the handbook is intended for authorities, most of the information is also useful for private employers.

The principle of non-discrimination also applies to termination of employment. If the prohibition of discrimination is breached, this may result render the termination of employment invalid.

- Although the Labour Code lays down that employment may be terminated during the trial period for any reason or without stating a reason, this does not mean that the prohibition of discrimination does not apply in this case. Discrimination occurs, for example, if the employer lays off an employee because she is pregnant.

3. Smetáčková, Irena, Fellerová Palkovská, Iva, Šafařík, Radan, Hradecká, Lucie. Prevence sexuálního obtěžování ve státní správě: Příručka pro úřady (How to Prevent Sexual Harassment in the Civil Service: Handbook for Authorities) [online]. Prague: Office of the Government, 2019 [retrieved on: 2023-10-05]. Available (in Czech) at: https://www.vlada.cz/assets/ppov/rovne-prilezitosti-zen-a-muzu/Aktuality/Prevence-sexualniho-obtezovani-ve-statni-sprave.pdf.

- Protected characteristics may not influence your decision-making as to which employees will be offered an extension of employment contract.

- Discrimination can occur even if the statutory conditions are met for dismissing an employee on the grounds of redundancy. If more than one employee is working in the job being abolished, you must not choose on the basis of discriminatory criteria. Otherwise, it is possible to challenge the termination of the employment in court.

- I recommend a cautious approach to dismissing an employee if the reason for dismissal is directly or indirectly related to their disability. Such an employee should only be dismissed because they have lost their medical fitness for work in view of the results of an occupational medical check-up. However, if the employee can continue working after reasonable accommodations are made, the employee's condition does not qualify as a loss of medical fitness for work. A reasonable accommodation may also consist in transferring the employee to different work. I therefore recommend that you discuss with the disabled employee what options there are for their continued employment (e.g. offer them a transfer to another position) before you decide to lay them off due to a loss of medical fitness.

Glossary of terms: discrimination

Discrimination is unfavourable treatment of people in comparable situations

- in one of the areas defined by the law, including the area of work and employment, and
- on the basis of one of the grounds ("protected characteristics") specified by the law.
- In the area of work and employment, there is a broad prohibition of discrimination that covers more or less all situations that job seekers and employees may encounter.

Discrimination is assessed primarily under the Anti-Discrimination Act. In labour-law relationships, it is also covered by the Labour Code and the Employment Act, which contains many references to the Anti-Discrimination Act, and expands on some of its provisions.

Discrimination need not be intentional. What is important is the result, not the intent.

Protected characteristic is a characteristic based on which a person may not be placed at a disadvantage. According to the Anti-Discrimination Act, these characteristics include the following: race, ethnicity, nationality (in the sense of "national origin"; in Czech: "národnost"), sex/gender, sexual orientation, age, disability, religion, belief or worldview, and in some cases nationality (in the sense of "State citizenship"; in Czech: "státní příslušnost"). In addition, the Labour Code and the Employment Act define other protected characteristics (such as political belief and trade union membership). This Recommendation deals only with the characteristics under the Anti-Discrimination Act.

Permissible forms of different treatment are exceptions to the prohibition of discrimination, i.e. situations where it is possible to distinguish between employees on the basis of a protected characteristic.

Anti-discrimination action (anti-discrimination lawsuit) is an action (lawsuit) by virtue of which the plaintiff asserts his or her rights under the Anti-Discrimination Act. The plaintiff can claim refrainment from discrimination, remedying the consequences of discrimination, reasonable satisfaction and financial compensation for non-material damage.

Direct discrimination is the basic type of discrimination. This is an act or omission where someone is treated differently than another person in a comparable situation, based on one of the protected characteristics specified by the law. Discrimination in the area of work and employment does not occur in cases where different treatment is based on an objective ground consisting in the nature of the work performed and the requirements on the given employee are proportionate to this nature.

An example of direct discrimination could be the case of an employer who refuses to employ Roma people.

Indirect discrimination is an act or omission where a group of individuals protected by the law (a group defined by a protected characteristic, e.g. people with disabilities) is put at a disadvantage based on an apparently neutral provision or practice. This provision or practice cannot be reasonably justified. Where indirect discrimination is suspected, it is always necessary to examine whether the contested practice is justified by a legitimate objective and, if so, whether the means of achieving this objective are proportionate and necessary.

Example: The employer provides language training only to full-time employees. This may, on the face of it, be a measure that is not related to any protected characteristic. However, if part-time jobs at the employer are occupied predominantly by parents balancing work and childcare, such a rule may constitute indirect discrimination on the grounds of parenthood.

A special type of indirect discrimination is a **failure to provide what is known as reasonable accommodation** for a person with a disability.

A **reasonable accommodation** is a measure that enables a person with a disability to perform work for the employer. The employer is required to adopt such an accommodation; otherwise, the employer is deemed to commit discrimination. An exception to this rule is where such a measure would be disproportionate for the employer, i.e. if it would impose an excessive (e.g. financial) burden. A reasonable accommodation can take different forms, as the needs of individual employees with different types of disabilities are naturally different.

One can imagine, for example, building a ramp on a staircase, purchasing a special ergonomic chair or adjusting working hours.

Harassment is improper conduct that is aimed at or results in diminishing the dignity of a person and creating a hostile, humiliating or offensive environment. If it relates to one of the protected characteristics, this may constitute discrimination.

Example: Colleagues mock an employee for his sexual orientation and repeatedly joke about it in front of him. The employer finds out but downplays the actions of its employees.

Sexual harassment is based on the definition of harassment, but is specific in its sexual nature.

Examples include any unsolicited touches, as well as "sexual innuendo" that is uncomfortable and inappropriate in a work environment.

Victimisation (retaliation) is unfavourable treatment, punishment or disadvantage occurring after the victim of discrimination has decided to defend themselves against such conduct – e.g. by means of a complaint to their superior or by taking the case to court.

In employment relationships, victimisation can take the form of bullying or termination of employment.

Discrimination by association may arise if a person who is being treated unfavourably has a close relationship to a person identified by a protected characteristic.

An example would be a parent of a disabled child who is being penalised by their employer for absences related to the care for that child, although the employer tolerates the same behaviour by other employees-parents.

Race and ethnicity are protected characteristics listed in the Anti-Discrimination Act. These are one of the oldest protected characteristics; in view of historical experience, and the law provides them with the "strongest" protection. In this case, permissible forms of different treatment are greatly limited; i.e. placing an employee at a disadvantage on the grounds of their race or ethnicity will generally constitute discrimination.

Sex/gender is another protected characteristic listed in the Anti-Discrimination Act. Discrimination may concern both women and men. The Act states that discrimination on the grounds of sex/gender also includes discrimination on the grounds of pregnancy, parenthood (motherhood or fatherhood) and/or gender identity. Manifestations of motherhood may include not only the actual fact that a woman has given birth to a child, but above all the resulting consequences, including the duty to care for the child.

Nationality (in terms of "national origin" and "State citizenship") – nationality in the latter sense is a legal relation to a particular country; for an individual it is primarily expressed by citizenship. In relation to the prohibition of discrimination, it is necessary to keep in mind that citizens of EU Member States should have the same status in employment as citizens of the Czech Republic. Nationality in the former sense (i.e. "ethnic") is usually understood as subjectively perceived affiliation to a certain nation. It is typically based on the place of birth, ancestry or affiliation to a particular culture. However, in terms of the prohibition of discrimination, it is important what nationality the person committing discrimination attributes to the person (i.e. presumed protected characteristic).

Sexual orientation – this is a purely private matter of each employee and should in no way adversely affect their professional life.

Age is also listed in the Anti-Discrimination Act as one of the protected characteristics. Both younger and older employees are protected on the grounds of their age. Employees of pre-retirement and retirement age have a particularly difficult position on the labour market.

Under the Anti-Discrimination Act, a **disability** is characterised by a degree of damage to health that can put the individual in a disadvantageous position and a long-term (lasting) nature of that damage. This can be physical, sensory, mental or some other disability. Employees with a disability cannot be understood as only those who have a "proof" of their disability from the state (e.g. they have been granted a disability pension or hold a disability card (ZTP or ZTP/P)). Disability is a specific protected characteristic, as the employer must not only refrain from treating employees with disabilities unfavourably, but is also required to act pro-actively – take reasonable accommodations (see reasonable accommodation).

Faith, religion and worldview are also protected by the Anti-Discrimination Act. Faith, religion or atheism is a purely private matter of each employee and should not usually adversely affect their professional life. The term "worldview" is not precisely defined – it is not just any opinion or attitude of an employee, but an opinion that has a deep thought or philosophical basis, and represents a coherent view of the basic questions of the existence of the individual and the functioning of society.

Gender (in Czech also "sociální pohlaví" or "kulturní pohlaví") refers to the cultural characteristics that society ascribes to male or female individuals. The concept relates to the roles that society expects of these individuals. Therefore, the perception of gender roles differs across various geographical areas and time periods. The term "sex", in contrast to gender, is understood in a biological sense.

Gender identity means an identification of oneself with a specific gender, which may or may not correspond to the biological sex assigned to a person at birth based on external sex characteristics. Gender identity includes the perception of one's own body as well as expressions such as speech, behaviour, clothing, leisure time activities, preferred social roles, etc.

LGBTIQ+ is an abbreviation representing the following groups of persons – lesbians (L), gays (G), bisexuals (B), transgender persons (T), intersex persons (I) and queer persons (Q). The "+" symbol denotes potential inclusion of other diverse sexual orientations and identities, as well as potential sexual fluidity. **Transgender persons** are people who experience a discrepancy between their subjectively perceived gender and their biological sex. **Intersex persons** are people who have physical, hormonal or genetic traits since birth that don't fit into the female/male genetic binary; they are usually a combination of both. **Non-binary people** have neither a purely female nor a purely male identity – some perceive their identity as both male and female, and some as neither. **Queer** is an umbrella term for LGBTIQ+ persons who are not heterosexual or do not live in accordance with their biological sex assigned at birth.

Overview of applicable regulations

The **Anti-Discrimination Act** (Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination, as amended) prohibits discrimination in the areas defined in the Act (e.g. work and employment, access to goods and services). It lays down the basic definitions of discrimination and of related terms.

The **Labour Code** (Act No. 262/2006 Coll., the Labour Code, as amended) lays down the mutual rights and obligations of employers and employees. It contains an explicit prohibition of discrimination and a broader list of grounds (protected characteristics) than the Anti-Discrimination Act. It contains many references to the Anti-Discrimination Act, especially as regards the forms of discrimination.

The **Employment Act** (Act No. 435/2004 Coll., on employment, as amended) deals with the State employment policy and protection against unemployment. It provides that the State, the Labour Office of the Czech Republic and employers are required to ensure equal treatment of all people exercising the right to employment. Here again, the list of protected characteristics is broader than in the Anti-Discrimination Act, and similar to the Labour Code, the Employment Act refers to forms of discrimination under the Anti-Discrimination Act.

The **Labour Inspection Act** (Act No. 251/2005 Coll., on labour inspection, as amended) regulates the activities and powers of labour inspectorates. It also defines administrative infractions that employers can commit in the area of equal treatment.

The Anti-Discrimination Act is based on a number of **European Union directives**[4]. Compliance with EU law in the Member States is supervised by the Court of Justice of the European Union, which takes the opportunity

4. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

   Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

   Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

   Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

   Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

   Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

   Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

   Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

to specify in the individual cases referred to it how EU law should be interpreted in individual Member States. Rulings of the Court of Justice of the European Union are thus also a valuable source for national application of the right to equal treatment, and are therefore also used in this Recommendation.

Selection of a new employee

The selection of a new employee falls within the employer's competence. The employer can decide how to reach out to potential job seekers and what criteria to apply in the selection of an ideal new employee. However, the employer should assess individual candidates in terms of qualifications, necessary requirements and/or special abilities.[5] An important limit to the employer's freedom is, among other things, the prohibition of discrimination – save for certain exceptions, a job seeker cannot be rejected solely on the grounds that he/she is, e.g., a Roma, a woman or an elderly person. Under the Employment Act, the selection criteria must guarantee equal opportunities to all natural persons applying for employment.[6] One has to be careful even when writing a job advertisement, as an unfortunate wording can discourage some job seekers from applying for the job. The prohibition of discrimination is also related to the manner in which a job interview is conducted, where the employer must avoid asking for certain information.

1. Prohibited criteria and exceptions to the prohibition of discrimination

The Anti-Discrimination Act requires equal treatment in access to employment and prohibits discrimination, i.e. treating someone less favourably in relation to a protected characteristic. **Rejecting a job seeker solely because he/she belongs to a group defined by a protected characteristic** will undoubtedly put the applicant at a disadvantage. By doing so, the employer may be committing **discrimination**.

The legal regulation also provides for situations in which the rejection of a job seeker on the basis of a protected characteristic may be justified. Hence, there are certain exceptions to the prohibition of discrimination – "permissible forms of different treatment". **It must be borne in mind, however, that these exceptions are quite narrowly defined.** In most cases, employers should choose from job seekers according to their abilities, experience and other personal qualities that will be relevant to the job, not on the basis of protected characteristics.

5. This is based on Section 30 (1) of the Labour Code.
6. Section 12 (2) of the Employment Act.

The basic exception applied in the area of employment is the rule that a difference in treatment is permissible if there is an objective ground for different treatment consisting **in the nature of the work or activity performed and the requirements applied are proportionate to that nature**. With regard to the selection of a new employee, we can simplify this rule and state that a job seeker may be rejected on the basis of a protected characteristic in cases where this characteristic (i.e. ground of discrimination) prevents or significantly hinders the job seeker from performing the given work for the employer.

Rejecting a job seeker solely because he/she belongs to a group defined by a protected characteristic is usually discriminatory. A job seeker may be rejected on the basis of a protected characteristic in cases where this characteristic (i.e. ground of discrimination) prevents or significantly hinders the job seeker from performing the given work for the employer.

Discrimination in the selection of new employees is often due to stereotypes. At the same time, one has to admit that all of us follow stereotypes to a greater or lesser extent, i.e. we use prejudiced or overly simplified and generalised perceptions about an entire group of people. To some extent, stereotyping is natural to the human mind. Some stereotypes may be so preconceived that we are not even aware of how much they influence our actions.

Stereotypes can limit us in our private lives, as they may place us at a disadvantage or make us deprive ourselves of the opportunity to get to know a person better. However, in terms of the right to equal treatment, stereotypes become problematic when they "enter the workplace" and the employer decides on the choice of new employees on the basis of these stereotypes – then the employer may commit discrimination. It is therefore important to admit the possibility of stereotypical thinking and try to eliminate the influence of one's own stereotypes.

Of course, it is impractical for the average employer to conduct job interviews with job seekers being "hidden" somewhere. In addition, some job seekers are usually already eliminated before the interviews on the basis of information from their CVs. Below, I provide some tips on how to reduce the effect of stereotypical thinking in the selection on new employees:

- For example, multiple people should participate in the selection process. The ideal option is to involve persons with various life experiences.

- It is advisable to draw up a list of evaluation criteria in advance. Save for certain exceptions (see the subchapters below on the individual protected characteristics), these criteria should not include protected characteristics. In respect of criteria whose application could result in placing a group protected by the Anti-Discrimination Act at a disadvantage, it is always advisable to carefully consider whether the required characteristic is actually necessary for the performance of the job (see subchapter 1.9). The list must then be followed.

- Try to ignore the first impression, which is usually unreliable. Evaluators should discuss the pros and cons of each job seeker among themselves. Each evaluator should be able to justify why he/she supports or does not support a particular job seeker. This justification is particularly important in cases where there is no clear reason (e.g. lack of experience) for the evaluation but the evaluator "did not like" the job seeker or was "not impressed" by the job seeker (although, of course, the impression that a job seeker makes during the interview is an important criterion for the selection of a new employee).

- The employer should make it clear to evaluators who are in a subordinate position (typically employees of the HR department) that discrimination is unacceptable in the selection of new employees. In practice, these employees may exclude, e.g. job seekers of pre-retirement age, because they assume that is what the employer wants.

- There are certain prohibited questions that should not be asked during an interview (see subchapter 3.1). If one of the evaluators asks these questions, it may indicate his/her bias.

1.1 Race and ethnicity

Race and ethnicity are considered the most important protected characteristics. In the history of mankind, belonging to a certain race or ethnicity could deprive a person not only of material goods, but even of their life. The prohibition of racial discrimination is therefore one of the pillars in the protection of fundamental human rights.[7]

Race or ethnicity in no way affect whether a person is a good or bad employee or how well a person can handle the work assigned. A job seeker may therefore be rejected only exceptionally on the grounds of his/her race or ethnicity, i.e. **placing a job seeker at a disadvantage on these grounds will usually constitute discrimination**. Permissible different treatment may be considered especially in the case of film or theatre parts where the actors' appearance may be important – in these cases, it can be considered that there is an objective ground for a different treatment consisting in the nature of the work performed.[8]

✓ A dark-skinned actor is auditioning for the lead role in a documentary about the life of Henry VIII. In view of the fact that, according to the preserved sources, Henry VIII was white and that the intention of the documentary is to be as historically accurate as possible, the actor is rejected on the grounds of his race. This is not discriminatory.

✓ Similarly, if a director chooses a dark-skinned actor or an Asian person to play this historical figure in a modern production, this will not constitute discrimination against other races.

It thus again needs to be emphasised that the rejection of job seekers on the grounds of their ethnicity cannot be justified by stereotypical perceptions or the employer's possible negative experience with some employees of the given ethnicity. Each job seeker must be considered individually and no one can be held responsible for the actions of others.

✗ An employer operates in a town with a large Roma minority. The employer has previously dismissed several Roma employees due to frequent unexcused absences and therefore decided that it will no longer employ such unreliable employees. All Roma people are now automatically excluded from recruitment procedures. Such a practice constitutes discrimination.

Similarly, the employer cannot justify discrimination by claiming that employees of a different ethnicity would put off its customers or that its business partners have a problem with such employees.

In the past, the Defender dealt with the case of a Roma person who had applied for a job as a security guard at a company providing security services to a chain of grocery stores. When the job seeker arrived for his training shift, the hypermarket manager saw him and said that she did not want Roma people guarding the store. The employer eventually rejected the job seeker.

The employer's conduct constitutes discrimination. Although the conduct may be driven by the intention to satisfy the contractual partner so that their co-operation continues, economic reasons cannot justify discrimination on the grounds of race and ethnicity.

The case shows that the employer may find itself in a difficult situation and the core of the problem as to why the discrimination is occurring in the first place may not be on its side. For this reason, the Anti-Discrimination Act makes the actual originator of the discrimination also liable (in addition to the employer). In the case at hand, the Defender concluded that the company operating the grocery stores had committed discrimination in the form of incitement.[9]

7. Boučková, Pavla; Havelková, Barbara; Koldinská, Kristina; Kühn, Zdeněk; Kühnová, Eva; Whelanová, Markéta. Antidiskriminační zákon. Komentář (Anti-Discrimination Act. Commentary). 2nd edition. Prague: C. H. Beck, 2016, ISBN 978-80-7400-618-0, p. 47.
8. Permissible form of different treatment under Section 6 (3) of the Anti-Discrimination Act.
9. See the Report of the Public Defender of Rights of 20 November 2018, File No. 700/2017/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/6416.

1.2 Nationality (in the sense of "State citizenship" and "national origin")

1.2.1 Nationality (in the sense of "State citizenship")

expresses a legal relation to a particular country; in the case of employees, it is expressed by their citizenship. We usually distinguish three categories of employees in terms of citizenship: citizens of the Czech Republic, citizens of EU Member States and citizens of other countries (third-country nationals).

Citizens of the Czech Republic

are very rarely placed at a disadvantage in relation to their citizenship in this country. For example, it may happen that the employer is trying to attract employees from abroad by promising them benefits that the other employees (citizens of the Czech Republic) will not receive. Recently, some Czech employers have tried to help Ukrainian war refugees by prioritising them. These situations must always be assessed on a case-by-case basis. To conclude, the purpose of the employer's conduct always has to be assessed to determine whether certain conduct is discriminatory (see also subchapter 1.7). When adopting similar measures, employers should also be mindful of potential conflicts with other legal rules (e.g. the rule that they must provide the same salary or pay for the same work[10]).

Citizens of Member States of the European Union[11]

as well as citizens of the European Economic Area (i.e. Iceland, Norway and Liechtenstein) and Switzerland have, as a rule, the same status as citizens of the Czech Republic.[12] Free movement of workers is guaranteed by EU law[13] and includes the elimination of discrimination among workers in the Member States on the basis of their nationality. An exception applies in public administration – the State can reserve certain public administration positions for its own citizens. However, these must only be positions that are related to the exercise of public authority, rather than all the positions at public employers (e.g. in healthcare, schools, etc.) indiscriminately. In other cases, EU citizens generally[14] cannot be restricted in their access to employment, i.e. a job seeker cannot be rejected simply because he/she does not have Czech citizenship.

Furthermore, it should also be borne in mind that citizenship is closely linked with the requirement of permanent residence in the Czech Republic. In this regard, one has to determine what exactly is meant by "permanent residence".

Only citizens of the Czech Republic can obtain permanent residence in terms of registration details[15] indicated in the identity card of every citizen of the Czech Republic. Consequently, if the employer requires job seekers to have registered permanent residence in the Czech Republic, the employer thus effectively excludes all foreigners from the given job. Such a practice will generally be discriminatory at least in relation to EU citizens.

On the other hand, permanent residence in terms of a residence permit is relevant only to foreigners (EU citizens as well as third-country nationals). If the employer requires all foreign job seekers to have a permanent residence permit, the employer thus contravenes EU law, as EU citizens can work in the Czech Republic regardless of their residence permit.

10. See Section 110 of the Labour Code.
11. Equal or comparable rights are also guaranteed to family members of EU, EEA and Swiss citizens.
12. In connection with the employment of citizens of the EU, European Economic Area and Switzerland and their family members, employers have the duty to inform the Labour Office of the Czech Republic (see Ministry of Labour and Social Affairs. Postup zaměstnavatele (Employer's Procedure) [online]. 2020 [retrieved on: 2023-10-09] Available (in Czech) at: https://www.mpsv.cz/postup-zamestnavatele1).
13. In particular, Article 45 of the Treaty on the Functioning of the European Union and the Regulation No 492/2011 on Freedom of Movement for Workers.
14. In exceptional cases, discrimination against a citizen of an EU Member State can be justified by the public policy, public security or public health (Article 45 (3) Treaty on the Functioning of the European Union).
15. Permanent residence within the meaning of Section 10 of Act No. 133/2000 Coll., on population records and birth identification numbers and on amendments to certain laws (the Population Records Act).

Citizens of other countries (except for the citizens of Iceland, Liechtenstein, Norway and Switzerland and family members of EU citizens)

have a different status on the labour market. They usually have only **limited access to the labour market** and the law itself anticipates that employers will prioritise "local" employees (the above categories of employees) when filling vacancies. However, there are also groups of third-country nationals with **unlimited access to the labour market**. In their case, citizenship should generally not constitute an obstacle when applying for a job in the Czech Republic.

In order to obtain employment in the Czech Republic, third-country nationals usually need a permit (residence permit and employment permit, or, alternatively, "employee card"[16]). The law also envisages that third-country nationals may apply for a vacant job and obtain the necessary permit only once the vacancy has not been filled by "local" employees[17]. The right to apply for a job and the related protection do not follow from EU law either. It is thus generally permissible for an employer to give preference to a Czech job seeker over a third-country national. It is administratively easier and faster for employers to hire a "local" employee, as they do not have to wait for the foreigner to obtain the necessary permit.

✓ Raja is a Tunisian citizen who lives and works in her home country, but she would like to move to the European Union. Online, she found an employer operating in the Czech Republic who offers vacancies for English-speaking employees. Raja contacted the employer and expressed her interest in a specific position, but the employer rejected her, stating that several suitable candidates with Czech citizenship had already expressed interest in the job. There is no discrimination in this case.

However, employers should be mindful in the case of third-country nationals who have **free access to the labour market** (e.g. foreigners with permanent residence permits, students or foreigners who have been granted asylum[18]). As a rule, these persons should not be refused solely on the grounds of their nationality. The Labour Code lists nationality as a prohibited protected characteristic, and (unlike the Anti-Discrimination Act) this protection applies to all foreigners, not just EU citizens. Therefore, the employer should have a relevant reason for rejecting a third-country job seeker with free access to the labour market (one of the permissible forms of different treatment, e.g. positions related to the exercise of public authority).

✗ Ali is a Tunisian citizen who lives in the Czech Republic and has a permanent residence permit in the country. This permit entails free access to the labour market. However, when Ali applied for a job as a supermarket clerk, he got rejected on the grounds that the employer did not wish to employ foreigners. This constitutes discrimination.

1.2.2 Nationality (in the sense of "national origin")

Unlike nationality in the sense of State citizenship, nationality in the sense of national origin does not express any formal or legal relation, but merely a subjectively perceived affiliation to a particular nation. It is typically based on the place of birth, ancestry or affiliation to a particular culture. However, in terms of the prohibition of discrimination, it is usually more important what nationality the person committing discrimination attributes to the person. The national origin of the discrimination victim need not be the same as the national origin the victim claims allegiance to – discrimination also occurs in the case of a "presumed protected characteristic".

✗ Yevgeny was born in Russia, but moved with his parents to the Czech Republic at an early age, and later obtained Czech citizenship. Although his parents still consider themselves Russian, Yevgeny perceives his national origin to be Czech because of his lifelong ties to the Czech Republic. When looking for a new job, the employer asks him during the interview about his unusual name. Yevgeny sees no

16. For more information, go to: Ministry of Labour and Social Affairs. Zaměstnávání cizinců (Employing Foreigners) [online]. [retrieved on: 2023-10-09]. Available (in Czech) at: https://www.mpsv.cz/web/cz/zamestnavani-cizincu.
17. Section 37a (4) of the Employment Act.
18. For more information, go to: Ministry of Labour and Social Affairs. Volný vstup na trh práce (Free Access to the Labour Market) [online]. 2020 [retrieved on: 2023-10-09]. Available (in Czech) at: https://www.mpsv.cz/web/cz/volny-vstup-na-trh-prace.

reason to hide his Russian origins. He is all the more surprised when the employer rejects him, stating that he "doesn't want to employ Russians". The employer's practice constitutes discrimination.

As with race and ethnicity, nationality in the sense of national origin in no way affects whether a person is a good or bad employee or how well a person can handle the work assigned. **Therefore, the employer cannot reject a job seeker solely on the basis of information about his/her nationality.** Otherwise, the employer would be committing discrimination.

On the other hand, nationality (in the national origin sense) is usually linked to knowledge or skills that may be relevant for the performance of the job. This is true primarily of language, but such virtues can also include the knowledge of traditions or cultural practices. If such knowledge is important for a certain job, for example if the employer needs to enter a new market in a different cultural-geographical area, the employer may require job seekers to possess this knowledge. However, the employer should check whether the employee actually has the required knowledge, rather than infer language skills only on the basis of the job seeker's nationality.

✗ A multinational company is looking for a new employee for its Prague office. The new employee's job will consist mainly in communication with clients from Germany and Austria. Pavel applies for the job, but is rejected on the grounds that because of being Czech, he would not be able to communicate with the clients. However, Pavel has studied and worked in Germany for years and he has a native-speaker level of German. The employer committed discrimination against Pavel. If the employer had examined Pavel's level of communication in German, Pavel would not have been rejected.

1.3 Age

The specific nature of this protected characteristic lies in its variability over time. Surely many people remember the start of their careers when they were considered young and inexperienced. On the other hand, with the approaching retirement age, employees are concerned that employers will "throw them on the scrap heap". The prohibition of discrimination protects employees at every stage of their working lives.

As with other protected characteristics, age cannot, in principle, be a reason for rejecting a job seeker. However, the law also reflects fact that the age of an employee may be relevant in some cases and therefore provides exceptions to the prohibition of discrimination (permissible forms of different treatment).

First of all, these are **exceptions laid down by the legal regulations.** Hence, if the employer rejects a job seeker under the age of 15, this action is not discriminatory.[19] Age also plays an important role in some professions, especially in the case of civil servants. For example, judges cannot be appointed before the age of 30, and civil servants' service ends in the year in which they reach the age of 70.

The employer may also set a certain **minimum age, professional experience or length of employment requirement if compliance with such a requirement is a necessary prerequisite for a proper performance of the job.** These requirements disadvantage primarily young job seekers who, because of their age, have not had the opportunity to gain the experience required. However, it is only natural that previous experience is essential for some positions, and employers cannot afford to hire an inexperienced employee who will learn on the job.

A minimum age or experience cannot be required for positions where it this makes no sense in the context of the work performed. Typically, this may be true of simple manual work and jobs where lower qualification is sufficient. The requirement for a minimum age or experience should in no way be used to avoid employing young people due to the employer's stereotypical thinking.

The Defender dealt with a case where an employer had already made it clear in the wording of an advertisement that they would not be interested in employing younger employees. The employer was looking for a new wellness receptionist, stating that "due to the unreliability and volatility of young

19. Section 34 of Act No. 89/2012 Coll., the Civil Code.

ladies", the employer preferred women between 25 and 40 years of age. The Defender concluded that even younger employees could perform the job well. According to the Defender, the employer committed discrimination on the grounds of age (the text of the advertisement disadvantaged both younger and older employees) and gender (the employer explicitly stated that they were only looking for women).[20]

Another exception to the prohibition of discrimination on the grounds of age applies to older employees. The exception concerns cases where an employee must **undergo professional training** before being able to properly perform the work offered. **If the time for completing this training would be disproportionately long in view of the time when the job seeker reaches retirement age, the employer may reject the job seeker.** The employer can thus avoid a situation where they invest time and money in training and onboarding an employee, but the employee will only stay with the employer for a short time after completing the necessary training. That being said, the length of the training required must always be assessed ad hoc in relation to the job seeker's age – again, this exception cannot serve as a catch-all excuse for rejecting older job seekers.

✗ An employer is seeking a new production worker for their factory. Once accepted, the selected job seeker will attend a one-week "course", during which he/she will be introduced to the factory's operations and the working procedures at the individual production positions. If the employer rejected a 60-year-old job seeker with reference to the length of this training course, this would constitute discrimination.

Even in the case of age, a different treatment is permissible if there is an objective ground for different treatment consisting in **the nature of the work or activity performed and the requirements applied are proportionate to that nature.** Age as such is not generally relevant to the performance of work. However, certain characteristics that may be important for some jobs are closely related to age. This is true, for example, of **appearance,** which (similar to race and ethnicity) can be important especially for some artistic professions.

✓ When casting a movie role of a high school student, the producer may turn down an actor who is over thirty.

Physical strength is also usually linked with age. However, European case law shows that rejecting a person solely on the grounds of his/her age with reference to gradual decline in physical strength is only possible in exceptional cases. The Court of Justice of the European Union has dealt primarily with the age limits for acceptance into service relationships, in case of Czech Republic these age limits are set by the law (e.g. in case of firefighters or police officers). In the case of private employers, discrimination will usually be committed if an employer reject a job seeker solely on the basis of information about his/her age, referring to a decline in physical strength. Employers should therefore evaluate each job seeker individually. A job seeker may, of course, be rejected, if he/she is indeed physically unable to perform the work offered. However, this does not mean that the same applies to every job seeker of the same age.

The Defender has dealt with the case of an employee of a sugar refinery who continued to work in the same position even after he had been granted an old-age pension. Nonetheless, according to the collective bargaining agreement, he was excluded from receiving an annual bonus that the employer paid to employees in connection with the attainment of the factory's campaign goals just because he had been granted the pension. The employer justified this practice, inter alia, by arguing that working pensioners did not perform physically demanding work and, hence, did not contribute to any great extent to achieving the set goals. The Defender concluded that it is discriminatory to declare older employees ineligible for remuneration with reference to their disadvantage in performing physically demanding work without the employer having individually assessed the given employees' performance. It is also at variance with the prohibition of discrimination if the employer automatically excludes older employees from certain manufacturing activities without assessing individually their medical fitness for performing the work.[21]

20. Letter of the Public Defender of Rights of 20 February 2019, File No. 299/2019/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/9650.

21. Report of the Public Defender of Rights of 16 February 2021, File No. 1897/2018/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/9014.

1.4 Sex/gender

Save for certain exceptions, the sex/gender of a job seeker should be completely irrelevant to the selection of a new employee.

However, women are often disadvantaged when searching for a job due to **stereotypes about their intellectual and physical abilities.**

As far as **physical fitness** is concerned, it is true that, on average, strength, height and other physical characteristics tend to be higher among men. Such physical criteria are crucial for some occupations. However, if the work requires strength, physical stamina, etc., the employer should assess the fulfilment of these specific criteria instead of sex/gender. Just as it is not true that every man is tall and strong, a woman who easily meets these criteria can apply for the job. In such a situation, the essential requirement is not sex/gender, but rather the individual abilities of the candidates required for the performance of the given position.

✗ An employer is looking for a new gardener. As the job is quite physically demanding, the employer automatically excludes all women's CVs from the process.

✗ When seeking a new job, Karel comes across an advertisement for the position of "a (female) assistant to the director" (in Czech: asistentka ředitele). He decides to call the employer to find out the details. However, the HR officer tells him point-blank that the employer prefers to fill the position with a woman, as, in his experience, women are more detail-oriented.

In 2012, the Defender dealt with a case where a man had encountered discrimination in job recruitment. The complainant tried to get a job as a salesman in five different clothing and shoe stores. In all of them, he was told that the company only hired women as sales assistants. The Defender noted that systematic rejection of male job seekers in cases where there existed no objective ground for doing so, consisting in the nature of the work performed, constituted direct discrimination on the grounds of sex/gender.[22]

Moreover, it must be borne in mind that discrimination on the grounds of sex/gender also includes discrimination on the grounds of **pregnancy and parenthood** (motherhood or fatherhood). However, even here we can observe some differences. While mothers are usually expected to be constrained at work by childcare, in the case of men, employers are less likely to give the same weight to their parenthood. However, in particular cases, family responsibilities may affect an employee-father as much as an employee-mother. For example, while time flexibility may be a legitimate requirement for a particular job, the employer should not automatically assume that women will be less flexible than men. Again, these stereotypes work both ways. Men may therefore encounter greater misunderstanding from their employer if they want to take parental leave or care for a sick child, for example.

✗ After completing her university studies, Marie applies for a job, but the employer prefers a male candidate because they believe that a young woman might soon go on maternity and parental leave.

✗ An employer is looking for a new employee for a position that, due to the nature of the work, needs to be filled by a time-flexible employee. The employer automatically excludes from the CVs received that of a woman who has recently taken parental leave. The employer does not think that a mother of a small child can be flexible because she has to take care of the child.

Exceptionally,[23] **an employer's requirement for a specific sex/gender can be lawful.**

22. Report of the Public Defender of Rights of 25 July 2012, File No. 264/2011/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/1990.

23. We can infer the main principles that need to be followed in seeking exemptions from the prohibition of discrimination on the grounds of sex/gender from case law of the Court of Justice of the European Union. According to the Court of Justice, such exemptions must be applied as narrowly as possible, have to be proportionate and must be assessed in the light of social developments.

Typically, this may be true in cases where only men or women can actually perform the job properly. This is an exception as there is **an objective ground** for preferring a male or female job seeker **consisting in the nature of the work performed.**

✔ The employer is preparing a new catalogue of its products. As lingerie is involved, the employer is seeking a female model for a product shoot.

Religious reasons may also justify an exception, e.g. in the case of clergy.

The Anti-Discrimination Act also lays down that a difference in treatment is permissible if its purpose is to protect women on the grounds of pregnancy and maternity.[24] The Labour Code also provides protection for (expectant) mothers by stating that it is prohibited to employ women in jobs that endanger their maternity.[25] However, these rules can in no way be understood as permitting discrimination against pregnant women. **It is not possible to reject a female job seeker simply because she is pregnant, or to require job seekers to provide a confirmation that they are not pregnant.[26]**

1.5 Disability

People with disabilities are among the workers who face many barriers on the labour market.

1.5.1 Who is an employee with a disability?

This is a very diverse group of people – a disability can be physical, sensory, mental or other, it can be noticeable at first sight or hidden, it can significantly limit a person in finding employment and performing work, or it can limit the employee only in certain specific situations.

Under the Anti-Discrimination Act, a disability is characterised by a degree of damage to health that can put the individual in a disadvantageous position and a long-term (lasting) nature of that damage. Hence, an employee who is temporarily down with a flu cannot be considered a person with a disability. However, the Labour Code and the Employment Act list "medical condition" as a protected characteristic, so the protection against discrimination under these Acts is broader and can also apply to sick employees.

Employees with a disability are not only those who have a "proof" of their disability from the state (e.g. they have been granted a disability pension or hold a disability card (ZTP or ZTP/P)). What is important is the employee's actual medical condition and the fact that the employee may be disadvantaged by his/her disability.

1.5.2 Can a job seeker's disability be relevant when selecting a new employee?

Disability is a specific protected characteristic. While the age or religious belief of job seekers should not play a role in the in the recruitment process and the employer should generally not even try to learn this information, the medical condition of a future employee must always be ascertained and assessed so that the employee performs only work for which he/she is medically fit.

The medical condition of job seekers is therefore relevant in the selection of a new employee. At the same time, however, information on medical condition is sensitive information the employer should not try to establish (see subchapter 3.1.2 for details). Often, the employer does not even have the expertise to evaluate information on the employee's medical condition. **Therefore, as part of the initial occupational medical**

24. Section 6 (5) of the Anti-Discrimination Act.
25. Section 238 (1) of the Labour Code.
26. See e.g. the Report of the Public Defender of Rights of 25 January 2013, File No. 167/2012/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/1460. The Court of Justice of the European Union has already ruled that pregnancy cannot be a ground for not hiring a job seeker in its judgment of 8 November 1990, E.J.P. Dekker v. Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus, C-177/88. In that case, the job seeker herself had advised the employer during a job interview that she was pregnant.

examination, a physician (occupational health services provider) decides whether the job seeker is fit to perform work in the given position.[27]

✓ An employer is seeking a new employee for a job where the employee needs good eyesight. During the interviews, the employer notices that one of the job seekers wears glasses. The job seeker is therefore be advised of the requirement for good eyesight. The candidate responds that he is aware of the requirement and that his visual impairment is negligible, and with glasses, he can see perfectly. After the interviews, the employer concludes that the job seeker with glasses would be the most suitable new employee, but is still unsure whether his visual impairment will not be a barrier to the performance of the work. A physician should ascertain whether this is the case during the initial medical examination.

If the medical assessor determines during the initial occupational medical examination that the job seeker is medically unfit to perform the work offered due to his/her disability, the employer may reject the job seeker and not conclude an employment contract with him/her. This procedure would not constitute discrimination, as it is a permissible form of different treatment – there is an objective ground for rejecting the job seeker consisting in the nature of the work offered.

1.5.3 Can the employer decide themselves that an employee's disability constitutes a barrier to performing the relevant work?

As a rule, the decision on the employee's medical fitness should be made by the occupational health services provider, as the latter is a professional with detailed information on the employee's health and the conditions at the workplace. A job seeker should be rejected on the grounds of his/her disability without an occupational medical examination only if it is clear even to the employer as a layperson that the job seeker would not be able to perform the work assigned. This can happen in cases where the nature of the employee's disability is obvious at first glance or where the job seeker voluntarily discloses information about his/her medical condition to the employer.

✓ An employer is looking for a new call centre operator. Mr Daniel, who is deaf, is interested in the job. He uses a hearing aid which enables him to communicate by telephone. However, his mother tongue is the Czech sign language; he speaks Czech with minor difficulties and has a speech impairment. The employer may reject Daniel because they need an employee who speaks Czech very well and whose speech is clearly understandable. There is no discrimination in this case.

This procedure saves time and financial costs for the job seeker, who would otherwise have to unnecessarily undergo an occupational medical examination, which would result in a finding that he is medically unfit. However, the employer should only proceed in this way if it is absolutely clear that the job seeker cannot perform the work offered. In case of doubt, the employer should always send the job seeker for an initial medical examination. If the employer misjudged the situation, i.e. the job seeker's disability did not in fact constitute a barrier to the performance of the work, the employer would commit discrimination by rejecting this specific candidate.

✗ An employer is looking for a new employee. One of the job seekers states at an interview that he has an autism spectrum disorder. The employer has personal experience with a person with this disability and concludes based on this experience that an employee with the autism spectrum disorder would not be able to perform the work offered. However, the employer's assessment is incorrect, as this disability can manifest itself in various ways and in this specific case, the job seeker would easily be able to perform the job. The employer committed discrimination by rejecting this job seeker.

27. The duty to send a future employee for an initial occupational medical examination relates to all employees in an employment relationship. In the case of employees working on the basis of an agreement to complete a job or an agreement to perform work, this obligation arises only in some cases (mainly in the case of higher-risk occupations), but if the employer has doubts about the job seeker's medical fitness, they should send for an examination even those job seekers for whom the law does not impose this obligation.

In assessing whether a job seeker can be rejected on the grounds of his/her disability, both the medical assessor and the employer must take into account the employer's obligation to take reasonable accommodations.

1.5.4 Obligation to take reasonable accommodations

A reasonable accommodation is one that enables a person with a disability:

- to apply for a job with the given employer;
- to perform the work entrusted to him/her by the employer;
- to be promoted or otherwise improve his/her position with the employer; and
- to participate in professional education, training or counselling.

It can take different forms, as the needs of individual employees with different types of disabilities are naturally different. This may involve modification of the workplace (e.g. barrier-free access), purchase of special aids (special software to enable a person with a visual impairment to use a computer) or other equipment (a reclining desk for an employee with back problems), modification of working hours or regime (working from home for an employee who cannot commute regularly due to health reasons).

However, the duty to take reasonable accommodations has its limits. **The requested accommodation may be refused if:**

- the benefit of the measure to the disabled employee is negligible compared to the cost expended by the employer to adopt the accommodation; or
- the accommodation would be beneficial for the employee with a disability but too costly for the employer to adopt, and these costs cannot be reduced to a reasonable level (e.g. by financial assistance from the State); or
- it is possible to provide a measure other than the accommodation requested, and this measure is of comparable benefit to the employee and would place less burden on the employer.

The obligation to provide reasonable accommodation manifests itself on two levels in the selection of a new employee:

When organising the recruitment procedure

The recruitment procedure itself can be set up in a way that puts job seekers with disabilities at a disadvantage or excludes them from applying for the job altogether. This is neither unusual nor a manifestation of the employer's bad intention. Job seekers with disabilities may face barriers in situations that are entirely common for people without disabilities. Problematic in this context may be the venue of the selection procedure (e.g. it is not barrier-free), the method of the selection procedure (written test in the case of a blind job seeker) or even the way the employer communicates with the job seekers (only telephone contact in the case of deaf job seekers).

The duty to adopt reasonable accommodations does not mean that the employer must set up every recruitment procedure in such a way that no potential disabled job seeker is disadvantaged. **However, if a particular disabled job seeker expresses interest in a certain job and asks the employer to take reasonable accommodations, the employer must comply with the request, unless the accommodations would represent an unreasonable burden or unless it is clear from the circumstances that the job seeker cannot perform the work offered because of the disability.**

✔ The employer states in a job advertisement that the selection procedure includes a written test. A job seeker with a visual impairment contacts the employer, asking whether it would be possible to use a

larger font in his written test, as he finds it difficult to read text in the usual size. The employer complies with this request, thereby fulfilling the duty to take reasonable accommodations.

✓ The employer is contacted by a blind job seeker asking if he could attend an interview instead of a written test. The employer need not comply with the request and may outright reject the job seeker if the nature of the work offered completely prevents a blind employee from performing it.

✗ On the contrary, it would be a violation of the obligation to provide reasonable accommodations and therefore discrimination if the employer refused the blind job seeker's request simply because it would be more organisationally demanding to organise an oral interview instead of a written test.

It is possible that the employer is aware of the job seeker's disability (for example, the job seeker included this information in his/her CV). If the employer has an idea of the nature of the disability and suspects that the job seeker could face some barriers in the recruitment process, it is advisable for the employer to contact the job seeker and discuss the situation with him/her to avoid unnecessary complications.

When assessing whether a disabled job seeker can perform the work offered

In assessing whether a job seeker is medically fit to perform the work offered, both the employer and the medical assessor must take into account the duty to adopt reasonable accommodations. It is possible that the current workplace setting would make the job unsuitable for the job seeker from a medical point of view, but if some adjustments are made (i.e. a reasonable accommodation is made), the disabled job seeker will be able to perform the work.

A job seeker may only be rejected on the grounds of his/her disability if he/she would not be able to perform the work properly even after the employer adopts reasonable accommodations. This may happen in a situation where the working conditions cannot be adjusted (there is no reasonable accommodation available) in view of the nature of the activity performed or where an accommodation that would enable the job seeker to perform the work offered exists, but the employer cannot be required to provide it (the accommodation would represent an unreasonable burden).

✓ The job of an air traffic controller is associated with great responsibility and stress. An individual applies for the job although he/she has a mental disability which causes people suffering from this condition to poorly cope with stressful situations. As there is no way to completely eliminate the stress entailed in this job, the employer may refuse to hire a person with this type of disability.

A person in a wheelchair applies for a job:

✓ Such a person may be rejected if the workplace is not barrier-free and it would be impossible or too costly to make it accessible. The employee would not be able to telecommute either.

1.6 Faith, religion, worldview and sexual orientation

Faith and sexual orientation are protected characteristics that have nothing in common at first glance. However, they are connected by the fact that **the employer:**

- **should not, as a rule, try to obtain information about the job seeker's faith, worldview or sexual orientation** (see Chapter 3 for details) **; and**
- **if the employer learns this information** (e.g. the job seeker wears a cross around his/her neck or mentions his/her partner in the interview), **these reasons should not disadvantage the job seeker or be a reason for his/her rejection**.

The above applies especially in relation to the job seeker's sexual orientation. In this case, it is hard to imagine a situation where different treatment of a job seeker would be permissible.

An employee's faith or affiliation with a particular church may play a role if **the employer is a church or a religious society.** However, even these employers may reject a job seeker with reference to his/her religious belief only in the case of a job where this is justified by the nature of the work offered (e.g. employees representing a religious society vis-à-vis third parties). For other positions (e.g. an accountant), such a requirement would be unreasonable and rejection of the job seeker would constitute discrimination.

The protected characteristic of **"worldview"** is problematic in practice, as it is not entirely clear what this category includes. A worldview is the sum of an individual's ideas, opinions, and values regarding fundamental philosophical, ethical and political issues. In the past, the Defender has defined this concept more narrowly, concluding that the term "worldview" does not include, for example, membership in a particular political party[28] or an opinion on vaccination.

It should be noted, however, that the Labour Code contains a broader list of protected characteristics than the Anti-Discrimination Act. These include political or other opinions and membership in political parties and movements.

Today, when a lot of information on the employees' private lives can be found online, employers should be advised against rejecting job seekers because they think differently about certain topics. It cannot be automatically concluded that such a practice is discriminatory. It is always necessary to take into account the position in question (ordinary employee vs. employee representing the employer vis-à-vis third parties) and the kind of opinion the employer disagrees with (the job seeker wears a badge of a political party in the parliament / the job seeker has a swastika and the number 88 tattooed on his forearm). Especially in the case of employees representing the employer vis-à-vis third parties, the requirement for certain opinions of the employee, and in particular his/her conduct in private life, may be appropriate.

1.7 Diversity in the workplace – positive measures

While the prohibition of discrimination protects employees from being put at a disadvantage by their employer, there may also be situations where the employer wishes to favour an employee on the basis of a protected characteristic. For example, one employer might want a man to join a predominantly female teaching staff, whereas another would prefer a woman to join their chiefly male IT department. Many employers consider the diversity of their workforce to be an asset to their business – being able to co-operate with people with different life experiences. In fact, the benefits of a diverse and inclusive workplace in terms of increased employee engagement and loyalty have been confirmed by numerous studies. Employers also want to be socially responsible, so they try to be welcoming towards groups of employees who are otherwise at a disadvantage in the labour market.

However, it can be argued that this approach is also inherently discriminatory. Most discriminatory reasons work both ways, i.e. both men and women, older and younger employees, atheist and religious employees, etc. are protected against being disadvantaged. The prohibition of discrimination generally protects all employees by requiring employers to completely disregard any protected characteristics.

On the other hand, it is undisputed that some groups of employees have long been disadvantaged in the labour market. The Anti-Discrimination Act therefore provides an exception where an employer may take protected characteristics into account – a practice that compensates for disadvantages arising from a certain protected characteristic is not considered discrimination. An employer may therefore adopt measures to prevent or compensate for disadvantages arising for a group of people defined by one of the protected characteristics, and to ensure equal treatment and equal opportunities.[29] These measures are often referred to as positive action or affirmative action.

28. Letter of the Public Defender of Rights of 19 May 2015, File No. 2284/2015/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/2860.

29. Section 7 (2) of the Anti-Discrimination Act.

However, employers should always be cautious when adopting such measures, as they are, after all, an exception to the prohibition of discrimination. A fundamental limitation to this exception is the rule that **a positive measure must not lead to giving preference to the "weaker", i.e. lower quality job seeker.**[30]

✓ If it turns out that the job seekers involved are of approximately equal quality, and there are indeed significantly more women in the teaching staff, the head teacher could take the gender of the job seekers into account.

It follows from the above that if the employer decides to promote diversity in the workplace or support a group of employees endangered in the labour market, the employer should do so in a different way than by reserving a particular position for, e.g., single mothers. There is one exception to this rule – it is possible to reserve a position for an employee with a disability (see the next subchapter).

So, to increase diversity, the employer should adopt mainly "softer" measures.

- For example, the employer may emphasise in an advertisement that the job is also suitable for parents on parental leave or parents of small children, or that they are happy to welcome older employees into their team.
- Job offers can also be advertised in a targeted manner (e.g. by posting an advertisement on social media where job seekers join various groups) or by co-operating with non-profit organisations in searching for employees.
- Not only in an advertisement, but also, for example, on their website, an employer can stress that diversity and openness are the organisation's core values, which is why the employer makes sure that there is no discrimination in the selection procedure.
- See Chapter 5 for more tips on how to support certain groups of employees.

Recently, a "positive action" was observed in the practice of some employers advertising vacancies in Ukrainian in addition to Czech. Along with efforts to find the lacking labour force, many employers were also trying to help war refugees.

1.7.1 Positions reserved for people with disabilities

While most protected characteristics protect all employees against unfavourable treatment, this is not the case for disability. The Anti-Discrimination Act only protects people with disabilities, not those without a disability. Thus, a person who claims that he/she is at a disadvantage due to not being disabled cannot successfully claim a violation of the prohibition of discrimination.

Therefore, it is not a violation of the prohibition of discrimination if an employer offers a certain position only to disabled job seekers. This is not a rare practice – simply look for the phrase "the position is reserved for disabled persons" or similar in the wording of the job advertisement.

This state of affairs shows respect for the particularly vulnerable position of disabled persons on the labour market, which is reflected not only in the prohibition of discrimination. The Employment Act explicitly provides for increased protection of people with disabilities on the labour market[31] and encourages employers to employ them in various ways. According to the law, most employers should ensure that at least 4% of their

30. Section 7 (3) of the Anti-Discrimination Act.

31. Section 67 (1) of the Employment Act.

workforce is made up of employees with disabilities.[32] If the employer decides to operate on the sheltered labour market, the share of employees with disabilities must be at least 50%.[33] The employer may also obtain a contribution for the creation of a position for a disabled person, in which case the position must be filled by a disabled employee for a certain period of time.[34] It follows from these obligations that an employer may have a legitimate interest in filling a vacancy with a disabled person if the job is suitable for an employee with a particular type of disability.

1.8 Other protected characteristics

In addition to the "traditional" protected characteristics, which are protected primarily under the Anti-Discrimination Act, the Employment Act lists other grounds on the basis of which the employer should not disadvantage a job seeker. It is therefore forbidden, subject to certain exceptions, to reject job seekers on the grounds of their social origin, property, marital or family status, language, political or other opinion, or membership and activity in political parties, political movements and trade union organisations. In addition to the prohibition of discrimination, the Act also imposes a general obligation to ensure equal treatment of all persons exercising their right to employment. Thus, job seekers should not be unjustifiably put at a disadvantage in other cases either.

In practice, job seekers with a criminal record or those who are paying off their debts often face difficulties in finding employment.

1.8.1 Requirement for non-existence of debts

In the past, the Defender has dealt with a case where job seekers were rejected because they asked to be paid only in cash. According to the Defender, this practice may disadvantage persons who have their bank account attached within an enforcement procedure. As a result of such attachment, these persons cannot (although temporarily) dispose of the part of their salary that cannot be affected by the enforcement procedure. If this part is sent to their bank account, they will be left without any financial means. The employer may be committing indirect discrimination on the grounds of property.[35]

1.8.2 Requirement for a clean criminal record

One of the most common employers' requirements is for the job seekers to prove that they have a clean criminal record. It again cannot be automatically concluded whether such a procedure is legitimate. For some jobs, this requirement is set by law, while for others, it may be justified by the activity the job seeker is expected to perform. Where applicable, the employer should also take into account the nature of the crime, especially in the case of unintentional criminal offences.

✓ If an employer seeking a new public bus driver finds that a job seeker has a history of driving under influence, the employer may reject the job seeker.

The procedure of an employer who requires a clean criminal record from all job seekers, i.e. without considering whether this is reasonable in relation to the work offered, is at variance with the Labour Code.[36]

32. Pursuant to Section 81 of the Employment Act, this obligation applies to employers with more than 25 employees. Employers who fail to comply with this obligation must provide "substitute performance" or contribute funds to the State budget.
33. For details, see Section 78 et seq. of the Employment Act.
34. For details, see Section 75 of the Employment Act.
35. Opinion of the Public Defender of Rights of 7 June 2018, File No. 39/2018/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/6026.
36. See Section 316 (4) of the Labour Code.

1.9 Indirect discrimination

In addition to the prohibition of direct discrimination, i.e. a disadvantage based on one of the protected characteristics listed above, indirect discrimination is also contrary to the law. Indirect discrimination differs from direct discrimination in that the ground on the basis of which the employer distinguishes between job seekers (an apparently neutral criterion or practice) is different from the protected characteristics listed in the Anti-Discrimination Act or the Employment Act. However, differentiation on this basis of this ground will result in a disadvantage for a group protected by the law (a group defined by a protected characteristic, e.g. people with disabilities).

For example, the Court of Justice of the European Union has previously dealt with the requirement that people applying for enrolment in schools for officers and members of the Greek police force had to be at least 170 cm tall. The Court assessed whether this requirement (an apparently neutral criterion) did not in fact disadvantage women, i.e. whether or not it constituted indirect discrimination on the grounds of sex/gender, as on average, women tend to be shorter than men. The Court concluded that although the minimum height criterion was more burdensome for women than for men, it did not constitute indirect discrimination. This practice was justified by a legitimate goal – the Court agreed that some activities in the police force could not be performed efficiently by people of small stature.[37]

As follows from the above example, although the criterion for selecting new employees may disadvantage a group of job seekers protected by the prohibition of discrimination, it does not necessarily constitute discrimination. It must be further examined whether this criterion can be objectively justified by a legitimate objective and, if so, whether the means of achieving that objective are proportionate and necessary.

In practice, the courts and the Defender deal quite rarely with indirect discrimination in job recruitment; cases of direct discrimination are more common. Even so, I recommend that employers keep the prohibition of indirect discrimination in mind when setting requirements for new employees. If they conclude that a certain requirement may disadvantage a group of employees protected by the prohibition on discrimination, they should consider whether the requirement in question is actually necessary for the performance of the work offered. If so, it will most likely not constitute discrimination.

An example of a requirement that may disadvantage a group protected by the Anti-Discrimination Act is the requirement for employee flexibility. This requirement is quite common and understandable for many positions – given the nature of the job, it is not always possible to schedule work so that the employee has regular shifts without overtime. However, adapting to the employer's time demands can be problematic for parents of small children, who are often limited by the schools' and kindergartens' opening hours. A non-negotiable requirement of time flexibility may disadvantage parent employees; hence, employers should not automatically require time flexibility from all employees, but only from employees in positions where they really need the employee to be able to adapt to the employer's needs without too much difficulties.

2. Job advertisements and public announcements

2.1 Job offers

Employers usually seek for new employees by means of job advertisements. Of course, it is mainly up to employers how they reach out to potential job seekers. **In theory, employers can already commit discrimination when wording a job offer. Their course of action is discriminatory if the wording of a job offer makes it clear that the employer does not want to employ a particular group protected by the principle of non-discrimination.** In such a case, people for whom the job is not intended (according to the advertisement) will most likely not apply at all, which is understandable – would you try to get a job with an employer

37. See the judgment of the Court of Justice of the European Union of 18 October 2018, Ypourgos Esoterikon, C-409/16.

who declares in advance that they are not interested in you just because you are a woman or a man or an older employee? The prohibition of discrimination in the wording of job offers therefore complements the prohibition of discrimination in the actual selection of new employees, in order to ensure protection against an unjustified disadvantage in the area of access to employment.

As follows from the previous chapter, the prohibition of discrimination in the selection of employees can be subject to exceptions; hence, employers may base their decisions on protected characteristics in some cases ("permissible forms of different treatment", for details, see Chapter 1 Prohibited criteria and exceptions to the prohibition of discrimination). If an offer falls under one of these exceptions and the employer, for example, needs to fill a position that objectively can only be performed by men, it is entirely acceptable to include the gender requirement in the text of the job offer. That is not discriminatory. Similarly, the employer may state in the text of a job offer that the vacant position is reserved for employees with disabilities (for details, see subchapter 1.7.1).

Employers must also not discriminate when writing job offers. It is discriminatory if the wording of a job offer makes it clear that the employer does not want to employ a particular group protected by the principle of non-discrimination. This does not apply if the offer falls under one of the exceptions where an employer can select employees on the basis of a protected characteristic – in such a case, the requirement regarding, for example, the job seeker's gender may be stated in the offer. The employer can indicate in the advertisement that they have decided to reserve the position for a disabled employee.

It is an administrative infraction to violate the prohibition of discrimination in the wording of a job offer.[38] The Employment Act states that employers must not make offers of employment that are "discriminatory in nature".

There may be different views of what constitutes a "discriminatory nature" of a job offer. This is not a precisely defined category, yet employers can be fined for by labour inspectorates for poorly wording their job offers.[39] Some cases are clear-cut – e.g., in the past, the Defender has dealt with a case where a fast food manager explicitly stated in a job advertisement that he would not employ any Roma. Such advertisements are nowadays rare on official advertising servers or employers' websites, although they can still be encountered, e.g., on social networks. However, in most potentially problematic offers, employers will not be this "open and straightforward".

The Defender was contacted by a complainant who considered the wording "young team of enthusiasts looking for a colleague" to be discriminatory. Although the Defender consistently advises employers against highlighting a young team as a benefit, as this could discourage older job seekers, he did not find the given case discriminatory. The overall message conveyed by the advertisement did not imply that the employer was not interested in employing older people.[40]

The decision-making practice of the Labour Inspectorate and the related case law are also constantly evolving. Lately, it has been discussed, for example, whether an employer commits an infraction if they merely phrase the job title in the advertisement in the feminine – could this procedure discourage men from applying for the job?

The court recently ruled on a fine for an advertisement in which the employer was looking for a "[female] administrative assistant" (in Czech: administrativní pracovnici). According to the Labour Inspectorate, the offer was discriminatory on the grounds of sex/gender. However, the Regional Court did not find the

38. Pursuant to Section 140 (1)(a), in conjunction with Section 12 (1)(a) of the Employment Act.

39. The fine may be up to CZK 1,000,000 [Section 140 (4)(a) of the Employment Act]. E.g. In 2019, the Labour Inspectorates inspected compliance with the duties in employment at 264 employers. They found a total of 269 violations, of which 195 consisted in publication of discriminatory job offers. See the State Labour Inspectorate. Annual Summary Inspection Report 2019 [online]. [retrieved on 2023-10-11], available (in Czech) at: https://www.suip.cz/documents/20142/43684/suip_rocni-souhrnna-zprava-o-vysledcich-kontrolnich-akci-za-rok-2019.pdf/21a48ca2-9790-a47d-60fd-41e0c1c08c33, Chapter 3.1, page 36 et seq.

40. Letter of the Public Defender of Rights of 13 February 2018, File No. 897/2018/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/6386.

advertisement discriminatory. Nevertheless, it is clear from the reasoning of the decision that the use of the feminine in advertisements is not always in compliance with the prohibition of discrimination.[41]

I consider such decisions correct. In the Czech Republic, we have many waiters and waitresses, doctors (in Czech: lékařů a lékařek) and I do not consider it appropriate that mentioning just one gender should be seen as discrimination against the other. Obviously, if one is looking for a doctor, they will be happy to employ both male and female doctors. It is evident that there is a certain "grey area", i.e. phrasing which may be problematic in some cases, to say the least, in terms of the prohibition of discrimination. As everywhere, even in these cases, this is merely a matter of using common sense, rather than excessively interpreting the law.

Below, I provide specific recommendations on how to word job offers so that they are not problematic in terms of the prohibition of discrimination. My recommendations also relate to this "grey area" – that is, if employers formulate an offer in contradiction to some of these recommendations, they do not automatically commit discrimination. In my opinion, however, it is advisable to avoid such wording even if it is not expressly prohibited. Employers thus do not run the risk of unnecessarily discouraging some job seekers by phrasing their advertisements inappropriately or having to explain to the Labour Inspectorate what they meant by the given wording. Still, I believe that job offers written with greater sensitivity will contribute to the overall openness and cultivation of the labour market.

Race, ethnicity, nationality (in the sense of both "national origin" and "State citizenship"), faith, religion, worldview and sexual orientation

of the job seeker should, in view of the prohibition of discrimination, be completely irrelevant for most positions and should therefore not appear in job offers as requirements for new employees. The only exceptions are situations where the Anti-Discrimination Act allows these characteristics to be taken into account.

✗ "We are looking for fast food workers. Roma people, do not apply."

✗ "The position is suitable for Czech people only / we are seeking a new employee of Czech nationality."

✗ "Requirements – Czech nationality / permanent residence registered in the Czech Republic / permanent residence permit."[42]

✓ "Excellent knowledge of Czech/other language required."[43]

Sex/gender

of the job seeker should not play a role for most positions; hence the requirement for a specific gender should not appear in job offers.

It is necessary to distinguish between a situation where an employer includes a clear requirement for the employee's gender ("we are seeking a woman for the position of…") and situations where the employer only uses the masculine ("we are hiring a new employee / we are looking for a new colleague") (in Czech:

41. Judgment of the Regional Court in Ostrava, Olomouc Branch, dated 30 November 2022, File No. 60 Ad 2/2021, available (in Czech) at: https://www.nssoud.cz/. The Labour Inspectorate has lodged a cassation complaint against the decision, which is still pending at the time of when this Recommendation is issued.

42. Some positions can only be filled by Czech citizens, see subchapter 1.2.1 for details.

43. The level of knowledge required should be appropriate to the job description. If, for example, a job seeker was required to have a disproportionately high level of Czech language in relation to the nature of the job (e.g., a cleaner), such a requirement could be discriminatory.

přijmeme nového zaměstnance/hledáme nového kolegu) or the feminine ("we are looking for a new accountant") (in Czech: hledáme novou mzdovou účetní). While a clearly worded gender requirement will constitute discrimination unless there exists an exception to this prohibition, the situation is not so clear-cut as regards the use of the feminine/masculine.[44] Even so, I recommend to phrase job offers so that they are gender-neutral. It is not necessary for an employer to look for a female equivalent of "typically male" positions or vice versa (e.g. in the case of nurses) (in Czech: zdravotní sestra) or to use terms that may seem unusual (e.g. "welderess") (in Czech: svářečka). It is quite sufficient if the employer opens their offer by stating "looking for a new employee" (In Czech: hledá nového zaměstnance či zaměstnankyni).

✗ "We're looking for a man to fill the position of a warehouse worker."

✗ "The position is only suitable for women."

✓ "We are looking for a new colleague for the position of a nurse." (in Czech: Hledáme nového kolegu nebo kolegyni na pozici zdravotní sestra)

✓ "We are recruiting a new employee for the position of a waiter/waitress." (in Czech: Přijmeme nového zaměstnance/zaměstnankyni na pozici číšník/servírka)

✓ "We are looking for a new employee for the position of a teacher." (in Czech: Na pozici učitel/učitelka hledáme nového zaměstnance)

✗ "Designed for women on maternity leave to earn additional income."

✓ "Due to the time flexibility, the position is also suitable for parents on maternity and parental leave or parents of small children."

✗ "The position is only suitable for men because of the greater physical demands."

✓ "The job is physically demanding, so physical strength and stamina are required."

Age

of the job seeker should not play a role for most positions; hence the requirement for a specific age should not appear in job offers. In addition to the clearly stated age requirement (we are looking for a young assistant / we are looking for a receptionist under 40), it is also advisable to avoid other wordings that could discourage some job seekers from applying for the job. These may include phrases such as "we will hire a recent graduate" or cases where working in a young team is mentioned as one of the benefits.[45] While it is impossible to conclude without further context whether such phrases violate the prohibition of discrimination, I recommend that employers carefully consider their use in advertisements. The requirement for a minimum length of experience is quite common and is not problematic in itself. However, the length of the required experience should be justified in relation to the position offered (see chapter 1.3 for details).

44. For details on the use of the feminine and masculine in job offers, see the Recommendation of the Public Defender of Rights of 29 November 2021, "Parenthood and discrimination at work: practical guide for parents regarding their right to equal treatment in the labour market", File No. 63/2020/DIS, p. 18, available (in English) at: https://eso.ochrance.cz/Nalezene/Edit/10724.

45. The "benefit" of a young team can have a dissuasive effect on older job seekers, as once an older job seeker is hired, the team would no longer be young and the employer would lose the opportunity to use the young team as a benefit.

✗ "We are looking for a young colleague to work as a production operator."

✗ "We are looking for a receptionist aged 20–40."

✗ "We are looking for a new employee of productive age."

✗ "We are recruiting a recent graduate for the position of an assistant."

✓ "The job is also suitable for graduates."

✗ "As a benefit, we offer working in a young team."

✗ "We are looking for a new employee for the position of a cleaner; we require 10 years of experience in the field."

Disability

of the job seeker may or may not be relevant to the position offered. People with disabilities are almost never directly excluded in job offers, but we often see a requirement for job seekers to be in excellent health.[46] Although it may not be clear what the employer means by this, such wording may discourage people with disabilities from applying for the job. This is problematic in the case of positions that some people with disabilities could easily perform. On the other hand, advertisements where an employer declares that they are ready to employ people with disabilities can be considered a friendly approach.

✗ "The applicant for the position of an accountant must be in a good medical condition."

✗ "We're looking for a cashier. Requirements: flexibility, clean criminal record, excellent medical condition."

✗ "We are looking for a warehouse worker. For job seekers without any health problems only."

✓ "This position is physically very demanding and the work is performed in difficult working conditions (high temperature, lifting heavy burdens), so we require good physical shape."

✓ "We are happy to welcome employees with disabilities. We will adjust the working conditions according to their needs."

✓ "The job is also suitable for blind employees or employees with other visual impairments."

46. The Employment Act prohibits discrimination, inter alia, on the grounds of medical condition. While good physical shape and the related good medical condition may be important for some jobs, I recommend that the requirement for good or excellent medical condition is always carefully considered or replaced with a more appropriate requirement for good physical shape.

› The topic of discrimination in job advertisements is also addressed by LMC, which has prepared a clear leaflet[47] with tips on how to word the text of an advertisement in terms of the right to equal treatment. The company has also prepared some practical tips[48] on how to attract as many suitable candidates as possible with a well-written advertisement.

2.2 Public announcements

Under the Employment Act, employers may not make discriminatory job offers. However, case law implies that employers may commit discrimination even when they are not looking for a new employee if they make clear a public announcement that the employer does not intend to employ any of the groups protected by the Anti-Discrimination Act. This may happen, for example, where an employer makes a media appearance or publishes a statement on their website. This does not necessarily have to be the employer's official opinion or that of a staff member directly responsible for recruitment – what is important is whether the statement is likely to deter some job seekers from applying for a job with the employer in the future.

The question of whether direct discrimination can occur when an employer publicly states that they intend to discriminate has been addressed by the Court of Justice of the European Union. In the Feryn decision[49], the Court stated that a public statement by an employer to the effect that they will not hire employees of a certain ethnic or racial origin can also constitute direct discrimination in the labour-law area, since such a statement is likely to dissuade certain job seekers from applying into the selection procedure. In this case, it was a statement by a company director that his company was not interested in recruiting installation workers of "foreign origin" because the company's customers were reluctant to give them access to their homes. The Court of Justice of the European Union followed up on this conclusion in its ruling in Asociatia Accept,[50] which concerned public statements made by a football club manager in the sense that he would not hire a footballer presented as being homosexual, and the decision in NH. v. Associazione Avvocatura[51], where the Court declared a statement made by a lawyer discriminatory as the latter vowed on a radio programme that he would never employ a homosexual person in his law office.

3. Questions prohibited in a job interview and seeking information about job seekers

3.1 Questions prohibited in a job interview

In addition to the prohibited use of discriminatory criteria in the selection of employees, **employees are also protected against being placed at an unjustified disadvantage in that employers should completely avoid seeking certain information about employees.** Under the Labour Code, an employer may only ask the candidates or other persons (for example, a former employer when requesting a reference) to provide information that is directly relevant to the conclusion of the employment contract.[52] The Employment Act also explicitly states that, as a rule, employers may not request information on the job seeker's ethnicity, religious

47. LMC. Nejsou vaše inzeráty diskriminační? Stáhněte si manuál, díky kterému to poznáte. (Are your Ads Discriminatory? Download our Manual to Find Out) [online]. 2021 [retrieved on: 2023-10-09]. Available at: https://magazin.lmc.eu/nejsou-vase-inzeraty-diskriminacni-stahnete-si-manual-diky-kteremu-to-poznate.
48. LMC. Praktické PDF: Chcete mít skvělé inzeráty? Těchto 12 bodů vám zajistí více reakcí (Practical PDF: Want to Have Great Ads? These 12 Tips Will Get You More Responses) [online]. 2022 [retrieved on: 2023-10-09]. Available at: https://magazin.lmc.eu/prakticke-pdf-chcete-mit-skvele-inzeraty-techto-12-bodu-vam-zajisti-vice-reakci.
49. Judgment of the Court of Justice of the European Union of 10 July 2008, Feryn, C-54/07, p. I-05187.
50. Judgment of the Court of Justice of the European Union of 25 April 2013, Asociatia Accept, C-81/12.
51. Judgment of the Court of Justice of the European Union of 23 April 2020, Associazione Avvocatura, C-507/18.
52. Section 30 (2) of the Labour Code.

beliefs, political attitudes or, for example, sexual orientation, and other information that is unrelated to the performance of the employer's statutory duties.[53]

Save for certain exceptions, the employers may not request this information from their employees either, i.e., once an employer has concluded an employment contract or an agreement to perform work / agreement to complete a job with the job seeker, and may not try to learn this information from third parties. The Labour Code explicitly emphasises that, with a few exceptions, an employer should not ask female employees about pregnancy, should not enquire about the employees' family circumstances and ask for other information not directly related to the performance of work and the labour-law relationship. Under the Act, employers are allowed to enquire about pregnancy, family and financial circumstances and criminal record[54] where there is an objective ground for doing so, consisting in the nature of the work performed, and provided that this requirement is reasonable, or in cases where this is laid down by a legal regulation.[55] In practice, however, these rules are often violated.

Employer process the personal data of job seekers during recruitment, so their actions are subject not only to the limitations resulting from the Employment Act and the Labour Code, but also to the regulations governing the protection of personal data, especially the General Data Protection Regulation (GDPR).[56]

3.1.1 Questions about family circumstances

In the Defender's survey on the impact of pregnancy and motherhood on the work lives of mothers of small children, almost two-thirds of the respondents reported that they had been asked questions about their family life during job interviews.[57]

However, these questions are inadmissible – during a job interview, employers are generally not allowed to ask job seekers questions about parenthood and childcare. In cases where the job offered involves, for example, irregular working hours and travel (which may be more problematic for parent employees), the employer may draw attention to this aspect and ask whether the job seekers are able to adapt to these requirements. However, the employer should not ask about details of the job seekers' personal lives.

The following questions are inadmissible, for example:

✗ when (and whether at all) the job seeker plans to have children;

✗ whether the (female) job seeker is pregnant or uses contraception;

✗ how the job seeker has arranged for childcare.

On the other hand, employers may ask whether:

✓ job seekers can easily adapt to irregular working hours and overtime;

53. Section 12 (2) of the Employment Act.
54. On a clean criminal record as a criterion in the selection of a new employee, see subchapter 1.8.2.
55. Section 316 (4) of the Labour Code.
56. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
57. Survey Report of the Public Defender of Rights of 22 May 2023, File No. 30/2023/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/11734.

✓ frequent business trips are not a problem.

Of course, an employer can also point out benefits such as flexible working hours or children's groups set up by the employer.

In some cases, similar questions that are unrelated to potential employment can be classified as harassment, which is one of the forms of prohibited discrimination.[58] The job seeker (in this case, more often female job seeker) is not obliged to answer such a question, and his/her refusal to answer should not be to his/her disadvantage. If the job seeker answers the question and the information provided regarding parenthood or care for children becomes the basis for a decision not to hire him/her, this will most likely represent direct discrimination on the grounds of sex/gender.

The employer must not try to find out whether an employee is pregnant. However, the employer may require this information from female employees who perform work prohibited to pregnant women. In this case, obtaining the information is justified by the employee's duty to protect the health of pregnant employees.

3.1.2 Questions concerning disability / medical condition

In most cases, it is not admissible for employers to ask questions about job seekers' disability or medical condition. An employer may request information about the job seeker's medical condition prior to the establishment of the employment relationship only if this is directly related to the conclusion of the employment contract or if a request for such information does not contravene good morals or if such information serves to fulfil the employer's obligations set out by a special legal regulation.[59]

Information on medical condition belongs to special categories of personal data (formerly "sensitive personal data") and, as such, its processing is subject to increased protection.[60] Employers should in no case seek detailed information on a job seeker's diagnosis. Although assessment of the medical fitness for work is part of the recruitment process, this assessment is generally carried out as part of an occupational medical examination carried out by a physician, who therefore may request information on the job seeker's medical condition (see subchapter 1.5.2). From the report on medical fitness, the employer will only learn whether or not the job seeker is fit to perform the work offered. The report does not contain information on the medical condition ascertained by the doctor.

However, it does not follow from the above that discussing an employee's disability in an interview is an absolute taboo. Where a disability is visible or if the employee discloses this information to the employer, it is possible to discuss the topic. In view of the obligation to adopt reasonable accommodation (see subchapter 5.1), the employer may, for example, ask whether the job seeker will require any such accommodation or what form should it take. Information on the reasonable accommodation required may already be relevant for the purposes of formulating a request for an initial occupational medical examination. When assessing the employee's medical fitness, the medical assessor must take into account the specific working conditions stated in the employer's request (see subchapter 8.3.2).[61]

However, I recommend being as sensitive as possible during these interviews – even though an employer may ask these questions with the good intention of ensuring a smooth onboarding process, which may require individual approach due to a disability, these questions can be uncomfortable for the disabled job seeker. It is necessary to bear in mind that some disabled job seekers have had a negative experience of being rejected

58. Report of the Public Defender of Rights of 25 February 2013, File No. 146/2012/DIS, available (in Czech) at: http://eso.ochrance.cz/Nalezene/Edit/1700. But not every unpleasant question can be considered harassment. For details, see the Recommendation of the Public Defender of Rights of 29 November 2021, "Parenthood and discrimination at work: practical guide for parents regarding their right to equal treatment in the labour market", File No. 63/2020/DIS, p. 19, available at: https://eso.ochrance.cz/Nalezene/Edit/10724.
59. See also Chapter 8.2 of the Survey Report of 16 March 2021, File No. 23/2020/OZP, available (in Czech) at:https://eso.ochrance.cz/Nalezene/Edit/9078.
60. Article 9 of the GDPR.
61. For more details, see e.g. Tomšej, Jakub. Pracovnělékařské služby (Occupational Medical Services). 2nd edition. Prague: Wolters Kluwer, 2018. Legal monographs. ISBN 978-80-7552-955-8.

because of their disability. They may therefore fear that if they tell the employer before the employment contract is concluded, for example, that they need the workplace modified, the employer will prefer a job seeker without a disability.

The needs of the employer and the prospective employee can be aligned if the employer informs the job seeker in detail about his/her rights and obligations during the employment and the working conditions – this is also one of the employer's obligations.[62] On this occasion, the employer may suggest reasonable accommodations that they consider appropriate. The information may be included in the broader context of information on work-life balance at the employer's organisation. The job seeker can thus assess himself/herself whether the job would be suitable for him/her and, if necessary, suggest further modifications.

3.2 Searching for information from publicly available sources

Although the Labour Code and the Employment Act focus primarily on obtaining information from the job seeker/employee and third parties, employers can now obtain a lot of information from publicly available sources even without the co-operation of the above people. All they need to do is just type the name of the job seeker into an internet search engine.

However, it should be noted that this procedure is also covered by the GDPR. The employer already processes the job seeker's personal data by searching for them.[63] Therefore, the employer should know what information on the job seeker will be sought and for what purpose. This is because pursuant to Article 6 (1) of the GDPR, the employer needs a legal ground for the processing of personal data. In practice, the employer must have a legitimate interest in ascertaining information about the job seeker.[64] A legitimate interest is the employer's interest in finding the most suitable candidate. When searching for information, the employer must adhere to other data processing principles, in particular the principles of data minimisation[65] and transparency of the processing.

It will not be at variance with the above if the employer tries to verify the information that the job seeker provided about himself/herself in his/her CV. For example, if the job seeker states that he/she has written a diploma thesis on a certain topic, it is entirely acceptable for the employer to find the relevant thesis on the university's website.

The job seekers' social media, where the employer can learn a lot of information about the job seeker's privacy (unless the job seeker has a private profile), are a much greater issue. The private lives of job seekers and employees and their political and other opinions should not be of interest to employers. By way of exception, this does not apply to certain positions, especially those where an employee's private conduct could negatively affect the employer's reputation (see subchapter 1.6). However, the nature of specific social media must be taken into account. An employer may try to find the job seeker's profile on networks such as LinkedIn, which focus on presenting the users' professional experience. However, employers should avoid social media such as Facebook and Instagram unless the job seeker has a profile dedicated only to his/her professional life (profiles such as "Jan Novák – attorney-at-law").

Searching in the Central Registry of Enforcement Procedures and the Insolvency Register is a chapter of its own. Employers should not use them to avoid hiring employees in respect of whom they would have to make deductions from salary, although an attempt to avoid more administratively demanding payroll processing is understandable. Employers should therefore only consult these registers if they can legitimately request that an employee have no debts (see subchapter 1.8.1)

62. Section 31 of the Labour Code.

63. Article 4 (2) and (4) of the GDPR.

64. According to Article 6 (1)(f) of the GDPR. The processing of personal data concerning the job seeker's privacy on the basis of his/her consent [Article 6 (1)(a) of the GDPR] will usually not be possible due to the unequal positions of the job seeker and the employer, which generally excludes that the consent was given freely.

65. Even if there is a legitimate interest in the processing of the job seeker's personal data, the employer should be able to demonstrate for each individual piece of the job seeker's information why the employer needs that information to select the most suitable candidate.

Conditions in employment

Not only in the recruitment process, but also during an employment relationship, any distinction possibly made by an employer between employees has to be based on criteria that are not discriminatory. An employer commits discrimination if they unjustifiably set worse working conditions for a group of employees defined by a protected characteristic.

For example, the Defender has encountered situations where employers were offering less favourable contracts to certain groups of employees or were overlooking them when selecting an employee for promotion. The area of remuneration is also a major issue – it is not uncommon that a discriminatory rule is included directly in the employer's internal regulations or collective bargaining agreement. Employers should pay special attention to the working conditions of employees with disabilities and employees with children. They should also ensure that there is no discrimination in the form of harassment or sexual harassment among their employees. If any of the employees believes that he/she has experienced discrimination in the workplace and files a complaint in this regard, the employer should address the complaint properly.

4. Working conditions

4.1 Offering fixed-term agreements and contracts

In some cases, the type of contracts provided by an employer to their employees may constitute discrimination. The employees' respective positions may differ significantly under the individual types of contracts, with some of them being less favourable and, more importantly, less stable. Of course, an employer may conclude with an employee any contract the parties deem appropriate. For example, it would be discriminatory for an employer to automatically offer an indefinite-term contract to young men, but only a fixed-term contract to young women, because they can be expected "to go on maternity leave soon anyway". It also constitutes discrimination if the employer takes advantage of a person's vulnerable position on the labour market (e.g. a person with a disability) and, unlike other employees, pushes him/her into the "Švarc system" scheme (false self-employment).

The Defender dealt with the case of a scientist. His employer, a research institute, applied rules according to which employees over 65 years of age were mainly offered fixed-term contracts and their salaries were paid from an institutional (i.e. certainly available) budget only up to 50% of their working hours; the remuneration for the remaining working hours depended on (limited) grant money. However, younger employees were offered indefinite-term full-time contracts and their salaries were largely paid from the institutional budget. As a result of this practice, employees over 65 were at a disadvantage as they enjoyed less certainty about the duration of their employment and the stability of their future income. The employer's practice was directly discriminatory on the grounds of age.[66]

4.2 Remuneration

Employers must not discriminate in the remuneration of employees either. This area receives considerable attention from the State and the European Union institutions, especially in relation to unequal pay for women and men.[67] The prohibition of discrimination applies to all protected characteristics, but the Defender has encountered mainly complaints against a disadvantage on the basis of gender, age and disability.

4.2.1 What "remuneration" means

The salary/pay/remuneration specified in a mutual agreement ("salary") forms the basis of remuneration.[68] However, the prohibition of discrimination must also be observed in the provision of any performance, whether pecuniary or non-pecuniary, repeated or one-off, which is directly or indirectly provided to employees.[69] Hence, employers must also be careful when setting the rules for drawing of other benefits (meal vouchers, culture allowance, etc.).

Although the prohibition of discrimination applies to any remuneration provided by the employer, it makes sense to distinguish between salary and other benefits. The "equal pay for equal work" principle also applies, in addition to the prohibition of discrimination, when determining the amount of salary.[70] Employees performing the same job must therefore receive the same salary, but the employer may determine that only some of these employees will qualify for other benefits. Nevertheless, the criteria for granting these benefits must be justified and must not be discriminatory.

4.2.2 Salary, pay and remuneration on the basis of a mutual agreement

Salary and pay are provided on the basis of the complexity and difficulty of the work and the responsibility associated with the work, the difficulty of the working conditions, and the performance and results achieved.[71] Employers should not use any other criteria when determining the amount of salary.

66. Report of the Public Defender of Rights of 3 April 2018, File No. 898/2015/VOP, available (summary in English) at: https://eso.ochrance.cz/Nalezene/Edit/6164.
67. The term "gender pay gap" (GPG) is often mentioned in relation to unequal pay for men and women. GPG shows the average difference between the earnings of women and men. The value of 18.9% for the Czech Republic means that women in this country earned, on average, almost a fifth less per hour of work than men in 2019, which was the fifth largest gap in Europe. Along with the general GPG, we can also monitor "adjusted gender pay gap". Adjusted GPG ignores systemic inequalities (e.g. that women are more likely to work in occupations with lower salaries or that they are more likely to take career breaks due to maternity and parental leave) and shows the difference between the salaries paid to women and men doing the same job for the same employer. This net difference is approximately 10% in the Czech Republic.
68. Including any extra pay, personal bonuses, special bonuses, etc. Section 109 et seq. of the Labour Code regulates what is included in the term salary/pay/remuneration under an agreement. For the sake of clarity, this Recommendation further uses mainly the term "salary".
69. Section 5 (1) of the Anti-Discrimination Act.
70. Section 110 (1) of the Labour Code.
71. Section 109 (4) of the Labour Code.

Employees are entitled to the same salary for the same or comparable work. The Labour Code defines same work (or work of the same value) as work of the same or comparable complexity, responsibility and difficulty that is performed under the same or similar working conditions, with the same or similar working performance and results of work.[72]

Recently, the application of the "equal pay for equal work" principle has caused quite a stir, especially among employers operating throughout the entire Czech Republic. The courts were deciding whether an employer could take into account the place of work when determining the amount of the salary. The case involved a Czech Post driver who had moved from Prague to Olomouc. Although he worked in the same position for the same employer after moving, his salary was several thousand lower. In court, the employer justified this difference primarily by the higher cost of living in the capital city, i.e., that with the same nominal salary, the real salary of employees in Prague would be lower compared to employees in other parts of the country. However, the court did not accept this argument, as the criteria set out in Section 110 of the Labour Code do not make it possible to reflect on the cost of living when determining the salary. According to the court, drivers in Prague and Olomouc performed the same work, so the employer should have paid them the same salary.[73]

In addition to the rule that employers must pay the same salary to comparable employees performing the same work, the prohibition of discrimination also applies. **Employees may not be provided with a lower salary on the basis of a discriminatory criterion.**

✕ A person with a disability applies for a job with an employer and the employer decides to hire him. It is clear from the job seeker's CV and some of his statements that he is very interested in the position because he has been unable to find suitable work for a long time due to his health limitations. The employer takes advantage of this situation and offers the job seeker two thousand less than the salary they originally intended to pay the new employee. This practice is discriminatory.

The prohibition of discrimination applies to both the **claimable and non-claimable components of salary**.

The Defender dealt with the case of a driver's assistant whose employer had told him that driver's assistants usually received a percentage of sales as a bonus in addition to the agreed salary base. The complainant indeed received the bonus several times, but after a while, the employer stopped paying it. Other drivers continued to receive bonuses. The claimant believed that the employer had stopped paying him the bonus because of his disability. The employer justified the non-payment of bonuses, inter alia, by stating that this was a non-claimable component of salary, so it was entirely at the employer's discretion to whom the bonuses would be granted. The Defender agreed that for bonuses of this kind, which were not enshrined in the contract or the employer's internal regulations and where the criterion for their award was further unspecified "employee's good work performance", it was up to the employer to assess whether to grant the bonuses or not. However, the fact that this was a non-claimable component of salary did not mean that it could be denied on the basis of a discriminatory criterion. If the reason for not granting the bonus were the employee's disability, this would constitute discrimination.[74]

In another case of suspected discrimination, the employer also argued that the annual bonus was a non-claimable component of the salary. However, in that case, the rules for granting the annual bonus were set formally in the employer's internal regulations, including the amount of the bonus. In view of the clearly defined criteria for granting this bonus, it became a claimable component of salary – if the employee met the criteria for its granting, he/she was entitled to its payment.[75] As in the case of the non-claimable components of salary, these criteria must not be discriminatory.

72. Section 110 (2) of the Labour Code. The following paragraphs of this provision describe how the individual criteria for determining the same work/work of the same value are assessed.
73. See judgment of the Supreme Court of 20 July 2020, File No. 21 Cdo 3955/2018, available (in Czech) at: https://nsoud.cz/.
74. Report of the Public Defender of Rights of 9 April 2015, File No. 265/2015/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/2792.
75. On the distinction between claimable and non-claimable components of salary, see e.g. the judgment of the Supreme Court of 8 November 2004, File No. 21 Cdo 537/2004, available (in Czech) at: https://nsoud.cz/.

Inequalities in remuneration can **already arise during a job interview** if it involves negotiations on future salary. Although salary negotiation is now a normal part of the recruitment process, employers are obliged to remunerate employees according to the work they actually do, having regard to the "equal pay for equal work" principle, not according to how much they are able to negotiate with the employer.[76] Similarly, it is quite common in practice for employers to ask how much an employee earned in the previous job. While it is understandable why the employer is interested in this information, such a question may be at variance with the rule that before concluding an employment relationship, the employer should only ask for information that is directly related to the conclusion of the employment contract (see Chapter 3 for details).

When deciding on an anti-discrimination action, the court aptly responded to the employer's argument that the inequality in pay was due to different salary requirements presented by the job seekers during their interviews by stating that:

"Considerations [...] regarding the contractually agreed salary can in no way be accepted, as these would lead to the completely unacceptable conclusion that the amount of salary does not depend on the work performed, but above all on the employee's ability to assert his/her interests when negotiating the contents of the employment contract. It cannot be inferred from the fact that in the private sector, remuneration for work is left largely to the contractual autonomy of the parties to the employment relationship that in such cases, employers need not comply with the legal requirement of equal treatment of all employees in their remuneration."[77]

Another critical moment when discrimination and unequal remuneration often occurs is the time when **parents return from maternity or parental leave**. Some employers set the returning employee's salary at the same level as the salary he/she was paid before taking maternity/parental leave, without reflecting the salary developments during the employee's absence. This approach is one of the reasons why women are often underpaid, as women are the ones who most often take leave to care for small children.

✕ An employee worked as a technician in a small company. Five years ago, she started parental leave with two children in succession. She recently went back to work. She was surprised that she would be paid the same salary she had received five years ago, even though her colleagues were now earning several thousand more, including colleagues who had been hired recently, without any previous experience. She was also stripped of personal bonuses because, according to her employer, she would not be able to achieve the same results after such a long working break as she had before starting parental leave. This practice is contrary to the "equal pay for equal work" principle and would most likely constitute discrimination.

Employers should take the salary development into account in order to avoid a disadvantage for employees who have cared for children.[78] In accordance with European law[79], these employees have the right to improved working (including pay) conditions.

The current salaries paid to employees performing the same or similar work as that which the employee will carry out after his/her return from parental leave should therefore be used to calculate his/her salary. This also follows from the above "equal pay for equal work" principle. If, however, salaries paid by the employer have dropped in the meantime due to the general economic situation, it is appropriate to also analogously reduce the salary of an employee who is returning to work after childcare leave.

76. This practice systematically disadvantages employees who have an inferior position on the labour market (e.g. people with disabilities, people of pre-retirement age, parents of small children). For example, statistically, men are able to negotiate a higher remuneration than women. See Analýza příčin a procesů vedoucích k rozdílům v odměňování žen a mužů: Kvalitativní výzkum (Analysis of the Causes and Processes Leading to the Gender Pay Gap: Qualitative Survey). [online]. Prague: Ministry of Labour and Social Affairs, 2020 [retrieved on: 2023-10-09]. ISBN 978-80-7421-224-6. Available (in Czech) at: https://www.rovnaodmena.cz/www/img/uploads/501c18172.pdf.

77. Resolution of the Regional Court in Brno of 17 September 2014, File No. 49 Co 319/2013.

78. Report of the Public Defender of Rights of 19 August 2013, File No. 75/2012/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/1600.

79. Article 15 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

The situation is more problematic in cases where the employer reflects the number of years of work in the amount of salary, without including the years spent on maternity or parental leave. So far, neither the Defender nor the courts have dealt with a case where a disparity between the remuneration of employees was caused by this practice.

The Defender has also repeatedly encountered situations where **older employees and employees with disabilities were disadvantaged**. Employers do not grant some components of salary or benefits to employees who have been granted **an old-age or disability** pension. It is not uncommon that this discriminatory practice is set out in the employer's internal regulations or in a collective bargaining agreement. Employers are thus probably not even aware that their practice could be unlawful.

The Defender has dealt with the case of an employee of a sugar refinery who continued to work in the same position even after he had been granted an old-age pension. Nonetheless, according to the collective bargaining agreement, the employee **was excluded from receiving an annual bonus that the employer paid to employees in connection with the attainment of the factory's campaign goals just because he had been granted the pension.** A financial bonus that the employer undertakes to provide to a defined group of employees subject to fulfilment of a pre-determined task constitutes remuneration within the meaning of the Anti-Discrimination Act. By excluding old-age pensioners from receiving this bonus, the employer committed direct discrimination on the grounds of age.[80]

A similar case concerned a farming co-operative, which laid down in its internal regulation that it would **not provide a contribution towards supplementary pension insurance and certain bonuses to persons receiving disability pension**. Again, this was a case of direct discrimination, this time on the grounds of disability. As defined in the Anti-Discrimination Act (see subchapter 1.5.1), the characteristic feature of a disability is a degree of damage to health that can put the individual in a disadvantageous position and a long-term (lasting) nature of that damage. In order to be granted an invalidity pension, the employee must be declared disabled, i.e. there must be a reduction of at least 35% in his/her capacity to work due to a long-term unfavourable medical condition. It is clear from the definition of disability that persons receiving disability pensions are "persons with disabilities" within the meaning of the Anti-Discrimination Act – by definition, these people must suffer from a long-term impairment of their health which results in a reduction in their capacity to work, and there can be no doubt that the reduction in the capacity to work can be a reason for them being disadvantaged. Eligibility for disability pension is therefore so closely linked to disability as a protected characteristic that unequal treatment of an employee because

he/she is receiving a disability pension may constitute direct discrimination on the grounds of disability.[81]

4.2.3 Benefits

Contribution from the cultural and social needs fund, meal vouchers, contribution towards supplementary pension insurance, higher than statutory severance pay and various benefits in kind – employee benefits provided by an employer voluntarily and beyond the scope of the duties imposed on the employer by the Labour Code are also considered remuneration.[82] Even in the provision of such benefits, employers must refrain from discrimination.

80. Report of the Public Defender of Rights of 16 February 2021, File No. 1897/2018/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/9014. Although the collective bargaining agreement did not explicitly refer to age as the criterion, this constituted direct discrimination (although it could be argued that the discrimination was indirect). By definition, the disputed provision applied exclusively to elderly employees because only persons who have reached the elderly age required by the law may become recipients of the old-age pension. The Court of Justice of the European Union came to a similar conclusion when it held that the entitlement to the old-age pension was a criterion inextricably linked to age. See the judgment of the Court of Justice of the European Union of 12 October 2010, Ingeniørforeningen i Danmark acting on behalf of Ole Andersen v Region Syddanmark, C-499/08.

81. Report of the Public Defender of Rights of 26 May 2020, File No. 2791/2019/VOP, available (in Czech) at: http://eso.ochrance.cz/Nalezene/Edit/8670.

82. Section 5 (1) of the Anti-Discrimination Act. In the past, the Defender also used this prism to assess, for example, contributions from the cultural and social needs fund (FKSP); see the Report of the Public Defender of Rights of 20 January 2011, File No. 117/2010/DIS/JKV, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/2186.

As in the above cases, the mere fact that the employee has been granted **an old-age or invalidity pension** must not be the reason for denying the benefit.

For example, the Defender dealt with the procedure of an employer who provided its employees with a contribution towards supplementary pension insurance. However, according to the collective bargaining agreement, employees receiving old-age pension were not entitled to this allowance. Such a practice constitutes discrimination.[83]

The court also found discrimination in the case of an employer who had the amount of contractual severance pay set in the collective bargaining agreement. In the event of redundancies, the employer provided severance pay in excess of the statutory entitlement on the basis of the number of years the employees had worked for the employer. This, however, did not apply to employees entitled to an old-age pension, who received only the statutory severance pay.[84]

What is more questionable is the issue of **excluding employees on maternity and parental leave from drawing benefits**.

As regards work-related benefits, it can be stated in general that the employer has the option to exclude parents on maternity or parental leave from this option. However, if the employer chooses to do so, it is essential to treat all employees in a comparable position identically. These can be, e.g., long-term sick employees, employees taking unpaid leave, employees caring for a family member in the long-term carer's allowance regime, etc. Mutual comparability of these employees must also be assessed on a case-by-case basis with regard to the nature of the given benefit.

Exclusion from employee benefits could be considered discriminatory if it could have a negative impact on further employees' performance after returning from maternity or parental leave (e.g. a benefit in the form of education). However, this issue is also quite complicated and must be considered on a case-by-case basis.[85]

Employers should not automatically exclude employees on maternity and parental leave when deciding whether to grant a particular benefit. For example, if the employer provides a Christmas bonus as remuneration for work done for the employer in the previous year, employees who worked for the employer for at least part of that year should also be eligible for a proportional part of the bonus. If an employer systematically excluded employees who started maternity or parental leave during the year from eligibility to such a bonus, the employer could be committing discrimination on the grounds of parenthood.[86]

The Defender dealt with the procedure of an employer who had proportionately reduced contributions from the cultural and social needs fund in cases where it was necessary to hire a new employee due to an employee's long-term sick leave or termination of employment during the year. This rule also led to a reduction in the contribution for a female employee who was on long-term sick leave due to her high-risk pregnancy. In the Defender's opinion, the employer's practice was not discriminatory.[87]

Another issue relates to the relatively widespread practice of employers who provide financial remuneration to employees with full (or otherwise defined) attendance. This benefit is most commonly referred to as the **"attendance bonus",** but employers may call similar benefits differently (e.g., a full-time bonus). The objective of the bonus is to motivate employees to keep their absences to a minimum. This is understandable; the sudden absence of an employee can undoubtedly cause problems for the employer in organising work. However, it must be taken into account that occasional absences from work are inevitable – everyone gets

83. Report of the Public Defender of Rights of 26 January 2018, File No. 1966/2016/VOP, available (in English) at: https://eso.ochrance.cz/Nalezene/Edit/5878.

84. Judgment of the Supreme Court of 18 January 2017, File No. 21 Cdo 5763/2015, available (in Czech) at: https://nsoud.cz/.

85. Letter of the Public Defender of Rights of 27 January 2020, File No. 5973/2019/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/7784.

86. Judgment of the Court of Justice of the European Union of 21 October 1999, Susanne Lewen, C-333/97.

87. Report of the Public Defender of Rights of 20 January 2011, File No. 117/2010/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/2186.

sick at some point and leaving an illness untreated is the worst possible solution, which often endangers not only the health of the sick employee but also, in the case of infectious diseases, that of his/her colleagues. Prevention is also an essential part of caring for one's health and cannot always be scheduled outside of working hours.[88] Moreover, attendance bonuses may disadvantage, e.g., employees with disabilities, older employees and parent employees. In the case of these people, the more frequent absences are often the result of taking care of their own health or the health of their loved ones. These employees are thus faced with the choice of losing part of their remuneration or neglecting that care. **Although the courts have not addressed the issue of attendance bonuses yet, I would recommend that employers avoid this practice as it may be indirectly discriminatory.**

However, some employers take the opposite approach and enable their employees to take sick days. Sick days allow employees to already stay at home and slow down when they feel they are coming down with something. This approach can prevent a later full outbreak of the disease or its spreading to other employees. Even if this is an extra time off, it may have a positive effect on employee attendance.

The Defender has only rarely encountered disadvantages in the area of remuneration for other than the above discriminatory reasons. This does not mean, of course, that other protected groups are never disadvantaged.

For instance, the Defender dealt with the employer's conditions for granting a financial contribution for relocation to persons who moved to the vicinity of the employer's manufacturing plant. The fulfilment of the conditions was verified by means of a proof of the change of the employee's permanent residence. However, the conditions put at a disadvantage EU citizens who moved to the Czech Republic to work for the employer. Although these employees incurred moving costs, they did not receive the contribution because they could not meet the condition of a change of permanent residence, which is only registered in respect of Czech citizens.[89]

4.2.4 Confidentiality clauses

Some employers try to avoid potential conflicts over the amounts of salaries by prohibiting their employees from discussing the issue with their colleagues. Thus, employment contracts tend to comprise **confidentiality clauses** that prohibit employees from disclosing their salary to a specific group of people or to anyone in general.[90] The Defender[91] and the Ministry of Labour and Social Affairs[92] agree that such a clause lacks legal consequences.

4.2.5 Setting fair remuneration

- A good way to prevent pay inequalities is to set up a transparent remuneration system that employs objective criteria for calculating the salaries of all employees, including all extra pay and bonuses.

- The criteria for determining the amount of salary should be based on Section 109 (4) of the Labour Code. Thus, employers should first and foremost reward the difficulty of the work performed by any given employee, the responsibility associated with the performance of the work, and the quality of the work

88. I emphasise that employers are required to excuse absences relating to an employee's illness and doctor's appointments. Employers should also contribute to the protection of their employees' health.

89. Letter of the Public Defender of Rights of 13 April 2015, File No. 6856/2012/VOP.

90. Analýza příčin a procesů vedoucích k rozdílům v odměňování žen a mužů: Kvalitativní výzkum (Analysis of the Causes and Processes Leading to the Gender Pay Gap: Qualitative Survey). [online]. Prague: Ministry of Labour and Social Affairs, 2020 [retrieved on: 2023-10-09]. ISBN 978-80-7421-224-6. Available (in Czech) at: https://www.rovnaodmena.cz/www/img/uploads/501c18172.pdf.

91. Recommendation of the Public Defender of Rights of 27 July 2020, File No. 2/2020/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/8426.

92. Rovná odměna: Projekt 22 % k rovnosti (Equal pay: 22% towards equality project). O výši svého platu můžete říci komukoliv (You Can Tell Anyone How Much You Earn) [online]. 2021 [retrieved on: 2023-10-09]. Available (in Czech) at: https://rovnaodmena.cz/o-vysi-sveho-platu-muzete-rici-komukoliv/.

performed by the employee. Any other criteria are inadmissible, in principle.

- If the employer wishes to apply criteria that are not explicitly listed in Section 109 (4) when determining the salary, they must be able to justify the use of such criteria by showing how the criterion for determining the salary relates to one of the criteria listed in the above provision. If, for example, an employer wants to reflect, in the amount of the salary, the years of experience in the given field, the employer should be able to demonstrate, at least in general terms, whether the quality of the work done increases with the experience gained. This need not apply to all work.

- Although the current legislation does not require employers to be transparent about remuneration, this will change in the near future. The Czech legislation will reflect the European Directive[93], which regulates the obligations of employers in relation to transparency. Employers should therefore prepare for this change.

- Employers should be able to identify employees doing the same or comparable work, and respect the "equal pay for equal work" principle. While differences in remuneration of these employees are permissible, they must relate only to the quantity and quality of the work performed.

- It is therefore good practice to regularly evaluate the work done by all the employees.

- For more information on equal pay, see the website of the project of the Ministry of Labour and Social Affairs "22% towards equality".[94] On this website, you will also find information about the Logib tool, which can be used to determine whether remuneration is set equally for men and women.

4.3 Career advancement

Protected characteristics may not play a role, either, in an employer's decision-making as to who will be promoted or, on the contrary, removed from a senior position. While a senior employee may be removed from the given position at any time and for any reason, the employer must refrain from discrimination even in this case.

The fact that such cases do occur in reality and that defending against an employer's discriminatory practices can be very difficult is illustrated by some highly-publicised discrimination cases. E.g., in 2006, Pražská teplárenská (the Prague heating company) did not hire a female employee for a management position because she was a woman. In 2019, the court concluded that this had indeed constituted discrimination and granted the woman an apology. However, the claimant has yet to succeed with her other claims.[95]

A female employee who had been removed by her employer from a senior position the day before she commenced her maternity leave was partially successful in court only 7 years after the incident. In this case, too, the court found discrimination on the grounds of gender. It is a paradox that the employee worked at the Office of the Government, where she was responsible for gender equality.[96]

93. Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

94. Rovná odměna: Projekt 22 % k rovnosti (Equal pay: 22% towards equality project). Věnujeme se problematice rovného odměňování (We Address the Issue of Equal Pay) [online]. [retrieved on 2023-10-09] Available (in English) at: https://rovnaodmena.cz/.

95. For details, see e.g. judgment of the Supreme Court of 21 January 2020, File No. 21 Cdo 2770/2019, available at: https://nsoud.cz/, or Czech Radio. Apology for discrimination. Pražská teplárenská nejmenovala ženu do ředitelské funkce kvůli pohlaví (Pražská teplárenská Rejected a Woman for a Director Position Because of Her Gender) [online]. 2019 [retrieved on: 2023-10-09]. Available (in Czech) at: https://www.irozhlas.cz/zpravy-domov/omluva-diskriminace-kvuli-pohlavi-prazska-plynarenska-marie-causevicova_1903070921_dbr.

96. See judgment of the District Court for Prague 1 of 15 March 2019, File No. 23 C 146/2014, available (in Czech) at: https://www.ochrance.cz/uploads-import/ESO/23C146-2014_Redigovano.pdf.

5. Special working conditions for certain employees

The employer should ensure equal working conditions and not disadvantage anyone on the basis of protected characteristics. Therefore, to comply with the prohibition of discrimination, it is usually sufficient if the employer refrains from certain conduct. However, this does not apply to all cases – in relation to disabled employees, the employer must take active steps to avoid discrimination. Specifically, under the Anti-Discrimination Act, the employer is required to provide a reasonable accommodation. In the case of parent employees and pregnant employees, the obligation to modify working conditions follows especially from the Labour Code. In this way, the legislator reflected on the fact that the specific position and life situation of these employees also needs to be considered at work. Employers may also accommodate other groups of employees who may be put at a disadvantage at the workplace.

5.1 Working conditions for employees with disabilities

The employers are required to provide a reasonable accommodation in relation to employees with disabilities. Who is an employee with a disability and what form this obligation may take when a new employee is hired was discussed in the previous chapter (see subchapters 1.5.1 and 1.5.3). At this point, I will only repeat what a reasonable accommodation means and provide some practical examples of accommodations for the benefit of employees who already work at the employer.

A reasonable accommodation is one that enables a person with a disability:

- to apply for a job with the given employer;
- to perform the work entrusted to him/her by the employer;
- to be promoted or otherwise improve his/her position with the employer; and
- to participate in professional education, training or counselling.

It can take different forms, as the needs of individual employees with different types of disabilities are naturally different. This may involve modification of the workplace (e.g. barrier-free access), purchase of special aids (special software to enable a person with a visual impairment to use a computer) or other equipment (a reclining desk for an employee with back problems), modification of working hours or regime (working from home for an employee who cannot commute regularly due to health reasons), modifying work activities and tasks (no business trips for employees with physical disabilities, no obligation to make phone calls for employees with hearing impairments), or enabling other forms of support in the workplace (allowing the presence of an assistance dog or a personal assistant at the workplace).[97]

The Defender[98] dealt with a complaint from a prison service employee who commuted across the country to work every week. The long commute was problematic for the employee due to health reasons, so he asked for relocation to another prison closer to his home. Although there was a suitable vacancy in the prison in question, the employer did not satisfy the request. The Defender concluded that relocation to another organisational unit of the employer could constitute a reasonable accommodation and, in the case at hand, the employer had had no objective reason for rejecting the relocation request. The employer had discriminated against the complainant by failing to provide a reasonable accommodation. This conclusion was subsequently confirmed by the court.[99]

If an employee loses his/her medical fitness to work in the long term as a result of a disability, a reasonable accommodation may be to reassign the employee to another job.[100] See subchapter 8.3.2.

97. See, for example, Section 103 (5) of the Labour Code.
98. Report of the Public Defender of Rights of 21 January 2019, File No. 7571/2017/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/6674.
99. Judgment of the Supreme Court of 25 July 2022, File No. 21 Cdo 916/2022, available (in Czech) at: https://nsoud.cz/.
100. Within the meaning of Section 41 (1)(a) and (b) of the Labour Code.

› A reduction in working hours is one of the forms of reasonable accommodation that may be asked for by employees with disabilities. Did you know that as of 1 February 2023, employers can benefit from a social insurance discount if they employ a disabled person part-time? For more information, go to the website of the Czech Social Security Administration.[101]

However, the duty to take reasonable accommodations has its limits. **The requested accommodation may be refused if**:

» the benefit of the measure to the disabled employee is negligible compared to the cost expended by the employer to provide the accommodation; or

» the accommodation would be beneficial for the employee with a disability but too costly for the employer to provide, and these costs cannot be reduced to a reasonable level (e.g. by financial assistance from the State); or

» it is possible to adopt a measure other than the accommodation requested, and this measure is of comparable benefit to the employee and would place less burden on the employer.

It is important to bear in mind that the aim of the obligation to provide a reasonable accommodation is not to provide employees with disabilities with better conditions than other employees, but rather to give them employment opportunities at the given employer comparable to those of employees without disabilities.

Support for employers

The obligation to provide a reasonable accommodation arises if the employer knew or should have known of the employee's need. If the employer is unaware that the employee is a person with a disability, they cannot be blamed for not taking any specific measures.

However, employers may be hesitant even when the employee clearly states what accommodation he/she requires. The affordability of the required accommodation may be a problem. The employer may also have doubts as to whether the employee actually needs the accommodation due to his/her health limitations, or how the accommodation will work in practice or how it should be set up.

› Some support should be provided to the employer by its contracted occupational medical services provider. The scope of these services includes, among other things, consultancy on the modification of workplaces, including positions for employees with a disability, or on work rehabilitation.[102] The employer may also contact non-profit organisations that focus on the inclusion of people with disabilities in everyday life. The services of a non-profit organisation can be used especially if this is recommended by the employee himself, as he/she has experience with the given organisation.

› In terms of the financial costs, employers should not let themselves be immediately discouraged by the price of acquisition of the required equipment. First, it is always necessary to consider whether or not it is possible to receive a State contribution provided by the Labour Office of the Czech Republic under the Employment Act. This includes, in particular, a contribution towards creating a job for a disabled person[103] and a contribution towards the operating costs of employing a disabled person.[104] Sometimes, it is also possible to temporarily borrow some aids, which may be cheaper than their purchase.

101. Česká správa sociálního zabezpečení (Czech Social Security Administration). Sleva na pojistném (Discount on Insurance Contributions). [online]. 2023 [retrieved on: 2023-10-09] Available (in Czech) at: https://www.cssz.cz/slevy-na-pojistnem.

102. Section 2 (b) of Decree No 79/2013 Coll., on implementation of certain provisions of Act No. 373/2011 Coll., on specific healthcare services (Decree on occupational medical services and certain types of medical reporting).

103. Ministry of Labour and Social Affairs. Příspěvek na zřízení pracovního místa pro OZP (Contribution Towards Creating a Job for a Disabled Person) [online]. 2023 [retrieved on: 2023-10-09]. Available (in Czech) at: https://www.mpsv.cz/web/cz/-/prispevky-na-zrizeni-pracovniho-mista-pro-ozp.

104. Ministry of Labour and Social Affairs. Příspěvek na provozní náklady zaměstnávání OZP (Contribution Towards the Operating Costs of Employing a Disabled Person) [online]. 2023 [retrieved on: 2023-10-09]. Available (in Czech) at: https://www.mpsv.cz/web/cz/-/prispevky-na-provozni-naklady-zamestnavani-ozp.

› If the accommodation required is too costly for the employer even with financial assistance from the State, the employer should try to find an alternative solution. In this search, the employer should collaborate primarily with the disabled employee himself/herself.

5.2 Working conditions for employees with children

Pregnancy, maternity and parental leave and the employee's return to work – the birth of a child is a turning point in an employee's life, which usually affects his/her working life and thus also the employer. Under the law, employers must respect this natural part of life and must not put their employees at any disadvantage in relation to childcare. The law does not protect parent employees only by prohibiting discrimination – below, I briefly list the obligations of employers towards these employees, although most employers are well aware of them.

Furthermore, I provide examples of good practice – measures beyond the scope of legal obligations that employers can adopt to help their employees achieve work-life balance. I firmly believe that most employers want to accommodate the needs of their employees, if this is within their means. This helps employers keep good and loyal employees.

The Defender's research among mothers of small children showed that only one third of women planned to return to their original employer after their maternity or parental leave. As for the respondents who have already returned to work after the birth of their child, only about one third of them (30%) returned to their original employer; this is mainly due to the inability to balance their original job with the care for the child (42% of the respondents).[105]

Employer's obligations:

Prohibition of certain work – pregnant women, women up to nine months after childbirth and breastfeeding employees are prohibited from performing work that could endanger their pregnancy (and later maternity).[106]A list of these types of work is given in a decree.[107] This may also be a job for which the given female employee is not medically fit. If the employee still performs such work, she should ask the employer to reassign her to some other job. The employer is obliged to comply with such a request.[108]

Work at night – if the above women work at night, the employer must reassign them to day work at their request.[109]

Breaks for breastfeeding – breastfeeding women must be provided with breaks for breastfeeding.[110]

Overtime work – pregnant employees (as well as parents taking care of a child under one year of age) may not be ordered to work overtime.[111]

Business trips – a pregnant woman (or parents caring for a child under 8/15 years of age) may be sent for a business trip only with her (their) consent.[112]

105. Survey Report of the Public Defender of Rights of 23 May 2023, File No. 30/2023/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/11734.

106. If the employee receives a lower salary as a result of the reassignment, she is entitled to a "compensation allowance".

107. A list of these types of work is given in Decree No. 180/2015 Coll. They include, for example, high-risk work under the Public Health Protection Act (Section 39 (1) of Act No. 258/2000 Coll., on the protection of public health), work requiring the use of insulating respiratory devices, work associated with a risk of impact or high vibrations, and work with a high risk of injury.

108. Section 41 of the Labour Code.

109. In this case, too, the employee is eligible for a compensation allowance.

110. Section 242 of the Labour Code.

111. Section 240 (3) of the Labour Code.

112. Section 240 of the Labour Code.

Protection period – is a period during which an employer may not give notice to an employee, save for certain exceptions. The protection period runs during pregnancy, during maternity leave, during parental leave (applies to both parents) and during the period when a carer's allowance or long-term carer's allowance is drawn. The protection period protects a female employee even when she did not inform her employer of her pregnancy; however, the employee must invoke the nullity of the notice by informing her employer that she is pregnant and therefore considers the notice of termination void. The protection period also applies if the employee becomes pregnant during the notice period. In that case, the notice period is interrupted and runs out only after the protection period expires.[113]

Returning from maternity and parental leave – employers must allow employees returning from maternity or parental leave to return to their work. The employer must "hold the spot" for women who return to work immediately after maternity leave. The employee must thus be able to return to the same position as the one she had before leaving for maternity leave.[114] Where this is not possible, because the work has ceased to exist or the workplace has been abolished, the employer must assign them to some other job corresponding to the employment contract.[115] When employees return after parental leave, they are not legally entitled to return to their original position, but have the right to be assigned the type of work and job description as set out in the employment contract.

Calculation of severance pay in cases where the employee is dismissed after returning from parental leave – it may happen that the employer undergoes such an organisational change during the time of an employee's parental leave that it is objectively impossible for the employee to return. Notice should be given in that case on the grounds of redundancy and with severance pay. The amount of the severance pay depends on the employee's previous salary and the duration of employment. Similar to the calculation of salary after the employee's return from parental leave (see subchapter 4.2.2), the current salary conditions at the employer must also be taken into account in these cases.[116]

Working hours – when assigning employees to shifts, the employer should reflect the needs of those employees who care for children.[117] Pregnant employees and employees caring for a child under the age of 15[118] must be allowed to adjust their set weekly working hours as appropriate, unless this is prevented by serious operational reasons. The following options can typically come into play as adjustments of working hours: shorter working hours (i.e. the provision of part-time work), adjusting the start and end of working hours (e.g. leaving work early to pick up a child from kindergarten), flexible scheduling of working hours, and a "compressed work week".

- As in the case of employees with disabilities, employers may receive a social insurance discount for parents of children under 10 if they employ them part-time. For more information, go to the website of the Czech Social Security Administration.[119]

- The employer may deny a request for an adjustment of working hours only if the requested adjustment is prevented by serious operational reasons. According to the Supreme Court, such reasons exist only in cases where granting the employee's request would prevent, disrupt or seriously jeopardise the proper operation (performance of tasks or activities) of the employer.[120] If the employee can perform the job equally well with the adjustment of duties, or the limitations arising from the adjustment can be easily resolved by the employer in some other way, the employer should not deny the request.

113. Unless the employee has explicitly told the employer that she does not insist on extension of the employment relationship. See resolution of the Supreme Court of 28 August 2018, File No. 21 Cdo 1975/2018, available (in Czech) at: https://nsoud.cz/, or PTÁČEK, Lubomír. § 53 [Zákaz zaměstnavatelovy výpovědi v ochranné době]. (Section 53 [Prohibition of Employer's Termination During the Protection Period].) In: BĚLINA, Miroslav, DRÁPAL, Ljubomír et al. Zákoník práce. (Labour Code.) 3rd ed. Prague: C. H. Beck, 2019, p. 332.

114. Section 47 of the Labour Code.

115. Section 38 (1)(a) of the Labour Code.

116. Report of the Public Defender of Rights of 19 August 2013, File No. 75/2012/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/1600.

117. Section 241 (1) of the Labour Code.

118. The same applies to a pregnant employee or an employee who proves that he/she are predominantly caring themselves for a dependent person in the long term. This may include not only childcare, but also care for other family members.

119. Česká správa sociálního zabezpečení (Czech Social Security Administration). Sleva na pojistném (Discount on Insurance Contributions). [online]. 2023 [retrieved on: 2023-10-09]. Available (in Czech) at: https://www.cssz.cz/slevy-na-pojistnem.

120. Judgment of the Supreme Court of 17 December 2003, File No. 21 Cdo 1561/2003, available at: https://nsoud.cz/.

› If the employee's working hours are shortened, the employer should also adjust accordingly not only the employee's salary but also the amount of work assigned.

Caring for a sick child – the employer must excuse the absence of employees while the child is being treated.[121] Leave intended for taking care of a child is not linked to drawing of a carer's allowance. Therefore, leave can be taken for a longer period of time even if there is no longer an entitlement to this allowance. The employer must allow the parent to accompany his/her child to a doctor, and the Labour Code also foresees the possibility of hospitalisation. While the absence of employees may place a certain burden on the employer, this does not mean that the employer could penalise employees for childcare-related absences.

The Defender was approached by a man who alleged unfavourable treatment by a supervisor, motivated by the fact that the complainant had taken leave to care for a minor child. The supervisor thus allegedly used various forms of coercion against the complainant, such as frequent checks on the complainant while on duty, excessive assignment to night shifts, exclusion from social events, etc. In the given case, the Defender was unable to conclude, beyond any doubt, that the complainant had been treated less favourably than his colleagues who were not parents. If this were so, the employer would have committed direct discrimination on the grounds of parenthood.[122]

Recommended procedures

As regards benefits provided beyond the scope of legal obligations, this always depends on the employer's possibilities and the nature of the work performed by the employees. For example, a large manufacturing company may find it worthwhile to set up a children's group at the workplace, but it cannot offer most of its employees the benefit of telecommuting. In the case of a smaller employer, setting up a children's group will usually be financially unaffordable, but if their employees mostly perform office work, they can offer some flexibility in the form of flexible working hours and the possibility to telecommuting. It is therefore up to each employer to consider their options and set up their offer of benefits to meet the needs of their employees, as far as possible.

Information and communication – employees may be reluctant to ask, for example, for adjustments to their working hours or the option of telecommuting. If this is not an established practice at the employer, they may fear a negative reaction. It is therefore good practice to inform employees about the possibilities to ensure work-life balance and other benefits offered, e.g. in the form of an internal regulation or in other available ways. Everyone should also know whom they can contact if they need advice or help in this area.

Communication with pregnant employees and employees on maternity and parental leave is also important. Pregnant employees should know in advance what the employer will require of them in relation to their departure (e.g. to whom they should hand over unfinished work or borrowed work equipment, etc.). Employers may also help their female employees to get acquainted with their rights and obligations – for example, some employees may find it confusing when and how they should apply for maternity leave and benefits (employers can refer their employees to the guide[123] prepared by Aperio or give them the leaflet[124] drawn up by LMC). It is always also a good idea to try to have an open conversation with the employee about his/her return. In the case of employees whose employment terminates during maternity or parental leave by expiry of the agreed term of employment, it is advisable to have an open conversation about their return if the employee or employer is interested in that option. Employees will appreciate information on the possibility of a gradual return (see below), and for employers, information on the planned duration of absence is important in terms of organisation of work and finding a possible replacement. It can also be good practice for employers

121. Section 191 of the Labour Code.

122. Report of the Public Defender of Rights of 16 December 2014, File No. 231/2012/DIS/VP, available at: https://eso.ochrance.cz/Nalezene/Edit/1994.

123. Aperio. Průvodce zákony pro rodiče (A Legal Guide for Parents) [online]. [retrieved on: 2023-10-11]. Available (in Czech) at: https://www.aperio.cz/pruvodce-zakony-pro-rodice.

124. LMC. Vše o mateřské a rodičovské v jednom PDF (All about Maternity and Parental Leave in One PDF). Připomeňte si, jak správně postupovat (Remember How to Proceed Correctly) [online]. 2021 [retrieved on: 2023-10-09]. Available (in Czech) at: https://magazin.lmc.eu/vse-o-materske-a-rodicovske-v-jednom-pdf-pripomente-si-jak-spravne-postupovat.

to invite employees to staff parties and similar events where employees on parental leave can keep in touch with their colleagues.

Enabling a gradual return from maternity/parental leave – compared to other countries, parental leave is unusually long in the Czech Republic. This fact, combined with the lack of kindergarten capacity for children under 3 years of age, means that many parents, mostly women, will leave the labour market altogether for a long time. This situation has many negative consequences not only for employees, but also for employers and the whole society.

Unfortunately, the debate on possible adjustments of parental leave or the guarantee of places in kindergartens has been shifting from one extreme to the other. Many parents would appreciate the possibility of a gradual return to work, so that they can work to a limited extent while continuing to attend fully to their child's needs. So it is good practice if employers provide this option. This may include an offer of occasional or limited work while taking maternity[125] or parental leave (typically co-operation under an agreement to perform work or agreement to complete a job) or an offer of an early return while temporarily reducing working hours or allowing other work-life balance measures (e.g. working from home). Maintaining co-operation during maternity leave or more often during parental leave is beneficial and useful for both parties. It helps parents to stay in touch with the work environment, allows the employer to maintain the relationship with an experienced employee, and prevents turnover in the staff.

Unpaid leave – on the contrary, some employees choose to take their parental leave in full. This decision is often influenced by the fact that they cannot ensure the care for their children by any other means. Even after the child turns three – due to the lack of capacity – some parents are unable to secure a place in a kindergarten so that they could start working immediately after their entitlement to parental leave ends. The solution to this situation is for the employer to agree with the employee on the provision of compensatory time-off without compensation for salary (usually, this will be for a few months until September, when the child starts kindergarten).[126]

Work from home – partial work from home[127] (telecommuting, homeworking or "home office") may be the most suitable solution for achieving work-life balance for many employees. Employers have tested this benefit during the Covid-19 pandemic, in an effort to limit interpersonal contact. Despite this fact, many employers still remain reluctant to provide this benefit because they do not believe that employees will work as effectively at home as they do in the office, or because they are concerned about the difficulty of communication.

- Of course, employers do not have to offer benefits beyond the scope of the law. This, however, is an effective way of attracting new employees and keeping the existing ones. This is especially true in times of high employment, when companies are "competing" over new employees and simply offering a higher salary than others is no longer sufficient. Work-life balance measures are important for a constantly increasing number of employees.

- Therefore, if the employer offers benefits to promote work-life balance, it is always advisable to emphasise this fact in the job advertisement.

- The employer's obligation to ensure equal treatment of all employees in terms of their working conditions does not mean that the employer must treat all its employees completely the same. This obligation protects employees against unjustified differences. For example, it is acceptable if an employer allows employees to telecommute only if the nature of the work makes this possible.

- Employers may be reluctant to provide some benefits because of concerns about the quantity or quality of the work done or that a certain benefit might unnecessarily complicate the organisation of work.

125. Receiving maternity benefits does not prevent the employee from working part-time along with caring for the child. Such work can be based on an agreement to perform work or an agreement to complete a job. Work may also be performed for the former employer, but this must be different work than the one under the original employment contract (Section 16 (a) of the Sickness Insurance Act).

126. The employer is not obliged to accept such an arrangement. However, where an employee had no other option than to stay at home because of a lacking capacity of kindergartens, this, according to the Supreme Court, should not be a reason for their dismissal. See judgment of the Supreme Court of 10 October 2008, File No. 21 Cdo 4411/2007, available (in Czech) at: https://nsoud.cz/.

127. Section 317 of the Labour Code.

These concerns are understandable, although the pros of the benefits (such as reduced turnover or increased employee motivation) should also be kept in mind. It is also true that, for example, allowing work from home presupposes a certain level of trust between the employer and the employee.

› Where an employer is not sure how the provision of the benefit will affect the work done, the benefit may be provided to an employee only provisionally – for a limited period of time. For example, an employee will be allowed to telecommute for a month within an agreed scope, with the proviso that if this arrangement proves successful, they can agree to extend this period.

› It is not always possible to provide an employee with the benefit requested. In these cases, however, it is important to talk to the employee and try to find a solution that would be acceptable for both parties. For example, instead of reducing working hours, the employer might allow the employee to work flexible hours so that he/she can pick up a child from school.

5.3 Working conditions for other groups of employees

Other groups of employees will also appreciate if the employer bears their needs in mind, even if the law does not explicitly require the employer to do so.

5.3.1 Older employees

The specifics of employing older people do not receive the attention they deserve. It can be expected that this will change in the future due to the ageing population and the increasing retirement age.

For older employees, disadvantage at work may be manifested in them being denied further training; they are often overlooked in the selection of new senior employees or are being pressured to leave their employment voluntarily. The denial of certain benefits to older employees is also a frequent problem (see subchapters 4.2.2 and 4.2.3)

The Defender has encountered a case where an employer agreed in a collective bargaining agreement that in the event of an organisational change and the related layoffs, the employer would primarily lay off employees of retirement age. Such a procedure is obviously discriminatory (see subchapter 8.3.1).

Employees who are subjected to such treatment will naturally not feel like valuable employees. If employers want to take the opposite approach, it is a good idea to address the needs of older employees on an individual basis, if possible. An employee performing strenuous physical work will appreciate a different approach than an employee working in the office. To some extent, however, older employees will welcome the same measures that employers provide for employees with children, i.e. flexibility that will enable their gradual transition between economic activity and retirement. For example, part-time work can be a good way for employees of pre-retirement or retirement age to stay active and become financially secured while getting more rest and maintaining important social contacts. On the other hand, the employer will not lose an experienced employee for whom full-time work may already be too demanding.

› When designing an offer of benefits, it is also good to consider the needs of older employees.

› Asking the question of when an employee plans to retire is not necessarily taboo. This information may be important in terms of planning further steps in relation to personnel, e.g. the need to train a new employee for the position that will thus become vacant. However, the employer should in no way force the employee to retire. On the contrary, it is advisable if the employer uses this conversation to assure the employee that he/she is valued and informs the employee of the possibility of suitable adjustments to working conditions (reduction in working hours, assignment of less physically demanding work). It should be a matter of course to also involve older employees in training offers.

› Even in the case of older employees, employers may receive a social insurance discount if they employ them part-time. The age limit is set at 55 years. For more information, go to the website of the Czech Social Security Administration.[128]

The Defender dealt with a case of an employer who provided a financial bonus to employees of retirement age if they decided to voluntarily terminate their employment. The Defender concluded that the practice of granting severance pay did not constitute discrimination on the grounds of age.[129]

5.3.2 LGBTIQ+ employees

As I noted above, sexual orientation and gender identity are purely private matters of each employee that should not be of interest to employers. This is, of course, true. Fortunately, the days when most LGBTIQ+ people carefully guarded their privacy in order to avoid condemnation, discrimination or even physical attacks are gone. Today, these individuals are more open about their private lives and, within day-to-day interactions at the workplace, they no longer hide the fact that they, e.g., have been on a vacation with their same-sex partner. Nonetheless, even today, such commonly communicated information can lead, for example, to employees becoming the target of insults and "funny" remarks from their colleagues.

It is therefore good practice for employers to make it clear that such a behaviour is unacceptable and that LGBTIQ+ employees are welcome in their workplace. The employers may explicitly state this in, for example, a code of conduct or other internal regulation. However, in order to go beyond a mere statement (which all employees are not even thoroughly familiar with), it is advisable to complement the internal regulation with setting the working conditions so that they actually accommodate all employees. This sends a clear signal to LGBTIQ+ employees that the employer has their needs in mind, too.

Differences in working conditions may arise as a result of the Czech legislation, which still distinguishes between a formal union of a man and a woman and a same-sex union (marriage vs. registered partnership); they may also follow directly from the legislation or be a result of the set-up of benefits voluntarily provided by the employer. A minor adjustment by the employer is often enough to level the working conditions.

› For example, a government regulation specifying the scope and extent of other important personal impediments to work provides that employees are entitled to two days' time-off for their own wedding (conclusion of marriage). The employees are entitled to a compensation for salary or pay for one of these two days. Under this regulation, time-off with compensation for salary shall also be granted for one day to parents who attend the wedding of their child or to a child who attends the wedding of his/her parent (in this case, without compensation for salary). The regulation explicitly refers to a wedding (which, by definition, is linked to the conclusion of marriage) but does not apply to registered partnership (and participation in the related ceremony). Therefore, I recommend that employers provide such time-off and compensation for salary to registered partners to the same extent as an employee benefit, beyond the scope of the legislation.

› Also when setting up other benefits, it is advisable to think about registered partners and the needs of LGBTIQ+ parented families. For example, the employer should excuse absence from work to accompany a child to the doctor, at the birth of a child or for taking a child into care not only for biological or adopted children, but also for children of a (registered) partner living in the same household.

128. Česká správa sociálního zabezpečení (Czech Social Security Administration). Sleva na pojistném (Discount on Insurance Contributions). [online]. 2023 [retrieved on: 2023-10-09]. Available at: https://www.cssz.cz/slevy-na-pojistnem.

129. Opinion of the Public Defender of Rights of 16 May 2017, File No. 84/2016/DIS, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/5720.

5.3.3 Foreign employees

For some employers, employing foreigners is a way to fill long-term vacancies. In view of employees from abroad, working in the Czech Republic can be attractive in terms of financial remuneration.

It is no secret that some employers exploit the vulnerable position of foreign employees, especially those from Eastern Europe or third countries, and the practices of these employers can be often considered exploitation bordering on modern slavery. I assume that these employers will not be among the readers of this Recommendations, so I will not further discuss their practices. But even with regular employers, foreign employees can face disadvantages.

> The Defender asked employees from the European Union working in the Czech Republic about their experience with discrimination. Almost one third of the respondents stated they had felt discriminated against in their working life in the Czech Republic because of their nationality (in the sense of "State citizenship" or "national origin"). EU citizens most often perceive discrimination on the grounds of their nationality with regard to remuneration (15%), followed by job assignments (13%) and job search (12%). Perceived disadvantage at work is much higher among low-skilled workers and employees working for employment agencies than among highly skilled and regular employees. It is not surprising that the feeling of discrimination in working life is related to the level of knowledge of the Czech language.[130]

If an employer wants to provide support to foreign employees, it is advisable to focus primarily on overcoming the difficulties associated with the lack of knowledge of the Czech language, the Czech legal system and the local conditions. The extent to which an employer can address the issues of foreign workers largely depends on the employer's possibilities – the employer's assistance could include the provision of accommodation, assistance in dealing with the authorities and securing the necessary permits, mediation of contact with a non-profit organisation that focuses on helping foreigners or referring them to information in a language they understand.

› Employers can use materials in various languages on the cizinci.cz website[131] and on the website of the State Labour Inspectorate.[132]

It is absolutely crucial to adapt the employee-employer communication in cases where the parties do not speak the same language.

> The Defender inquired into the procedure of an employer who had presented an employee with poor knowledge of the Czech language with an employment contract in Czech. At the same time, the employer pressured the woman to sign the contract on the spot without giving her the opportunity to acquaint herself with the content of the contract (e.g., to arrange for a translation or to discuss the contract with another employee fluent in Czech). The Defender found this procedure problematic.[133]

6. Harassment and sexual harassment

Bullying, discrimination and sexual harassment – it might seem logical that interpersonal relationships in the workplace are a purely private matter between adults who are able to resolve any conflicts themselves. However, victims of bullying often cannot effectively defend themselves, especially when they are bullied by their superiors. Such conduct should also be of concern to the employer because even if it is not committed by the employer but "only" by their employees, the employer will often be ultimately held liable for their actions. Moreover, employers have an obligation under the Labour Code to prevent bullying and harassment in the

130. Recommendation of the Public Defender of Rights of 15 November 2021, File No. 72/2020/DIS, available (in English) at: https://eso.ochrance.cz/Nalezene/Edit/9920.

131. Ministry of Labour and Social Affairs. Cizinci v České republice (Foreigners in the Czech Republic) [online]. [retrieved on: 2023-10-11]. Available (in English) at: https://www.cizinci.cz/web/en.

132. State Labour Inspectorate [online]. [retrieved on: 2023-10-11]. Available (in English) at: https://www.suip.cz/web/en.

133. Report of the Public Defender of Rights of 27 May 2020, File No. 6601/2019/VOP, available (in Czech) at: http://eso.ochrance.cz/Nalezene/Edit/8250.

workplace. Finally, both bullying and harassment can have a negative impact on the employer's business – from the costs associated with higher turnover to negative media attention (see more in Chapter 9).

6.1 Bullying

Bullying can be defined as long-term and systematic conduct of another person that creates a hostile environment. In the workplace, it usually takes the form of psychological violence. The most common manifestations of bullying include undervaluation of work performance, assignment of meaningless tasks and duties that do not correspond to the employee's qualification, ridiculing and defaming the bullied person within the work team, various spiteful actions, provision of incorrect or incomplete information or constant criticism of work. In extreme cases, bullying escalates to physical attacks. It is important to note that bullying can also manifest itself in an act envisaged by the law if it is motivated by a desire to harm the employee – for example, a manager will not allow the bullied employee to take his/her leave on the chosen dates, while other employees are allowed to do so without any problem.

If a supervisor treats subordinate employees unfavourably, this is denoted as "bossing". The opposite (bullying a manager by subordinates) is called staffing. Mobbing is bullying within a team among similarly situated employees.

Although the results of individual sociological studies may slightly vary, it is clear that workplace bullying is not an isolated phenomenon. According to the latest LMC JobsIndex survey, 21% of employees surveyed have experienced bullying.[134]

Bullying need not simultaneously represent discrimination. This will depend on whether the unfavourable treatment is motivated by one of the protected characteristics or, for example, by personal animosity.

6.2 Harassment

Harassment is a form of discrimination. Harassment means, in particular, improper conduct related to one of the protected characteristics that is aimed at or results in diminishing the dignity of a person and creating an intimidating, hostile, humiliating or offensive environment. Consequently, bullying relating to a protected characteristic can be considered harassment.

The Defender has dealt with[135] the case of an employee who had a standard relationship with his employer until he began to deal with problems caused by kidney stones. The employee underwent an unplanned surgery, which, however, did not entirely solve his problems. After notifying his employer of the need for a second surgery, he began to feel increased pressure. This was mainly manifested by work overload, while the employer did not allow the employee to work overtime. Subsequently, the employer sent him a notice of possible termination of employment and a request to remedy his unsatisfactory performance, which led to the postponement of the planned surgery. The claimed bullying was also allegedly manifested in that the employee had to report his toilet breaks, even though the employer was aware that the more frequent need to urinate was caused by the employee's kidney stone problems. According to the Defender, the employer committed discrimination in the form of harassment, as the employee's health problems constituted a disability within the meaning of the Anti-Discrimination Act.

The case was subsequently addressed by the court. The employer paid CZK 220,000 to the employee as part of a court settlement.

134. LMC. Vývoj na pracovním trhu Hlavní data, změny a trendy / Q2-2023 (Labour Market Development – Main Data, Changes and Trends / Q2-2023) [online]. 2023 [retrieved on: 2023-10-11]. Available (in Czech) at: https://s3.eu-central-1.amazonaws.com/cms-api.mgw.cz/lmc/f8c0f0ab-88de-4781-b600-877208c50235.pdf.

135. Report of the Public Defender of Rights of 18 May 2015, File No. 5560/2014/VOP, available (in Czech) at: http://eso.ochrance.cz/Nalezene/Edit/3772.

However, not every unpleasant situation can be considered harassment. When assessing potential harassment, it is necessary to examine:

» **Subjective and objective aspects of the harassing conduct**. While the subjective aspect depends on the victim's own perception of the situation, the objective aspect requires assessment of the situation through the eyes of another person in a position similar to the victim. In order for it to constitute harassment, the conduct observed must be harassing both subjectively and objectively.[136]

» **Intensity of such conduct.** Harassing behaviour often consists of multiple acts which, over a period of time, form an adverse environment in their totality. A particularly objectionable behaviour may, however, in view of its intensity, qualify as harassment even in its individual manifestation (in the case of verbal harassment, also in the case of an individual statement), although such excessive cases are quite exceptional. Another factor to be taken into account when assessing the intensity of certain conduct is the relationship between the harassed person and the person who allegedly committed the harassment (e.g. conduct of a person in a position of power may have a greater impact on the victim's mental health).[137]

✓ Pavel has disability since his birth, which is noticeable at first sight. He has been working for his employer for several years and his colleagues have gradually become his good friends. Pavel's disability is not a taboo among these employees; on the contrary, they often make fun of it. Although an unbiased observer might find this style of communication unacceptable and offensive to Pavel, Pavel does not see it that way. On the contrary, he was the one who started joking about his disability with his colleagues, because that is what he does with his other friends as well. Since Pavel's behaviour made it clear that he was not bothered by his colleagues' remarks, this could not constitute harassment – the subjective aspect is missing.

✗ Pavel started a new job. There is a much more formal atmosphere at the workplace. Pavel is only getting to know his new colleagues and they address each other in a formal manner. But after a week, he overhears his supervisor refer to him as the "cripple". Later, it is brought to Pavel's attention that his superior refers to him in this way regularly, mimics the manifestations of his disability and otherwise ridicules him, though always behind Pavel's back. In direct contact, the supervisor is reserved towards Pavel, and it soon becomes clear that he does not trust him, as he entrusts him only with the simplest tasks, the completion of which he repeatedly checks in front of everyone. Pavel does not feel comfortable at the workplace and is soon looking for a new job. This case constitutes harassment. Pavel himself perceives the superior's behaviour as harassment and any average employee in his position would feel the same. Moreover, the harassment is repeatedly committed by a senior employee.

6.3 Sexual harassment

The topic of sexual harassment has received increased attention in the past few years. This is certainly a good thing, because sexual harassment is serious conduct with negative consequences not only for the lives of the victims, but also their close ones. On the other hand, there has been a lot of misleading or even apparently inaccurate information in the debate on the topic.

There are several definitions of sexual harassment in literature. However, employers should use the definition provided by the Anti-Discrimination Act. As in the case of bullying and (non-sexual) harassment, employers have the duty to prevent sexual harassment in the workplace and, if such conduct occurs, they may be the ones held liable.

136. Report of the Public Defender of Rights of 4 December 2017, File No. 1494/2017/VOP; available at: https://eso.ochrance.cz/Nalezene/Edit/5844; or Report of the Public Defender of Rights of 28 March 2018, File No. 1047/2017/VOP; available (in Czech and English) at: https://eso.ochrance.cz/Nalezene/Edit/5952.

137. Report of the Public Defender of Rights of 7 May 2019, File No. 3639/2018/VOP, available (in Czech) at: http://eso.ochrance.cz/Nalezene/Edit/6998.

According to the Anti-Discrimination Act, **sexual harassment** is harassment that has a sexual nature.[138] It consists in inappropriate conduct that is aimed at or results in diminishing the dignity of a person or that can be rightfully perceived as a condition for a decision influencing the position of the person being harassed, i.e. quid pro quo.[139]

✗ A colleague repeatedly loudly comments on a female colleague's figure, asks her to send him nudes and sometimes puts his hand on her thigh or behind. When she tells him to stop, he always laughs and calls her a prude.

✗ A superior tells her subordinate that he will do better financially at work if he goes on a date with her.

✗ An employer shows interest in his employee and repeatedly invites her to a meeting outside the workplace. She always politely declines and, upon several such invitations, emphasises that she would like their relationship to remain purely professional. The employer cannot deal with the rejection and tries to terminate the woman's employment.

Sexual harassment is therefore behaviour that is:

- inappropriate;
- of an intensity amounting to a violation of human dignity; and
- of sexual nature or overtones.

Discerning the **sexual nature** or overtones of the criticised conduct is usually not that difficult. It ought to be noted in this context that, in general, sexual harassment is not an inappropriate expression of interest; the harassing person might not even be sexually attracted to the victim. Rather, a common cause of sexual harassment is the need to assert one's formal or informal power.

The Defender dealt with a case of alleged sexual harassment committed by an attorney-at-law against his employee, a trainee attorney. To illustrate the possible manifestations of sexual harassment, I include a part of the relevant complaint:

"He always called me 'Babe', even in front of the clients. He was constantly telling me about his sexual activities with his mistresses and his wife. He demanded physical contact – kisses on the lips. He was checking whether I was wearing underwear – he would just walk up to me and lift my skirt to have a look. Or he'd feel my breasts over my clothes to see if I was wearing a bra. He repeatedly offered to visit me at home, saying: 'Babe, you've been working for me for a whole year, two, three (as time passed) and you still haven't let me get any. We've got to set that right!' When the assistant at the time had birthday, I had to go with him to a sex shop to choose a vibrator for her."[140]

An example is the long-term harassment faced by a female employee of the municipal police. While she objected to the harassing conduct, she did not otherwise formally defend herself because she was afraid of retaliation by the perpetrator, who was her superior. However, as the conduct escalated (from inappropriate innuendo and obscene language to physical touches of her private parts), the employee finally contacted her employer. The employer assessed the matter as a possible criminal offence and handed it over to the Czech Police. The court indeed convicted the perpetrator of rape.[141]

138. Section 4 (2) of the Anti-Discrimination Act.

139. Section 4 (1) of the Anti-Discrimination Act.

140. Report of the Public Defender of Rights of 6 April 2017, File No. 2569/2016/VOP, available (in Czech and English) at: https://eso.ochrance.cz/Nalezene/Edit/4958.

141. Judgment of the Municipal Court in Brno of 23 February 2018, File No. 4 T 73/2017.

6.4 Responsibilities and obligations of the employer

In the examples provided in the Recommendation, I state whether or not the employer did commit discrimination in the given case. Given that employers are nowadays very often legal persons and the conduct of an individual is usually[142] the key issue in discrimination cases, it is appropriate to at least briefly consider the question of imputability of discriminatory conduct to the employer. In practice, a discriminatory decision is most often not taken by the employer itself or, for example, by a member of its governing body. The question of employer liability arises especially in cases of bullying or harassment committed by a senior or an ordinary employee.

If an employee commits discrimination in the performance of his/her working duties, the imputability of such conduct to the employer will generally be unquestionable. This may include, for example, a situation where a manager does not award bonuses to an older employee because of his/her age, or where a branch manager refuses to employ a job seeker because of his/her ethnicity.

The Supreme Court had to remind the lower courts of this fact in its recent decision[143]. The courts were hearing a case of a pregnant employee who had been dismissed during the trial period. When the employee found out she was pregnant, she immediately informed her superior. Given the nature of the work she performed under her employment contract, it was necessary for her to be reassigned to another job. The superior contacted the HR manager, who subsequently ordered the employee to stay temporarily at home and sent her for an extraordinary occupational medical check-up. The employee was found to be medically unfit, with the physician being solely concerned with her pregnancy. Subsequently, the employment of the pregnant employee was terminated during the trial period, and the decision was signed by the division director.

The employee was certain that her pregnancy was the sole reason for the termination of her employment, so she took the case to court, lodging an anti-discrimination action. Even though the courts subsequently confirmed that the employee's superior, HR manager and the physician had known about the employee's pregnancy and that the only reason for sending the employee to the extraordinary medical check-up and the reason for the conclusion on her unfitness for work was the employee's pregnancy, the courts concluded that there had been no discrimination in the case. According to the courts, the division director who had signed the decision to terminate the employment was demonstrably only informed that the employee was medically unfit to work. The courts emphasised that the employer is not authorised to ask about the reason for the ascertained medical unfitness.

The first court to side with the employee was the Supreme Court. It rejected the notion that discrimination could only be found if it was proven that the person acting on the employer's behalf (in this case, the division director) was aware of the discriminatory motive for the termination. According to the Supreme Court, the employee acted logically when she discussed her pregnancy with her superior. It was then proven in court that the notification of pregnancy led to the termination of the employee's employment.[144]

In the case of bullying, harassment and sexual harassment, the imputability of the aggressor's actions to the employer can be more complicated. This is particularly the case where the conduct takes place only or mainly one-on-one and the employee concerned does not speak up against it. Thus, no one in the workplace knows about the harassing conduct except for the aggressor and the victim. The issue of imputability in such cases will likely be addressed in future case law.

142. I will now leave aside the highly topical issue of artificial intelligence.

143. See judgment of the Supreme Court of 16 March 2021, File No. 21 Cdo 2410/2020, available (in Czech) at: https://nsoud.cz/.

144. The case subsequently came before the Constitutional Court. The Court responded as follows to the employer's argument that the reason for the termination was the employee's medical unfitness and that the employer had not even known about the employee's pregnancy: "The argument that the employer knew only of the intervener's medical unfitness but not of her pregnancy suffers from an inherent contradiction given that the employer had sent her for an extraordinary occupational medical check-up (which had established that unfitness) only because she had informed her manager of the pregnancy."(Resolution of the Constitutional Court of 23 August 2022, File No. III. ÚS 2081/22, available (in Czech) at: https://nalus.usoud.cz).

It is, however, imputable to the employer beyond doubt if:

» the harassing conduct is committed by an employee who acts as a representative of the employer towards the harassed employee (a senior employee, a member of the HR department, a governing body or a member of the management), or

» if the harassment occurs exclusively or predominantly in the workplace, during working hours or in connection with the performance of work, and the employer becomes aware of the conduct (e.g. through a complaint by the employee concerned or a notice by his colleagues), but does not adopt any measures to resolve the situation.[145]

In relation to the question of employer liability for bullying and (sexual) harassment, it is also worth considering whether the employer is obliged to prevent such conduct and what the obligations are of the employer and its employees.

The Labour Code explicitly states that **any discrimination in labour-law relationships is prohibited, including discrimination in the form of harassment and sexual harassment**. However, if we look into the Labour Code, there are no such terms as bullying or bossing there. **Thus, the prohibition of bullying can only be inferred from the more generally defined obligations** – especially from the obligation to ensure equal treatment[146]; the obligation to create conditions for the fulfilment of the employees' working tasks[147]; the obligation to create a safe and harmless working environment and working conditions[148]; or the employees' right to satisfactory and safe working conditions.[149] At the employee level, there is the managers' obligation to create favourable working conditions and ensure occupational safety and health protection[150] and the obligation of all employees to co-operate with other employees.[151]

Under Section 265 of the Labour Code and case law, the **employer is liable for damage caused to an employee by unequal treatment**. In the event of discrimination, the employee concerned may assert claims under the Anti-Discrimination Act in addition to damage.

It is also important that the **obligation to ensure equal treatment is defined in such a way that the employer's active approach is required for its fulfilment**. This follows especially from Section 5 (2) of the Anti-Discrimination Act. Under this Section, ensuring equal treatment means adopting measures necessary for effective protection against discrimination which, having regard to good morals, may be required given the circumstances and personal circumstances of the employer. Providing equal opportunities is also considered part of ensuring equal treatment.

The law therefore expressly imposes on employers the obligation to adopt specific measures to ensure protection against discrimination. However, the Anti-Discrimination Act does not specify how this obligation is to be fulfilled, not even by means of a non-exhaustive list of the measures required. However, it follows from the Act that different measures may be required of a large multinational company than of an employer with a few employees.

› Possible measures include the establishment of a company ombudsman, the issuance of an internal regulation clearly stating that discrimination or harassment at the workplace is not tolerated, the establishment of a transparent system of work evaluation and employee remuneration, and regular questionnaire surveys among employees. A number of measures are listed in this Recommendation.

› Although the obligation to ensure equal treatment is defined somewhat vaguely, I believe that it can be inferred that employers have the duty to investigate any complaints of discrimination and, if these

145. Tomšej, Jakub. Diskriminace na pracovišti (Workplace Discrimination). Prague: Grada Publishing, 2020. Právo pro praxi (Law in Practice). ISBN 978-80-271-1014-8, p. 118.

146. Section 16 (1) of the Labour Code.

147. Section 38 (1)(a) of the Labour Code.

148. Section 102 (1) of the Labour Code.

149. Section 1a (1)(b) of the Labour Code.

150. Section 302 (c) of the Labour Code.

151. Section 301 (a) of the Labour Code.

complaints prove to be justified, to adopt appropriate measures. The obligation to discuss an employee's complaint with the employee is, in fact, expressly laid down in the Labour Code.[152]

7. Employee complaints and prohibition of victimistation

7.1 Investigation of employee complaints

The obligation to ensure equal treatment implies, among other things, that employers must address complaints in which their employees speak up against discriminatory conduct. The Labour Code also explicitly states that employees have the right to have their complaints discussed by the employer. Breach of this obligation is an administrative infraction for which the employer may be fined up to the CZK 400,000.[153]

However, a complaint should not be addressed only formally. The employee should always be informed by the employer **what the employer discovered on the basis of the complaint** (if the complaint contains facts that need to be verified), **how the employer evaluated these facts** (whether the complaint is justified or not and how the employer reached this conclusion), and if appropriate, **what measures the employer has taken** to remedy the shortcomings found.

- The fact that a complaint is addressed does not, of course, mean that the employer must find it justified. However, attention should also be paid to discrimination complaints in cases where no discrimination, in fact, occurred. The employee concerned may be relying on incorrect or incomplete information, and may in fact feel harmed by the employer's actions. If the employer provides explanation, this can prevent unnecessary conflicts or misunderstandings.

- When investigating an employee's complaint, the employer should try to be as **impartial** as possible. This requirement may sound paradoxical, as the employer will usually be investigating a complaint about conduct for which the employer is ultimately liable. Nevertheless, the investigation of the criticised conduct should be carried out impartially.

- A complaint should never be investigated by the employee whose actions form the subject of the complaint. However, this employee should be given the opportunity to comment on the criticised conduct.

- It may be a good idea to involve a person who is trusted both by the employer and the complainant.

- Depending on the seriousness of the criticised conduct and the credibility of the information provided in the complaint, it may be appropriate to consider expert assistance. The involvement of an external entity will also improve the employee's confidence in the impartiality of the investigation of their complaint. Assistance can be obtained, e.g., from a mediator, especially if an amicable solution to the dispute can be reached. More information about mediation can be found in the Mediation leaflet.[154]

- At the employee's request, the employer is required to discuss an employee's complaint with a trade union organisation. In some cases, involving the union might be suitable even if the employee does not explicitly request so. For example, the employer can ask the union to provide an opinion on the criticised conduct; the employee will have more confidence that the union is taking an unbiased approach to the matter.

- Where a complaint concerns discrimination, it is usually necessary to find a suitable employee in a comparable position as the complainant (a comparator) in order to properly assess the complaint. For example, if discrimination is perceived in the fact that the employee's superior did not award bonuses to the complainant, the employer should not be satisfied with merely determining what bonuses the

152. Section 276 (9) of the Labour Code.

153. Section 24 (1)(d) and (2)(b) of the Labour Inspection Act.

154. The Public Defender of Rights. Mediace (Mediation) [online]. 2022 [retrieved on: 2023-10-11]. Available (in Czech) at: https://www.ochrance.cz/letaky/mediace/mediace.pdf.

employee received / did not receive and why, but should also find out what his/her colleagues received / did not receive bonuses for.

- If a complaint concerns bossing, the employer should not assess the relevance of the alleged facts solely on the basis of the statement provided by the supervisor concerned. Bossing often involves conduct that, without context, may seem like normal performance of a manager's obligations – assigning working tasks or evaluating work performed. The superior will usually object that his/her criticism of the employee is justified and that the complainant errs in his/her work and cannot handle criticism. These statements may, of course, be true – but the employer should attempt to verify their truthfulness in a manner other than a mere statement by someone who has a clear interest in not confirming the alleged facts.

- Where a complaint concerns serious forms of bullying or harassment, it is advisable to adopt provisional precautionary measures to protect the potential victim before investigating the alleged facts as such.

- One of the possible courses of action for investigating a complaint is to confront the complainant with the employee whose conduct is the subject of the complaint. However, I recommend that the employers always carefully consider this approach. Confrontation may not be appropriate in cases of tense relationships or in some sensitive cases (especially in cases of sexual harassment or when the complainant disagrees with such a course of action).

- When investigating some forms of unequal treatment, the employer may find themselves in a situation of "one person's word against another's" i.e., a situation where the employer is not able to determine who is telling the truth. This could happen especially if the criticised conduct took place without witnesses, behind closed office door. However, even in this case, it is not appropriate not to follow-up on the complaint if it is clear that relationships between the employees are still tense. The employer may, for example, take preventive measures, i.e. avoid frequent contact of the relevant employees or pay more attention to their further co-operation.

- If the employer finds during the investigation of the complaint that discrimination has indeed occurred, it is not appropriate to try to sweep the matter under the carpet. Both my experience with addressing complaints and research show that only very few employees want to defend themselves against discrimination primarily by lodging a court action or a complaint with the labour inspectorates. On the contrary, employees only take these steps when all efforts to reach an agreement with the employer have failed. Most employees want to avoid further discrimination or have its consequences remedied. Employees are also usually aware of how difficult any lawsuit would be for them. The employer should therefore take advantage of the employees' willingness to resolve the matter amicably. Even for the employer, such a solution is usually more beneficial (costs associated with a possible lawsuit, risk of negative media coverage) and safer.

- Is an employee complaining about sexual harassment and you do not know how to handle the situation? For a lot of useful information about sexual harassment and tips on how to prevent it and how to check whether it is happening at your workplace, see the How to Prevent Sexual Harassment in the Civil Service handbook.[155] While the handbook is intended for authorities, most of the information is also useful for private employers.

- Information on bullying and how to investigate it can be found, for example, on the websites of the STOPPER[156] and Respectful Workplace[157] projects or on the Mobbing Free Institute website.[158]

155. Smetáčková, Irena, Fellerová, Palkovská, Iva, Šafařík, Radan, Hradecká, Lucie. Prevence sexuálního obtěžování ve státní správě: Příručka pro úřady (How to Prevent Sexual Harassment in the Civil Service: Handbook for Authorities) [online]. Prague: Office of the Government, 2019 [retrieved on: 2023-10-05]. Available (in Czech) at: https://www.vlada.cz/assets/ppov/rovne-prilezitosti-zen-a-muzu/Aktuality/Prevence-sexualniho-obtezovani-ve-statni-sprave.pdf.

156. Ministry of Labour and Social Affairs. Stopper – stop šikaně na pracovišti (Stopper – Stop Workplace Bullying) [online]. 2021 [retrieved on: 2023-10-05]. Available (in Czech) at: https://www.stopper.cz/.

157. Ministry of Labour and Social Affairs. Důstojné pracoviště ve veřejné správě (Respectful Workplace in Public Administration) [online]. 2019 [retrieved on: 2023-10-05]. Available (in Czech) at: https://www.dustojnepracoviste.cz/.

158. Mobbing Free Institute [online]. 2023 [retrieved on: 2023-10-05]. Available (in Czech) at: https://sikanavpraci.cz/.

› A completely inappropriate response of the employer to a complaint is to ignore or downplay the situation.

For example, the Defender was approached by a young woman of Vietnamese origin who had joined an almost all-male team in an IT company. From the moment she started her work, her colleagues made fun of her background and gender. Even though she objected to these "jokes", her colleagues did not stop, quite the opposite. For example, they left pornographic photos on her desk. When she turned to her superior, she was told that "that's the way around here" and that "boys will be boys" and that she should get used to it. Needless to say, such a response is completely unsatisfactory.

7.2 Prohibition of victimisation

The Anti-Discrimination Act defines **victimisation** as unfavourable treatment, punishment or placing at a disadvantage in consequence of the exercise of rights under the Anti-Discrimination Act.[159] This means that if an employee speaks out against discrimination, he/she should not be punished in any way for doing so. It is irrelevant whether the employee makes a mere informal statement, files a complaint with the employer, contacts a labour inspectorate or lodges an action against the employer. The prohibition of unfavourable treatment of an employee as a result of an exercise of his/her rights is also laid down by the Labour Code.[160]

› The prohibition on victimisation applies not only in cases where the discrimination has actually been confirmed, but also in other cases. Even if, e.g., it was not possible to prove during the investigation of the complaint that the discrimination indeed occurred, the employer must not punish the employee for filing the complaint. It may be the case that the criticised conduct indeed occurred, even though it could not be proven, or that the employee relied on incomplete or erroneous information when filing the complaint.

› However, it would not be considered victimisation if the employer found that the employee had deliberately lied in his/her complaint in order to harm a colleague, for example. Such conduct would constitute an abuse of rights by the employee and the employee would thus not be entitled to the above protection.

› In order to ensure the prohibition of victimisation, the employer should pay close attention to the relationships between the employees involved in the complaint.

159. Section 4 (3) of the Anti-Discrimination Act.

160. The employer may not penalise an employee or put an employee at any disadvantage whatsoever for the reason that the employee lawfully asserts his/her rights following from labour-law relationships (Section 346b (4) of the Labour Code).

Termination of employment

The Labour Code provides employees with relatively broad protection against unfair or sudden termination of employment. The employer must comply with several conditions in order to validly terminate an employee's employment. Some employers may consider this protection too broad and not allowing them to respond flexibly to the changing market conditions. However, it is important to remember that for most employees, employment is their primary source of income, and job stability is crucial for them and their families.

The protection of employees is established primarily by defining the conditions under which an employer may validly terminate an employment. This protection is complemented by the prohibition of discrimination. In practice, the latter applies especially in situations where the employer has certain freedom as to how they will proceed. This is true, or example, of the termination of employment during the trial period or the selection of an employee to be dismissed for redundancy. Discrimination also occurs if an employer tries to get rid of an "unwanted employee", even though it might seem that there were grounds for a standard dismissal. This may be a situation where an employer pretends to adopt an organisational change with a view to laying off an employee on the grounds of redundancy or where an employer gives an employee purpose-driven and unsubstantiated reprimands. It is also common for employers to pressure employees to sign an agreement on the termination of employment. Discrimination may also occur even if the employee's employment terminates by expiry of the agreed term.

8. Termination of employment

8.1 During the trial period

It holds in general that both the employer and the employee may terminate the employment relationship during the agreed trial period with immediate effect and without stating a reason.[161] However, the courts[162] and the Defender have already noted in the past that, even in this case, the employer is bound by a prohibition of

161. Section 66 (1) of the Labour Code.

162. Judgment of the Supreme Court of 21 April 2009, File No. 21 Cdo 2195/2008, available (in Czech) at: https://nsoud.cz/.

discrimination. The employer may therefore dismiss an employee during the trial period because they are not satisfied with the employee's work, but may not make this decision based on discriminatory criteria.

Discriminatory termination of employment may occur, for example, if the employer discovers during the trial period that the employee is pregnant. Discrimination could also be present if the employer terminated the employment relationship in this way after discovering that the employee is caring for a young child (e.g. the employee is on time-off with carer's allowance during the trial period).

The Defender inquired into a case where a woman approached him with a complaint against discrimination on the grounds of pregnancy. The complainant had already worked for the employer in the past and had never received any criticism. When she returned to the employer in another position, she and the employer agreed on a three-month trial period, during which the complainant became pregnant. After having unsuccessfully asked for reassignment to another type of work, the complainant stopped working due to impediments on the part of her employer, who subsequently terminated her employment during the trial period without giving a reason. The Defender assessed the complainant's case as direct discrimination on grounds of sex/gender, and more specifically pregnancy. The case was recently heard by the Supreme Court, which concluded that the real reason for the termination of employment had been the employee's pregnancy, and that the employer had thus committed discrimination. Therefore, the case was referred back to the first-instance court, which upheld this conclusion.[163]

8.2 By expiry of the term of the agreement

The simplest way of employment termination is the expiry of its term – the employment ends as of the date agreed in the employment contract or agreement. There is no legal entitlement to renewal (extension) of an employment contract, just like there is no entitlement to be hired.

Under the Labour Code, the employer generally decides on its personnel policy.[164] Thus, the employer may offer employees an extension according to the employer's operational needs.

The Defender has repeatedly dealt with cases of female employees whom the employer allegedly promised an extension of their employment. However, the offer fell through after the employer learned of their pregnancy.

The Defender was contacted by an employee who had concluded a fixed-term employment contract with her former employer. A few months later, she became pregnant. The employer subsequently refused to renew her contract in spite of an earlier promise to this effect. When the employee asked, the HR manager told her that the termination of co-operation was unrelated to her work performance, and that the employer was looking for "long-term co-operation and stability". A job advertisement was subsequently posted for the position.

In this case, the Defender concluded that an employer committed direct discrimination on the grounds of sex/gender when the employer did not allow a pregnant employee to extend the duration of her fixed-term employment, and the reason for doing so was her pregnancy or her (expected) absence from the workplace relating to pregnancy or maternity leave.[165]

8.3 By notice

Both the employee and the employer may terminate the employment by notice. However, while an employee may give notice on any grounds whatsoever, the employer may do so only on grounds explicitly listed in

163. Judgment of the Supreme Court of 16 March 2021, File No. 21 Cdo 2410/2020, available (in Czech) at: https://nsoud.cz/.

164. See, for example, Section 30 of the Labour Code.

165. Report of the Public Defender of Rights of 11 July 2022, File No. 8798/2022/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/10676.

the Labour Code. If a ground for termination of employment arises, the employer may proceed with the termination. By way of exception, this does not apply to cases where a protection period is running for the employee (e.g. during the employee's pregnancy, during maternity leave, during parental leave, during the period when a carer's allowance or long-term carer's allowance are drawn).[166]

✗ After a car accident, an employee has back problems that require him to see a doctor more often during working hours. He also asks his employer to buy a special office chair for him so that he can better cope with the long hours sitting at a computer. The employer decides that the employee is no longer wanted.

✗ The employer repeatedly sends warning letters to the employee, pointing out shortcomings in his work and asking him for a remedy. The employee defends himself against the content of these letters because the employer, e.g., has reproached him for not completing a task that the employee was not assigned or a task for which the employer has objectively failed to provide enough time. Even so, the employer gives notice to the employee on the grounds of unsatisfactory results of work.[167] Such a practice would be discriminatory.

✗ In a warning letter, the employer reproaches an employee for a breach of the working discipline that the employee has actually committed. However, the employer ignores similar breaches committed by other employees. This may include, for example, a method of recording attendance which the employer has set in an internal regulation, which, however, is purely formal, as no one at the workplace complies with it. Even if the employee brings the established workplace practice to the employer's attention, he is the only one who receives a notice of termination. This would also constitute discrimination.

8.3.1 Dismissal on the grounds of redundancy

The Defender has encountered cases where employers tried to get rid of "unwanted" employees on the grounds of redundancy.[168]

This ground for termination is based on the following conditions:

- adoption of a decision to reduce the number of staff in order to increase efficiency ("organisational change");
- redundancy of the specific employee;
- a causal link between the decision on the organisational change and the employee's redundancy.[169]

Feigned redundancy

Employers occasionally try to dismiss employees on this ground although they, in fact, are not redundant. The above-listed statutory conditions for dismissal on the grounds of redundancy are thus not met. The Defender has been alerted to this practice primarily by employees who were made redundant after returning from maternity or parental leave.[170]

166. Section 53 (1)(d) and (f) of the Labour Code. However, this protection is not absolute – it does not apply, for example, if the employer is being dissolved.

167. Termination pursuant to Section 52 (f) of the Labour Code.

168. Section 52 (c) of the Labour Code.

169. Bělina, Miroslav. Zákoník práce: komentář (The Labour Code: Commentary). 2nd ed. Prague: C. H. Beck, 2015. Extensive commentaries. ISBN 9788074002908, p. 320.

170. Report of the Public Defender of Rights of 25 January 2013, File No. 167/2012/DIS, available (in Czech) at: http://eso.ochrance.cz/Nalezene/Edit/1460, or the Report of the Public Defender of Rights of 1 March 2017, File No. 1206/2015/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/5764.

The employer may not give notice to an employee on the grounds of redundancy if the employee becomes "redundant" for the employer just because someone else has been hired as a replacement for the time of the employee's absence. This also applies if the employer does not have enough work for both employees to match their employment contracts. In this case, the employer cannot terminate either employee on the grounds of redundancy, as the employees' "redundancy" did not arise as a result of the employer's decision to make an organisational change.[171] As regards "replacement" of employees on maternity or parental leave, the employer must think ahead to ensure that such a situation does not arise. It is advisable to offer to the new employee a fixed-term contract, which will only last for the necessary period of time.

That the employer' argument of redundancy was merely feigned is also indicated by the fact that the employer hires someone else to replace the dismissed employee, either before or shortly after the decision to terminate the co-operation, without any change in the circumstances.[172]

Invalidity of termination on the grounds of redundancy may also be pleaded if the employer could have resolved the situation of redundancy caused by an organisational change through other means than by making one of the employees redundant. For example, the employer should not have renewed the employment contract of an employee holding the same position as the one who the employer wants to make redundant.[173]

- In view of the above, it is advisable that employers lay off an employee only if the employee genuinely becomes redundant as a result of an organisational change.

- According to the law, the decision on an organisational change need not be made in writing; however, it is advisable to justify the reasons for cancellation of the given position in writing, especially if the employee's position is not cancelled without replacement (there is no decrease in the total number of employees). An employee may be validly dismissed on the grounds of redundancy even if there is a new position created at the same time. However, the new position must sufficiently differ from the position that was cancelled (especially in terms of the job description) and it is up to the employer to refute in potential court proceedings any doubts that the organisational change was merely a matter of renaming the cancelled position.

- In terms of the validity of the notice, it is also necessary to carefully monitor the date when the organisational change becomes effective. The notice period should not expire before the employee's position actually terminates.

- Employers must also respect the protection period and the above requirement that employers primarily reduce the number of employees holding the position being cancelled by means other than termination for redundancy.

Organisational change leading to genuine redundancy

If an employer genuinely needs to reorganise, it may be that more than one employee holds the position being cancelled and that the employer has to choose which employee to make redundant. In such a case, the employer must not use discriminatory criteria to select the redundant employee. In the opposite case, although all the legal conditions for dismissal on the grounds redundancy are otherwise met, it is possible to challenge the termination of the employment in court with reference to alleged violation of the prohibition of discrimination.[174]

171. This is not an organisational change within the meaning of Section 52 (c) of the Labour Code, as this change does not constitute a means of reducing the number of staff with a view to increasing work efficiency (i.e. "job cuts" aimed, for example, to make production more efficient) or a change in their qualification composition, but rather a solution to a situation caused by the employer's error in recruiting a replacement employee. The Supreme Court reached this conclusion in its judgment of 12 April 2005, File No. 21 Cdo 2095/2004, available (in Czech) at: https://nsoud.cz/.

172. For example, the Defender considered it suspicious that, just 4 weeks later, the employer had announced a selection procedure for the originally cancelled job. Report of the Public Defender of Rights of 1 April 2017, File No. 1206/2015/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/5764.

173. For more details, see judgment of the Supreme Court of 27 April 2004, File No. 21 Cdo 2580/2003, available (in Czech) at: https://nsoud.cz/.

174. Judgment of the Constitutional Court of 30 April 2009, File No. II. ÚS 1609/08, available (in Czech) at: https://nalus.usoud.cz.

The Defender was contacted by a female court employee who had worked in the court for many years as a judicial officer. The employer gave her notice on the grounds of redundancy. She believed that the alleged redundancy was merely a pretext while the actual reason was her retirement age.

The Defender concluded that the employer had indeed taken age into account when selecting redundant employees. The employer preferred maintaining the jobs of female employees with minor children because the employer was convinced that employees of retirement age had at least some income (old-age pension). The Defender further stated that, beyond reasonable doubt, the employer directly discriminated on the grounds of age.[175] This conclusion was subsequently confirmed by the court, which declared that the dismissal was invalid on grounds of discrimination.[176]

As follows from the above case, it can sometimes be difficult for employers to choose an employee to be dismissed for redundancy. In the given case, the employer had a choice between a woman of pre-retirement age and a woman with children, i.e. between two female employees who might find it very difficult to find a new job. It is understandable if an employer is reluctant to dismiss a mother with young children. Moreover, in this case, it may seem that there is no safe choice for the employer – both employees belong to protected groups of employees and could feel discriminated against by the employer's decision.

- Yet, there is a solution to this seemingly unsolvable situation. It is clear from case law that discriminatory criteria must not play any role in the selection of a redundant employee. Hence, it is up to the employer to set clear non-discriminatory criteria for selecting a redundant employee in similar cases (e.g. the quality of the work done). This procedure can be recommended whenever a redundant employee has to be selected within an organisational change.

- The employer may also always try to achieve a reduction in the number of employees by agreement (see subchapter 8.4).

8.3.2 Dismissal of an employee with disability

Employees with disabilities may be dismissed under the same conditions as other employees. However, employers should be cautious if the dismissal relates to the employee's disability.

Disability differs from other protected characteristics in that it can be a reason for dismissal. While, as a rule, it is not permissible to give notice of termination to an employee simply because he/she is, for example, a man or a Christian, **disability may be a reason for the termination of employment if it results in the employee's long-term loss of medical fitness to perform the work assigned.**[177] This situation is comparable to the selection of a new employee, where a job seeker's disability may also be a reason for his/her rejection (see subchapter 1.5.2).

The situation can also be likened to the process of choosing a new employee in that the decision that the employee has lost his/her long-term medical fitness should, as a rule, be made by a physician during an occupational medical check-up. Although the Supreme Court admits in its most recent case law that an employer may validly terminate an employment due to the loss of medical fitness even without such a report,[178] I recommend that employers send an employee for an **extraordinary occupational medical check-up** if there is any doubt as to the employee's medical fitness. Within this check-up, the employee's medical condition will be assessed by a professional. If the physician concludes that the employee has lost his/her medical fitness to work, this significantly lowers the likelihood of a court reaching the opposite conclusion if the validity of

175. Report of the Public Defender of Rights of 26 January 2016, File No. 8024/2014/VOP, available (in Czech and English) at: http://kvopap:81/KVOPEsoSearch/Nalezene/Edit/19219.

176. Resolution of the Supreme Court of 22 October 2019, File No. 21 Cdo 2662/2019, available (in Czech) at: https://nsoud.cz/.

177. See the grounds for termination defined in Section 52(d) and (e) of the Labour Code.

178. See judgment of the Supreme Court of 30 May 2022, File No. 21 Cdo 530/2022, available (in Czech) at: https://nsoud.cz/.

the termination is challenged.[179] The procedure of an employer who dismisses an employee on the basis of the conclusion made during an occupational medical check-up will also generally be less suspicious in terms of the prohibition of discrimination on grounds of disability.

In assessing whether the given employee has in fact become medical unfit to perform work, both the employer and the occupational medical services provider must take into account **the employer's obligation to adopt reasonable accommodations.** A situation may arise where an employee is indeed unable to perform the work assigned due to health limitations without the employer taking the necessary accommodations, but if such an accommodation were taken, the employee could continue working. In such a case, the employer should adopt the accommodation requested (if this is within the employer's means, i.e. it is in fact a reasonable measure), rather than dismiss the employee. Otherwise, in my opinion, the court would find the notice of termination invalid.

✗ Roman is visually impaired and works mostly on a computer. This impairment gradually gets worse. Thus, after several years, the defect cannot be compensated by glasses and Roman cannot properly see the work on the computer. He could continue working only if his computer was equipped with a special program for people with visual impairment. Roman therefore asked his employer to purchase the software. Even though it would not have been a major financial burden for the employer to purchase the program, instead of the employer's help, Roman received a notice of termination due to a loss of medical fitness.

The employer must always bear in mind that sending an employee for an (extraordinary) occupational medical check-up does not release the employer from the obligation to provide reasonable accommodations. When writing a request for the check-up, the employer must already consider what reasonable accommodations will be adopted, has already been adopted, or may be adopt in relation to the relevant employee. When assessing the employee's medical fitness, the medical assessor must take into account the specific working conditions stated in the employer's request.[180] Thus, for example, a physician cannot conclude that an employee is medically fit subject to a particular condition if that condition is in direct conflict with the work conditions specified by the employer in the request for check-up.[181] If the employer fails to formulate the request while taking account of reasonable accommodations, the medical assessor may be forced to conclude that the employee has become medically unfit to perform work despite his belief that under certain conditions, the employee would be medically fit.

The Defender dealt with the case of a teacher with a visual impairment. Due to her significantly limited vision, she had long been excluded from supervising activities in the school (e.g. hallway supervision) or outside of school (e.g. supervising school trips). Once new school management was appointed, the employee got word that the headteacher wanted to get rid of her because of her disability. The employee began to feel discriminated against. She suspected discrimination in, among other things, the fact that the headteacher had sent her for an extraordinary occupational medical check-up and stated "work during the day, inside and outside" in the request, even though this requirement did not correspond to reality and the employee could not work outside the school. The Defender found this procedure suspicious in terms of the prohibition of discrimination. As this was not the only suspicious behaviour, the Defender concluded that the employer had committed discrimination.[182]

Even in a situation where an employee is found medically unfit to perform work under the employment contract and there is no reasonable accommodation available that would enable the employee to continue

179. Although it cannot be ruled out that even if a physician determines during an occupational medical check-up that the employee in question has lost his/her medical fitness to work, the court might reach the opposite conclusion in the proceedings over the invalidity of the termination (typically on the basis of an expert report).

180. For more details, see e.g. Tomšej, Jakub. Pracovnělékařské služby (Occupational Medical Services). 2nd edition. Prague: Wolters Kluwer, 2018. Legal monographs. ISBN 978-80-7552-955-8.

181. Otherwise, the physician may be liable for damage incurred by the employer as a result of an incorrect report. The assessment may also be cancelled after a review.

182. Letter of the Public Defender of Rights of 28 August 2018, File No. 3381/2017/VOP, available (in Czech) at: https://eso.ochrance.cz/Nalezene/Edit/6168.

working, the employer cannot dismiss the employee without further considerations. In fact, the Court of Justice of the European Union has concluded in its decision[183] that if an employee becomes permanently unfit to perform his/her work due to a disability, an appropriate reasonable accommodation may constitute in reassigning the employee to another job if the employer has such a vacancy and the employee has the professional knowledge and skills required for such a job – according to this ruling, if an employee is found to be medically unfit, the employer should primarily proceed in accordance with Section 41(1)(a) and (b) of the Labour Code, i.e. reassign the employee to another job.[184] The employer should only proceed with termination if there is no suitable vacancy or the employee does not want to be transferred to the job proposed by the employer.

It can, of course, be argued that a reassignment as the employer's unilateral legal act is not an ideal form of a reasonable accommodation. Although the employer must ensure that the new job is suitable for the employee in terms of his/her medical condition, abilities and, if possible, qualifications, the employee may not be interested in the new job. Moreover, the reasonable accommodation consisting in reassignment of an employee should not serve as a means for the employer to avoid paying severance pay in the event of an accident at work or occupational disease. These doubts were dispelled by the Supreme Court.[185] In the court's opinion, the reassignment to a job other than the one agreed with the employee in the employment contract is only a temporary solution to the situation. If the employee does not agree to the reassignment, the change in the type of work cannot be permanent. In such a situation, the employer has no choice but to terminate the employment, while the right to severance pay is preserved.

In the given case, the employee worked as a track maintenance technician. After he started with the job, he was diagnosed with a heart disease and had a pacemaker implanted. This device is sensitive to the electromagnetic field that is found on railway tracks. Thus, the employee could not spend too much time around the tracks and, therefore, according to the medical report, he was no longer able to perform the work for which he had been hired. In his report, the medical assessor stated that the employee could be reassigned to another job, provided that the job was moderately demanding without exposure to electromagnetic fields.

Discrimination on the grounds of disability may also occur in the case of other grounds of termination, e.g. in the case of redundancy or in the case of dismissal on the grounds of unsatisfactory results of work. If an employee is selected as redundant or is dismissed due to lower productivity (i.e. on the face of it, a reasonable and non-discriminatory reason), and the employee's lower productivity was caused by the employer's refusal to take a requested reasonable accommodation, such a dismissal would constitute discrimination.[186]

8.4 By mutual agreement

Termination of employment by mutual agreement is one of the simplest and most flexible ways of terminating employment. It provides employers with room for dealing with situations that would otherwise be difficult to resolve.

The previous chapter provided an example of an employer who had to dismiss an employee as a result of an organisational change. The employer had to decide whether to dismiss a staff member of retirement age or one with small children. The employer gave notice to the older employee, stating that the loss of employment would not be so financially painful, as she was eligible for an old-age pension. This practice was discriminatory.

183. Judgment of the Court of Justice of the European Union of 10 February 2022, HR Rail SA, C-485/20

184. The decision of the Court of Justice of the European Union opposes an earlier decision of the Supreme Court. In its resolution, the Supreme Court concluded that the Labour Code did not prefer an employee's reassignment over his/her dismissal. In the court's opinion, it was therefore up to the employer whether to reassign the medically unfit employee or give him/her a notice. However, in interpreting the relevant provisions of the Labour Code, the Supreme Court failed to take into account the employer's obligation to take reasonable accommodations. Resolution of the Supreme Court of 3 November 2016, File No. 21 Cdo 1276/2016, available at: https://nsoud.cz/.

185. Resolution of the Supreme Court of 3 November 2016, File No. 21 Cdo 1276/2016, available (in Czech) at: https://nsoud.cz/.

186. Judgment of the Court of Justice of the European Union of 11 September 2019, DW v Nobel Plastiques Ibérica SA, C-397/18.

Especially in cases like this, agreements can be a suitable tool for an employer to achieve the objective of reducing the number of full-time workers without discrimination. The employer may also take discriminatory criteria into account to some extent. An agreement to terminate employment is not the only option in this regard, as a reduction in the number of full-time workers can also be achieved by the employer agreeing with employees to reduce their working hours.

In the case at hand, the employer could have, e.g., asked the employee of a retirement age subtly how long she planned to continue working and whether she would consider the possibility of part-time work. For example, part-time work can be a good way for employees of pre-retirement and retirement age to stay active and become financially secured while getting more rest. For example, if the employee had stated that she was planning to stay with the employer only until the end of the year, the employer could have motivated her to voluntarily leave earlier by offering her severance pay. If the employee had showed interest in part-time work and the employer had also agreed on a temporary reduction in working hours with the employee with small children, both employees could have continued working for the employer.

Employment should only be terminated by agreement should based on genuine consensus of the parties. In practice, there are cases where employers use various ways to try and force employees into signing such an agreement. For example, they often falsely claim that if the employees do not sign the agreement, they will be given notice that will be less favourable for them. In other cases, employers' threats are less sophisticated – they simply inform employees that if they do not agree to terminate their employment, the employer will make their jobs so unpleasant that the employees will give notice themselves. Indeed, some employees will agree to terminate the employment by agreement after being bullied or harassed for a long time, as they can see no other solution than to terminate their employment as soon as possible. Employees are also often pressured to make a decision on the spot – to sign the agreement immediately, without having the time to consider their actions or to consult someone.

Parents returning from parental leave are also often presented with an offer of termination of employment by agreement.

The Defender has dealt with the case of a female primary school teacher who was employed for an indefinite term. During her maternity and parental leave, she was in contact with the headteacher, and she understood from their communication that the headteacher was relying on her return. The headteacher even tried to persuade her to return to work earlier. However, when the employee met with the headteacher before the end of her parental leave to discuss the details of her return, the headteacher presented her with an agreement on the termination of her employment. The headteacher explained that after the employee had gone on maternity leave, she had hired two new teachers for an indefinite term (one as a substitute and one in relation to the expansion of teaching) and did not plan to change anything in the functioning of the team. The agreement included a severance pay in the amount of twice the average monthly earnings. When the employee was reluctant to sign the agreement, the headteacher started to be more personal and reproached her for shortcomings in her work, even though she had always praised the employee before she went on maternity leave.[187]

Further, termination of employment by agreement should not be used by employers to avoid their obligations in cases where it is in fact an alternative to unilateral termination. Typically, some employers try to avoid the obligation to pay statutory severance pay.[188] Although it is not necessary to give reasons for the termination of employment by agreement, the employer should do so in some cases. Providing the reason may affect the amount of unemployment benefits, something that employees may not be aware of.[189]

187. Letter of the Public Defender of Rights of 19 February 2018, File No. 1075/2018/VOP.

188. Section 67 (1) of the Labour Code.

189. Section 50 (3) of the Employment Act.

Consequences of discrimination

Discrimination against employees is prohibited by law. In practice, however, violation of this prohibition by employers does not always have legal consequences, i.e., the sanctions regulated by anti-discrimination law. The discriminatory motive is often well hidden and there are cases where the victims of discrimination may not be even aware that they have been discriminated against. Typically, this is true of the area of access to employment – for example, the employer excludes all older employees from the incoming CVs and does not contact the excluded job seekers in any way. In such a case, the unsuccessful job seekers can only guess why they were not selected, especially if they cannot find out who ultimately got the job (e.g. that it was a younger employee who does not have the experience or education required in the advertisement). There are also cases where even the originator of discrimination may not be aware that the decision was influenced by a discriminatory motive. Discrimination is often caused by stereotypes that may be so preconceived that we are not even aware of how much they influence our decision-making.

However, in addition to legal consequences, discrimination also has other repercussions. Some of them manifest themselves independently of whether or not the discriminatory conduct remains hidden. As the Defender, I am primarily concerned with the consequences of discrimination that are laid down in the law; however, I will also briefly mention the non-legal consequences below.

I cannot but note that discrimination primarily affects the lives of the victims of discrimination and that our entire society suffers as a result of discrimination. This topic deserves more space than I can devote to it in this Recommendation. However, I believe that the average empathic person should be able to put themselves in the shoes of a person who is rejected or disadvantaged simply on the basis of their gender, the place or time when they were born, who their parents are, what they believe in or who they love. Discrimination at work will significantly affect everyone's life – after all, we spend a lot of our time at work and, for many people, work is the primary source of finance, self-worth and social contacts. Even small slights, rejecting approach or just a contemptuous attitude can make the life of a discriminated person very unpleasant. More serious forms of discrimination, especially long-term harassment, may lead to damage to mental and physical health and, in some cases, even to suicide. Discrimination also results in maintaining (or even exacerbating) the existing inequalities in society. In connection with the economic impact, which is caused, among other things, by the untapped potential of many employees, it is not an exaggeration to talk about the negative impact of workplace discrimination on society as a whole.

9. Consequences of discrimination for employers

9.1. Penalties for the violation of the prohibition of discrimination

The negative consequences of violating the prohibition of discrimination are already mentioned in several parts of this Recommendation. I will only briefly summarise them at this point.

By discriminating against an employee, the employer commits an administrative infraction carrying a possible fine. Compliance with the right to equal treatment is supervised by labour inspectorates (i.e. the State Labour Inspectorate and eights district labour inspectorates). They may carry out an inspection at the employer's organisation on the basis of an inspection plan, but more often they inquire into a potentially discriminatory conduct on the basis of a complaint. Virtually anyone – a discriminated employee, his/her colleagues, client or business partner – can report workplace discrimination to the labour inspectorates.

Infractions in the area of equal treatment are defined in the Employment Act and in the Labour Inspection Act. The Employment Act prohibits discrimination in access to employment.[190] Employers may be fined for violating this prohibition, especially if they **reject a job seeker on the basis of a protected characteristic** (see Chapter 1) or if **they publish a discriminatory job offer** (see subchapter 2.1). The fine can be up to CZK 1,000,000.[191] The Labour Inspection Act states that any discrimination against an employee constitutes an administrative infraction. **Therefore, if an employer commits discrimination at any time from the conclusion of the employment contract to the termination of employment, the employer may be fined under this Act.** This may include discrimination in the form of unequal pay, failure to take a reasonable accommodation, termination of employment during a trial period, provision of a less favourable type of contract or harassment. The Act also explicitly states that **retaliation and failure to ensure equal treatment** (see subchapter 7.2) also constitute discrimination, all of which can result in fines of up to CZK 1,000,000. Failure to investigate a complaint filed by an employee is also an infraction, carrying a fine of up to CZK 400,000. [192]

In addition to being penalised by governmental authorities, employers who commit discrimination also faces the risk that their (former) employee will take the case to court. Most often, this will be an **anti-discrimination action**, but discrimination may also be claimed in other types of lawsuit (e.g. an action for declaring termination of employment invalid). By filing an anti-discrimination action, a discriminated employee can claim that:

- the employer refrain from the discriminatory conduct (e.g. to prevent ongoing harassment);
- the consequences of the discriminatory conduct be remedied (e.g. that the employee is retroactively paid the remuneration lost as a result of the discriminatory conduct);
- the employee be provided with reasonable satisfaction (typically an apology for discrimination, which may be published on the employer's website or in a newspaper); and
- the employee be compensated for intangible damage in cash.

Research into the decision-making practice of Czech courts and the Defender's experience show that courts usually do not award the victims of discrimination staggering amounts of money as compensation for intangible damage. The compensation awarded is most often in the tens of thousands, or in the lower hundreds of thousands at most.[193] **However, discrimination disputes are often very long**, which owes to the fact that the cases return to lower instances after an intervention by superior courts. The risks of an unsuccessful court

190. Sections 4 and 12 of the Employment Act.

191. Section 140 (4)(a) of the Employment Act.

192. Section 24 of the Labour Inspection Act.

193. Survey Report of the Public Defender of Rights "Decision-making of Czech Courts in Discrimination Disputes 2015–2019" of 24 September 2020, File No. 61/2019/DIS, available (in Czech and English) at: https://eso.ochrance.cz/Nalezene/Edit/9478.

dispute thus also include considerable sums expended on the lawsuit as such, especially the costs of legal representation. If unsuccessful, i.e. if discrimination is confirmed by the court, the latter may also order the employer to reimburse the employee for the legal costs.

Another potential risk of court disputes lies in the media attention that is often associated with discrimination disputes. **The employers may thus receive unwelcome media attention and their carefully built reputation may be tarnished.**

In the context of court proceedings, employers should also be advised that the **burden of proof is shared in discrimination disputes**.[194] This compensates for the plaintiff's procedural disadvantage in discrimination actions. The idea is that proving (discriminatory) motivations is difficult if not impossible for the plaintiff.[195] It is easier for the defendant to prove a fact justifying a legitimate motivation.

However, the fact that the burden of proof is shared does not mean that it would be sufficient for the employee to state in court that he/she felt discriminated against by particular conduct. The plaintiff must adduce evidence to the effect that he/she has been treated unequally and specify the circumstances indicating that the reason lay in one of the prohibited protected characteristics. Whether the plaintiff has presented circumstances suspicious enough to justify a shared burden of proof must be assessed on a case-by-case basis. However, if the plaintiff adduces the evidence required and makes relevant allegations, the onus will be on the employer to prove that there was no discrimination.

- If the violation of the prohibition of discrimination claimed by the employee indeed occurred, I recommend that employers try to resolve the matter amicably. An amicable solution is usually beneficial for both parties – it is faster and usually cheaper.

- Avoiding a court dispute is advantageous for the employer even in cases where discrimination has occurred, but the employee is unlikely to have sufficient evidence to prove the discriminatory conduct in court. Even if the employer is successful in the court dispute, the lawsuit may have negative consequences for the employer, most often in the form of time and money spent and the unwelcome media attention.

9.2 Other consequences of discrimination

As regards the other consequences of discriminatory conduct, these will always depend on the specific nature of the discrimination. Rejecting a job seeker on the basis of a protected characteristic will have different consequences than long-term harassment that can lead to a feuding and dysfunctional work team. Moreover, it is difficult to examine and describe the consequences of discriminatory conduct in more detail in view of the fact that discriminatory conduct is often hidden. The following list therefore only briefly summarises some of the consequences for employers that may be associated with discriminatory conduct.

Workplace discrimination can result in:

- failure to utilise the potential of employees / job seekers;

- loss of key staff and higher turnover;

- damage to the employer's reputation;

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

195. The discriminatory motivation is only rarely explicitly expressed. As a matter of fact, this was confirmed by the Constitutional Court when it commented on evidence-taking in discrimination cases: "The notion that such motivation would be explicitly communicated to the affected individual is illusory. Although such a situation can occur, it is an exception rather than a rule in everyday reality. Discriminatory conduct often happens under a certain pretence that could, in itself, stand as a justification for different treatment." (Judgment of the Constitutional Court of 22 September 2015, File No. III. 1213/13, paragraph 33, available at: https://nalus.usoud.cz).

- deterioration of workplace relations, increased stress and the associated decline in productivity and efficiency, more frequent absences;
- lack of trust in the company's management; and
- financial losses resulting from the above.

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