

Record card

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Headnote

I. Exclusive use of the Czech language in public space is not required under any law. Job advertisements published in foreign languages in themselves do not constitute discrimination on the grounds of ethnicity, as language is only one of the set of factors determining ethnicity. For any difference of treatment on the grounds of language to raise concerns regarding discrimination on the grounds of ethnic origin, it has to adversely affect people of a certain ethnicity.

II. Job offers published in foreign languages in themselves does not constitute denial of the right to employment on the grounds of language.

However, the requirement that an applicant should be fluent in a certain language to win a certain job must be reasonably justified. If the use of a specific language were to create a workforce homogenous in terms of ethnicity (nationality) or to exclude persons of a certain ethnic origin (or nationality), this would constitute inadmissible discrimination on the grounds of ethnic origin/nationality and an infraction with regard to the right to employment.

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

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Brno, 4 April 2018

Opinion
on job advertisements published in foreign languages

At a meeting of representatives of the Office of the Public Defender of Rights and of the District Labour Inspectorate, one of the inspectors raised a question regarding job advertisements published in foreign languages[1] and their compliance with legal regulations on equal treatment and protection against discrimination.

I decided to issue an opinion on this matter, dealing with the question of whether job advertisements published in languages other than Czech could violate the right to equal treatment. The opinion relies on the amendment to the Employment Act of 2017, the latest case law of the Court of Justice of the European Union and my new role since 1 January 2018, based on which I am now also competent to deal with protection of the citizens of the European Union in matters relating to free movement of workers. I hope the Labour Inspectorates will use this opinion in their inspections.

The opinion focuses exclusively on job advertisements as such, rather than on any differences of treatment on the grounds of language in the field of the right to employment. Specifically, I will deal with the following questions:

- (1) Is the use of a foreign language in a job advertisement unlawful?
- (2) Can a job advertisement published in a foreign language constitute direct or indirect discrimination on the grounds of ethnic origin/nationality, thus violating the Anti-Discrimination Act?[2]
- (3) Can a job advertisement published in a foreign language constitute denial of the right to employment on the grounds of a language within the meaning of the Employment Act?[3]
- (4) Could a job advertisement published in a foreign language give rise to concerns regarding discrimination in recruitment? If so, under what conditions?

A. Summary of conclusions

Exclusive use of the Czech language in public space is not required under any law.

Job advertisements published in foreign languages do not constitute direct discrimination on the grounds of ethnicity, as language is only one of the set of factors determining ethnicity. For any difference of treatment on the grounds of language to raise concerns regarding indirect discrimination on the grounds of ethnic origin, it has to adversely affect people of a certain ethnicity.

Job offers published in foreign languages in themselves does not constitute denial of the right to employment on the grounds of language.

Since a job offer published in a foreign language constitutes neither discrimination on the grounds of ethnic origin and nationality, nor denial of the right to employment on the grounds of a language, it also cannot constitute an infraction with respect to the right to employment.

The requirement that an applicant should be fluent in a certain language to win a certain job must be reasonably justified. If the use of a specific language were to create a workforce homogenous in terms of ethnicity (nationality) or to exclude persons of a certain ethnic origin (or nationality), this would constitute inadmissible discrimination on the grounds of ethnic origin/nationality and an infraction with regard to the right to employment.

B. Legal analysis

B.1 Use of a language in public space

The use of a foreign language in the text of a job offer does not, *a priori*, violate any legal regulation.

The Czech Republic does not have any laws governing the use of the official (national) language^[4] and, therefore, there is no rule relating to the use of the (Czech) language in public space. Such requirements have only been stipulated for contact with administrative bodies.^[5] The condition that a job offer must be published in the Czech language is not included in the Employment Act either.

B.2 Prohibition of discrimination in the area of access to employment under the Anti-Discrimination Act

Job advertisements published in foreign languages in themselves do not constitute direct discrimination on the grounds of ethnicity, as language is only one of the set of factors determining ethnicity.

For any difference of treatment on the grounds of language to raise concerns regarding indirect discrimination on the grounds of ethnic origin, it has to adversely affect people of a certain ethnicity. A hypothetical adverse effect on the members of a certain ethnic group does not suffice.

B.2.1 Direct and indirect discrimination under the Anti-Discrimination Act

Direct discrimination under the Anti-Discrimination Act means an act or failure to take action, where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of ethnic origin or nationality, among others.^[6] This also includes nationality of an EU Member State.^[7] Discrimination is not deemed to have occurred where a difference of treatment in matters relating to the right to employment and access to employment is based on objective grounds consisting in the nature of the work or activities performed and respective the requirements are proportionate to that nature.^[8]

Indirect discrimination means an act or failure to take action where a person is put at a disadvantage compared to other persons on any of the prohibited grounds, using an apparently neutral provision, criterion or practice.^[9] Indirect discrimination does not occur if such a provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are proportionate and necessary.^[10]

The prohibition of discrimination also applies to public statements on whether or not a certain employer wishes to employ persons of a certain nationality (ethnicity).^[11]

Both direct and indirect discrimination on the grounds of ethnic origin or nationality constitute infractions under the Employment Act,^[12] which relies on the Anti-

Discrimination Act in terms of the definition of discrimination.[13] Pursuant to the Employment Act, an infraction occurs if a natural person[14] or a legal person[15] violates the prohibition of discrimination or fails to provide for equal treatment, as required by the Employment Act. A fine of up to CZK 1,000,000 may be imposed for an infraction.[16]

B.2.2 Definition of discrimination on the grounds of ethnic origin and nationality

The definition of the term ethnic origin has been addressed by the Court of Justice of the European Union. The Court of Justice indicated that the concept of ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds.[17] In the second cited judgement, the Court of Justice of the European Union tackled the legitimacy of a difference of treatment based on the place of birth, or rather it considered the question of whether a criterion consisting in whether or not a certain person was born outside European Union could have an indirect discriminatory effect on persons of a certain ethnic origin, concluding that this was not the case. Ethnic origin cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors, some objective and others subjective.[18]

Direct discrimination can only occur if the allegedly discriminatory measure has the effect of placing a person of a particular ethnic origin at a disadvantage.[19] The fact that the use of a neutral criterion is generally more likely to affect persons of a given ethnicity than other persons cannot constitute indirect discrimination either.[20]

As a discrimination ground, nationality (*in terms of the Czech notion of “národnost”*) overlaps with ethnic origin to a certain extent. We can say that ethnic origin is one of the factors defining a national minority[21], similarly to language, traditions or culture. One's nationality (*“národnost”*) is then determined based on the sum of these factors.

B.2.3 Evaluation of discrimination on the grounds of ethnic origin and nationality in the case of advertisements published in a foreign language

A criterion consisting in fluency in a certain language has an adverse effect on persons who do not meet this criterion, but the fact that they do not speak the relevant language in itself does not necessarily indicate their nationality (*“národnost”*) or ethnic origin. Therefore, such a criterion does not constitute direct discrimination on the grounds of nationality (*“národnost”*) or ethnic origin. This is because direct discrimination on the grounds of ethnic origin requires that the disadvantage must apply to a group of persons defined by certain sets of factors associated with an ethnic origin or nationality (*“národnost”*). If someone is put at a disadvantage based on just one factor, i.e. language, this does not constitute direct discrimination.

Regarding indirect discrimination, i.e. a disadvantage based on an apparently neutral criterion, such as language, the case law of the Court of Justice of the European Union indicates that it would be necessary to identify an adverse effect on a group of people of a certain nationality (*“národnost”*) or ethnic origin. A potential disadvantage for people of a certain nationality (*“národnost”*) or ethnicity in contrast to others is not sufficient. In the present case, one cannot say that persons of a certain specific nationality (*“národnost”*) or ethnicity are put at a disadvantage by job offers published

in foreign languages. Anyone who is fluent in the language can apply for the respective job, rather than just people of a certain nationality (*“národnost”*) or ethnic origin.

B.3 Discriminatory nature of employment offers (job advertisements) under the Employment Act

While job offers published in foreign languages put persons who are not fluent in those languages at a disadvantage, they in themselves do not constitute denial of the right to employment on the grounds of language. Fluency in a certain language may be required for the performance of the respective job.

B.3.1 Job offers and denial of employment on the grounds of language

A job advertisement constitutes an employment offer and, as such, it is subject to the prohibition of discrimination under Section 12 (1) of the Employment Act.[22] Furthermore, under Section 12 (2) of the Employment Act, employers may not seek information relating to nationality, race or ethnic origin etc. while selecting their employees, unless this is in compliance with the Anti-Discrimination Act. Under Section 4 (1) of the Employment Act, when any natural persons exercise their right to employment, the respective employer is obliged to provide for their equal treatment. Furthermore, any discrimination is prohibited in such cases.[23] The right to employment cannot be denied on the grounds of nationality (*comprising both Czech notions – “národnost” (corresponding to ethnic origin) and “státní příslušnost” (meaning nationality in the usual sense)*) and language, *inter alia*. [24] If the prohibition of discrimination is violated and equal treatment is not provided for, this constitutes an infraction.

C.3.2 Permitted forms of differences of treatment

The Employment Act does not stipulate any precise definition of discrimination and the permitted forms of differences of treatment, but rather relies on the Anti-Discrimination Act in this respect. The Anti-Discrimination Act bases its definition of discrimination and the right to equal treatment exclusively on the grounds stipulated therein[25]; however, we can easily apply this definition by analogy also to other grounds for differences of treatment prohibited under other laws. Under the Anti-Discrimination Act, discrimination is not deemed to have occurred where a difference of treatment in matters regarding the right to employment and access to employment is based on objective grounds consisting in the nature of the work or activities performed and respective the requirements are proportionate to that nature.[26] The possibility of different treatment in the area of the right to employment and access to employment is rather narrow in view of the grounds listed in the Anti-Discrimination Act, given the nature of the fields of labour and employment and the grounds prohibited under the Anti-Discrimination Act.

On the other hand, the room for differences of treatment on grounds not listed in the Anti-Discrimination Act is broader, as the requirement of equal treatment does not imply absolute equality. Inspiration can be found e.g. in the case law of the Constitutional Court[27], which uses the criterion of objective and reasonable justification when deciding in discrimination cases.

B.3.3 Evaluation of the use of a foreign language in an employment offer (job advertisement)

By publishing a job offer in a foreign language, an employer clearly indicates that only persons fluent in that language should apply for the job. In certain specific cases (especially if the job offer is published in a script other than Latin), these persons may be the only ones able to see that the text is actually a job offer. This may put people who do not speak the language at a disadvantage, since these persons are limited as to their possibility to respond to the offer.

In the light of the above outlined possibility of objective and reasonable justification of the difference of treatment, we can state that differences of treatment are, by definition, inherent in recruitment, where differences are made especially based on the respective qualification criteria. Fluency in a language generally constitutes a legitimate qualification criterion (i.e. it is objectively and reasonably justified).

A job offer published in a language other than Czech in itself does not constitute denial of the right to employment to those who are not fluent in the language. It is usually impossible to detect from the job offer alone whether or not the requirement of fluency in a language is reasonable with respect to the job offered. Therefore, the language of the job offer cannot determine whether or not it is discriminatory.

B.4 Equal treatment and prohibition of discrimination in exercise of the right to employment and the possibility of justifying a difference of treatment based on language

If the requirement of fluency in a language is not reasonably justified, this can constitute denial of the right to employment on the grounds of language. If the use of a specific language implies that it is aimed at creating e.g. a workforce homogenous in terms of ethnicity (nationality) or excluding persons of a certain ethnic origin (or nationality), this constitutes discrimination, or rather an infraction in the area of the right to employment.

B.4.1 Fluency in a language as a qualification criterion

Under Section 4 (1) of the Employment Act, when any natural persons exercise their right to employment, the respective employer is obliged to provide for their equal treatment. Any discrimination[28] is prohibited not only in publication of job offers, as stated above, but also in all phases of recruitment. Employers cannot deny the right to employment to applicants on the grounds of nationality (*comprising both Czech notions – “národnost” and “státní příslušnost”*) and language, *inter alia*. [29] The definitions of direct and indirect discrimination and the possible forms of differences of treatment are provided above (chapters B.2.1 and B.3.2).

B.4.2 Evaluation of the requirement of fluency in a language from the perspective of discrimination

Despite the fact that a job offer published in a foreign language cannot be considered *a priori* discriminatory on the grounds of ethnic origin or nationality, nor can it

constitute denial of employment on the grounds of language, such a job offer may imply potential difference of treatment in the next stages of recruitment, or rather an attempt to exclude applicants of any non-preferred ethnic origin or nationality (*meaning “národnost” – see above*).

An employer's requirement that the applicants be fluent in a certain language should meet the following criteria:

- The employer should present the reasons for which the requirement of fluency in the language is objectively and reasonably justified.
- The requirement of the respective degree of fluency in a language should be proportionate to the nature of the job. For example, an employer cannot require that a blue collar worker be proficient in a foreign language.

If the employer fails to present a convincing justification for the requirement of a certain level of fluency in a language, this could constitute denial of the right to employment on the grounds of language and an infraction consisting in discrimination.

Should other circumstances of the case indicate that the actual motivation of the employer is the unwillingness to employ persons of a certain ethnic origin or nationality (*“národnost”*) or an attempt to create a workforce homogenous in terms of ethnicity or nationality (*“národnost”*), this should be reflected in the amount of the fine imposed. Stricter standards should be applied to cases where not only denial of the right to employment on the grounds of language, but also discrimination on the grounds of ethnic origin and nationality (*“národnost”*) is proven.

C. Information on further procedure

I will send this Opinion to the State Labour Inspectorate and, based on Section 21b of the Public Defender of Rights Act[30], I recommend that this authority take account of my findings in its inspections and acquaint the District Labour Inspectorates with the issue at hand in a suitable manner.

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

[1] Also in connection with a script other than Latin.

[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] Act No. 435/2004 Coll., on employment, as amended.

[4] Such provisions are included e.g. in Article 6 of the Constitution of the Slovak Republic and Act No. 270/1995 Coll., on the official language of the Slovak Republic, as amended.

[5] Section 16 of Act No. 500/2004 Coll., the Code of Administrative Procedure, as amended, which also allows the use of the Slovak language, apart from Czech. Such provisions are included e.g. in Article 6 of the Constitution of the Slovak Republic and Act No. 270/1995 Coll., on the official language of the Slovak Republic, as amended.

[6] Section 2 (3) of the Anti-Discrimination Act contains an exhaustive list of discrimination grounds, specifically race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, faith, worldview and, in matters related to free movement of workers within the European union, also nationality of a Member State.

[7] The prohibition of discrimination on the grounds of nationality of a Member State in access to employment follows from Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

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

[9] Section 3 (1) of the Anti-Discrimination Act.

[10] Section 3 (1), second sentence of the Anti-Discrimination Act.

[11] The Court of Justice of the European Union addressed the question of whether a public statement of an employer to the effect that it would not take on members of a certain group (in this case, these were people from Morocco) constituted discrimination, reaching the conclusion that this indeed equalled direct discrimination in access to employment. Judgment of the Court of Justice of 10 July 2008, Feryn, C-54/07.

[12] Based on Sections 139 and 140, in conjunction with Section 4 and 12 of the Employment Act.

[13] Section 4 (2) of the Employment Act.

[14] Under Section 139 (1)(a) of the Employment Act.

[15] Under Section 140 (1)(a) of the Employment Act.

[16] Under Section 139 (3) and Section 140 (4) of the Employment Act.

[17] Judgment of the Court of Justice (Grand Chamber) of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, C-83/14, paragraph 46, judgment of the Court of Justice (First Chamber) of 6 April 2017, *Jyske Finans A/S v. Ligebehandlingsnævnet*, C-668/15, paragraph 17.

[18] Judgment of the Court of Justice in the case of *Jyske Finans*, paragraph 19.

[19] Judgment of the Court of Justice in the case of *Jyske Finans*, paragraph 31.

[20] Judgment of the Court of Justice in the case of *Jyske Finans*, paragraph 33.

[21] For more information, on the interpretation of the relationship between ethnic origin and nationality, and the Czech terms *národnost* and *státní příslušnost* (both translated into English as nationality), see e.g. KVASNICOVÁ, J., ŠAMÁNEK, J., at al. *Antidiskriminační zákon. Komentář. (The Anti-Discrimination Act. A Commentary.)* Prague: Wolters Kluwer, a. s., 2015. ISBN 978-80-7478-879-6, pp. 119 - 121.

[22] The Public Defender of Rights surveyed the issue of discrimination in job advertisements in 2011. The Office of the Public Defender of Rights. *Výzkum veřejného ochránce práv – projevy diskriminace v pracovní inzerci. (Survey of the Public Defender of Rights – Discrimination in Job Advertisements.)* Public Defender of Rights – Ombudsman [on-line] Brno [cit. 2016-2-11] Available at: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Doporuceni/Doporuceni-Inzerce.pdf.

[23] Section 4 (2) of the Employment Act.

[24] Section 4 (2) of the Employment Act.

[25] Section 2 (1) of the Anti-Discrimination Act.

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

[27] In judgment of the Constitutional Court of 17 May 1994, File No. Pl. ÚS 36/93, judgment of the Constitutional Court of 28 February 1996, File No. Pl. ÚS 9/95, judgment of the Constitutional Court of 16 October 2007, File No. Pl. ÚS 53/04, judgment of the Constitutional Court of 6 June 2006, File No. Pl. ÚS 42/04, judgment of the Constitutional Court of 21 April 2009, File No. Pl. ÚS 29/08, available at <http://nalus.usoud.cz>.

[28] Section 4 (2) of the Employment Act.

[29] Section 4 (2) of the Employment Act.

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