Record card

File number	1966/2016/VOP
Area of law	Discrimination – labour and employment
Subject	Remuneration
Type of finding	Report on a case where discrimination was found – Section 21b
Result of inquiry	Discrimination found
Relevant Czech legislation	155/1995 Coll., Section 29, Section 32 262/2006 Coll., Section 16 198/2009 Coll., Section 1 (1)(c), Section 2 (3), Section 5 (1), Section 6 (3) 198/2009 Coll., Section 10
Relevant EU legislation	78/2000/ES, Article 6
Date of issue	26 January 2018
Date of filing	23 March 2016

Headnote

I. **As a recurring cash benefit provided to a person within dependent activities, the employer's contribution towards supplementary pension insurance constitutes remuneration within the meaning of Section 5 (1) of the Anti-Discrimination Act.**

II. The entitlement to the old-age pension arises upon reaching the elderly age specified by the law. If a particular measure applies exclusively to persons receiving the old-age pension, it constitutes a criterion inseparably and directly linked to a prohibited discrimination ground.

III. A provision of a collective bargaining agreement containing a rule according to which recipients of the old-age pension are not entitled to the employer's contribution towards supplementary pension insurance – although the nature of the work performed by them does not justify this in any way – is at variance with the principle of equal treatment.

IV. A provision of a collective bargaining agreement comprising rules for salary raises which are less favourable for employees who receive the old-age pension – although the nature of the work performed by them does not justify this in any way – is at variance with the principle of equal treatment.

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

Document:

File No.: 1966/2016/VOP/BKU
Ref. No.: KVOP-4225/2018
Brno, 26 January 2018

Report on a case where discrimination was found
in terms of not recognising the entitlement of a recipient of the old-age pension recipient to the employer's contribution towards supplementary pension insurance

Mr A (hereinafter the "complainant") contacted me with a complaint in which he claimed unequal treatment on the grounds of his age. He felt discriminated against because, based on a provision of the applicable collective bargaining agreement, his former employer, X, a.s. (hereinafter the "employer") stopped providing him with a contribution towards supplementary pension insurance after the complainant had become a recipient of the old-age pension. Furthermore, he felt discriminated against by the rules enshrined in the collective bargaining agreement with respect to across-the-board increasing of employees' salaries.

The Public Defender of Rights Act[1] has entrusted to me competence *inter alia* in the area of the right to equal treatment and protection against discrimination.[2] Therefore, I assessed the objections raised by the complainant from the viewpoint of a potential violation of the Anti-Discrimination Act.[3]

When dealing with the case, I focused on assessing whether or not the employer committed discrimination by stopping to provide the complainant with a contribution towards supplementary pension insurance because the complainant had begun to receive the old-age pension. At the same time, I assessed the respective provisions of the collective bargaining agreement stipulating the rules excluding recipients of the old-age pension from the employer's contribution towards supplementary pension insurance.

Furthermore, I dealt with the question of whether or not the complainant was discriminated against on the grounds of his age in connection with across-the-board increases in salaries and whether or not the respective provisions of the collective bargaining agreement providing for an exemption from across-the-board increases in salaries applicable to recipients of the old-age pension were at variance with the right to equal treatment.

A. Summary of conclusions

A.1 Employer's contribution towards supplementary pension insurance

As a recurring cash benefit provided to a person within dependent activities, the employer's contribution towards supplementary pension insurance constitutes remuneration within the meaning of the Anti-Discrimination Act.[4] Employers must respect the principle of equal treatment of all employees in terms of remuneration.[5]

The entitlement to the old-age pension arises upon reaching the elderly age specified by the law.[6] If a particular measure applies exclusively to persons receiving the old-age pension, it constitutes a criterion inseparably and directly linked to a prohibited discrimination ground.[7]

A provision of a collective bargaining agreement containing a rule according to which recipients of the old-age pension are not entitled to the employer's contribution towards supplementary pension insurance – although the nature of the work performed by them does not justify this in any way[8] – is thus at variance with the principle of equal treatment.

The employer stopped paying the contribution towards supplementary pension insurance to the complainant because the latter had become a recipient of the old-age pension. The employer thus committed direct discrimination against the complainant on the grounds of his age.

A.2 Rules governing across-the-board increases in salaries

Employers are obliged to provide for equal treatment of all employees as regards remuneration (among other things).[9]

The entitlement to the old-age pension arises upon reaching the elderly age specified by the law.[10] If a particular provision of a collective bargaining agreement is less favourable for persons receiving the old-age pension, it constitutes a criterion inseparably and directly linked to a prohibited discrimination ground.[11]

A provision of a collective bargaining agreement comprising rules for salary raises which are less favourable for employees who receive the old-age pension – although the nature of the work performed by them does not justify this in any way[12] – is at variance with the principle of equal treatment.

However, the rules governing across-the-board increases in salaries did not apply to the complainant. The evidence gathered in this connection does not enable to prove with certainty that he was actually discriminated against by the employer in connection with salary increases.

B. Findings of fact

The complainant was employed by the employer for more than 40 years. His employment relationship was terminated in December 2015. In September 2014, he reached the age required by the Pension Insurance Act and started to receive the old-age pension. At the same time, in September 2014, the complainant agreed with the employer on a change to his employment relationship, specifically from an employment relationship established for an indefinite term to an employment relationship for a fixed term (until the end of 2015). The complainant thus became an employee subject to a contract with individual labour and salary conditions and, in this connection, he received a retirement bonus from the employer in the amount of CZK 8,000. Nevertheless, he continued to be the employer’s employee performing the same work within the same scope as before and, at the same time, he continued to save up under the so-called supplementary pension insurance,[13] towards which the employer paid a contribution for his employees under the respective provisions of the applicable collective bargaining agreement[14].

However, employees who had become recipients of the old-age pension were excluded from the entitlement to the employer’s contribution towards supplementary pension insurance pursuant to the collective bargaining agreement.[15]Therefore, the employer stopped paying the contribution to the complainant in September 2014. In 2014, the employer’s contribution paid to the complainant equalled CZK 1,400 per month.[16]

Furthermore, the collective bargaining agreement for 2015 stipulated different rules governing increases in tariff salaries of employees who did not yet receive the old-age pension, on the one hand, and employees who were the recipients of the old-age pension, on the other hand. The relevant provisions laid down an increase in tariff salary by CZK 300 per month for all employees, except for employees receiving the old-age pension. According to the collective bargaining agreement, the decision on a possible increase in salary for those employees was to be made by the respective division manager on a case-by-case basis.[17]

In 2015, the complainant was not a tariff employee because, in 2014, he became an employee subject to a contract with individual labour and salary conditions. Therefore, the rules governing across-the-board increases in salaries did not apply to him.[18]The decision on an increase in salaries for employees who were subject to individual employment contracts was made by the respective division manager on a case-by-case basis, where the average salary increase for non-tariff employees was supposed to equal CZK 300 per month. The complainant demonstrated that his salary had been increased only by CZK 200 per month. The employer did not state any further reasons for raising the complainant's salary by a below-average amount.

C. Legal analysis

C.1 Employer's contribution towards supplementary pension insurance

The entitlement to the old-age pension is inseparably linked to reaching a certain elderly age, as required by the law.[19]The contribution towards supplementary pension insurance is a component of remuneration [20] and, as such, it may not be made conditional on any specific age of employees. Where the employer sets and applies rules for paying contributions towards supplementary pension insurance which exclude employees who are, at the same time, recipients of the old-age pension – although the nature of the work performed by them does not provide any objective ground for this – the employer commits direct discrimination on the grounds of age.

C.1.1 Old-age pension and age as a discrimination ground

Age is one of the protected characteristics which may not serve as a basis to treat one person less favourably than another.[21]

Based on the collective bargaining agreement, employees who are, at the same time, recipients of the old-age pension are excluded from the possible entitlement to the employer's contribution towards supplementary pension insurance. Although the collective bargaining agreement does not explicitly refer to age as the criterion, by definition, the provision at hand applies 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.[22]The Court of Justice of the European Union (hereinafter "CJ EU") came to a similar conclusion when it held that the entitlement to the old-age pension was a criterion inextricably linked to age.[23]

The question of an entitlement to the old-age pension as a criterion excluding employees from obtaining possible extra benefits (contractual severance pay in the amount of fourteen times the average monthly salary) was also addressed by the Supreme Court.[24]The court concluded that, in fact, such a criterion affected especially the group of employees defined by the retirement age and, therefore, was based on age as a protected characteristic.

In this respect, it is irrelevant whether the employee who has become entitled to the old-age pension after reaching the required age actually receives the old-age pension or not (e.g. because he or she has not yet applied for the old-age pension or because it has not yet been granted to him or her for whatever reason). In both cases, he or she is "identifiable" by age as a protected characteristic and, therefore, entitled to equal treatment and remuneration on the same basis as other employees. Unequal treatment on the grounds of age in areas not related to public pension insurance scheme, such as remuneration for work in the case at hand, may not be justified by the State pension policy and/or statutory rules governing an entitlement to the old-age pension.

C.1.2 Contribution towards supplementary pension insurance as a component of remuneration

Remuneration is defined in Section 5 (1) of the Anti-Discrimination Act. According to said provision, remuneration means all cash and non-cash benefits provided to a person within a dependent activity. Remuneration thus means all claimable and non-claimable components of salary, including its optional components.[25]The employer is obliged to respect the principle of equal treatment of all employees in terms of remuneration.[26]

According to settled case law of the CJ EU[27], remuneration also means performance related to a dependent activity which does not necessarily have to constitute remuneration for work in the strict sense of the word; this may include, e.g., fare discounts, contributions towards pension insurance scheme, severance pay, bonuses, extra pay, social fund contributions. The prohibition of discrimination in remuneration applies even to rules governing remuneration.

Therefore, we cannot accept the argument presented by the employer according to which the contribution towards supplementary pension insurance constitutes a voluntary extra benefit [28] and, therefore, the rules relating to its payment may be set at the employer's sole discretion (or based on the results of the collective bargaining, where applicable).

It is, of course, at the sole discretion of the employer whether or not he decides to pay contributions towards supplementary pension insurance to his employees and, if so, in what amount and under what conditions. However, if the employer decides (or agrees in a collective bargaining agreement) to pay said contribution to his employees, the respective rules governing its payment may not be discriminatory because the contribution is a component of remuneration.

Indeed, the Supreme Court came to the very same conclusion in the decision cited in section C.1.1 hereof. Pursuant to that decision, a benefit may be made conditional on

fulfilling certain requirements in a collective bargaining agreement; however, those requirements may not be at variance with the law, including the principle of equal treatment and prohibition of discrimination. Otherwise, such provisions of the collective bargaining agreement are null and void due to their variance with the law.[29]

C.1.3 Assessment of permissibility of unequal treatment

According to the Anti-Discrimination Act, direct discrimination means an act or omission where one person is treated less favourably than another in a comparable situation based on any of the protected characteristics.[30]

However, discrimination in employment is not deemed to have occurred if there is an objective ground for the different treatment consisting in the nature of the work or activities performed, and if the respective requirements are proportionate to that nature.[31]

According to the collective bargaining agreement, employees who are, at the same time, recipients of the old-age pension, are not – as opposed to other employees – entitled to a contribution towards supplementary pension insurance. The withdrawal of the contribution towards supplementary pension insurance is expressly linked to the receipt of the old-age pension, according to the collective bargaining agreement. No other ground consisting in the nature of the work performed is mentioned in the agreement.

The employer stopped paying the contribution towards supplementary pension insurance to the complainant in the month when the complainant began to receive the old-age pension. The employer did not state any other reason for this (e.g. a change in the nature of the work performed by the complainant).[32]The complainant continued to perform the same work within the same scope for the employer as at a time when he had not yet received the old-age pension and when he had still been receiving the contribution towards supplementary pension insurance.

The employer substantiated the exclusion of recipients of the old-age pension from the entitlement to receive contributions towards supplementary pension insurance by stating that the contribution towards supplementary pension insurance was provided to employees in order to enhance staff stability and support the social policy programme as a form of an old-age security scheme. The employer believed that the exclusion of recipients of the old-age pension was an objective fact defining the rules for the contribution payment and that this was consistent with the purpose of the pension insurance.[33]

However, this cannot be regarded as an objective ground consisting in the nature of the work performed. The ground stated by the employer could be assessed, where appropriate, as an employment policy or labour market objective, as referred to in Article 6 of the Framework Directive.[34]However, it should be emphasised that said provision was implemented into the Czech legislation through the Anti-Discrimination Act, which goes beyond the Framework Directive in protection against discrimination in employment. Under the Anti-Discrimination Act, a permissible different treatment is only such treatment that is based on an objective ground consisting in the nature of

the work performed, and not treatment that merely pursues any legitimate aim whatsoever.[35]

The employer's substantiation of his decision not to pay the contribution towards supplementary pension insurance to recipients of the old-age pension, i.e. persons whose old-age social security is provided for by public a pension insurance scheme, was not based on the nature of the work performed. Thus, it does not meet the first requirement of permissible different treatment under the Anti-Discrimination Act. Therefore, it is no longer necessary to address the second requirement, i.e. the proportionality of this measure.

In view of the above, the decision to refuse paying contributions towards supplementary pension insurance to employees who are, at the same time, recipients of the old-age pension is not covered by the statutory exemption of permissible unequal treatment and, therefore, constitutes direct discrimination on the grounds of age.

C.2 Rules governing across-the-board increases in salaries

Rules governing across-the-board increases in salaries which are less favourable for employees who receive the old-age pension – although the nature of the work performed by them does not justify this in any way[12] – are at variance with the principle of equal treatment.

C.2.1 Rules regulating increases in tariff salaries pursuant to the collective bargaining agreement

The entitlement to the old-age pension is inseparably linked to reaching a certain elderly age, as required by the law (for more details, see section C.1.1 hereof).

As regards remuneration, the employer is obliged to respect the principle of equal treatment of all employees, *inter alia*, on the grounds of their age (for more details, see section C.1.3 hereof).

According to the rules governing increases in salaries enshrined in the collective bargaining agreement for 2015, the base salary was increased by CZK 300 for all employees except for employees who were, at the same time, recipients of the old-age pension. According to the agreement, the decision on a possible increase in salaries of employees receiving the old-age pension was to be made by the manager of the respective division or unit. Therefore, those employees could not claim a raise based directly on the collective bargaining agreement, in contrast to other employees.[36]

Therefore, such a provision of the collective bargaining agreement is less favourable for recipients of the old-age pension because, unlike other employees, they were not entitled to an automatic salary increase; rather, this depended on the decision of the respective manager. Such rules are at variance with the principle of equal treatment.

C.2.2 Claimed discrimination in connection with salary increases in the case of the complainant

In the case of the complainant, I am unable to properly assess the alleged discrimination in connection with salary increases because he was not subject to the rules governing across-the-board increases in salaries as he was, in 2015, an employee subject to a contract with individual labour and salary conditions. According to the CEO's instructions, the salaries of such employees were to be increased by CZK 300 on average, while the complainant's salary was increased by CZK 200.

I do not have sufficient data to determine whether or not the salary of other employees who had a contract with individual labour and salary conditions and worked in a position comparable to the complainant was raised and if so, by what amount, nor whether or not those employees were also entitled to the old-age pension. Therefore, the evidence gathered does not enable to prove with certainty that the complainant was actually discriminated against by the employer in connection with salary increases.

D. Information on further procedure

I hope that the employer will not regard my assessment as a reproach or an attempt to prove the employer guilty of intentional discrimination against the complainant. The question of whether or not any discrimination occurred is not based on demonstrating the negative intention to disadvantage elderly people; discrimination can also occur completely unintentionally. Therefore, it is necessary to assess in specific cases, in particular, whether or not less favourable treatment was reasonably substantiated. My assessment and the resulting recommendations are aimed at compliance with the Anti-Discrimination Act and improving the employer's practice with regard to its elderly employees so that they do not have to feel less valuable than other (younger) employees.

Based on my conclusions within the meaning of Section 21b (c) of the Public Defender of Rights Act, I recommend that the employer take the necessary steps to cancel the provisions of the collective bargaining agreement constituting unequal treatment of employees on the grounds of their age, or rather on the grounds of the fact that they are recipients of the old-age pension. Furthermore, I recommend that the employer possibly reconsider his position and satisfy the complainant's claims amicably.

The complainant may, where appropriate, claim his right to equal treatment by filing an anti-discrimination action with a court.[37]

If any of the parties wishes to comment on my conclusions, it can do so within 30 days of delivery hereof.

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

[1] Act No. 349/1999 Coll., on the Public Defender of Rights, as amended.

[2] Section 1 (5) in conjunction with Section 21b of the Public Defender of Rights Act.

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

[4] Section 5 (1) of the Anti-Discrimination Act.

[5] Section 16 of Act No. 262/2006 Coll., the Labour Code, as amended, in conjunction with Section 2 (3) of the Anti-Discrimination Act.

[6] Sections 29 and 32 of Act No. 155/1995 Coll., on pension insurance (the Pension Insurance Act), as amended.

[7] Judgement of the Court of Justice of 12 October 2010, Ingeniørforeningen i Danmark acting on behalf of Ole Andersen v Region Syddanmark, C-499/08, ECR I-9343.

[8] Section 6 (3) of the Anti-Discrimination Act.

[9] Section 16 of Act No. 262/2006 Coll., the Labour Code, as amended, in conjunction with Section 2 (3) of the Anti-Discrimination Act.

[10] Sections 29 and 32 of Act No. 155/1995 Coll., on pension insurance (the Pension Insurance Act), as amended.

[11] Judgement of the Court of Justice of 12 October 2010, Ingeniørforeningen i Danmark acting on behalf of Ole Andersen v Region Syddanmark, C-499/08, ECR I-9343.

[12] Section 6 (3) of the Anti-Discrimination Act.

[13] The complainant entered into the supplementary pension insurance contract on 15 February 2000 under then effective Act No. 42/1994 Coll., on supplementary pension insurance with State contribution and on amendments to certain laws related to its implementation (the Supplementary Pension Insurance Act), i.e. as amended by Act No. 170/1999 Coll.

[14] Article 1.1 of Amendment 2 to the Collective Bargaining Agreement – Rules regulating the utilisation of social expenses and social fund (hereinafter the “amendment to the collective bargaining agreement”).

[15] See Articles 1.1.1 and 1.1.3 of the amendment to the collective bargaining agreement.

[16] The complainant demonstrated those facts by submitting copies of his pay slips for 2014.

[17] See Article 7.2.1 of the collective bargaining agreement for details: “As of 1 January 2015, salaries shall be adjusted by virtue of an across-the-board increase by CZK 300 with respect to all entitled employees pursuant to the rules set forth by the CEO’s instructions on salary adjustments for 2015. Base salaries of employees receiving the old-age pension may be exempted from this increase in base tariff salaries. The manager of the respective division/unit shall decide on a possible increase in base salaries of recipients of the old-age pension. Any unspent funds intended for the increase in base salaries of the pensioners shall be retained by the respective division/unit and distributed on a proposal submitted by the centre/department heads in line with the decision of the manager of the respective division/unit.”

[18] In line with Article 7.2.5 of the collective bargaining agreement, which stipulates that persons employed on the basis of a manager employment contract or a contract with individual labour and salary conditions are exempted from the rules governing across-the-board increases in salaries.

[19] Judgement of the Court of Justice of 12 October 2010, Ingeniørforeningen i Danmark acting on behalf of Ole Andersen v Region Syddanmark, C-499/08, ECR I-9343.

[20] Section 5 (1) of the Anti-Discrimination Act.

[21] Section 2 (3) of the Anti-Discrimination Act.

[22] Sections 29 and 32 of Act No. 155/1995 Coll., on pension insurance (the Pension Insurance Act), as amended.

[23] Judgement of the Court of Justice of 12 October 2010, Ingeniørforeningen i Danmark acting on behalf of Ole Andersen v Region Syddanmark, C-499/08, ECR I-9343.

[24] Judgement of the Supreme Court of 18 January 2017, File No. 21 Cdo 5763/2015, accessible at www.nsoud.cz.

[25] Judgement of the Court of Justice of 21 October 1999, Susanne Lewen v Lothar Denda, C-333/97, ECR I-07243.

[26] Section 16 of Act No. 262/2006 Coll., the Labour Code, as amended, in conjunction with Section 2 (3) of the Anti-Discrimination Act.

[27] E.g. Judgement of the Court of Justice of 9 February 1982, Eileen Garland v British Rail Engineering Ltd., 12/81, ECR I-00359, and Judgement of the Court of Justice of 27 June 1990, Maria Kowalska v Freie und Hansestadt Hamburg, C-33/89, ECR I-02591.

[28] For more details, see the statement of the head of the employer’s HR Department, Ing. Y, of 26 June 2017.

[29] Judgement of the Supreme Court of 18 January 2017, File No. 21 Cdo 5763/2015, accessible at www.nsoud.cz.

[30] Section 2 (3) of the Anti-Discrimination Act.

[31] Section 6 (3) of the Anti-Discrimination Act.

[32] For more details, see the statement of the head of the employer's HR Department, Ing. Y, of 15 March 2017.

[33] Ibid.

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

[35] Similarly in the Public Defender of Rights' report of 26 January 2016, File No. 8024/2014/VOP/EN, accessible at http://eso.ochrance.cz/Nalezene/Edit/3710.

[36] The collective bargaining agreement also stipulated that any unspent funds intended for the increase in base salaries of the pensioners were to be retained by the respective division and distributed among its employees.

[37] Section 10 of the Anti-Discrimination Act.