SUMMARY

2016/6 An employee's salary may be above the equal treatment standards if there is a material reason (CZ)

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Facts

Article 110 of the Czech Labour Code, which transposes the EU rules on equal pay, provides that all employees with the same employer are entitled to the same salary for the same work or work of equal value. Thus, the prohibition of unequal treatment is not limited to specific grounds such as race, gender or age.In the employment contract between the plaintiff (the employee) and the Cultural House in Liberec (the employer), which was the defendant in this case, the parties agreed the employee would work as a cook and be paid a salary of CZK 15,000. On the same day, the employer agreed another employment relationship with another employee for a cook, with a salary of CZK 17,000. The second employee then also signed an agreement about guiding students and was described as their instructor. The second employee was also older and had more experience of the job and had passed his final exams at

school.The plaintiff claimed unequal treatment in remuneration, arguing that both cooks were performing the same type of work and should have been entitled to the same salary. He wanted the employer to pay him additional salary of CZK 48,000 to cover almost two years of employment.The court of first instance refused the action on the basis that there was no discrimination by the employer, since the two cooks were not performing the same work. This was because the second cook also had an agreement with the employer to guide students, as he had comple|ted high school and had more experience of the job. The difference in salary was to reward him for guiding the students.The plaintiff disagreed with the court's decision and appealed to the second instance court.The appellate court acknowledged the decision of the first instance court, saying that the two cooks could not possibly be performing work of equal value, if one took into account the agreement on guiding the students that the more experienced cook had made. According to the appellate court, the difference in the cooks' salaries ensued from their different positions.Again disagreeing with the court's opinion, the plaintiff filed an extraordinary appeal with the Supreme Court, arguing that the difference in the workload of the two cooks should have been accounted for in the employment contract. By making almost identical employment contracts, with the only difference being the amount of salary, the employer was in breach of his obligation to give the same amount to employees performing the same work.

Judgment

The Supreme Court upheld the judgment of the lower instance courts, justifying its decision as follows:An employer may only pay one employee more than others for equal work if there is a reason, as provided in subsections 3-5 of Article 110 if the Labour Code:

"(3) The complexity, responsibility and difficulty of work shall be assessed according to the education and practical knowledge and skills required for the performance of this work, the complexity of the subject of the work and working activity, the organisational and management difficulty, the degree of liability for damage and responsibility for health and safety, the physical, sensory and mental load and influence of adverse effects of the work.
(4) Working conditions shall be assessed according to the difficulty of work regimes based on the distribution of working hours, for example into shifts, non-working days, night work or overtime work, the harmfulness or difficulty caused by other adverse effects of the working environment and the risks associated with the working environment.
(5) The working performance shall be assessed according to the intensity and quality of the performed work, working abilities and working capacity, and the results of work shall be assessed according to quantity and quality."

Commentary

Although not very surprising in the end, this decision is important for Czech labour law mainly for its subject matter. Until this decision, there was no Czech case law in the field of equal pay. In this case, the Supreme Court gave a valuable example of possible derogation from the equal treatment principle where there is a material reason on the employer's side.

According to the decision, the position of each employee at the employer must be regarded, both in relation to other employees and with respect to the individual qualities of each employee, such as education, previous practice, experience and reliability.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The Czech courts in this case concluded that although both cooks held the same job title of 'cook', their work was not of equal value and they therefore could not be compared to one another. This reminds me of the Brunnhofer case (C-381/99), in which the ECJ held that:

"as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay".

The claimant in Brunnhofer was a female employee in a bank who held the same position as a male comparator but worked under different conditions (i.e. more frequent overtime, larger clients and more authority to represent the employer) and performed better than the claimant. In this regard, the facts in Brunnhofer are reminiscent of those in this Czech case, despite the fact that Brunnhofer was about sex discrimination, which this case is not.

There is another aspect to the case reported above that brings to mind what the ECJ had to say in Brunnhofer:

"in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sex for the same job or work of equal value cannot be justified by factors which become known only after the employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the

effectiveness of the work of a specific employee compared with that of a colleague".

The Czech Supreme Court "took into account the fact that the plaintiff had already received a warning letter from the employer for wilfully leaving the workplace". This warning must have been given after the two cooks had been hired and after the employer had decided to pay them different salaries. How then could the warning justify paying the plaintiff less than the comparator?

Dutch statute only prohibits unequal treatment on certain prohibited grounds, such as race, sex, age and disa|bility. It does not prohibit 'general' unequal treatment as such. However, the courts have applied the 'good employer' provision in the Civil Code to develop a doctrine that employees who perform the same work should be rewarded similarly, even where there is no discrimination based on any of the protected characteristics. The snag is that judicial review in such cases is limited. Only where the differential treatment is manifestly unfair will the courts intervene. The result is that the protection against unequal treatment in general is weaker than the protection against unequal treatment on the grounds of a protected characteristic.

Subject: discrimination, remuneration

Parties: J. H. (employee) – v – Dům kultury Lib|erec, s.r.o.

Court: Nejvyssi soud (Supreme Court)

Date: 6 August 2015

Case number: 21 Cdo 3976/2013

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