



**ombudsman**

veřejný ochránce práv

File. No.: 1047/2017/VOP/KS  
Ref. No.: KVOP-13045/2018  
Date: 28 March 2018

Dear Madam,

I would like to inform you about the result of an inquiry initiated on the basis of your complaint filed in February 2017. In the complaint, you asked me for assistance in the matter of alleged humiliating and offensive behaviour on the part of your former colleagues and supervisors at X., s. r. o. (hereinafter also the “former employer”). You are convinced that this behaviour was directly connected to your gender identity, and therefore consider it discriminatory in the context of your employment relationship.

You worked with your former employer as Economic Researcher since 2008 and your experience was very positive at first. In 2014, you started your real life test in connection with your planned sex reassignment surgery. According to your statements, the gradual changes related to your gender identity<sup>1</sup> made you fall victim to harassment by your colleagues and supervisors’ abuse both in and outside the workplace. As your mental health was deteriorating, you handed in your notice in October 2016.

I reached the conclusion that the **evidence collected in your case does not indicate that you had been subjected to (sexual) harassment within the meaning of the Anti-Discrimination Act,<sup>2</sup> on the basis of your gender identity.** I am also convinced that your former **employer did not violate its duty under the Anti-Discrimination Act with respect to the suspected discrimination consisting in (sexual) harassment in the workplace.**

### Gender identity as a discrimination ground

An individual’s gender identity means an identification with a specific gender, the feeling of harmony or discord with one’s own body, sex characteristics and social roles assigned to the relevant gender.<sup>3</sup> It is reflected in the person’s thoughts, feelings and behaviour, constituting a fundamental aspect of their life, a part of their intimate sphere and an inherent component of their dignity.<sup>4</sup> It is not a person’s choice or wish. Every individual has a gender identity; however, people whose gender identity is inconsistent with the majority society’s expectations from with their sex assigned at birth may face unequal treatment. The Anti-Discrimination Act does not include gender identity as an independent discrimination ground, but subsumes

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1 You identify as an intersexual, according to your statements.

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

3 FIFKOVÁ, Hana. *Transsexualita: diagnostika a léčba. (Transsexuality: diagnostics and treatment)*. 1<sup>st</sup> edition. Prague: Grada, 2002, ISBN 80-247-0333-5, page 13.

4 KVASNICOVÁ, Jana, ŠAMÁNEK, Jiří *et al.* *Antidiskriminační zákon. Komentář. (Anti-Discrimination Act. A Commentary)*. 1<sup>st</sup> edition. Prague: Wolters Kluwer, a. s., 2015, ISBN 978-80-7478-879-6, page 155.

it under “sex” – a ground that is expressly included in the Act.<sup>5</sup> The protection under this ground extends to persons who underwent, or are preparing to undergo, a sex reassignment surgery<sup>6</sup> as well as to persons who do not intend to do so, whether in the present or in the future.<sup>7</sup>

According to your statements, you identify as an intersexual. In the past, you were dissatisfied with your physical appearance and assigned gender and, therefore, you decided to take steps to change your sex in 2013. You completed this process in 2015, when you underwent a sex reassignment surgery, followed by a complete change of sex in official documents. Currently, you live as a woman, in alignment with your identity.

Since you underwent both the sex reassignment surgery and the change of sex in official documents, **you** enjoy the **protection extended by the Anti-Discrimination Act in the area of discrimination on grounds of gender identification (i.e. sex)** in all the areas of life listed in the Act.<sup>8</sup> These include **employment and public service relationships**, among others.

### Discrimination in the form of (sexual) harassment in the workplace

The forms of discrimination prohibited under the Anti-Discrimination Act in the area of employment and public service relationships include harassment. Harassment consists especially in undesirable behaviour related with a discrimination ground defined in the Act (i.e. also with sex, or gender identification), where the behaviour aims at, or results in, a violation of dignity of the person and creation of an intimidating, hostile, humiliating or even offensive environment.<sup>9</sup> The definition of sexual harassment is analogous. The distinctive aspect of sexual harassment is that the behaviour is sexual in its nature.<sup>10</sup> Since the Act defines (sexual) harassment as a behaviour, rather than an act, this means that harassment can consist in any external expression of a person regardless of the will or motivation to harass someone.<sup>11</sup> Harassment can thus also be accidental or unintentional. The important factor is the result of the behaviour, i.e. violation of one’s dignity (as a part of the person’s humanity and fundamental essence) and creation of an environment defined in the Act, i.e. an environment that is intimidating, hostile, humiliating or offensive. This means that, apart from the subjective component of (sexual) harassment consisting in subjectively perceived violation of one’s dignity, harassment also has an objective component consisting in creation of an environment that would be considered unusual and undesirable also by other persons in the same position.

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

6 This also follows from the EU anti-discrimination directives, or rather the respective case law in which the Court of Justice of the European Union interpreted certain issues related to transsexuality.

7 This interpretation is expressly stated in the explanatory memorandum regarding the Anti-Discrimination Act. See the explanatory memorandum regarding draft Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws (the Anti-Discrimination Act). In: *ASPI 2015 version* [legal information system]. ©2000–2015 Wolters Kluwer ČR, a. s. [quoted on 28 February 2018]. ISSN 2336-517X ASPI ID: LIT32375CZ.

8 Section 1 (1) of the Anti-Discrimination Act.

9 *Ibid.*, Section 4 (1)(a)

10 *Ibid.*, paragraph 2. The Defender dealt in detail with the issue of sexual harassment also in her report related to a case of sexual harassment of a trainee attorney-at-law. Cf. The Public Defender of Rights’ Report on a Case Where Discrimination Was Found of 6 April 2017, File No. 2569/2016/VOP; available at <http://eso.ochrance.cz/Nalezene/Edit/4958>.

11 KVASNICOVÁ, Jana, ŠAMÁNEK, Jiří *et al.*, *op. cit.*, page 187.

Both of these components must be present at the same time for a certain behaviour to qualify as harassment.

In your complaint and its supplements, you identified certain situations in the workplace which you believed constituted (sexual) harassment. These generally included:

- the behaviour of your superior manager, Mr Y., consisting especially in disparaging the results of your work in connection with the changes in your gender identity, psychological extortion, inappropriate questions (e.g. regarding the details of your sex reassignment surgery) and comments related to your sex change and generally with your gender identity;
- and behaviour of other colleagues in the workplace, consisting especially in insults, threats, inappropriate looks (including when you were changing your clothes), ridicule, questions and comments, all motivated by your gender identity.

You have stated that all these expressions were merely verbal or physical and you have no evidence at your disposal (written records or witnesses) to corroborate your assertions.

You also allege that you were harassed by the responsible employees who did not allow you to use the ladies' lavatories in connection with your real life test, and only gave you the key to the lavatories for persons with disabilities, which were located on a different floor.

It is obvious that you subjectively considered certain events that transpired in the workplace as a violation of your dignity. You considered them insulting, humiliating and felt intimidated as a result. These feelings also gave rise to your psychological problems diagnosed by your specialised physician in 2016. However, based on the documents you submitted to me for assessment, I am not able to determine whether also the objective component of harassment was present, i.e. whether an environment was created that also other persons in the same situation would consider unusual and undesirable, as the Act requires. There are certain facts that may have played a role in your perception of the situation, including the language barrier (i.e. that you do not speak Czech) or the fact that you are a generally more sensitive and perceptive person. The changes you were going through may also have been new and unusual for your colleagues and, at first, they may have been unsure about how to behave and express themselves in your presence. The evidence presented by the employer only shows that Mr Y. was friendly and kind to you in your e-mail correspondence. Since most of the situations you described have not been objectively recorded in any manner (and it is therefore a "your word against theirs" kind of situation) and you are not able to document them, **I have obtained no evidence in the course of the inquiry suggesting that you were subjected to (sexual) harassment in the workplace.**

Regarding the **problem with the access to the ladies' lavatories**, I must note that I **do not consider the situation discriminatory**. Your former employer allowed you to use the ladies' lavatories after your coming out and the key to the lavatories for persons with disabilities was given to you only at your express request. The employer is able to document this by virtue of e-mail correspondence.

### **Duties of the employer in connection with harassment in the workplace**

The prohibition of discrimination in the form of (sexual) harassment in the area of employment exceeds the relationship between the harassing person (this can be anyone in the workplace) and the harassed person and is, by definition, reflected in the underlying relationship between the employee and the employer under labour law. This prohibition of discrimination manifests

in that the employer, as the person for whom the employee agreed to perform dependent work,<sup>12</sup> is obliged to immediately take sufficient steps to prevent suspected (sexual) harassment in the workplace (e.g. if the employer suspects harassment based on an employee's complaint).<sup>13</sup> In this way, the employer can avoid liability for violation of the prohibition of discrimination. The employer should choose the steps in view of their goal (i.e. to end the harassment), but also in view of the specific situation in the workplace, e.g. the degree to which the situation is serious and sensitive.

You contacted your former employer (or rather the competent departments), informing it that you felt (sexually) harassed in the workplace. You requested that the matter should be investigated and the employees you identified should face appropriate repercussions; you also requested that all the employees should be advised of your situation. You also state that you requested not to be left alone with Mr Y. in the same room. You asked to work from home more often than your employer had offered in order to avoid situations where you felt harassed. According to your statement, the employer failed to take any measures, or rather you considered the measures insufficient.

The statement of your former employer yielded the following information:

- In late 2013, the competent staff informed your colleagues that you intended to start the real life test, explained this situation to them and advised them as to how to behave towards you in this connection.
- The employer only learned that you considered the conduct of some of your colleagues harassing in June 2014 (in connection with your sudden suicidal tendencies). Up to that point in time, the employer had not been aware of any of your complaints, and you have not been able to prove that you raised any such complaints.
- After these events, the employer held a series of discussions with the employees, but found no evidence for your specific allegations (the colleagues' story was different, with their word against yours) and the employer thus saw no reason to take any steps regarding specific employees.
- The employer then regularly met with you (through a member of the HR staff, Ing. Z.) to discuss the issue. However, on the meetings you only discussed the situations that had taken place in the first half of 2014 and you raised no further complaints. The employer held another meeting where it explained to the employees how they should behave towards you.
- After you contacted the international HR representation in London, the approach and conduct of Mr Y., your manager, was independently reviewed in late 2014. However, no inappropriate conduct on the part of Mr Y. was found.
- The international HR representation of the company (namely Ms A.) also discussed your complaints with you and held video conferences to discuss your problems and seek appropriate solutions. Certain remedial measures were adopted. These included, e.g., a

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12 Section 7 of Act No. 262/2006 Coll., the Labour Code, as amended

13 The employer is obliged to act so as to prevent (sexual) harassment. Pursuant to Section 5 (3) of the Anti-Discrimination Act, an employer is generally obliged to provide for equal treatment with respect to the right to employment. More specifically, it follows from the Recitals 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 that employers should be encouraged to take measures to combat all forms of discrimination on grounds of sex. In this respect, cf. BOUČKOVÁ, Pavla et al. *Antidiskriminační zákon: Komentář* (Anti-Discrimination Act. A Commentary). 2<sup>nd</sup> edition. Prague: C. H. Beck, 2016, p. 238.

measure aiming to ensure that you and Mr Y. would not be left alone in the same room (to the extent to which this was possible).

- The former employer gave you a time off around the date of your sex reassignment surgery and you were not required to come to work. Later, you continued to be provided with a time off to undergo medical treatments in connection with your sex reassignment surgery. After that, you and your former employer agreed that you could work from home twice a week, but you were later actually allowed to work remotely more often, based on *ad hoc* arrangements, which the former employer can document by means of e-mail communication between yourself and Mr Y., your manager. You were not required to come to work during the notice period. You never asked for any modifications beyond the *ad hoc* individual arrangements (e.g. a review of the original agreement on the scope of homeworking) and you have not been declared unfit to work, i.e. you were able to go to work. Your former employer only learned of your psychiatric diagnosis in connection with your notice of termination (you have not submitted any medical report predating the report of October 2016 either).

Even though you have been invited to do so and have been provided with a sufficient period of time, you provided no documents or other evidence to refute the employer's assertions. The employer, on the other hand, provided evidence to support its statements.

In view of the above, I am convinced that the employer adopted measures sufficient to either verify or refute your suspicions in the given situation and to stop or prevent any further harassment. **Therefore, I do not believe that the former employer violated its duties under the Anti-Discrimination Act in your specific case.**

I would also like to note the following. You and your former employer both stated that the international HR representative of your former employer also offered you professional mediation to address your complaints and dispel your fears. Specifically, your former employer offered you three appointment dates in December 2014, but none of them suited you, probably for health reasons. The mediation thus never took place. I believe that the employer could and should have put more efforts in ensuring that the mediation actually took place at a time convenient for you. However, this lack of effort cannot change my conclusion stated above.

### Recommendations for the employer

In spite of the above conclusions, I **recommended** to your former employer **to be more resolute and active if it learns of any suspected (sexual) harassment motivated by any grounds of discrimination** in the future. This is because new situations could occur where offering appointments dates for mediation when the complainant cannot come for objective reasons could be interpreted as a "token" attempt to find a solution (i.e. a formal step that does not lead to an actual resolution of the situation).

I consider it important to comment on this issue despite the fact that it does not fall within my statutory competence (given my duty to contribute to enforcement of the right to equal treatment). In this connection, I would also like to mention the provisions of the Labour Code which stipulate that discussing a complaint means an exchange of opinions and explanations with the aim of reaching an agreement, where the employer is obliged to take appropriate measures to ensure that the employees are able to express their opinions.<sup>14</sup> For example, the Supreme Administrative Court confirmed a decision of the District Labour Inspectorate

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14 Section 278 (3) of the Labour Code

to impose a fine on an employer for its failure to discuss an employee's complaint about workplace bullying. The employer failed to discuss the complaint because the employee was unfit to work, despite the fact that the employee's physician allowed her to leave home and the employee offered to use the time to discuss the complaint. The competent bodies interpreted this as the employer's intentional attempt to avoid discussing the complaint.<sup>15</sup>

## Conclusion

Dear madam, within my role consisting in providing methodological assistance to victims of discrimination I am competent to preliminarily assess whether or not certain behaviour constitutes discrimination under the Anti-Discrimination Act. In view of the above, I have decided to close your case with the conclusion that **in the present case, X., s. r. o. did not violate its duty under the Anti-Discrimination Act in connection with the suspected discrimination consisting in (sexual) harassment in the workplace.** I will also inform your former employer accordingly through its legal counsel.

I understand that the past years were everything but easy for you and that the significant events that took place in your life in connection with your sex change made you very vulnerable. I hope that you feel content with your professional and personal life now.

If you wish to comment on my conclusions, please do so within **30 days of delivery of this letter.**

Sincerely,

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

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<sup>15</sup> Judgement of the Supreme Administrative Court of 30 December 2014, Ref. No. 4 Ads 211/2014-36. NSS; [http://www.nssoud.cz/files/SOUDNI\\_VYKON/2014/0211\\_4Ads\\_1400036\\_20150122124259\\_prevedeno.pdf](http://www.nssoud.cz/files/SOUDNI_VYKON/2014/0211_4Ads_1400036_20150122124259_prevedeno.pdf)