

## Discrimination in Pre-contractual Relations within the Labour Law according to the Current European Court of Justice Case Law<sup>1</sup>

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**Abstract:** *The practice of recent years shows that employers often discriminate the candidates for employment not only in terms of gender, but also in terms of other reasons, in particular due to ethnicity or nationality, disability, sexual orientation, and recently mostly due to their age. This is, for example, a legal situation when the jobseeker has not yet concluded the employment contract with the employer and is applying for a job most often in a selection process. These pre-contractual relations within the labour law can be regarded as labour relations for which there is also applied the prohibition of discrimination which is also binding throughout the duration of employment relationships. In the Slovak judicial practice, there are not many anti-discrimination actions with regard to the breach of the prohibition of discrimination in the recruitment process. The employer who in refusing a job applicant justifies his/her rejection by other reasons, for example by lack of job skills or other qualifications, also contributes to this condition with such behaviour. In recent years, the European Court of Justice has taken interesting decisions relating to non-discrimination in access to employment. The European Court of Justice partly addressed the right of the refused jobseeker to have the opportunity to look into the personal files of other jobseekers.*

**Key Words:** *European Court of Justice; European Court of Justice Case Law; Labour Law; Directive 2006/54/EC; Directive 2000/78/EC; Directive 2000/43/EC; Discrimination; Pre-contractual Relations; Nationality; Religion and Belief; Sex; Age; Disability; Ethnicity; Sexual Orientation; Selection Procedures; Penalties for Breach of Prohibition of Discrimination; the European Union.*

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## Introduction

When we observe the decision-making activities of the Court of Justice of the European Union in the last decade, we can say that in terms of the number of court decisions the most dynamically developed field has been the anti-discrimination law, which applies to the field of pre-contractual relations in the labour law. For instance, over the past three years the European Court of Justice has adopted over 50 decisions in the field of the labour law of which almost a third consisted of decisions relating to the prohibition of discrimination.

The legal basis for the European Court of Justice's activities in relation to discrimination were the anti-discriminatory European Union directives, in particular the Directive 1976/207/EEC and subsequently the Directives 2000/78/EC, 2000/43/EC, and 2006/54/EC.

A new dimension in development of the anti-discrimination law was brought especially by the Directive 2000/43/EC and the Directive 2000/78/EC which, building on the Amsterdam Treaty of 1997, significantly extended the discriminatory features. The anti-discrimination directives brought, unlike the former legal status, a wide range of exemptions; this consequence was not evaluated favourably by the specialized literature.

The latest report of the European Commission on the application of the anti-discrimination directives in the Member States of the European Union from January 2014 states that the European Union countries have made a significant progress in the development of the anti-discrimination law, although statistics for the vast majority of the Member States are not comprehensive. Therefore, the Commission does not consider the data on real discrimination as objective and exhaustive. The Commission mostly registers the discrimination of the Roma population. *In terms of importance for the interpretation of the European Union law in the near future there is important the fact that ruling on the Case Coleman on discrimination on grounds of disability is considered by the European Commission as a decision according to which the discrimination can be assessed not only in terms of disability, but as well in other discriminatory characters.*<sup>2</sup>

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<sup>2</sup> See *Report from the Commission to the European Parliament and the Council: Joint Report on the Application of Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin ('Racial Equality Directive')* and of Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation ('Employment Equality Directive') [2014-01-17]. COM (2014) 2 final.

This means for the legal practice that even in the case of discrimination on other grounds there could be applied a broad legal interpretation of discrimination as the European Court of Justice decided on it in the Case C-303/06 (Coleman). According to this decision, the prohibition of discrimination on grounds of disability is not limited only to persons who themselves have a particular disability. If the employer treats the employee who is not himself/herself disabled less favourably than he/she treats, has treated or would treat other employee in a comparable situation and it is demonstrated that the unfavourable treatment is based on the disability of the employee's child to whom the concerned employee provides the majority of necessary care, such a treatment is contrary to the prohibition of direct discrimination enshrined in the Article 2 paragraph 3 of the Directive 2000/78/EC.

As follows from the above-mentioned facts, in certain circumstances the discrimination on grounds of disability may include discrimination on the basis of the applicant's close relationship with a person who is a person with a disability, even if the applicant himself/herself is not a person with disability.<sup>3</sup> *The Commission in its Report on the Application of the Directive 2000/78/EC and the Directive 2000/43/EC of January 2014 states that: "It seems that this reasoning is of a general nature and is applicable also to other grounds of discrimination."* The Commission takes the view that the two anti-discrimination directives prohibit the situation in which a person is directly discriminated on the basis of erroneous perception or assumption on the protected characteristics. For instance, if the jobseeker is not employed because the employer erroneously believes that the job applicant is of a certain ethnicity or is a homosexual.<sup>4</sup>

General prohibition of discrimination also applies to pre-contractual relationships in the labour law. As shown by the decision-making of the European Union Court of Justice, in practice there is mostly discrimination in access to employment on grounds of nationality, ethnic origin, and on grounds of age or gender.

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<sup>3</sup> See *Case of S. Coleman v. Attridge Law and Steve Law* [2008-07-17]. Judgement of the Court of Justice of the European Union, 2008, C-303/06.

<sup>4</sup> See *Report from the Commission to the European Parliament and the Council: Joint Report on the Application of Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation ('Employment Equality Directive')* [2014-01-17]. COM (2014) 2 final.

## Discrimination on grounds of race or ethnic origin

In the application practice there are known cases of refusal of a jobseeker on grounds of discrimination which, according to the existing decision-making activities of the European Court of Justice, was often based on race, respectively ethnicity as a discriminatory reason, or nationality of the jobseeker. However, the number of such decisions of the European Court of Justice is not high.

Discrimination on grounds of nationality most often occurs in labour relations with a foreign person. This discrimination in its content often overlaps with racial discrimination or with discrimination due to ethnicity. Unlike other discriminatory characters, the prohibition of discrimination based on ethnic origin and nationality is not a subject matter of the anti-discrimination directives, but this prohibition is embedded directly in the European Union primary law, in the Article 45 of the Treaty on the Functioning of the European Union.

### *Legal Case Feryn*

The most famous and ground-breaking decision of the European Court of Justice in the previous decade that stated the discrimination by nationality in combination with ethnicity is the Legal Case Feryn dated on July 10<sup>th</sup>, 2008.

A company in Belgium was seeking to recruit installers, but the director of the company said that they could not employ “immigrants” on the grounds that the company’s customers were reluctant to give them access to their private residences for the period of the works. According to the facts, the employer has publicly said that as part of company’s recruitment policy the company will not accept foreigners, immigrants of a particular racial or ethnic origin as employees, arguing that company’s customers do not trust such employees in the framework of the provision of services. The European Court of Justice has in the mentioned legal case found that there is a direct discrimination in respect of recruitment within the meaning of the Directive 2000/43/EC, as such statements may strongly dissuade certain jobseekers from submitting an application to the recruitment process and the employer constitutes an obstacle to their access to the labour market with such an action. The employer must demonstrate that he/she has not infringed the principle of equal treatment, for example, by demonstrating that the actual practice of the company’s recruitment does not correspond to such statements. The national

court must assess whether the facts which are alleged to the employer are proven and whether the evidence of the employer that he/she has not infringed the principle of equal treatment is sufficient. According to the European Court of Justice, the Article 15 of the Directive 2000/43/EC requires, even in cases where there is no identifiable victim, to have a system of sanctions applicable to breaches of national provisions adopted in order to transpose these directives, which must be effective, proportionate, and dissuasive.<sup>5</sup>

*The above-mentioned decision of the Court of Justice of the European Union had a very significant impact on application practice in all European Union Member States, especially because it conveys the need to apply sanctions for violation of the principle of equal treatment, which must be effective, proportionate, and dissuasive, even in the absence of an identifiable individual victim of such behaviour of the employer who would be influenced by it. According to the current legal situation, the requirement arising from this ruling of the European Court of Justice is not applied in the Slovak anti-discrimination legislation both in terms of the severity of sanctions that should be effective, proportionate, and dissuasive (deterrent), but also, as regards the possibility of their application in cases when there is no specific victim, on the side where there is detriment.*

### **Prohibition of discrimination based on age**

Especially in the European Union countries belonging to the Eastern Bloc until 1989, there has developed the “fetish of youth” to such an extent that the middle-aged workers often have only a very limited possibility of career, if they lose their job in the meantime. This problem of age discrimination is also present in other European Union Member States and this trend of recent decades is also reflected in the decision-making of the European Court of Justice which has developed very dynamically in recent years.

Prohibition of discrimination based on age which in recent years has disseminated most widely especially in the application practice is enshrined in the Directive 2000/78/EC.

The European Court of Justice in its decisions concerning discrimination based on age assessed not only the admissibility of the legal en-

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<sup>5</sup> *Case of Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008-07-10]. Judgement of the Court of Justice of the European Union, 2008, C-54/07.

shrinement of general age limits for performing certain professions, but in some of its activities the European Court of Justice also focused on discrimination based on age in relation to remuneration for work. Discrimination based on age has the particularity of being able to affect not only older, but also younger jobseekers.

In a recruitment process an employer may not limit the vacant position for a particular age group. Neither oral question on age is permitted in the selection procedure nor may the data relating to age be required in written communications within the pre-contractual relations. Age should not be the sole criterion for selecting employees. This prohibition is enshrined in the Article 62 paragraph 2 of the Law No. 5/2004 Coll. on Employment Services as amended.

In the application practice the aspect of age as such often has a significant role in the staff recruitment. In many cases, the age is related to the employer's requirement concerning the length of work experience.

### ***Legal Case C-246/09 (Bulicke dated on July 8<sup>th</sup>, 2010)***

According to the Legal Case Bulicke, an employer would act in a discriminatory manner if he/she would, for example, select employees aged 30 to 35 years because this procedure would not only discriminate younger, but also older jobseekers. For example, the type of advertisement stating "we are looking for employees up to 45 years of age" is discriminatory, as it is contrary to the principle of equal treatment on grounds of age.

In this way a German employer advertised vacancies and published in the newspaper an advertisement that stated as follows: "We are looking for motivated employees for our young team. Do you like making calls? Are you 18 to 35 years old, do you speak German and are looking for a full-time job? Then you are in the right place." A female applicant for this job, Bulicke,<sup>6</sup> applied for the selection process. At that time she was 41 years old. Her job application was rejected on the grounds that all positions have already been covered, although it turned out that only two days prior to the receipt of this letter to Bulicke there were recruited two candidates aged 20 and 22 years. The European Court of Justice assessed this legal situation as discrimination on grounds of age.

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<sup>6</sup> See *Case of Susanne Bulicke v. Deutsche Büro Service GmbH* [2010-07-08]. Judgement of the Court of Justice of the European Union, 2010, C-246/09.

### *Legal Case Wolf*

According to the decision of the European Court of Justice C-229/08 (Wolf) dated on January 12<sup>th</sup>, 2010, the European Union law is respected by the practice according to which the recruitment to intermediate fire service sets an upper limit of 30 years for the candidates. The reason for conformity of the above-mentioned case with the European Union law is seen by the European Union Court of Justice in demanding several years of training to perform the duties of a fire-fighter. The difficulty of the work performed was also the reason for setting the upper age limit for the performance of this profession. If, for instance, the company recruited employees in middle age, after several years of difficult training the age of these employees in other third of their professional life would be an obstacle for the quality performance of the hard work of a fire-fighter.<sup>7</sup>

Compliance with the European Union law would also be represented by such a procedure by which an employer would advertise for a given position for the performance of which he/she would require at least 5 years of work experience.

The prohibition of discrimination based on age is in itself also violated in the Labour Code of the Slovak Republic which binds the length of the five-week vacation exclusively to the age of 33 years of an employee. Thus, the age contrary to the European Union law became the sole criterion for the acquisition of an individual right.

### *Legal Cases Cadman and Danfoss*

The remuneration of employees by age is admissible (C-17/05 Cadman dated on October 3<sup>rd</sup>, 2006). In the above-mentioned case the European Court of Justice decided that it is a valid and admissible difference in treatment if the employer prioritises in remuneration employees by length of their service. Taking into account the length of employment is understood by the current law of the European Court of Justice as a certain “notional” account for the anticipated higher qualification level achieved in the performance of the profession. This fact has also been confirmed by the decision of the European Union Court of Justice C-109/88 on the Legal Matter Danfoss dated on October 17<sup>th</sup>, 1989, in which the

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<sup>7</sup> *Case of Colin Wolf v. Stadt Frankfurt am Main* [2010-01-12]. Judgement of the Court of Justice of the European Union, 2010, C-229/08.

Court stated that the employer does not have to specifically justify the application of the particular criterion of seniority, since seniority is related to the professional experience that in general makes the employee better in carrying out his/her work. Only if there were serious doubts whether seniority in a particular case is an appropriate criterion for the achievement and consolidation of professional experience the employer would have to prove that the seniority for this job position is also related to higher working and professional experience and the employee is able to better perform his/her job.<sup>8</sup>

### ***Legal Case C-415/10 (Galina Meister)***

Ms. Meister, despite the submission of required documents, was not invited for a selection process of a certain company. The company rejected her application without inviting her to the selection process. The company soon again published an advertisement for the same job. Ms. Meister re-applied for a given position. The company again rejected her application without inviting her for an interview or without providing her with any information as to the reasons for the refusal. In doing so, the company did not submit documents that would confirm or claim that Ms. Meister's education does not correspond to that required for the job in question. Ms. Meister in that legal case claimed that it is a discrimination based on gender, age, and ethnicity (originally from Russia). The European Court of Justice had to answer the question whether the employee has the right to require the employer to indicate whether he/she has recruited for the position another employee if it is proven that the candidate in question qualifies for a job, but was not employed and was not even invited for an interview. The Court entrusted that assessment to the national court. *According to the ruling of the European Court of Justice it is the task of the national court to ascertain that the refusal of information in the context of investigating facts from which it would be possible to consider the existence of discrimination cannot be conducive to jeopardising the objectives pursued by the anti-discriminatory directives. Nor it can be ruled out that the defendant's refusal to provide any information may be one of*

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<sup>8</sup> *Case of B. F. Cadman v. Health & Safety Executive* [2006-10-03]. Judgement of the Court of Justice of the European Union, 2006, C-17/05; and *Case of Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, Acting on Behalf of Danfoss* [1989-10-17]. Judgement of the Court of Justice of the European Union, 1989, C-109/88.



*the factors to be taken into account in establishing the facts suggesting that there has been direct or indirect discrimination.*<sup>9</sup>

### **Legal Case C-104/10 (Kelly)**

Recruitment interview was also covered by the decision of the European Court of Justice in Legal Case Kelly. According to the operative part of this decision, the Article 1 paragraph 3 of the Directive 2002/207/EC and the Article 4 of the Directive 97/80/EC of December 15<sup>th</sup>, 1997, on the burden of proof in cases of discrimination based on sex are to be interpreted so that there does not arise the right of the training applicant for the access to information concerning the qualifications of the other applicants for the same training if the applicant considers that he/she was denied access to this training due to the non-compliance with the principle of equal treatment, as he/she did not have access to this training according to the same criteria as other applicants, and he/she was a victim of discrimination based on sex or if the applicant claims to have been discriminated on grounds of sex.<sup>10</sup>

However, it cannot be ruled out that a refusal to provide information by the defendant in the context of proving these facts could jeopardise the achievement of the objective pursued by the Directive and thus depriving the Article 4 paragraph 1 of the Directive of the necessary effect. The national court must determine whether that is the case in the main proceedings.

### **Discrimination on grounds of religion**

The first well-known case of assessment of non-discrimination on grounds of religion in the context of pre-contractual relations is the Legal Case Vivien Prais (Vivien Prais dated on October 27<sup>th</sup>, 1976).

According to the decision of the Court of Justice of the European Union, if a jobseeker notifies the employer that religious reasons represent an obstacle for him/her to participate in the interview on a certain day, a potential employer should take this fact into account and should ensure to set the date of the interview on other than these days. However, if the jobseeker has not notified the employer about his/her difficulties with

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<sup>9</sup> *Case of Galina Meister v. Speech Design Carrier Systems GmbH* [2012-04-19]. Judgement of the Court of Justice of the European Union, 2012, C-415/10.

<sup>10</sup> *Case of Patrick Kelly v. National University of Ireland (University College, Dublin)* [2011-07-21]. Judgement of the Court of Justice of the European Union, 2011, C-104/10.

sufficient advance, prospective employer may refuse to determine another date for the interview, particularly if other applicants have already been invited to the entrance examination. Accepting such a request would in turn infringe the principles of a democratic process and would also result in significant costs. In the present case, the European Court of Justice took into account that the applicant has not exercised her right to an effective manner. In this regard, there has played a significant role a basic fact – the timeliness of the exercise of the right by the authorised person. The authorised complaining person exercised her right on the conflict of faith with certain obligations late.<sup>11</sup>

### **The prohibition of discrimination based on sex**

The gender discrimination by the European Court of Justice case law is also present, when the employer decides to hire only female jobseekers. The European Union law does not imply any obligation on a Member State to impose on the basis of its legislation an obligation of the employer to conclude an employment contract.

#### ***Legal Case Dekker***

According to the decision of the European Court of Justice C-177/88 of November 8<sup>th</sup>, 1990, the employer cannot refuse to hire a pregnant woman (Dekker) on grounds of her pregnancy if the employer considers her otherwise appropriate for the position and does not want to hire her solely due to the adverse financial consequences associated with her absence at work because of pregnancy, nor even if it would lead to limitation of the operation of the employer during her maternity leave.<sup>12</sup>

The Directive 1976/207/EEC of February 9<sup>th</sup>, 1976, does not require that, in regards to the access to employment, the gender discrimination become subject to sanctions according to which the employer which is the source of this discrimination would be obliged to conclude an employment contract with a person who was discriminated.<sup>13</sup> As regards sanctions for any discrimination that occurs, the Directive does not con-

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<sup>11</sup> *Case of Vivien Prais v. Council of the European Communities* [1976-10-27]. Judgement of the Court of Justice of the European Union, 1976, C-130/75.

<sup>12</sup> *Case of Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990-11-08]. Judgement of the Court of Justice of the European Union, 1990, C-177/88.

<sup>13</sup> See *Case of Dorit Harz v. Deutsche Tradax GmbH* [1984-04-10]. Judgement of the Court of Justice of the European Union, 1984, C-79/83.

tain any unconditional and sufficiently determined obligation on which in the absence of implementing measures within the prescribed period an individual person could rely on to achieve specific compensation if such compensation has not been established or authorised by the national law. Although the Directive 1976/207/EEC provides for the purpose of imposing sanctions the Member States with a free choice among various solutions appropriate for achieving its purpose, it requires when a Member State chooses to penalise a breach of the prohibition by a compensation to ensure the effectiveness of this penalty and its deterrent effect. This sanction of a compensatory nature must also be adequate in relation to the damage and, at the same time, must be more than merely nominal compensation, for example, reimbursement of travel expenses incurred in connection with the application for admission. National courts are obliged to interpret and to apply the legislation adopted to implement the Directive in accordance with the requirement of the European Union law if the national laws give them the opportunity to act on their own discretion.

Professions which the Member States may exclude from the scope of the Directive 1976/207/EEC should be restricted to those which inevitably necessitate the employment of a person of certain sex, provided that the objective sought is legitimate and subject to the principle of proportionality.<sup>14</sup>

The applied legislation to protect future mothers cannot contain any disadvantages in access to work and the employer cannot be allowed to refuse to hire a pregnant woman because she cannot work under the prohibition of work arising from pregnancy from the beginning and during pregnancy. In other words, application of legislation for the protection of mothers cannot contain any disadvantages in access to employment and the employer cannot be allowed to refuse to employ a pregnant employee only because during her pregnancy she cannot work under the prohibition of work arising from pregnancy.<sup>15</sup>

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<sup>14</sup> See *Case of Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986-05-15]. Judgement of the Court of Justice of the European Union, 1986, C-222/84.

<sup>15</sup> See *Case of Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern* [2000-02-03]. Judgement of the Court of Justice of the European Union, 2000, C-207/98.

### *Positive actions in recruitment of women into employment*

According to the report of the Commission on the implementation of the anti-discriminatory directives of January 2014, almost all Member States have adopted some form of positive action, particularly in relation to persons with disabilities or in relation to the Roma population. These are mainly positive-type actions, such as preferring certain target groups. Positive actions in the form of quota system can also be found in the majority of the European Union Member States, mainly only in relation to persons with disabilities within the compulsory occupational integration of these persons into the labour market. The European Union law allows the application of the quota system only under certain conditions (i.e. soft quotas).

This issue is addressed in particular by the decision of the European Court of Justice in the Case C-450/93 (Kalanke),<sup>16</sup> the decision in the Case C-409/95 (Marschall) as well as the decision in the Case C-407/98 (Abrahamsson and Anderson).

If the male jobseeker is more technically competent than a female job applicant, in this case we cannot prioritise the woman. At the same qualifications and competences the employer may prefer a woman in professions where women are much less represented than men. *According to the Court of Justice of the European Union, the preferential treatment of women in employment in terms of their disproportionate representation in comparison with men with the same qualifications, skills (compared with male jobseekers) is admissible only if the reasons for employing the male job applicant do not prevail over the reasons for hiring a woman – job applicant.*<sup>17</sup>

When applying equal treatment between men and women the employer must apply such criteria that accept the apparent substantive and not formal equality, and these criteria would decrease the occurring actual inequality of social reality and compensate for disadvantages in the professional career of persons of the under-represented sex. However, these criteria should be used in a transparent and auditable manner, so

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<sup>16</sup> *Case of Eckhard Kalanke v. Freie Hansestadt Bremen* [1995-10-17]. Judgement of the Court of Justice of the European Union, 1995, C-450/93.

<sup>17</sup> See *Case of Hellmut Marschall v. Land Nordrhein-Westfalen* [1997-11-11]. Judgement of the Court of Justice of the European Union, 1997, C-409/95.

as to exclude any arbitrary assessment of the qualifications of the candidate.<sup>18</sup>

### **Prohibition of discrimination in the family businesses with few employees**

Discrimination, especially by gender, is often present also in family businesses.

The prohibition of discrimination also applies to domestic companies with few employees. According to the decision of the European Court of Justice in Case C-165/82 (EC/UK), the general exemption from the prohibition of discrimination to employment relationships in households and small businesses with up to five employees is contrary to the Article 2 paragraph 2 of the Directive 1976/207/EEC. The important issue here is not the fact that gender is decisive for certain housework, although this does not apply to all housework. The general exemption is considered by the European Court of Justice decision as inappropriate.<sup>19</sup>

### **Pre-contractual relationships and knowledge of the official language**

Another well-known case addressed by the Court of Justice of the European Union is the Legal Case Groener from the field of the university education from Dublin where in the interviewing process for the teaching position there failed a teacher who does not speak Irish. The requirement of hiring consisted in a successful passing of the test of the Irish language. The jobseeker in question did not pass the test. In his application he defended himself that the knowledge of the Irish language was not necessary because teaching at the university was conducted in English. The Court held that Ireland had not infringed the principle of equal treatment in the implementation of the right to free movement of workers because it qualified the knowledge of the Irish language as the necessary re-

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<sup>18</sup> See *Case of Katarina Abrahamsson, Leif Anderson v. Elisabet Fogelqvist* [2000-07-06]. Judgement of the Court of Justice of the European Union, 2000, C-407/98.

<sup>19</sup> *Case of Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1983-11-08]. Judgement of the Court of Justice of the European Union, 1983, C-165/82.

quirement for the position, as the teacher needed to generally participate in the daily school life.<sup>20</sup>

### Discrimination based on disability

In terms of non-discrimination, the concept of disability is certainly the focus of attention. The European Court of Justice has already stated in the Case Navas that the term disability means a disability that prevents the realisation of a person in professional life and lasts for a longer period of time. A disease can be a cause of disability, although a disease as itself cannot be confused with a disability.<sup>21</sup>

The concept of “disability” as one of the discriminatory characters is legally relevant only in the field of compliance with the principle of equal treatment. As well as it is in the case of the majority of other discriminatory characters, the prohibition of discrimination on grounds of disability is enshrined in the Directive 2000/78/EC. The European Court of Justice ruled already in the resolution Navas that a disease is not a disability. Nevertheless, the relationship between a disease and a disability is still unclear and the European Court of Justice has still not exhaustively explained it yet. A certain limit between disease and disability is formed by chronic diseases which are continuously expanding as a result of an unhealthy lifestyle. These are also the age-related chronic diseases, such as diabetes mellitus, arthritis, rheumatism, and dementia. In regard to this, it is necessary to make a distinction between the various stages of these diseases. At the beginning of such a disease persons can live and work, but later on, in the later stages of these diseases, they require the care of others. Therefore, it is almost impossible to find a common definition of chronic diseases. The problem begins where the existence of such a chronic disease impedes the exercise of the profession and it should be considered as discrimination. This problem has already been addressed by a decision of the Court of Justice of the European Union.

The definition of disability in relation to chronic diseases has become clearer after the decision of the Court on Legal Cases related to this issue – C-335/11, C-337/11 (HK Denmark). *According to the above-mentio-*

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<sup>20</sup> *Case of Anita Groener v. the Minister for Education and the City of Dublin Vocational Educational Committee* [1989-11-28]. Judgement of the Court of Justice of the European Union, 1989, C-379/87.

<sup>21</sup> *Case of Sonia Chacón Navas v. Eurest Colectividades SA* [2006-07-11]. Judgement of the Court of Justice of the European Union, 2006, C-13/05.

*ned decision, if a chronic disease, especially the age-related disease, impedes the performance of a professional activity, it can be considered a "disability" which is covered by the prohibition of discrimination.*

In addition to the landmark ruling by the European Court of Justice concerning discrimination based on disability in which the Court expressly ruled on the concept of disability and did not qualify the disease for disability, *when addressing the case KH Danmark the Court explained that the concept of disability may include, under certain circumstances, a health status caused by an incurable disease or a long-term curable disease.*<sup>22</sup>

### ***A woman who does not have a uterus is not a person with disability***<sup>23</sup>

A determined mother from Ireland agreed with a surrogate mother that this woman will carry her child and was seeking legal protection under the Directive 2006/54/EC and the Directive 2000/78/EC. The applicant could not become pregnant or give birth, although she is fertile, because she does not have a uterus. A surrogate mother, therefore, gave birth to her child. The European Court of Justice did not grant this woman a legal protection of a pregnant worker or mother after birth, since the applicant has never been pregnant or given birth to a child. Similarly, the Court did not see any discrimination behaviour based on disability in the conduct of her employer. In its justification the Court stated that despite the constraints imposed by disability to be long-term, *it is not a restriction that prevents an employee to fully and effectively participate in working life, therefore, it did not consider her disease as a disability within the meaning of the Directive 2000/78/EC.*

The Court of Justice of the European Union included in its interpretation the concept of disability as it is enshrined by the United Nations Convention on the Rights of Persons with Disabilities. This Convention is the first legally binding international instrument for the protection of human rights for persons with disabilities which contractual party is also the European Union. Therefore, the Directive 2000/78/EC shall, as far as

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<sup>22</sup> See *Case of HK Danmark, Acting on Behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, Acting on Behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, Acting on Behalf of Pro Display A/S* [2013-04-11]. Judgement of the Court of Justice of the European Union, 2013, C-335/11 and C-337/11.

<sup>23</sup> See *Case of Z. v. A Government Department, The Board of Management of a Community School* [2014-03-18]. Judgement of the Court of Justice of the European Union, 2014, C-363/12.

possible, be interpreted in a manner that is consistent with the United Nations Convention on the Rights of Persons with Disabilities.

### **The employment contract only in the official state language or is it a restriction on the free movement of workers?**

The pre-contractual relationships are also related with a problem whether the employment contract must be concluded in accordance with the requirements of the state official language in cases when the law is provided by the state where the work will be performed.

The European Court of Justice has dealt with this issue in the context of the Legal Case Las. This case is the issue of labour relations with a foreign element in relation to the use of the official language in employment contracts. Legislations of various Member States provide for the use of the state language not only in public legal relations, but also in non-official, private-law relations between individuals, i.e. also in employment relations. According to the Act No. 270/1995 Coll. on State Language, written legal actions in employment relations or similar labour relations are carried out in the state language. In addition to the state language, there may be made originals of identical content also in another language.

According to the Article 22 of the Charter of Fundamental Rights of the European Union as well as the Article 4.2 of the Treaty on European Union, *the Union shall respect the national identities of the Member States, which also includes the protection of the official state language*. Therefore, the protection policy of the state language authorises the Member States to apply measures restricting freedom of movement for the workers. In the Case Las of April 16<sup>th</sup>, 2013 (C-202/11) the Court was deciding on a dispute concerning the Dutch language region of the Kingdom of Belgium and decided on the inadequacy of the compulsory use of Dutch in employment relations with an international element. Mr. Las as a Dutch national who came to Belgium to work understands Dutch, but the director of the international company that employed him does not speak Dutch. Therefore, they concluded the employment contract in a language understood by both parties, in English, although in this region the crucial wording is only the Dutch version of the employment contract. According to the local law, the employment contract which is concluded in a language other than Dutch is null and void, while this nullity has an absolute effect, the so-called *ex tunc* effect, i.e. is retroactive. According to the European Court of Justice, this fact has a deterrent effect on the employees



and the employers who do not speak the Dutch language and come from other Member States.<sup>24</sup>

In the above-mentioned case, the Court considered as essential the assessment of whether the Flemish legislation on the use of Dutch in creating employment contracts respects the principle of proportionality in relation to the objective of protecting official language. *In this case the Court did not confirm the compliance with the principle of proportionality.* It based its decision on a requirement for a free and informed consent between the parties which means that the parties must be able to make their contract also in a language other than the official language of the Member State in question. *This deficiency results in inadequate enforcement of the official language, contrary to the Article 45 of the Treaty on the Functioning of the European Union, which ensures that the nationals of the Member States will not be disadvantaged if they wish to pursue an economic activity in another Member State.* Union citizens should not be disadvantaged merely because they have exercised this right. *Therefore, the implementation of the policy for the state language protection may not unreasonably interfere with the fundamental freedom of free movement of workers.* The infringement of the free movement of workers would not have occurred if the legislator of the Member State would have allowed the drawing up of the employment contract in the language understood by the both parties. As it is stated in the Court's reasoning in this case, in such cases the objectives pursued by the Constitution can be provided with much less interference with the freedom of movement of workers than by the exclusive use of the official language of the Member State.

## Conclusion

The prohibition of discrimination also applies to pre-contractual relations. Precisely in the recruiting process of employees the employer often violates the principle of equal treatment. The past practice has shown that in recent years there has been a violation of this principle, particularly in relation to older jobseekers, although there are also significant violations of the principle of equal treatment on other grounds covered not only by the both primary and secondary European Union laws, but also by the legislation of the European Union Member States.

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<sup>24</sup> *Case of Anton Las v. PSA Antwerp NV* [2013-04-16]. Judgement of the Court of Justice of the European Union, 2013, C-202/11.

The Labour Code and the Anti-Discrimination Act, unlike the European Union law, prohibit discrimination not only based on the explicit discriminatory reasons, but also in terms of other status which must be understood in the way that it cannot be any other reason of discrimination than that specified in the legislation. Discrimination for any other reason is linked to the reasons associated with the identity, integrity, and dignity of the person in question. Thus, even if the enumeration of discriminatory grounds in the Labour Code or the Anti-Discrimination Act is not exhaustive and represents the so-called open status, when interpreting legal reasons that can be subsumed under the notion “other status” these are to be understood the reasons of the same type and the same nature.

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