

Communication concerning the decision of the Curia of Hungary  
in labour case n<sup>o</sup> Mfv.III.10.707/2017

According to the well-established facts of the case, the plaintiff had been employed by the defendant company as of 6 November 2006, first as a secretary, then, as of 1 May 2013, as an administrative assistant at the executive director's secretariat. Her tasks were the same as those of her younger colleague, Ms. Zs. R., both of them in the possession of a high school diploma. On 12 May 2014, the defendant handed over a written warning to the plaintiff, then, on 10 June 2014, it decided to terminate her employment with immediate effect.

In her statement of claims, the plaintiff requested the court to set aside the defendant's written warning and establish the unlawfulness of the termination of her employment. Moreover, she requested the court to oblige the defendant to pay her compensation for pain and suffering, redundancy benefits and interests, as well as damages for loss of income, cafeteria benefits and wage-differentials on the basis of primarily 350 000,- HUF monthly absentee pay and secondarily 250 000,- HUF monthly absentee pay. She was of the opinion that the reasoning of the defendant's decision to terminate her employment with immediate effect had not been in compliance with the relevant labour law legislation and her superior entrusted with employers' powers had misused his right to terminate. The plaintiff argued that the defendant had discriminated against her on grounds of her age, when, as of November 2013, she had been earning a monthly salary 100 000,- HUF lower than that of her younger colleague, Ms. Zs. R., although both of them had been carrying out the same tasks at the same workplace.

The defendant requested the court to reject the plaintiff's claims, as it proved in the court's proceedings that the employee's termination with immediate effect had been lawful. The defendant did not contest the fact that Ms. Zs. R. had been receiving a salary higher than that of the plaintiff, but it argued that the higher salary had been based on an individual wage bargaining prior to the establishment of employment relationship and on Ms. Zs. R.'s special administration management qualification.

In its judgement, the administrative and labour court set aside the defendant's written warning dated 12 May 2014 and established that the plaintiff's employment had been unlawfully terminated by the defendant. The court obliged the defendant to pay damages for loss of income, cafeteria benefits, redundancy benefits and interests to the plaintiff, while it rejected the remainder of the plaintiff's claims.

The court found the plaintiff's claim for wage-differentials on grounds of discrimination to be ill-founded. It established that the plaintiff's protected characteristic had been her age, she had argued that the damages suffered by her had been caused by a loss of income, as her monthly salary had been 100.000,- HUF lower than that of her younger colleague, Ms. Zs. R. who had been designated by her as a person in a comparable situation. According to the court of first instance, the principle of equal pay for equal work does not entail that employees entrusted with the same tasks at the same employer should earn exactly the same salary, otherwise the legal provision by virtue of which the parties to an employment contract are free to agree on the amount of the employee's salary would be deprived of its purpose. The court agreed with the defendant's position according to which it could not be established that the plaintiff had

been discriminated against Ms. Zs. R. in breach of the requirement of equal treatment, as their salary had been determined as a result of an individual wage bargaining process.

Proceeding upon the plaintiff's appeal, the high court partially modified the first instance judgement and obliged the defendant to pay the plaintiff compensation for pain and suffering, as well as additional damages for loss of income and additional cafeteria benefits for the time period elapsed between the delivery of the first and second instance court decisions, while it upheld the remainder of the first instance judgement. As regards the issue of discrimination, the high court pointed out that although the plaintiff had been more experienced in the position concerned, Ms. Zs. R. had obtained a special administration management qualification that the plaintiff had lacked. The court of second instance was of the opinion that it had been within the employer's full discretion to decide on what kinds of skills and qualifications had been necessary or privileged for filling a given employee's post. The employer appreciated Ms. Zs. R.'s work performance and was determined to employ her, consequently, it decided to hire her and, at the same time, – in compliance with the principle of equal pay for equal work – it gave the plaintiff a 37 percent salary raise.

Proceeding upon the plaintiff's petition for judicial review, the Curia modified the second instance judgement and increased the amount of damages for loss of income and redundancy benefits to be paid to the plaintiff by the defendant on the basis of a monthly salary of 350 000,- HUF. In the reasoning part of its judgement, the Curia stated on the basis of the result of the lower instance courts' taking of evidence that the plaintiff and her younger colleague, Ms. Zs. R. – who had complied with her study commitments when attending an administration management course at a post-secondary educational establishment, but had failed to graduate, thus, she had obtained no diploma in that respect – had been responsible for the same tasks. In the courts' proceedings, the defendant had been unable to justify the unequal pay of the two employees on grounds of alleged differences in the quality and quantity of their work, their intellectual efforts or any other circumstances.

The Curia established that the European Court of Justice had consistently acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law, had been clarified by Directive 2000/78/EC and had been incorporated into Article 21 of the Charter of Fundamental Rights as well [case C-555/07 (Küçükdeveci), paragraph 21; cases C-297/10 and C-298/10 (Hennings and Mai), paragraph 47].

It is apparent from the Court's settled case-law that whenever there is evidence of discrimination, it is for the employer to prove that the practice at issue is justified by objective factors unrelated to any discrimination based on protected characteristics. The justification given must be based on a legitimate objective. The means chosen to achieve that objective must be appropriate and necessary for that purpose [case C-17/05 (Cadman), paragraphs 31-32; case C-427/11 (Kenny), paragraphs 20 and 37; case C-381/99 (Brunnhofer), paragraphs 59-62 and 66-67].

The Court pointed out that, in relation to work paid at time rates, circumstances linked to the person of the employee which cannot be determined objectively at the time of that person's

appointment but come to light only during the actual performance of the employee's activities, such as personal capacity or the effectiveness or quality of the work actually done by the employee, cannot be relied upon by the employer to justify the fixing, right from the start of the employment relationship, of pay different from that paid to another colleague performing identical or comparable work. On the other hand, professional training and qualification may be an objective justification for a difference in pay granted to employees doing comparable work, because it is a factor which is objectively known at the time when the employee is appointed [case C-427/11 (Kenny), paragraph 29; case C-381/99 (Brunnhöfer), paragraphs 76 and 78].

The Curia concluded that the defendant had fixed the plaintiff's salary in breach of the principles of equal treatment and equal pay for equal work as stipulated in section 12 of Act no. I of 2012 on the Labour Code and had been unable to give an objective justification for the difference in pay, hence, it had failed to comply with its duty to provide evidence as required by section 19 of Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities.

Budapest, the 7<sup>th</sup> of November 2018

Administrative and Labour Department of the Curia of Hungary