Mfv.II.10.155/2015/7

The Kúria in the lawsuit between the applicant,... , represented by ... law firm (in the present case by dr. Imre Krisch attorney-at-law) and the defendant, ... Zrt., represented by ... law firm (in the present case by dr. Lajos Pál attorney-at-law) for challenging the lawfulness of a dismissal and applying the relevant legal consequences, initiated before the Budapest Környéki Közigazgatási és Munkaügyi Bíróság (Budapest Environs Administrative and Labour Court) under No. 14.M.942/2011, decided in interlocutory judgment No. 8.Mf.20.030/2014/6 on second instance before the Budapest Környéki Törvényszék (Budapest Environs Regional Court), on the application for review lodged by the defendant and on the cross-appeal for review lodged by the applicant, – without a public hearing – delivered the following judgment:

The Kúria sets the operative part of the interlocutory judgment No. 8.Mf.20.030/2014/6 of the Budapest Environs Regional Court aside, in which the court altered the judgment of first instance in relation to the termination of the employment relationship and stated that the defendant unlawfully terminated the employment relationship of the applicant, and that it should cease on 15th October 2014; moreover, it upheld the judgment No. 14.M.942/2011/28 of the Budapest Environs Administrative and Labour otherwise it is not affected.

The Kúria orders the applicant to pay within 15 days to the defendant HUF 300,000 (three hundred thousand forint) + 81,000 (eighty-one thousand forint) VAT for the costs of the procedure of second instance, and HUF 100,000 (one hundred thousand forint) + 27,000 (twenty-seven thousand forint) VAT for the costs of the review procedure, as well as to pay the State – when called upon to do so – HUF 948,340 as court fees on appeal and HUF 1,185,430 (one million, one hundred and eighty-five thousand, four hundred and thirty forint) as court fees for the review procedure.

S t a t e m e n t o f R e a s o n s

According to the facts at issue in the review process, the applicant had been employed by the defendant since 15th July 1994, and from 14th December 2009 on was the Head of the Property Protection Department. This department was renamed in the spring of 2010 to Security Department, and its organisational structure and its functions were reorganised in January 2011. The Security Department was moved under the Purchasing and Logistics

Directorate on 2nd May 2011, then on 24th June 2011 it was discontinued. One part of the duties carried out by the Security Department were transferred to the Real Estate Management Department led by Zs.K., another part of the duties to the newly established Information Management Group, led by dr. E.V., and a third part of the duties to the Recovery Group, led by G.S. An important duty of dr. E.V. was to carry out tasks relating to data protection, to internal audit processes and to compliance.

The employer, with a notice of 24th June 2011, terminated the applicant's employment relationship through ordinary termination, with effect from 23rd August 2011, on the grounds that the employer had decided on reorganisation, and would establish a new organisational structure, due to which the Security Department would discontinue in that form; the groups and employees under this department would be transferred to other directorates and departments, and the position occupied by the applicant would terminate through the reorganisation. In the same period, the defendant dismissed the Head of the Debt Management and Prevention of Misuse Department, and the Head of the Security Back Office Group. Following the dismissal of the applicant, two new employers were recruited to the information management group, who had to carry out duties relating to data protection and internal audit.

The applicant requested in his action to declare that the defendant had unlawfully terminated his employment relationship, thus requested the application of the legal consequences of unlawful dismissal; moreover the payment of royalties in the amount of HUF 2.000.000 plus interest.

He argued that the reason for dismissal was not real;, his job did not actually ceased and a simple organisational restructuring took place. When doing so, a new department was created with duties which had mainly belonged to him and where he had already proven his suitability for leading such a department. Nor did he find this measure reasonable. In his view, the real reason for the employer's action was his age and the length of the employment relationship, in relation to which he complained of the breach of the principle of equal treatment by the defendant. He argues that the former CEO had made a statement that it was necessary to dismiss older employees with longer periods of service and, at the same time as his employment was terminated, other employees of the same age and with the same length of employment relationship were dismissed.

The defendant sought dismissal of the actions in his

counterclaim, arguing that the reason for dismissal was real and reasonable, and contested that his action had been discriminatory.

The Budapest Environs Administrative and Labour Court, with its judgment No. 14.M.942/2011/28, ordered the defendant to pay HUF 2,000,000 royalties to the applicant together with interest, and dismissed the action in all other respects. Furthermore, it ordered the applicant to pay HUF 743,000 as costs of the procedure, and HUF 710,800 as procedural fees not yet paid, and ordered the defendant to pay HUF 120,500 as procedural fees not yet paid.

In the reasoning of the judgment, the court explained that the Security Department led by the applicant had been abolished, the employees working at this department were transferred to other units, and that the duties of that department were subsequently carried out by these units. All this necessarily involved the termination of the applicant's role. As the duties earlier carried out by the applicant were assumed by several other employees, formerly employed by the defendant, the reorganisation was completed. The court did not find the allegation of the applicant well founded, that the duties carried out by him and by dr. E.V. were identical, and stated that, notwithstanding the fact that there had been overlapping areas, dr. E.V. had other duties beyond those carried out previously by the applicant. On the grounds of all these, the court concluded that the reason for the measures taken by the employer was in accordance with the facts, and that it created a basis for the dismissal.

Nor did the court find the allegation of the applicant in relation to the breach of the principle of equal treatment by the defendant to be well founded. It stated that the applicant had to produce prima facie evidence of harm that had been caused due to the circumstances and properties characterising him as alleged. According to the court, the statement of the witness A.M.P., as well as the age and the length of the employment relationship of the heads of units mentioned by the applicant, did not suffice to provided prima facie proof that the applicant had been dismissed for these reasons. It referred to the fact that there was no temporal or personal connection between the conversation mentioned by the witness and the dismissal of the applicant, since the conversation had taken place in the second half of September 2009, and the personal connection was missing,

because the CEO indicated by the witness no longer had any employer's rights over the applicant.

The court of first instance found the claim of the applicant for royalties well founded, and, in accordance with the action, ordered the employer to pay HUF 2,000,000.

The Budapest Environs Regional Court, on appeal lodged by the parties, in its interlocutory judgment No. 8.Mf.20.030/2014/6, altered the judgment of the court of first instance regarding the dismissal, and stated that the defendant unlawfully terminated the employment relationship of the applicant; it should be terminated on 15th October 2014. It furthermore held that it did not have jurisdiction to hear the claim for royalties relating to intellectual property already decided upon in the judgment of first instance, set the judgment of first instance in this regard aside and referred the case to the Budapest Environs Regional Court for a ruling as court of first instance.

In its judgment, the court stated that the court of first instance concluded correctly that the communicated reason for dismissal was correct and reasonable. The ordinary termination by the defendant had been justified on operational grounds and by reorganisation, in the course of which the Security Department led by the applicant had been abolished. His duties had been distributed to three other units, and this necessarily involved the termination of his position as head of department. The defendant demonstrated that the reorganisation had been completed and that the post of the applicant was abolished; moreover, the employer has discretionary power to appoint the heads of the newly created units. In this scope, no new employees have been recruited, and it could not be contested in the proceedings whether the reorganisation had been reasonable or justified.

The court of second instance held that the appeal of the applicant with regard to the breach of the principle of equal treatment was well founded. It stated that the defendant did not succeed in clearly demonstrating that the applicant had been dismissed because of his age; therefore, notwithstanding the fact that the communicated reason for dismissal was real and reasonable, the defendant infringed the principle of equal treatment and so the dismissal was unlawful.

The defendant lodged an application for review against the final judgment, and the applicant lodged a cross-application for review.

The defendant requested that the Kúria set the interlocutory judgment of the high court aside in the part relating to the assessment of the unlawful dismissal, and uphold the part of the judgment of the Budapest Environs Administrative and Labour Court, in which the claim concerning the termination of the employment relationship had been dismissed; and moreover requested that the applicant be ordered to pay arising costs. As infringed provisions, he indicated section 206 (1) of the Code of Civil Procedure, section 5 of Act XXII of 1992 on the Labour Code, and section 7 (2) b), section 8 o) and t), section 19 (1) and (2), and section 22 (1) a) of Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (hereinafter: Equal Treatment Act).

He submitted that, pursuant to section 8 of the Equal Treatment Act, age is considered to give rise to the need for protection, because individuals belonging to different age groups have different chances – for objective reasons – in different areas of social life, such as employment. However, this provision does not mean that in all cases when a specific age is reached the chances in the different areas of social life would automatically change in an objective manner. The need to be protected by law arises only in relation to such ages which may entail the inequality of chances for objective reasons. Thus, concerning the domain of employment, two age groups need protection: young people looking for their first job, and workers over the age of 50. Workers in their 30s and 40s are in the most effective position in that sense. The applicant was in his early 40s when dismissed. Since there have been no special age requirements concerning his field of employment, in terms of employment he belonged to the same age group as his colleagues in their 30s referred to by him, and not to an age group which, on the basis of age, could fall under protection by law in relation to employment. It follows that the applicant did not produce prima facie evidence establishing that he belonged to the age group in need of protection concerning the given employment relationship, and that, on this basis, he had been treated differently compared to other age groups; therefore, failing that, the breach of the principle of equal treatment cannot be examined.

Beyond that, the applicant referred, as a characteristic giving rise to the need for protection, to the fact that he had been employed by the defendant for a longer period, namely 17 years. In the application for review, it was argued that only characteristics belonging to the essential features of the individual may be protected (decision BH 2010.194.). The Equal

Treatment Act provides protection against discrimination because of a characteristic that is an essential feature but an independent attribute of the individual. Referring to other circumstances in the absence of substantiating the characteristic in need of protection does not suffice to establish that the employer's conduct had been unlawful. According to the defendant, it can be concluded from the above, that the applicant did not produce prima facie evidence establishing that he possessed other characteristics giving rise to the need for protection under section 8 t) of the Equal Treatment Act, and, in the absence of such, the infringement of the principle of equal treatment cannot be examined; a defence obligation did not incur.

In his view, it does not suffice to indicate a protected characteristic and the alleged disadvantage, since there has to be a causal connection between the two; they are to be examined together. In this sense, he referred to individual decision of the Supreme Court No. EBH 2010.2272.

The applicant intended to bring prima facie evidence through the testimony of A.M.P., and the judgment of second instance also accepted the statement of the witness as substantiating the discrimination on the grounds of age. Nevertheless, the statement made by the witness indicated that the former CEO expressed that he was planning on replacing employees in senior positions for a longer time, but did not clearly declare the discrimination on the grounds of age.

He objected that the court of second instance completely ignored the fact that the person having made such a statement, as mentioned by the witness, was no longer CEO at the time of the applicant's dismissal. There was no temporal or personal connection between the conversation mentioned by the witness and the dismissal of the applicant, as he was dismissed one and a half years after that.

According to the defendant's declaration, the court of second instance also weighed the testimony of dr. M.R.E. in a flagrantly unreasonable manner, accepting that it established that one selection criterion was the length of the employment relationship. In contrast, the witness declared that the reorganisation had been decided upon while taking into consideration which duties should be transferred to the Legal Directorate, and which tasks should be regrouped otherwise. Hence, the basis of the measure was to regroup the duties according to the different functions. The essential part of the

reorganisation was to reduce the redundant management layer and to save significant wage costs. It follows from the above that the selection criteria were not based on the length of employment or on age, but the intention to reduce the number of senior employees, thereby saving wage costs. The witness gave a detailed explanation of what criteria ed to the selection of dr.E.V.; however, the court of second instance did not take these into consideration. The declarations of Dr. M.R.E., legal director, proved that, throughout the reorganisation and the selection of the new heads of units, such criteria had been taken into consideration, which had a reasonable explanation directly related to the relevant relationship, and which constituted relevant and legitimate conditions generally considered for recruitment; as such, their procedure had been in compliance with section 7 (2) b) and section 22 (1) a) of the Equal Treatment Act. He fulfilled his defence obligation, and proved, on the basis of section 19 (2) b) of the Equal Treatment Act, that there had been no discrimination.

The applicant requested in his counter-application for review that the final interlocutory judgment be upheld by the Kúria, and also in his cross-application for review that the provisions in the reasoning of the final interlocutory judgment, which stated that the reasons for ordinary dismissal were correct and reasonable, be set aside and a new decision be delivered in that scope, indicating section 89 (2) of the Labour Code, as the infringed provision, moreover demanding that the defendant should be ordered to pay the costs of the review procedure. He criticised the restrictive interpretation of discrimination on the grounds of age given in the application for review, an incorrect position, according to which he was in need of protection as neither being a young person looking for his first job, nor a workers aged over 50. All this would be contrary, in his view, to case law. The burden of proving that the alleged circumstances did not exist, and that the principle of equal treatment had been respected or it was not required to respect it, should have been placed on the defendant, and he had not fulfilled this obligation. He contested the applicability in the present case of the individual decision referred to by the defendant, arguing that the length of the employment relationship was an individual characteristic concerning not only him, but other employees as well. In his view, the length of the employment relationship spent at the employer constitutes a characteristic that needs to be protected, taking into consideration that it did not depend on his own intention, and it was a well-defined feature for the outer world. The causal

connection had been proved in the procedure and this circumstance had been correctly evaluated by the court of second instance. Furthermore, he referred to section 9 of the Equal Treatment Act, under which the purpose of the employer to save wage costs constitutes indirect negative discrimination.

In his cross-application for review, he referred to the court of second instance evaluating the available evidence unreasonably, infringing section 89 (2) of the Labour Code and section 206 (1) of the Code of Civil Procedure. He maintained his allegation that his role had not actually been abolished; his duties continued to be carried out by dr. E.V. He already performed internal audits and compliance; these were not new tasks to be carried out. By analysing the reorganisation, it can be stated that, although the transfer of the task of internal audit to an expert group led to a reduction of costs, this however emerged independently from the reorganisation of the functions of the Security Department. Transferring the duties of data protection and internal audit to the Department did not lead in itself to reducing the number of expert or senior staff and therefore had no effect on cost saving. On the grounds of the above, it can be concluded that the reorganisation of the duties of the Security Department did not result in any cost savings, and it could not achieve any of the objectives mentioned by the defendant. The defendant had no reasonable or appropriate grounds for dismissing him, nor was it realistic to put a head of unit in his place who had previously carried out only one of the tasks. The ruling courts did not properly examine the reality of the measure, and did not take into consideration that the reorganisation was incapable of achieving the objectives declared by the defendant.

The applicant explained in his counter-claim that the Equal Treatment Act has no provision prescribing that age, as a protected characteristic, should apply for the protection in terms of equal opportunities only for the two age groups indicated by the defendant. Such an interpretation would be contrary to the spirit of the law, and would contradict the case law. The burden of proving that the principle of equal treatment had been respected or it was not required to respect it, should have been placed on the defendant, and he had not fulfilled this obligation. As far as the length of the employment relationship as a protected characteristic is concerned, he argued that this feature not only defined him, but other employees as well, which could be perceived by the employer.

In his view, he delivered prima facie evidence for the causal

link between the protected characteristic and the manifested disadvantage, but the defendant did not fulfil his defence obligation, which was pointed out correctly by the court of second instance. The testimony of A.M.P. confirmed the causal link between the age, as well as the length of the employment relationship, and the dismissal. In his view, the testimony of dr. M.R.E. was not suitable for the exculpation of the defendant, and the court of second instance assessed his statement and concluded correctly that the one selection criterion had been the length of the employment relationship.

The defendant, in his counter-application for review and in his observations, sought dismissal of the cross-application for review, with regard to section 274 (1) d) of the Code of Civil Procedure, according to which judicial review may not be requested against the statement of reasons part of a final decision, and the applicant lodged his cross-application for review only against the reasoning of the final interlocutory judgment; moreover the copy transmitted to the defendant was not signed by the legal representative of the applicant nor by the applicant, in breach of section 93 (3), section 73/A (1) a) and section 73/B (1) and (4) of the Code of Civil Procedure.

He held the substance of the cross-application for review also to be unfounded, since it sought the review of the assessment of the final interlocutory judgment, which is not possible on the basis of section 275 (1) of the Code of Civil Procedure. The applicant incorrectly declared that his role had not been abolished, since his duties were transferred to the head of the new Information Management Department. According to the coherent case law, terminating a job through reorganisation and through distribution of the tasks within that function, does not discount the retention of those tasks, and the causal link is not affected by the argument of the applicant, that although the department previously led by dr. E.V. was also abolished, his employment relationship was not terminated. The tasks of the Information Management Department that were transferred from other domains did not only involve the tasks indicated by the applicant, this has been demonstrated in the course of the procedure. The new department not only carried out tasks that previously belonged to the functions and responsibilities of the applicant as head of the department, since data protection, internal audit, analysis work in compliance cases and keeping contact with intelligence services fell within the competence of the head of the unit. As far as the correctness and reasonability of the grounds for dismissal are concerned, it is irrelevant how and on

what basis the defendant recruited the new head of unit, since it fell within the discretion of the employer; it cannot be contested in labour litigation, as it cannot also be reviewed whether the reorganisation was appropriate or not.

Age can only give rise to examining the infringement of the principle of equal treatment if it is possible to draw a distinction on the grounds of significant objective circumstances between two age groups, which was not the case in the present proceedings. Concerning the principle of equal treatment, the applicant placed himself in the same group as I.V. and J.Z.; however, he did not substantiate the correctness of this grouping scheme. In contrast, he substantiated that the grounds for the reorganisation and for recruiting the new head of department were relevant and legitimate conditions that were generally considered. He contested that the length of the employment relationship was a characteristic that could give rise to prejudice, and argued that the applicant, as well as the court of second instance, weighed the testimony of A.M.P., including only his subjective opinion, in a flagrantly unreasonable manner. Furthermore he referred to the applicant having given a new plea in law in his counter-application for review with reference to section 9 of the Equal Treatment Act, although he based his appeal at the second instance merely on section 8 of that law.

The Kúria decided upon the application for review of the defendant without a public hearing according to Section 274 (1) of the Code of Civil Procedure.

The application for review of the defendant is well founded, whilst the cross-application for review of the applicant is unfounded.

The applicant requested in his cross-application for review that the assumptions in the reasoning of the final interlocutory judgment, which stated that the reasons for ordinary dismissal were correct and reasonable, be set aside and a new decision be delivered to that extent by the Kúria, as the findings of the final interlocutory judgment infringe section 89 (2) of Act XXII of 1992 on the Labour Code, and to order the defendant to pay the costs incurred in the review procedure.

The defendant sought, in his counter-application against the cross-application for review, the dismissal of the cross-application for review by the Kúria ex officio, taking into consideration that, according to section 274 (1) d) of the Code of Civil Procedure, a judicial review may not be requested

against the statement of reasons part of a final decision.

According to opinion No. 3/2013.(IX.23.) KMK on the standards of review applicable in administrative proceedings, the conditions excluding a review procedure under the last line of section 274 (1) d) of the Code of Civil Procedure shall be established through cumulative assessment of the operative part and the statement of reasons of the judgment delivered in the case. An application for review seeking to alter the statement of reasons of the final judgment in a way that affects the merits of the case shall not be regarded as an application for review lodged merely against the statement of reasons of the final judgment.

This also applies to labour litigation. The provision of the Code of Civil Procedure referred to is applicable only if the alteration of the form of reasoning is sought. In contrast, if the application for review lodged by the other party contests the decision itself, and affects both the operative part and the statement of reasons of the judgment, the legal remedies of the other party are then limited. With regard to that, the rule excluding a review procedure under the last line of section 274 (1) d) of the Code of Civil Procedure is to be examined in relation to the cross-application for review, in accordance with the operative part of the judgment, by analysing the substance of the ruling given in the final judgment, and in such a case the cross-application for review shall not be dismissed by the court ex officio.

It can be also stated that the cross-application for review lodged by the applicant before the Kúria was signed by the legal representative of the applicant, therefore it is unfounded for the defendant to refer to section 73/B (4) of the Code of Civil Procedure.

In labour litigation on the basis of an unlawful dismissal, it is necessary to assess – within the scope of the claim – the lawfulness of the reasoning (clearness, correctness, reasonability) before examining the plea based on the breach of the principle of equal treatment. The plea concerning the infringement of the principle of equal treatment is to be examined to that extent as the employee pursues a separate claim – for restoring the employment relationship (section 83 of the new Labour Code) or for a grievance award (according to section 2:52 of the Civil code applicable due to section 31 of the new Labour Code).

The applicant's cross-application for review contesting his dismissal with regard to its reasons, as well as the

reorganisation in its content and financial effects, was based on the infringement of section 89 (2) of the Labour Code, and section 206 (1) of the Code of Civil Procedure by the interlocutory judgment.

According to section 206 (1) of the Code of Civil Procedure, the court shall ascertain the relevant facts of a case upon weighing the arguments of the parties against the evidence obtained by the performance of taking evidence. The court shall evaluate the evidence as a whole, and shall rule according to its convincing nature. In the context of a review procedure, no question shall, in principle, be contested that lies within the discretion of the court, and the elements of evidence shall not be weighed or evaluated once again. An application for review based on the infringement of section 206 (1) of the Code of Civil Procedure can only be successful if the facts established in the final judgment are incorrect compared to the documents, or if the court did not evaluate the evidence – after assessment – as a whole, thus the established facts are flagrantly without reason, involving essential logical contradictions (BH 1999.44., BH 2012.179., EBH 2013.M.4.).

In the proceedings, both the court of first and of second instance stated that defendant had confirmed that the reorganisation indeed took place and that, due this, the role of the applicant was abolished. The court of first instance gave a detailed and convincing explanation of the evidence taken into consideration for this conclusion, and the court of second instance agreed with this statement of the court of first instance.

It was unfounded that the applicant contested in his cross-application for review that his role had only been formally abolished, but his duties were taken over by dr.E.V. In contrast, the ruling courts stated that the Security Department led by the applicant, together with his job, had been terminated, and that the newly established Information Management Department carried out, beyond the tasks transferred from the Security Department, other duties as well, and therefore the functions of the head of unit were not identical to those of the applicant. The defendant correctly referred in his counter-application for review to coherent case law, according to which, in the event of reorganisation, the transfer and distribution of tasks among the units fall within the discretion of the employer. The defendant substantiated during the proceedings that dr. E.V., the new head of the Information Management Department, assumed not only the duties previously carried out by the applicant, since data

protection, internal audit, analysis work in compliance cases and keeping contact with intelligence services fell within the competence of the head of unit; moreover, the question of reasonability or appropriateness of the reorganisation is not to be raised in a labour dispute.

The distribution of the duties of the Security Department led by the applicant, and the accomplishment of the reorganisation is confirmed by applicant himself in his cross-application for review (third paragraph after point 4.1: 'The distribution of the duties of the Security Department could not achieve any of the objectives mentioned by the defendant. The distribution of the duties of the Department is justified by a real business objective, namely realignment.') The distribution of the duties is confirmed furthermore by Figure 3 within the cross-application for review of the applicant, which clearly shows the rearrangement of duties between the Security Department and the Information Management Department. Furthermore, it has to be stressed that the reorganisation had occurred in two steps, and covered a wide range of departments and directorates with a substantial regrouping of duties.

On that basis, it is established that the final interlocutory judgment did not infringe section 89 (2) of the Labour Code and section 206 (1) of the Code of Civil Procedure referred to by the applicant; the duties of the Security Department, previously led by the applicant were regrouped for the purposes of realignment, therefore the applicant's role as head of the unit ceased, thence the reason for dismissal was clear, correct and reasonable.

The defendant claimed, in his application for review, that the final interlocutory judgment infringed section 206 (1) of the Code of Civil Procedure and section 5 of the Labour Code as well as section 7 (2) b), section 8 o) and t), section 19 (1) and (2), and section 22 (1) of Act CXXV of 2003 on equal treatment and the promotion of equal opportunities, and the relevant case law.

According to the court of second instance, the applicant indicated during the proceedings that he had suffered disadvantages, that his employment relationship ceased and had a characteristic under section 8 o) of the Equal Treatment Act – in the present case his age –, which made him eligible for protection. As this court stated, the defendant should have launched a defence against the claims of the applicant. However, the testimony of dr. M.R.E. attested that one criterion of

selection had indeed been the length of the employment relationship. It concluded from all this that the defendant did not succeed in clearly demonstrating that the applicant had been dismissed because of his age; therefore, notwithstanding the fact that the communicated reason for dismissal was real and reasonable, the defendant infringed the principle of equal treatment and so the dismissal was unlawful.

The Kúria deemed the argument in the defendant's application for review, according to which two age groups are in need of protection by law, namely young people looking for their first job, and workers aged over 50, but employees in their 30s or 40s who belong to the same age group are not eligible for protection based on age alone, to be unfounded. Indeed, these two age groups mentioned in the application for review are affected to a large extent by the breach of the principle of equal treatment, but in principle nothing speaks for excluding other ages from being a protected characteristic. This can be the case when two different age groups can be distinguished, and one group is in need of protection compared to the other age group in a comparable situation. The applicant invoked employees in their 30' and 40s as comparable groups, indicating that during the reorganisation, the employer dismissed the latter, whilst filling the vacant posts with young employees in their 30's.

In a similar case, the CJEU stated in its judgment C-132/11, Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH vs. Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH that it is clear from Article 2(2)(b) of Directive 2000/78/EC of the Council that indirect discrimination on the grounds of age occurs where an apparently neutral provision, criterion or practice would put persons having a particular age at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The experience which may have been acquired by the same or another company is neither inextricably, nor indirectly linked to the age of employees and so it found that the different periods of service do not establish a difference of treatment on the basis of age, in terms of the combined provisions of Article 1 and Article 2(2)(b) of Directive 2000/78.

In the present case, the court of second instance evaluated part of the testimony of A.M.P. as a proof for discrimination based on age, where he explained that the former CEO of the defendant had declared that he was planning on replacing employees n senior

positions for a longer period, as well as the testimony of dr. M.R.E., according to whom one criterion of selection had indeed been the length of the employment relationship without appropriate grounds. An employment relationship may start at any age, therefore there is no direct link between its length and the age of the employee, thus the court of second instance evaluated the testimonies referred to incorrectly as proof of discrimination based on age.

The judgment of second instance did not mention that it had evaluated the length of the employment relationship of the applicant by the defendant as a circumstance giving rise to less favourable treatment according to section 8 (1) t) of the Equal Treatment Act, nor had it been referred to by the applicant. The Kúria agrees with the statements made in the Position No. 208/2/2010.(IV.9.) TT of the Equal Treatment Authority Advisory Board in relation to the definition of discrimination based on other circumstances, according to which the core of the definition of other circumstances is based on a situation that is objectively verifiable, is suitable for creating a homogeneous group and gives rise to generalisations; furthermore, it arises from prejudice. The substance of the legal protection against discrimination in relation to other circumstances is based on the fact that the claimant with protected features suffers disadvantages not on the grounds of his own conduct, but for belonging to a specific group. The strict interpretation guarantees that no infringement of the principle of equal treatment shall be established in a procedure in those cases where the litigation involves violations of human dignity, the abusive exercise of rights or the misuse of a right.

The length of the employment relationship accomplished at the employer cannot be considered to be a circumstance that defines the basis of everyday life of the individuals harmed, since the length of an employment relationship can be altered or influenced by the individual at his own choice. Following the above, if the applicant claims that the has been dismissed on the grounds of this circumstance, he could have invoked the infringement of the proper exercise of rights under section 4 of the Labour Code, but this circumstance, even if established, does not give sufficient grounds to establish the infringement of the principle of equal treatment on the grounds of other circumstances.

According to section 19 of the Equal Treatment Act, if the disadvantaged individual proves that he has suffered harm, and substantiates that he possessed one of the characteristics

defined in section 8 of the law on equal treatment, the other party – in the present case the employer – is obliged to prove that the circumstances substantiated by the injured party did not prevail, and that he respected the principle of equal treatment or he was not obliged to observe it.

In the present case, the defendant had to prove accordingly that there was no causal link between the protected characteristic of the applicant (10 years older than the heads of units selected during reorganisation) and the disadvantage he suffered (dismissal).

In the procedure the defendant proved – as stated by both courts as a fact – that the dismissal of the applicant was necessary, since due to reorganisation and the regrouping of duties, the department led by the applicant ceased, and so his role as head of department as well.

In his counter-application for review, the defendant correctly referred to Position No. 95 of the Labour Panel of the Supreme Court and the case law, according to which, in the case of reorganisation, the transfer and redistribution of tasks among the units, as well as the choice of by whom and following what procedure these tasks, thus the management duties, shall be carried out fall within the discretion of the employer(Mfv.II.10.161/2009.) In accordance with that, in general, the employee cannot object if he has not been appointed as head of the newly created department, since this choice falls within the discretion of the employer. However the employee may contest the discrimination on the grounds of age compared to the newly selected heads of units during reorganisation. The employer may defend himself successfully by claiming the absence of a comparable situation, since his conduct constitutes discrimination if he discriminates between employees in a comparable situation without objective and reasonable grounds (section 22 (1) a) of the Equal Treatment Act].

According to the facts established in the applicable final judgment, in the Security Department led previously by the applicant there has been no change of senior managers; the department has been abolished, and the duties have been taken over by other departments. The applicant objected to a young employee, dr.E.V., being selected as head of the Information Management Department instead of him, although there had been many overlapping duties.

The applicant, as the former head of the Security Department ,and dr.E.V., as the new head of the newly created Information

Management Department, have not been in a comparable situation. The new department not only went through a change of duties, but the Information Management Department, with a new and reorganised structure, was placed under the Legal Directorate, in contrast to the Security Department led by the applicant, which was placed under the Purchasing and Logistics Directorate, and before that under the Revenue Chain Insurance Directorate. Dr.E.V. is an attorney-at-law, whilst the applicant is a telecommunications engineer with additional studies in data protection (documents submitted No. 8/A/1. and 2., minutes of the hearing No. 8, p.3). Following from all the above, in reality it was not because of the (not even significant) age difference that the employer did not count on the applicant as head of the Information Management Department; the reorganisation and the selection of new heads of Directorates and of Departments was based on reasonable and objective grounds. There has been no causal link between the applicant's age and the dismissal, as far as the termination of the employment relationship is concerned.

On the grounds of all the above, the Kúria set the final judgment aside according to section 275 (4) of the Code of Civil Procedure, and confirmed the judgment of first instance.

Pursuant to section 78 (1) of the Code of Civil Procedure, the applicant, having been unsuccessful, shall pay the costs of the defendant incurred in the second instance and in the review procedure, as well as the court fees on appeal and of the review procedure, pursuant to section 13 (2) of Decree 6/1986 (VI.26.) of the Minister of Justice.

Budapest, 27th January 2016

Dr. Erika Tálné Molnár (signed), President of the Chamber, dr. Rita Sipőczné Tánczos (signed), Judge Rapporteur, dr. Krisztina Szolnokiné Csernay (signed), Judge

In witness whereof:

Officer of the Kúria