

Communication concerning the decision of the Curia of Hungary in  
labour case number Mfv.II.10.475/2018

According to the facts of the case, the plaintiff judges were born between 1972 and 1979 and were appointed between 2002 and 2014, while the president of the high court at which they have been employed, the defendant to the present case, took account of a maximum of one-year long service as a court secretary towards their period of service as a judge. On the other hand, the president of the high court concerned took account of the entire length of service as a court secretary of a judicial employee born in 1984 and appointed on 1 December 2015 towards his period of service as a judge. In the timeframe between October 2016 and January 2017, the plaintiffs requested the defendant to take account of the whole length of their service as a court secretary towards their period of service as a judge. The president of the high court rendered no separate decision in respect of their request, however, it could be established on the basis of his actions as their employer concerning the determination of their salary in January 2017 that he had dismissed their request.

In their legal action, the plaintiffs requested the court to order the defendant to take account of the entire length of their service as a court secretary towards their period of service as a judge and to pay them salary differentials. They argued that, by using his discretionary powers, the defendant had breached section 12 of Act number I of 2012 on the Labour Code (hereinafter referred to as the Labour Code) and the relevant provisions of Act number CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter referred to as the Equal Treatment Act), because he had discriminated against them on grounds of their age and other status. They also alleged that the defendant had abused his employer's rights, a conduct prohibited by section 7 of the Labour Code. The defendant requested the court to dismiss the plaintiffs' action.

In its judgement, the competent administrative and labour court found in favour of the plaintiffs. Proceeding upon the parties' appeals, the competent high court partially revised the first instance judgement by altering the starting date of the plaintiffs' period of service as a judge and by modifying the amount of the salary differentials due. Based on section 8, point t) of the Equal Treatment Act, the high court considered a judge's period of service as a protected characteristic, since such period of service formed an integral part of the plaintiffs' personality. As none of the judges appointed after December 2015 and employed by the defendant belonged to the plaintiffs' age group, it could be stated that the defendant had indirectly discriminated against the plaintiffs on grounds of their age. Nevertheless, the high court, contrary to the viewpoint of the court of first instance, did not conclude to a breach of the prohibition of abuse of rights as regulated by section 7, subsection (1) of the Labour Code.

Proceeding upon the defendant's petition for judicial review, the Curia of Hungary quashed the final judgement, overturned the first instance judgement and dismissed the plaintiffs' legal action.

In the reasoning part of its decision concerning the determination of the starting date of a judge's period of service, the Curia referred to section 172, subsection (2) of Act number CLXII of 2011 on the Legal Status and Remuneration of Judges (hereinafter referred to as the Legal Status of Judges Act) according to which time completed in a judicial or prosecution service relationship prior to the appointment shall be taken into consideration as service time. Time completed in any other legal relationship or activity tied to a bar examination prior to appointment as a judge may be partly or fully taken into consideration as service time. In the latter case, the employer's discretionary decision on taking a period of time completed in any other legal relationship or activity into consideration as service time may be challenged, on the basis of section 145, subsection (1) of the Legal Status of Judges Act, only if the employer has exercised his discretionary powers by breaching the relevant legal provisions, for instance the applicable rules of the Equal Treatment Act and section 7 of the Labour Code.

The requirement of equal treatment may be breached not only by the employer's active conduct, but by the latter's omission (silence) as well. In the case at hand, the president of the defendant high court had two employer's actions in respect of the determination of the starting date of the judges' period of service. The first action was the practice, followed after 1 December 2015, of taking account of the entire length of service as a court secretary towards the period of service as a judge. The second "action" was the defendant's failure to deliver an explicit decision on the request of the plaintiffs, appointed before 1 December 2015, to modify the starting date of their period of service as a judge. The employer's omission qualified as an implicit decision, therefore both of the two employer's actions had to be examined by the courts.

The high court correctly argued that section 12 of the Labour Code on the principle of equal pay for equal work could not be interpreted on its own, but had to be assessed within the context of the standards of equal treatment as provided for in the Equal Treatment Act. It follows from the foregoing that a breach of the principle of equal pay for equal work may amount to a discriminative and unlawful conduct only if the employer's decision is directly or indirectly based on any of the protected characteristics listed in section 8 of the Equal Treatment Act. Pursuant to point 2 of Departmental Opinion number 4/2017 KMK (of 28 November 2017), adopted by the Administrative and Labour Department of the Curia of Hungary, on certain issues related to labour law cases originating from a breach of the requirement of equal treatment (hereinafter referred to as the Departmental Opinion), the violation of the principle of equal pay for equal work cannot be established in the absence of the indication or suggestion of a protected characteristic or a disadvantage.

The profession of a judge does not qualify as an "other status" pursuant to section 8, point t) of the Equal Treatment Act, because such status has to be linked to an essential feature of the personality traits of the individual concerned and has to connect the latter to a vulnerable social group (point 3 of the Departmental Opinion). The plaintiffs were older than the other individual in a comparable situation, the change in the employer's appointment practice was, however, not linked to their age, and no direct discrimination could be established as a result of the demonstration of the lack of causation between their age and the disadvantage suffered by them [section 19, subsection (2) of the Equal Treatment Act].

There had been an identical employer's action (practice) in respect of judges appointed before and after the date of 1 December 2015, therefore the establishment of a homogeneous group-forming characteristic may be possible in the case at hand regarding judges appointed both before and after the aforementioned date, and, by exercising his discretionary powers, the employer did not discriminate against any of the two groups (a group of judges appointed before 1 December 2015 and another group of judges appointed after that date). The employer's practice on the determination of the starting date of a judge's period of service and of a judge's salary grade has been exclusively based on the date of appointment (as an objective and neutral action) and has not been linked to the appointed judges' age. Consequently, the employer's practice could not amount to an indirect discrimination either (case C-154/18 of the European Court of Justice).

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Administrative and Labour Department of the Curia of Hungary