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ADMINISTRATIVE COURT
OF THE REPUBLIC OF
SLOVENIA

RULING IS FINAL AND ENFORCEABLE
ADMINISTRATIVE COURT OF THE REPUBLIC OF SLOVENIA, LJUBLJANA
11 November 2020

/stamp: "REPUBLIC OF SLOVENIA - ADMINISTRATIVE COURT, LJUBLJANA, 22"/

Signature of the competent court official:
/signed/

JUDGMENT

IN THE NAME OF THE PEOPLE

The judicial panel of the Administrative Court of the Republic of Slovenia, with senior judge Jure Likar presiding and senior judges dr. Damjan Gantar and Jasna Šegan as judicial panel members,

and senior judicial advisor Maja Perpar as the minute-keeper,

in the administrative dispute brought by the plaintiff: [redacted], represented by the law firm [redacted], against the respondent: **THE REPUBLIC OF SLOVENIA,** represented by the Advocate of the Principle of Equality, Železna cesta 16, Ljubljana,

in the matter of **the finding confirming discrimination under the Protection Against Discrimination Act (hereinafter referred to as "ZVarD"),**

on the **Action** filed against the decision of the Advocate of the Principle of Equality, ref. no. 0700-30/2019/15 of 4 September 2019,

convening on **11 November 2020**

RULED AS FOLLOWS:

I. The Action is dismissed.

II. Each party shall carry its respective costs of the procedure.

REASONING

1. In the decision being contested by the plaintiff, the respondent found the plaintiff to have violated the rule prohibiting indirect discrimination provided for under the ZVarD by setting out the criteria to assess individuals' eligibility for the business performance bonus and the share (%) of the bonus payout for each employee in the Agreement on Employee Earnings for the Year 2019, dated 9 April 2019 (hereinafter referred to as: "Agreement"), which refer to the individual employee's workplace attendance, where a predefined sliding scale is used to apply deductions based on the employees' absence from work due to all health-related reasons, maternity leave, paternity leave and unpaid personal leave.

2. In the Reasoning section of the decision, the respondent notes that it received an anonymous complaint alleging that the plaintiff adopted the aforementioned Agreement on 9 April 2019, which presumably contained discriminatory criteria. It follows from the discrimination complaint that the company pays out a reduced amount of the bonus to an employee who has over 100 hours of absence from work due to health-related reasons. The respondent deemed the case was of general significance for the protection against discrimination, which could be applied to future cases, both identical and similar. The respondent requested that the plaintiff submit the necessary clarifications and documentation in order to clarify specific circumstances involved in the matter at hand. The plaintiff disagreed with the allegation of discrimination. The plaintiff believes that if the payment were awarded in equal amounts for everyone, regardless of their work attendance record, this would be discriminatory to employees who worked for the majority of their mandatory work attendance hours. Moreover, this falls within the employer's autonomous discretion. Employees who are absent for personal (for example, health-related) reasons, only receive a lower amount of the business performance bonus. If they are absent for health-related reasons, they also receive a lower salary. The respondent also obtained specific clarifications from the National Labor Inspectorate of the Republic of Slovenia.

3. The plaintiff responded to the clarifications provided by the National Labor Inspectorate of the RS and insisted that it was not acting in a discriminatory manner. The disbursement of a business performance bonus is subject to an agreement reached with the employer. A larger share of the business performance bonus is awarded to employees who contributed more to the realized business results, as evidenced by their presence in the workplace. Employees who worked more effectively are not in a comparable situation to those who worked less.

4. Further along the reasoning section of the decision, the respondent summarizes what counts as discrimination according to Article 4 of the Protection Against Discrimination Act (ZVarD). *Inter alia,* discrimination is deemed to include unequal treatment based on personal circumstances. In addition to those explicitly mentioned

in Article 1 of the ZVarD, personal circumstances can also include any other personal circumstances. In the case concerned, the respondent recognizes pregnancy, parenthood, gender, family situation and health status to be such circumstances. In labor law, one's health and family statuses explicitly enjoy protections under Article 6 of the Employment Relations Act (hereinafter referred to as: "ZDR-1"). The respondent then explains what is deemed indirect discrimination under the second paragraph of Article 6 of the ZVarD.

This occurs when a person or a group of people having certain personal circumstances is, was or could be at a disadvantage compared to other people due to a seemingly neutral regulation, criterion, or practice. In accordance with Article 6 of the ZDR-1, the employer must ensure for the duration of the employment relationship that the employee receives equal treatment irrespective of the various circumstances mentioned in that Article, including other personal circumstances. The criteria for eligibility for the bonus, and the share of the payout per individual employee, are stipulated in the Agreement. The respondent found that, while the criteria were laid out as neutral and while they apply equally to all employees, the effect of these criteria could be such that it could in fact put at a disadvantage certain employees with specific personal circumstances. The Agreement is an internal bylaw of the employer, which regulates the rights of all employees. Absences for health-related reasons, absences related to maternity leave and paternity leave, constitute justified absences from work, which are covered by relevant forms of wage compensation. While the Agreement does not infringe upon the employees' rights to being absent from work, it does affect the employees' situation when they actually exercise these rights in practice. These employees are put in a less favorable position, as reflected in their receiving a lower percentage of the business performance bonus. Thus, the decrease adversely affects those employees who are either absent more frequently or those who are absent for longer periods of time, which includes pregnant employees, employees with chronic or long-time illnesses or injuries which require major medical procedures or rehabilitation, persons officially recognized as disabled employees, persons providing care for or accompanying a family member in the event of illness or injury, older employees, etc. Due to their specific personal circumstances, which they are unable to change, these employees will find it more difficult to achieve the criterion of employee attendance at work, which puts them in a disadvantaged position compared to those who are not faced with such circumstances. The employer's autonomy is limited by the statutory provision on the prohibition of discrimination and equal pay. Besides this, an employee's mere presence in the workplace is not necessarily an indicator of their performance level. The criterion used to determine eligibility for the bonus and for the share of the bonus paid out based on the Agreement constitutes unequal treatment of employees based on the aforementioned personal circumstances, which manifests itself as a curtailing, or as a reduction of the business performance bonus as a part of their salaries.

5. The plaintiff argues in the action that the operative part of the cited decision does not indicate which specific provision of the law it supposedly violated by executing the Agreement. Employee attendance at work cannot be considered a personal circumstance, as it is instead an objective, independent and neutral fact. To support this argument, it refers to the judgment of the Court of Justice of the European Union EU ref. no. C-13/05, whereunder sickness cannot be regarded a personal circumstance within the meaning of protection against discrimination, i.e. it differs from a handicap or disability as referred to in the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereinafter referred to as "Directive 2000/78"). The respondent's stance differs from the stance of the Court of Justice of the European Union. The fact that employees who participate in the employer's business processes have a greater contribution to the employer's business performance is not disputed. The respondent also refers to the judgment of the Higher Labor and Social Court in Ljubljana. ref. no. Pdp 1331/2008, which states that in the context of awarding the business performance bonus, it is necessary to assess whether an employee, during the year being evaluated for the business performance, did in fact contribute to said business performance. The respondent also refers to the same court's judgment no. Pd 709/2010, in which the court stated practically the same. This position is also consistent with the position of the Supreme Court of the Republic of Slovenia in judgment no. VIII Ips 145/2003, which states that discrimination which is based on work results constitutes permissible discrimination. Furthermore, the Health Care and Health Insurance Act also does not grant 100% of the salary compensation in cases of absence from work due to sick leave. The share of the salary referring to the business performance bonus is a relatively small part of the full salary and other remuneration stemming from the employment relationship. And even so, employees who were not at work at all still receive 20% of the business performance bonus as part of their salaries. The respondent's conclusion that the Agreement should not be regarded as a classic civil law agreement is also incorrect. It is incorrect that the respondent considers the Agreement to be an internal company bylaw. The Agreement has the status of a collective bargaining agreement, and a collective bargaining agreement is binding upon the two parties who have executed it. The respondent has no authority to interfere with its decision in the collective bargaining process taking place between employers and employees' unions. Collective bargaining agreements have the legal status of a regulation. The plaintiff proposes the court repeal the contested decision and also demands compensation for the costs incurred over the course of the proceedings, increased by the statutory default interest.

6. In its responsive pleading, the respondent argues that the General Administrative Procedure Act (hereinafter referred to as as the "ZUP") does not require citation of articles in the operative part of the decision. The operative part of the decision indicates that the plaintiff has been accused of having acted in contravention of the prohibition of indirect discrimination, and the articles of the ZVarD are duly cited in the reasoning section of the decision. Furthermore, the respondent clarifies that the

health status, pregnancy, parenthood etc. are considered personal circumstances, since these are either inherent or acquired characteristics which a person is unable to change, and it is also highly difficult to expect such person to change them. In the Republic of Slovenia, the legislator provided broader protections against discrimination than are provided under Directive 2000/78. If the legislator transposed into Slovenian law only the narrow protections, as stipulated in said Directive, this would be unconstitutional, since Article 14 of the Slovenian Constitution (hereinafter referred to as "URS") explicitly prohibits discrimination, including on the basis of other personal circumstances which are not explicitly mentioned. Directives specify only the minimum extent of the legal regulation which Member States are obligated to ensure, but this does not prevent Member States from providing for a broader scope of rights. One's health status as an independent personal circumstance is also recognized in case-law. In its judgment no. VIII Ips 145/2003, the Supreme Court of the Republic of Slovenia states that a provision granting an individual fewer rights from the outset based on their sickness is discriminatory. The fact that sick leave cannot be regarded as a criterion in the selection of redundant workers is also confirmed in Judgment VIII Ips 159/2011. All employees are entitled to receiving the business performance bonus based on the company's good business results. In this context, the employer's autonomy is limited by the statutory prohibition of discrimination. If the criterion is defined in such a way that the payout of the business performance bonus is based on the employee's individual contribution, this would make it no longer a business performance bonus, but rather an individual work performance bonus. An employee's mere presence in the workplace is not necessarily an indicator of their performance level. In the case of the Higher Labor and Social Court in Ljubljana judgment Pdp 1331/2018, which the plaintiff refers to, the issue at hand was a question of payout, not a question of the criteria or the amount of the business performance bonus to be paid out. In this context, the court based its judgment on the stance that the bonus should also be paid to a person who is no longer employed at the employer, but was employed during the year for which performance was being assessed. The court's assessment was limited to whether or not the person was employed in the company during the specified evaluation period, and since this was the case, the court took the position that he was entitled to the business performance bonus. Also, in the judment Pdp 709/2010, the court did not undertake an assessment of the issue of the employee's effectiveness, but instead, the issue at hand was the question of the nature of the Christmas bonus, which the court recognized was a form of income which is a form of a holiday present to the employee, rather than an earning based directly on the employee's contribution to the company's business results. The judgment of the Supreme Court of the Republic of Slovenia no. VIII Ips 145/2013, which the plaintiff referenced, shows that the consideration of the criterion of absence due to sickness is a circumstance which is beyond the individual's control, therefore it should not and must not affect their rights stemming from their employment relationship. By virtue of arriving at the conclusion that the plaintiff had violated the prohibition of indirect discrimination by setting out

the criteria for determining employees' eligibility to the business performance bonus and the proportional share thereof, the respondent did not interfere in the collective bargaining process between the employers and the representatives of the employees in any way whatsoever. Its finding did not overturn the Agreement, since this falls beyond its competence. The collective bargaining agreement can only be interfered with by way of a court case being brought before the cognizant labor court. In the case concerned, the issue is not a question of whether the law is discriminatory. The respondent proposes that the court dismiss the action.

7. In its pleading, the plaintiff also refers to the legal argument presented in the article *Discriminatory nature of criteria for payout of the business performance bonus* published in the publication *Podjetje in delo*, issue 8/2019, which shows that it is not impermissible to discriminate between employees who were regularly attending work over the course of the calendar year and contributed to the company's busines result with their presence, and those who were present for only part of the calendar year due to taking parental leave. The article also argues that employees who were absent for health-related reasons were to receive the performance bonus based on their attendance during the calendar year. In its own pleading, the respondent noted its disagreement with the legal opinion that employees who were absent for health-related reasons and employees who were absent due to taking parental leave should receive the employee performance remuneration based on their presence during the calendar year. In such a situation, both groups would be put in a disadvantaged position compared to other employees, which is in contravention with antidiscrimination laws.

To Point I of the operative part of the decision:

8. The action is unsubstantiated.

9. In the case under consideration, the point of contention is whether or not the provisions of the Agreement, which stipulate that the criterion for assessing individuals' eligibility for the business performance bonus and the share (%) of the business bonus payout for each employee are dependent on the individual employee's workplace attendance, where a predefined sliding scale is used to apply penalties even for absences due to health-related reasons, maternity leave, paternity leave and unpaid personal leave, are to be regarded as covert discrimination.

10. Article 4 of the ZVarD defines discrimination as any undue actual or legal unequal treatment, differentiation, exclusion, limitation or failure to act due to personal circumstances, the result or consequence of which is hindrance, reduction or nullification of equal recognition, enjoyment or exercise of human rights and fundamental freedoms, other rights, legal interests and benefits. The plaintiff found that the contentious provisions of the Agreement constitute indirect discrimination. In accordance with the second paragraph of Article 6 of the ZVarD, indirect

discrimination occurs when a person, or a group of people, having certain personal circumstances is, was or could be at a disadvantage compared to other people due to a seemingly neutral regulation, criterion, or practice, unless such provision, criterion, or practice is objectively pursuing a legitimate objective and the means of attaining this objective are appropriate and necessary.

11. The court finds that it is not disputed that even those of the plaintiff's employees who were absent for health-related reasons, maternity leave, paternity leave and unpaid leave, are eligible to receive a lower percentage of the business performance bonus. The disputed issue is whether these are the circumstances which constitute discrimination, as referred to in Article 4 of the ZVarD. The court deems that the respondent was correct in determining that these are circumstances which should not cause the affected persons to find themselves in a disadvantaged position. The court concurs with the respondent's reasoning in this regard, therefore, in accordance with Article 71 of the second paragraph of Article 71 of the Administrative Procedure Act (hereinafter referred to as "ZUS-1"), it will not repeat the reasons for the decision and will instead refer to the plaintiff's reasoning as stated. Court merely emphasizes that the respondent correctly established that, while the criteria were laid out as neutral and while they apply equally to all employees, the effect of these criteria could be such that it could in fact put at a disadvantage certain employees with specific personal circumstances. The respondent correctly established that these employees were put in a less favorite position, as reflected in the fact that they receive a lower amount of the business performance bonus, therefore the decrease adversely affects those employees who are either absent more frequently or absent for longer periods of time, which includes pregnant employees, employees with chronic or long-time illnesses or injuries which require major medical procedures or rehabilitation, persons officially recognized as disabled employees, persons providing care for or accompanying a family member in the event of illness or injury, older employees, etc., and that they will find it more difficult to achieve the criterion linked to employee attendance at work as a result of their special circumstances which they are unable to change, which puts them at a disadvantaged position compared to those not affected by these circumstances.

12. In regards to the argument that the operative part of the decision does not specifically state which statutory provision the plaintiff had violated, the court notes that the operative part of the decision is not where provisions of violated regulations are referenced. Instead, this information is included in the reasoning section, as the respondent did. Article 214 of the General Administrative Procedure Act (ZUP) stipulates that the reasoning section, inter alia, includes an indication of the provisions of regulations on which the decision is based.

13. In regards to the action claim that employee attendance at work cannot be considered a personal circumstances, the court notes that in its statement of the grounds for the decision, the respondent explained clearly enough, and in sufficient detail, that

employees who are at a disadvantage due to having a higher number of hours of absence from work include such employees who were absent due to such circumstances as health-related reasons, maternity and paternity leave, and, as a result of these circumstances, they should not be in a disadvantaged position compared to other employees who do not share these circumstances.

14. In regards to the action claim arguing that the judgment of the Court of Justice of the European Union no. C-13/05 indicates that sickness cannot be regarded as a personal circumstance in the context of protection against discrimination, or that it is different from a handicap or disability within the meaning of Directive 2000/78, the court finds that while Article 1 of the aforementioned directive does indeed state that the purpose of said Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, and while it is true that in its judgment the Court of Justice of the European Union assumed the position that sickness as such cannot be regarded as an additional reason besides those which Directive 2000/78 explicitly prohibits, it should be understood that both the directives and the judgments of the Court of Justice of the European Union specify only the minimum scope of legal regulation which Member States are obligated to ensure, but do not prevent Member States from granting a broader scope of rights, as was correctly argued by the plaintiff in its responsive pleading. Slovenian law grants a broader scope of human rights, since Article 14 of the Slovenian Constitution guarantees everyone equal human rights and fundamental freedoms irrespective of, *inter alia* – as is explicitly written in said Article – *any other personal circumstance* (i.e. not exclusively limited to nationality, race, gender, ...).

15. For all of the reasons listed above, the court also cannot concur with the legal stance expressed in the article referenced by the plaintiff, arguing that employees who are absent from work for health-related reasons or because they are taking parental leave, should be awarded the employee performance bonus based on their presence during the calendar year, because this would put them at a less advantageous position compared to other employees.

16. The Higher Labor and Social Court in Ljubljana judgment no. Pdp 1331/2008 of 5 March 2009 is also not relevant to the case at hand, since in that judgment the court was dealing with the issue of whether or not an employee who is currently in the process of termination is still eligible to receive the Christmas bonus. Also, in its judgment of 11 November 2010, the Higher Labor and Social Court in Ljubljana also did not consider the issue of whether or not the amount of an employee's business performance bonus can be reduced due to sickness-related reasons or similar. In said judgment, the court only ruled on whether it is justifiable to consider how much an employee contributed to the profits when determining the payout of the business performance bonus. However, the court did not consider the issue of discrimination

related to the absence of a certain category of employees. In Supreme Court of the Republic of Slovenia judgment no. VIII Ips 145/2003, which the plaintiff also references, took the position that consideration of the criterion of an employee's absence due to sickness is a circumstance which is beyond the plaintiff's control, and that this therefore should not and must not affect the employee's rights stemming from their employment relationship. In fact, this argument speaks supports the respondent, whose stance was that it is not permissible to reduce the amount of the employee's business performance bonus as a result of their absence due to sickness.

17. Even if the business performance bonus represents a relatively small proportional share of the entire salary, as the plaintiff argues in its action, this still does not justify a situation where employees who were absent due to sickness, maternity leave and similar reasons receive a smaller portion compared to those who do not share these personal circumstances.

18. With regard to the action claims arguing that the respondent interfered with the collective bargaining process between the employers and the labor union with its decision, the court finds that the defendant did not repeal the Agreement in any capacity, as it merely made the determination that some of the clauses of said Agreement are discriminatory. By doing so, it did not interfere with the subject matter of the agreement itself, since this falls beyond its competence. The court therefore disagrees that the respondent overreached into the field of competence of labor courts, since it did not pass decisions as to the validity of the Agreement.

19. Having considered all of the above, the court finds that the challenged decision is correct, therefore it dismissed the action as unsubstantiated pursuant to the first paragraph of Article 63 of the ZUS-1.

20. In the matter concerned, the court passed its decision in a session closed to the public, without conducting a main hearing. In doing so, the court determined that the point of dispute between the parties is an issue of substantive law, specifically whether a legal act - the Agreement - is in conformity with Slovenian law in terms of whether or not it contains discriminatory provisions. This issue involves exclusively the issue of application of substantive law. The facts of the case themselves, i.e. the wording of the Agreement, are not in dispute. The court was therefore had the legal basis to adjudicate on the matter pursuant to the first paragraph of Article 59 of the ZUS-1, without holding a main hearing. Namely, the aforementioned Article stipulates that the court may adjudicate without a main hearing if the facts of the case that were the basis for the issuing of the administrative act between the plaintiff and respondent are not contentious. The above notwithstanding, neither of the parties to the proceedings moved for the court to adjudicate after a main hearing has been conducted.

To Point II of the operative part of the decision:

21. The decision on the allocation of the costs of the proceedings is based on the fourth paragraph of Article 25 of the ZUS-1, whereunder each of the parties bears their own costs related to the procedure if the court dismisses the action.

LEGAL NOTICE:

No appeal may be lodged against this judgment (first paragraph of Article 73 of the ZUS-1).

Ljubljana, 11 November 2020

Presiding judge: Jure Likar, m.p.

/signed/

/stamp: »REPUBLIC OF SLOVENIA, ADMINISTRATIVE COURT, LJUBLJANA, 22«/

/stamp: »This facsimile is true to the original. Signed by the competent court official:«/

[END OF TRANSLATION]

*Podpisani TADEJ REISSNER, z odločbo Ministrstva za pravosodje Republike Slovenije z dne 12.9.2006 št. 705-22/2005, imenovani sodni tolmač za angleški jezik, potrjujem, da se ta prevod popolnoma ujema z izvirnikom, ki je sestavljen v **slovenskem** jeziku.*

*I, the undersigned TADEJ REISSNER, court interpreter for the English language appointed by decree of the Ministry of Justice of the Republic of Slovenia, no. 705-22/2005 dated 12.09.2006**,** hereby attest that the translation is true to the **Slovenian** original.*

Podpis/Signature

_____

Žig/Stamp

Ljubljana, 21. december 2020 / December 21, 2020