

AGE DISCRIMINATION IN THE CZECH AND EUROPEAN CONTEXT – COMPENSATION OF NON-PECUNIARY DAMAGE

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Abstract: Age discrimination (or ageism) is a cross-sectional stereotyping phenomenon that affects the whole of society particularly in respect of recent demographic changes, the evolution of legislation and relevant case law. The ambivalence of this kind of discrimination is widespread due to the differing nature of ageism's two subcategories – adultism and jeunism. The different manifestations of discrimination have their impact primarily on two specific age groups which complicates an integrated analytical and methodological approach. Prohibition of age discrimination is legally established in both Czech and European law. This study provides a view of changes in the perception of ageism throughout the EU Court of Justice's rulings, develops a number of case studies regarding direct, indirect, positive and negative forms of age discrimination and analyses the existing or potential private law consequences, such as non-pecuniary losses caused by age discrimination, in the Czech legal system with special regard to the new Czech Civil Code.

Keywords: ageism, age discrimination, European private law, new Czech Civil Code, damages, intangible harm, non-pecuniary loss, EU Law, EU Court of Justice (CJEU), constitutional court

1. INTRODUCTION

Demographic trends are the basic factor when choosing measures at national level in all areas: economic, institutional, legal and value-based. In this context the issue of the employment of older persons (50–60 years old) seems crucial. As we can expect a steady decrease of inhabitants of productive age, the issue of employing older workers becomes more acute.¹ The fact that this is not just an absolute decrease but also a relative one (the proportion of persons in the productive age range of 15–64 years will decrease from 70% to 64.5% in 2020 and then to 55.8% in 2050) only intensifies this issue.² Although age discrimination is most felt in relation to older age groups, it is a cross-sectional phenomenon that affects all age groups, although each encounters it in a different form and intensity. This article will concentrate on possible private law implications in the Czech private law *de lege lata* also from the perspective of the new Civil Code. It is particularly necessary to ask to what degree an act of discrimination represents a compensation claim.

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¹ We also take into account the Ageing Report 2012, which has been prepared for the European Commission by the specialized *Working Group on Ageing Population*. This report analyzes the influence of demographic changes on budgetary policies in the period 2010–2060.

² Although the ratio of children and young people to the productive population will probably decrease in the mid- to long-term period, it is expected that education costs in the Czech Republic will increase from the current 3.4% to 3.7% GDP, particularly due to EU policies, which aim to improve the quality of education, which inevitably involves certain costs.

1.1 The term age discrimination

Apart from gender, race and social origin, age is an important sociological criterion. The term age discrimination describes the social and economic disadvantaging of individuals or groups due to their age. In our opinion age discrimination is a specific phenomenon due to its ambivalence. It is a mixture of both the undesirable socio-economic exclusion of the affected groups and social protection provided to the same groups, although with a different motive. The different approach to persons due to their age can be also seen as a social benefit in some cases (advantages granted to more senior employees). The issue has to be viewed through the prism of two basic logics: differentiation, which takes into account the sustainability and appropriateness of specific adopted measures and egalitarianism, which appeals to respect for the non-discrimination principle.³ Age discrimination can be divided into **acceptable and unacceptable differentiation**. In this sense an acceptable discrimination would be, for example, setting an age limit for criminal liability, suffrage or pension age.⁴ However in general, we understand age discrimination to be a certain disadvantaging of an individual due to his age regardless of his other qualities – overall ability, education, qualification, experience etc.

The term **age discrimination (ageism)** first appeared in 1968, when it was introduced by the Director of the American National Institute on Aging, psychiatrist Robert N. Butler, who described this phenomenon in several forms: **adultism** describes favouring adults and prejudice against all who are not considered adult; **jeunism** on the other hand means favouring the young at the expense of the elderly, including political opinions etc., where it is expected that young people are more viable and possess superior physical beauty to those of riper age.⁵ Butler sees ageism as a process of systematic stereotyping and discrimination of persons due to their age, similar to the way racism and sexism relate to skin colour and gender. **“Old people are categorized as senile, rigid in their ways and thinking, old-fashioned in morals and skills.”** According to Butler ageism manifests itself in a wide range of phenomena both at the individual and institutional level: stereotypes and myths, open disdain and aversion or simply avoidance of contact, **discriminatory practices in housing, employment and services of all kinds**, nicknames, cartoons and jokes. *“Ageism sometimes becomes an effective method through which the society promotes its views of older persons with the aim of shaking off part of its responsibility towards them.”*⁶

³ The ambivalence of the whole construct is strengthened by the fact that age as a socio-economic category is an objective neutral criterion from the administrative point of view and paradoxically could be perceived as a guarantor of equal treatment.

⁴ By using age, the legislator could set limits for termination of a right or its acquisition (coming of age, gaining active or passive suffrage, setting age limits for driving licenses and subsequent medical examinations which are a condition to keep this right for older people for safety reasons etc.)

⁵ In the area of labour law relations in the case of the first group – young workers- there is emphasis on experience, regardless of whether the individual has the necessary qualification for the given position, will and enthusiasm for this work, at the same time it is important for him to get the required experience somewhere. As for the second group the problem here is the requirement of a long and perspective co-operation, while the experience of older workers gets overlooked, although it could be much more important for the employer than a long-term employment. “Such age discrimination is often excused by claiming that it is fair for older workers to make space for the younger ones.” See FREDMAN, S. *Anti-discrimination Law*. Prague: Prague Multicultural Centre, 2007. p. 58.

⁶ BUTLER, R. N. *Why Survive? Being old in America*. New York: Harper and Row Publisher, 1975. In: VI-DOVIČOVÁ, L. *Stárnutí, věk a diskriminace – nové souvislosti*. Brno: Masarykova Univerzita, 2008. p. 111.

Butler later redefined ageism with the help of so-called prejudice attitudes, discriminatory practices and institutional policies. E.B.Palmor continued with this reworked definition and described ageism as any prejudice or discrimination against or in favor of a certain age group “(...) prejudices against an age group are negative stereotypes against this group or negative attitudes based on a stereotype, (...) discrimination against an age group is an inappropriate, undue negative behavior towards members of the given age group.”⁷

1.2 Ageism in the context of European law – case law trends at the Court of Justice of the European Union

The basic pillar of protection against discrimination within **European law** is Article 19 of the TFEU. Embedded in this article is the requirement for unanimous adoption of measures against discrimination based on gender, race or ethnic origin, religion or world view, physical handicap, **age** or sexual orientation. As combating discrimination is one of the EU goals, **Council Directive No. 2000/78/EC of 27th November 2000 has been adopted, establishing a general framework for equal treatment in employment and occupation.** The aim of this Directive, according to the provisions of Article 1 is the establishment of a general framework for combating illegal discrimination “*based on gender, race or ethnic origin, religion or world opinion, physical handicap, age or sexual orientation in employment and occupation with the aim to establish the equal treatment principle in the Member States*”. This Directive focuses on the area of labour relations and age is listed here as a possible discrimination reason. Article 6 of the Directive focuses on the justification of differences in treatment due to age. This article establishes the right of Member States to stipulate in which cases there is no discrimination due to age; however these situations must be **objectively and reasonably substantiated by legitimate goals**, within the Directive mainly by goals of employment policy, the labour market and education. According to Article 6 the areas where Member States can set legal different treatment are in particular access to employment, education, legal regulation of employment and occupation including conditions for dismissal and remuneration for young workers, older workers and persons with nursing duties. Another area is the setting of the maximum age of hiring, if the position requires specialized training or the necessity for a certain period of employment before becoming a pensioner. Paragraph 2 of Article 6 further states that the setting of **age limits** by Member States in the area of social security is not discriminatory, providing there is no discrimination due to gender.

In decision-making practice, the relation between Articles 4 and 6 of Framework Directive 2000/78/EC turned out to be disputable. According to some opinions both provisions can be used in parallel for ageism. The wording of Article 4 of Directive 2000/78/EC is clear.⁸ Each characteristic listed in Article 1 of Framework Directive

⁷ PALMOR, E. B. *Ageism: Negative and Positive*. New York: Springer, 1999, p. 4.

⁸ Regardless of Article 2 (1) and (2) the Member States can stipulate that the difference in treatment based on a characteristic in relation to any of the reasons listed in Article 1 does not constitute discrimination, if due to the nature of the work activities in question or the contexts within which they are being performed, this characteristic constitutes a fundamental and decisive requirement for employment, if the goal is justified and the requirement appropriate.

2000/78/EC⁹ poses as a justifying fact, therefore its enumerative clause character cannot be denied. Only with regard to the issue of age the Directive 2000/78/EC offers an openly formulated Article 6, which with regard to the legitimate goals is not closed as it includes twice the term “particularly”¹⁰. However, it seems that CJEU case law has moved in another direction. The judges began to differentiate the test of justifiable unequal treatment by age. It seems that the term “particularly” in Article 6 of Directive 2000/78/EC, which establishes the demonstrative character of this provision, is being intentionally ignored and the goals in policies of employment, the labour market and specialized training are considered to be sole measuring scale of Article 6 of Directive 2000/78/EC. This has been demonstrated in the recent rulings *Petersen, Wolf*¹¹ and *Age Concern*¹². Regarding Article 6 of Directive 2000/78/EC it should be made clear in particular to what extent the private or entrepreneurial interests of the employer should be taken into consideration. In its *Age Concern* ruling the CJEU established the scope for considering the legitimate interests of private persons within Article 6 of Directive 2000/78/EC quite narrowly, although it does not exclude the possibility that national legislation promoting objectives of employment policy, the labour market and specialized training would grant the employers a certain degree of flexibility.

In particular it was the breakthrough ruling in the *Mangold* case which started a heated debate among experts, and it is appropriate to recall it here. The employee Mangold called for review of the interpretation of employment contracts, the duration of which could be limited, according to the then German legislation, by reaching a certain age. The CJEU could not apply Directive 2000/78/EC¹³, as its transposition period had not yet expired. Thus European law did not contain any explicit ban on age discrimination. The CJEU, in relation to the above mentioned case law *Wachauf* and referring to the fact that the German Federal Republic found itself in a situation of application of Community law,¹⁴ found the relevant provisions of German legislation inapplicable. The inference of a ban on age discrimination met with widespread criticism as it was based on international treaties on human rights and shared constitutional traditions of the Member States¹⁵, which the major part of the German doctrine disputed and understood as

⁹ The aim of this Directive is to establish the general framework for combating discrimination based on gender, race or ethnic origin, religion or world opinion, physical handicap, age or sexual orientation in employment or occupation with the goal to establish the equal treatment principle in the Member States.

¹⁰ Regardless of Article 2. (2). Member States can stipulate that the differences in treatment do not constitute discrimination, if in accordance with domestic law these are objectively and reasonable substantiated by justified goals, including goals of employment policy, the labour market and education and if the measures applied to reach the goals are adequate and necessary.

¹¹ CJEU ruling of 12th January 2010 in case C-229/08, Colin Wolf.

¹² CJEU ruling of 5th March 2009 in case C-388/07, Age Concern England.

¹³ Council Directive No. 2000/78/EC of 27th November 2000, establishing a general framework for equal treatment in employment and occupation.

¹⁴ Specifically Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

¹⁵ Several decisions operating with the prohibition of age discrimination were adopted within the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. An explicit ban on ageism is included in the constitutions of Portugal, Greece and Finland.

an instrument transgressing the competence limits. The dispute about the character of this ruling went as far as the second senate of the Federal Constitutional Court in Karlsruhe (*Bundeverfassungsgerichtshof*),¹⁶ which did not find the *Mangold* ruling to be an instrument transgressing competence limits adding that the inference of the ban on age discrimination is not indefensible. The measurement scale for assessing Community acts based on their defensibility had already been formulated in the so-called Kloppenburg resolution of 1987.¹⁷ **Therefore it can be said that the ban on age discrimination must be viewed as a valid maxim and a general legal principle, the observance of which is subject to the decision-making and supervisory authority of the CJEU.** The scope of this principle is not limited to labour law cases, but is relevant to the whole legal system. Its violation (e.g. by not respecting Framework Directive 200/78/ES) also establishes a violation of EU primary law.

Direct discrimination is based on the concept of equality as consistency.¹⁸ It is not the treatment itself but the fact that one person is treated less favourably than another who is in a similar position. The equality imperative is attained if both subjects are treated equally, i.e. not only equally favourably but e.g. equally unfavourably as well. A measure would be direct discrimination if its direct consequence would be a discriminatory result (e.g. persons who are of pension age are given mass notice).¹⁹ In the case of direct discrimination it is the kind of regulation where a certain person or group of persons is treated less favourably than other persons in similar conditions, if this is happening due to legally unjustifiable reasons, i.e. based on an unacceptable criterion (age, race, gender, nationality, religion), unless the different treatment based on such a criterion is substantiated by a justified goal and the methods of its fulfilment are appropriate and necessary. The characteristic of the principle of prohibition of direct discrimination is that its violation cannot be justified. However, as for, for example, discrimination in remuneration, the legislation in some cases allows its justification.²⁰ However, it is necessary that this justification be objective. The CJEU created a strict proportionality test, where the employer must prove that the chosen measures really serve the entrepreneurial need, are appropriate to achievement of the goal and necessary for the employer.²¹

¹⁶ Findings of the Federal Constitutional Court of 6th July 2010.

¹⁷ Resolution of the Federal Constitutional Court of 8th April 1987.

¹⁸ See FREDMAN, S. *Anti-discrimination Law*. Prague: Prague Multicultural Center, 2007, pp. 7–10; BOBEK, M. – BOUČKOVÁ, P. – KÜHN, Z. (eds.). *Equality and Discrimination*. Prague: C.H.Beck, 2007, pp. 11–17.

¹⁹ The disadvantage of equality as consistency in treatment is the necessity to find a similarly positioned individual as a reference point (comparator). Fredman in this context correctly remarks that the need of a norm of comparison with another person creates strong pressures to accommodate and the choice of the comparator itself requires a difficult value judgment on which of the numerous differences between any two comparators are relevant and which are not and there are situations, where a suitable comparator does not exist at all. This is the case e.g. of discrimination of women due to pregnancy, the result of which was that originally cases regarding pregnancy were excluded from protection due to the non-existence of a comparator or rather it was possible to compare only a pregnant and non-pregnant woman; it was unacceptable to compare with a man.

²⁰ Right to equal treatment gives ground to the economic interests of the employer to a certain degree.

²¹ CJEU ruling of 17th June 1998 in case C-243/95, [1998] IRLR 466.

The CJEU recently extended the interpretation of **direct discrimination**. In the *Feryn*²² ruling it stated that the public proclamation of the employer that he will not employ persons of a certain ethnic origin or of a certain race, is enough to substantiate the hypothesis of existence of direct discrimination according to Article 8 (1) of Directive 2000/43/EC. This conclusion can be used generally and thus now discrimination does not have to have a concrete victim in order to be in conflict with the anti-discrimination *acquis*. In the *Coleman*²³ ruling the CJEU under the impression of direct discrimination subsumed the associated discrimination as well, because in its opinion the prohibition of direct discrimination foreseen in Directive 2000/78/EC does not apply just to the injured persons, but also to workers who are not themselves disabled, but are evidently disadvantaged due to their care for a disabled child.

The core of **indirect discrimination**²⁴ is that a general legal regulation which formally does not contain any prohibited discrimination clause, actually causes discrimination when applied. There are two forms of indirect discrimination. If the core of indirect discrimination lies in application, discrimination can be removed by adjusting the interpretation. If, however, the core of indirect discrimination lies in the construction of the norm itself, then it can be removed only by changing this norm. Indirect discrimination is an action or neglect, when for a forbidden reason a person is disadvantaged compared to others based on a seemingly neutral decision, set criterion or practice²⁵. Indirect discrimination thus rather reflects the material concept of equality.²⁶ As for indirect discrimination, the CJEU decided to complete the law as well. In relation to gender equality it decided (see e.g. the *Jørgensen* ruling)²⁷ that if the prosecutor proves disadvantage as a result of the use of a neutral criterion (or at least with a high degree of probability), the burden of proof shifts to the accused. He then has to prove that the disadvantage is in no way related to the forbidden criterion and does not constitute discriminatory behaviour. This CJEU case law has been codified in both primary and secondary Community law.

The CJEU has fulfilled its **interpretative function** in other cases as well. Article 2 (5) of Framework Directive 2000/78/EC claims that “*this Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for*

²² CJEU ruling of 10th July 2008 in case C-54/07, *Feryn NV*.

²³ CJEU ruling of 17th July 2008 in case C-303/06, *Sharon Coleman*.

²⁴ Ruling of the Grand Senate of the ECHR of 13th November 2007, *D. H. and others v. the Czech Republic* (complaint No. 57325/00).

²⁵ Matching this description of indirect discrimination are two subtypes. The first can be characterized as follows: a general norm has an equal effect for all recipients, but it is too broad, because it affects some recipients unacceptably harshly or otherwise less favourably than others. The second is based on the fact that the legal norm governs an exemption from the general regulation, which however inappropriately affects a certain group of people. In the first case the affected person will demand the creation of an exemption from the general norm, i.e. the creation of a new material norm, whereas in the second case the person who is affected by the less favourable regulation will demand equality with the more protected group.

²⁶ More to material equality see e.g. See FREDMAN, S. *Anti-discrimination Law*. Prague: Prague Multicultural Center, 2007, pp. 124–125, 182–185; BOBEK, M. – BOUČKOVÁ, P. – KÜHN, Z. (eds.). *Equality and Discrimination*. Prague: C. H. Beck, 2007, pp. 17–18.

²⁷ CJEU ruling of 6th April 2000 in case C-226/98, *Brigitte Jørgensen*.

the protection of health and for the protection of the rights and freedoms of others.” In the **Petersen**²⁸ ruling the CJEU does not interpret this provision as a list of protected areas or areas excluded from the Directive’s scope, but as facts substantiating a different procedure.

Article 7 of Framework Directive 2000/78/EC enables positive discrimination regarding all forbidden differentiations and its contents correspond with Article 157 (4) of the TFEU. Compared to the original provision included in Article 2 (4) of Directive 76/207/EEC the current formulation is a bit stricter. However, the CJEU will maintain the same attitude towards positive discrimination, as the **Abrahamson**²⁹ ruling indicates. Positive measures related to age can also be adopted based on Article 6 I (2) letter a) of Framework Directive 2000/78/EC, as they could be classified as support or protection for employees.

Also related to the issue of discrimination is the **principle of proportionality**, as has been indicated above and this at two levels. First, it is a general principle determining the way the EU performs its competences. According to the principle of proportionality the EU may adopt only such measures as are necessary to achieve its goals. This principle is embedded in Article 5 of the Treaty on the European Union, which states: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” However, the principle of proportionality applies also in the area of indirect discrimination. If the differentiation or procedure is objectively justified by the goal and the means to achieve the aforementioned goal are **appropriate and necessary**, then it is not considered indirect discrimination.

Significantly related to the principle of proportionality was the **Palacios** ruling.³⁰ The point of the ruling was that while national legislation may set an age limit for a forced retirement, it may be subject to a review and if it is not considered objectively justifiable, it will be in conflict with EU law. *“The prohibition of any discrimination on grounds of age, as implemented by Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, must be interpreted as not precluding national legislation pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime where the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose”*. The possibility of using the institution of automatic, i.e. compulsory retirement is in this case based on the clauses of the collective agreements. As collective agreements are concluded for a relatively short period, it is possible for them to adapt to the current needs of the employment policy of the given member state or directly a specific region of this state. It is therefore desirable that these collective agreements are always made in accordance to the employ-

²⁸ CJEU ruling of 12th January 2010 in case C-341/08, *Dominica Petersen*.

²⁹ CJEU ruling of 6th July 2000 in case C-407/98, *Katarina Abrahamsson*.

³⁰ CJEU ruling of 16th October 2007 in case C-411/05, *Palacios de la Villa*.

ment policy of the given state so as not to abuse the institute of automatic retirement in order to get rid of older employees.

Another ruling which was related to the principle of proportionality in indirect discrimination was the *Küçükdeveci* judgment,³¹ which stated that the setting of an age limit of 25 years, for which the employee's years worked did not count for the purpose of determining the notice period (the plaintiff's period had been shortened from 4 months to 1), could not be justified by the goal of easing the employer's burden. It severely affected young people who enter the working process with short (or no) specialized training, in comparison to those, who went into work after extended education. These did not have to suffer any disadvantage. The age limit had been found unjustified in another case as well. The *Andersen*³² ruling specified that Article 2 and Article 6 (1) of Council Directive 2000/78 of 27th November 2000, establishing a general framework for equal treatment in employment and occupation, must be interpreted as precluding national legislation, according to which employees who are entitled to a retirement pension paid by their employer within the pension system, members of which they had become prior to reaching 50 years of age, cannot only for this reason receive special severance in case of dismissal, which is meant to support re-integration into the workforce of employees who had been employed in the company longer than 12 years.

On the other hand, the *Ivanov*³³ ruling stated that Council Directive 2000/78/EC of 27th November 2000, establishing a general framework for equal treatment in employment and occupation, particularly Article 6 (1) must be interpreted as not precluding national legislation such as the one concerned in the main action, which for university professors, who reached 68 years of age, sets a compulsory retirement and after reaching 65 enables them to continue working only by means of 1-year limited contracts, which cannot be prolonged more than twice, if this legislation pursues a legitimate goal related particularly to the policy of employment and the labour market, such as ensuring the quality of education and optimal distribution of professor positions among generations and if it enables achieving this goal by appropriate and necessary means. It is the national court's responsibility to verify that these conditions have been met. In the case of a dispute between a public facility and an individual the national court must, should a regulation such as the one concerned in the main action not fulfil the conditions listed in Article 6 (1) of Directive 2000/78, leave this regulation unused.

Similarly in the *Rosenblatt*³⁴ case. Article 6 (1) of Council Directive 2000/78/EC of 27th November 2000, establishing a general framework for equal treatment in employment and occupation, must be interpreted as not precluding national legislation such as section 10 point 5 f the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz in Germany), according to which the clauses on automatic retirement on reaching retirement age are considered valid, if the provision in question is reasonably and objectively justified by a legitimate goal of employment and labour market policy and if the means to achieve

³¹ CJEU ruling of 19th January 2010 in case C-555/07, *Seda Küçükdeveci*.

³² CJEU ruling of 12th October 2010 in case C-499/08, *Ole Andersen*.

³³ CJEU ruling of 18th November 2010 in joint cases C-250/09 and C-268/09, *Vasil Ivanov Georgiev*.

³⁴ CJEU ruling of 12th October 2010 in case C-45/09 *Gisela Rosenblatt*.

this goal are appropriate and necessary. The implementation of this permission via a collective agreement is not excluded from judicial review and in accordance with the requirements of Article 6 (1) of the above mentioned Directive must also pursue a legitimate goal and be appropriate and necessary.

As is apparent from the foregoing analysis, the CJEU had the possibility to deal with age discrimination only in relation to the cited Council Directive 2000/78/EC. For this reason even the preliminary questions were related to labour law relations. In their requests the Member States were interested mostly in the interpretation of Article 2 (2) and Article 6 (1) of the anti-discrimination Directive. Questions were dealt with regarding the so-called exemptions from prohibition of discrimination, i.e. when is different treatment allowed, setting a legitimate goal and the means to achieve it. The CJEU in its rulings did not avoid the answer to the question of whether or not it is a case of discrimination, however in most cases left the relevant national courts to assess the legitimacy of a goal and appropriateness of the means. The CJEU – as explained above – issued a rather ambitious judgment in the *Mangold* case, where it attributed a direct effect to the Directive in question and followed this line in the *Küçükdeveci* case. In other cases the court has been rather reserved and focused on justifying why it leaves quite broad competences to the Member States' courts which alone should judge whether the goals and means to achieve them, which lead to a certain inequality, are sufficiently legitimate and appropriate. Also of interest are the aforementioned decisions in cases *Petersen*³⁵ and *Wolf*³⁶, where the CJEU did not consider the setting of an age limit for some professions to be discriminatory. In the *Hütter*³⁷ ruling it concluded that not including the affiliation with an employer within the public administration prior to reaching 18 years of age for the purpose of grandfathering in Austria is inadequate and therefore must be annulled.

1.3 The Czech regulation – constitutional guarantees and private law instruments of protection

It is necessary to mention that at this time the Czech Republic is fully bound by the Charter of Fundamental Rights of the EU (hereinafter only the “Charter”), because the Czech Republic has not yet acceded to Protocol 30 of the Lisbon Treaty. Even after accession to this basically interpretative document the Czech Republic would remain bound by the fundamental rights of the EU when implementing EU law (*Wachauf*)³⁸ or if a national regulation fell into the scope of Community law (*ERT*)³⁹. In relation to this fact the Czech Republic also is and will be bound by the explicit and general prohibition of age discrimination included in Article 21 of the Charter, because this prohibition had been

³⁵ Abolition of the age limit of 68 in the regulation of health insurance in Germany. Legitimate goals presented by the federal government were not accepted as coherent and sufficient. The age limit should have served as protection of patients against incapable doctors. There had been no age limit in the system of private health insurance, which convinced the CJEU of the arbitrariness of the disputed regulation.

³⁶ Setting a maximum age limit for employment in intermediate career posts in the fire service had been found justified and in accordance with the Directive.

³⁷ CJEU ruling of 18th June 2009 in case C-88/08 *David Hütter*.

³⁸ CJEU ruling of 13th July 1989 in case 5/88 *Wachauf*.

³⁹ CJEU ruling of 18th June 1991 in case C-260/89 *ERT*.

formulated by the CJEU independently of the existence of the Charter, when it had been defined as an unwritten general principle of EU primary law in the *Mangold*⁴⁰ and *Kücükdeveci*⁴¹ rulings. For the purpose of interpretation of the scope and intensity of the fundamental right (non-discrimination) stipulated by the Charter, it is also necessary to bear in mind its accessory nature in relation to constitutional traditions common to the Member States (Article 52 (4) of the Charter).

The domestic guarantee of protection against discrimination is provided mainly by the Constitutional Act No. 2/1993 Coll., **Charter of Fundamental Rights and Freedoms**, particularly Article 1, Article 3 (1), Article 26 (1) and (3), Article 25 (1) and Article 28. Article 3 (1) of the Charter of Fundamental Rights and Freedoms stipulates that “fundamental human rights and freedoms are guaranteed to everybody irrespective of sex, race, colour of skin, language, faith, religion, political or other conviction, ethic or social origin, membership in a national or ethnic minority, property, birth, or other status”. Constitutional guarantees included in Article 3 (1) relate to all fundamental rights and freedoms, i.e. both to the whole content of the Charter of Fundamental Rights and Freedoms and the content of international treaties concerning human rights and freedoms, binding for the Czech Republic, which under the conditions of Article 10 Protection against Discrimination is regulated by other legal regulations as well. It is comprehensively dealt with in the Antidiscrimination Act.

The Charter of Fundamental Rights and Freedoms does not contain an explicit prohibition of age discrimination. However, from the context of its provisions (particularly Articles 1 and 3) it follows that people are equal and any form of discrimination is unacceptable, i.e. including age discrimination. The prohibition of age discrimination had therefore been already regulated based on positive law prior to the adoption of the so-called Antidiscrimination Act of 2009, implementing EU antidiscrimination Directives and which is the first to use this term explicitly. However, for the area of **labour law relations** the provision of the Labour Code directly reacting to the principle of prohibition of discrimination in section 16 is valid: “*Any form of discrimination in labour relations is prohibited. The terms, such as direct discrimination, indirect discrimination, harassment, sexual harassment, persecution, an instruction to discriminate and/or incitement to discrimination, and the instances in which different treatment is permissible, shall be regulated by the Antidiscrimination Act.*” From the cited provision among others directly follows the general prohibition of age discrimination in labour law relations, emphasizing admissible forms of different treatment as discussed above in the introductory part.

The **Antidiscrimination Act**⁴² is the first comprehensive legal regulation of its kind in the Czech Republic. This Act implements the relevant EU Directives. The new regulation defines the right of every natural person to equal treatment and prohibition of discrimination in the area of the right to employment and access to employment, access to an oc-

⁴⁰ CJEU ruling of 22nd November 2005 in case C-144/04 *Mangold*.

⁴¹ CJEU ruling of 19th January 2010 in case C-555/07, *Seda Küçükdeveci*.

⁴² Act No. 198/2009 Coll., on Equal Treatment and Legal Remedies to Protect against Discrimination (the Anti-Discrimination Act), as amended. It was adopted in April 2009, has been valid since 29th June 2009 and came into force on 1st September 2009, except for part II (regulating the activities of the Public Ombudsman), which came into force on 1st December 2009.

cupation, to entrepreneurship and self-employment, membership in unions, works councils or employers' organizations, access to education, healthcare, social security etc. The Act cited defines the terms direct and indirect discrimination, harassment, admissible forms of different treatment, the principle of equal treatment of men and women in social security and instruments of protection against discrimination are also regulated. **Private law instruments of protection** play an important role regarding the impacts of discriminatory actions on an individual's private life.

The Act awards an injured party a classic tripartite situation, as can be found in protection of personality rights, i.e. enables the person, whose rights associated with rights to equal treatment or prohibition of discrimination were affected, to claim in the courts restraint from discrimination (claim to refrain from action), removal of discriminatory impacts (claim to remove ill effects) and provision of adequate satisfaction (claim for satisfaction). The general private law construction of the right to adequate satisfaction implies that in the case of reduction of the good reputation or dignity of a person or his social prestige by a significant degree this person has a right to claim **monetary compensation of non-pecuniary damage**. Its amount will be determined by the court while taking into account the gravity of the damage and circumstances of the violation of the right. The burden of proof lies with the accused who has to prove that his action was not of a discriminatory nature. Employers also have to prove that the principle of equal treatment has been observed or rather that the possible unequal treatment was not of a discriminatory nature. It has been remarked above that **the prohibition of age discrimination in the light of CJEU case law is considered a valid maxim and a general legal principle**. The general prohibition of discrimination has a deep natural law base, a further reflection of which is the relevant constitutional guarantee at the level of the Charter of Fundamental Rights and Freedoms. The provisions of the civil law are crucial for enforcing possible compensations for damages or non-pecuniary damages. The new Civil Code (hereinafter only the "NCC")⁴³, which represents the focus of recodification of the private law, strengthens the intensity of protection of personal rights and expands the options to claim compensation for interference with intangible property. The base of personal rights protection is Section 81 NCC, which emphasizes the significance of a person's natural rights. It reflects the anthropocentric approach of the new Civil Code. A person's personality, including all his natural rights, enjoys protection. The right to compensation for non-pecuniary damage caused by a violation of the personal integrity of a person must be interpreted in an appropriate context of tort provisions. The new law of civil torts did not extend the legislative term for damage and is still based on the construction that non-pecuniary damage shall be compensated only if it is stipulated by law; however it indisputably extended the possibilities to sue for non-pecuniary damages.

The right to claim compensation for non-pecuniary damage suffered, apart from the standard compensation for pecuniary damage, embedded for those cases where an obligation arises for the perpetrator to compensate the person for the damage done to his natural right (typically the protection of personal rights). As one of the forms of non-pe-

⁴³ The NCC will come into force on 1st January 2014.

cuniary damage the psychical suffering caused shall be compensated as well. However, in our opinion the term psychic suffering is broader than psychic harm and will be interpreted as such⁴⁴. It includes more than just medically recognized (diagnosable) psychic disorders, which are currently compensated within the compensation for pain suffered. The victims of ageism – and of course not only this form of discrimination – may also experience psychic suffering as a result of discriminatory action. For the purpose of determining the amount of compensation for non-pecuniary damage the NCC stipulates general parameters which should be taken into account when calculating adequate compensation in a given case.⁴⁵ The satisfaction provided should also reflect circumstances worthy of special consideration, among which the legislator includes – among others – discriminatory action at the injured party's expense. Although age is not included among the examples of discriminatory reasons that are listed here, it can be considered as another serious reason documenting the possibility to apply the cited Section 2957 NCC.

Because, inter alia, particularly in disputes concerning compensation of non-pecuniary damage or damage compensation, the regulation of procedural obligations of the plaintiff and the accused turned out to be unclear (the regulation of the so-called burden of proof), the Supreme Court of the Czech Republic addressed this issue and came to the following conclusion: “If the employee demands that the employer refrain from his discrimination, removes the results of the discrimination of the employee, that the employer provide him with adequate satisfaction or that he provide monetary compensation for non-pecuniary damage or rather that the employer compensate for damage incurred by discrimination, the employee has in civil proceedings the procedural obligation to lodge a claim and burden of proof that he was (is) disadvantaged by the employer's actions compared to other employees of the same employer. The claims of the employee that the motive for the employer's actions were (are) discrimination reasons stipulated by law, is considered proven by the court, unless the employer can claim and prove through evidence or it otherwise becomes clear during the proceedings that he has not violated the principle of equal treatment in relation to his employees.”⁴⁶

Crucial for the purposes of **age discrimination** are the basic provisions of the Antidiscrimination Act in Sections 2 and 3. Section 2 includes a definition of what is understood by the right to equal treatment, i.e. the right not to be discriminated for reasons stipulated by this Act. The Act defines direct discrimination as: “*such action, including neglect, when a person is treated less favourably than another person is (or would be) treated in similar*

⁴⁴ See also ELISCHER, D. Nové i staronové jevy v deliktním právu: vybrané aktuální otázky v právu odpovědnosti za škodu ve 3. tisíciletí. In: Pauknerová, M., Tomášek, M. *Nové jevy v právu na počátku 21. století - sv. 4 - Soukromé právo*. Karolinum 2009, cap. 3.5.

⁴⁵ Section 2957 NCC: *The form and amount of the appropriate compensation must be determined in such a way that circumstances worthy of special consideration will also be compensated. Such circumstances are intentional cause of harm, particularly the case of harm with the help of a ploy, threat, abuse of dependence of the injured party on the perpetrator, multiplying the effect of the interference by making it public, or as a result of discrimination of the injured party regarding its gender, health condition, ethnic origin, religion or other similarly serious reasons. Also taken into account shall be the fear of the injured party of loss of life or a serious bodily harm, if such a fear has been caused by a threat or another cause.*

⁴⁶ File No. 21 Cdo 246/2008 of 11th November 2009.

situation, due to race, ethnic origin, gender, sexual orientation, age, physical disability, religion or world view.” In this provision we see age listed as a discriminatory reason for the first time within Czech law. In Section 3 of the Antidiscrimination Act we then find the definition of indirect discrimination, which is defined as such action or neglect, when based on a seemingly neutral provision, criterion or practice is a person disadvantaged compared to others due to one of the reasons listed in Section 2 (3). However, if such provision, criterion or practice is objectively justified by a legitimate goal and the means to achieve it is appropriate and necessary, then it is not considered forbidden discrimination.⁴⁷

Another regulation of the protection against discrimination can be found in Act No. 346/1999 Coll., on the **Public Ombudsman**, which in Section 1 (5) stipulates that the Ombudsman shall perform his/her mandate in matters of the right to equal treatment and protection against discrimination. According to Section 21b the Ombudsman shall contribute to promotion of the right to equal treatment of all persons regardless of their race or ethnic origin, nationality, sex, age, disability, religion, belief or opinions, and to this end, he/she shall provide methodical assistance to victims of discrimination in lodging their proposals for commencement of proceedings concerning discrimination, shall perform research, publish reports and issue recommendations on discrimination-related issues and provide for exchange of the available information with the relevant European parties. In his opinion of 12th February 2010 the Ombudsman first addressed the issue of age discrimination. He is inclined to favour the thought that *“the reasons for differentiation cannot be judged equally, but it is appropriate to grade them according to their seriousness. The most serious violation of the right to equal treatment would be differentiation based on race (or ethnicity), the European Court of Human Rights includes among the suspicious reasons also gender, sexual orientation, family origin, religion and nationality. If we respect this scale, then age does not belong among the suspicious reasons, or rather it is one of the youngest. This fact has practical consequences that it is not necessary to investigate so thoroughly and strictly whether such differentiation is based on reasonable and objective reasons and whether it keeps a reasonable ration of adequacy between the pursued goal and the selected means, as it is with prima facie suspicious reasons.”*⁴⁸

The cases concerning disputed age discrimination observed by the Ombudsman include in particular the following issues within his competence: discrimination in access to employment due to age (discrimination by a certain company, which refused to hire the injured party as a driver of a special vehicle due to his age with a reference to the

⁴⁷ Adoption of the Act No. 198/2009 Coll., on equal treatment legal remedies for protection against discrimination meant a comprehensive regulation of protection against discrimination within the domestic legislation. Until then there had been only a general regulation included in the Charter and a reference to an ineffective Antidiscrimination Act in the Labor Code. Due to this the decision-making of courts had a significant role in the protection against forbidden discrimination. No legislative act regulating the protection against forbidden discrimination includes an exhaustive list of all possible reasons for discrimination, which means that the activity of courts remains a key element in this area.

⁴⁸ See the Ombudsman's opinion on the assessment of section 74a par. 2 of the Act on Pension Insurance – File No. 6712/2008/VOP/JKV. Brno, 12th February 2010. Also available at: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Stanoviska/stanovisko_6712_2008_JKV.pdf.

physical demands of the job)⁴⁹; discrimination in remuneration due to age (alleged discrimination by lowering a personal bonus by 50% due to the fact that the injured party apart from the wage received a pension as well)⁵⁰; failure to provide a credit card to clients more than 70 years old (a bank refused to issue a credit card with the explanation that the client exceeded the maximum age limit for this service, set at 70 years)⁵¹.

As for the relevant case law for age discrimination, Czech law does not have a comparable number of judgments to the CJEU. At the level of higher instance courts and the Constitutional Court the issue has been so far practically not been dealt with. The Constitutional Court has touched on the subject of age discrimination only once and that rather equivocally in its finding in the case of a constitutional complaint claiming discrimination in employment due to age (ÚS 1609/08). The issue was that the plaintiff doc. ing. J. H., CSc. had been given notice in 2004⁵² from his job at the Office of the Government during a restructuring related to the arrival of a new Head of the Office. The plaintiff, who was at the time of the notice 59 years old, claimed that he had been discriminated due to age since the people who had been made redundant during the restructuring, “were mostly employees who were over 50 years old and on the other hand the newly hired employees were mostly younger than 28 years.” The Constitutional Court in this context emphasized the significance of Article 1 of the Charter and the principle of equality: “*The principle of equality is the focus of the constitutional order of the Czech Republic, it is the base for interpretation and application of law and its protection must be performed most prudently.*” As for the so-called reversed burden of proof in cases of discrimination, the Constitutional Court recapitulated its existing case law, i.e. that this provision does not mean that the accusing party can abandon its general obligation to present evidence. To achieve a procedural success the plaintiff’s belief that he had been discriminated does not suffice, it is also necessary to prove the alleged facts so that they really imply unequal treatment. Only in such a case have the courts an obligation to act on the presumption that the treatment had been unequal until the opposite is proven.

Thus the findings – to the detriment of the whole issue – did not touch on the core of age discrimination, it simply implies the obligation of the general court to transfer the burden of proof and inter alia judge whether the newly set criteria for attaining a certain position, from which a person is being dismissed, had not been set on purpose. Overall

⁴⁹ The Ombudsman concluded that the requirement of appropriate physical condition of the employee is completely legitimate. The rejection of the job applicant based on an objectively unproven assessment of his physical incapability concluded from the information about his age can be, however, judged as direct age discrimination. The absence of the required physical condition cannot be automatically related to higher age; it is always necessary to assess the physical condition individually and based on objective indicators. See Investigation report File No. 199/2011/DIS/AHŘ.

⁵⁰ The Ombudsman concluded that when lowering personal bonuses the employer cannot take into account a parallel income; if a personal bonus of an employee, who also receives pension, is lowered it is furthermore a case of indirect age discrimination. See Investigation report File No. 107/2011/DIS/AHŘ.

⁵¹ The Ombudsman concluded that the bank’s action were age-discriminatory. The exclusion of clients interested in a credit card due to the fact that they are more 70 years old affects personal dignity and cannot be justified by reference to elimination of a credit risk without investigating other information than just age. See Investigation report File No. 149/2010/DIS/JKV.

⁵² It is necessary to add that in 2004 the prohibition of discrimination had been explicitly regulated only by the Labour Code.

the approach of the Constitutional Court can be assessed as being very cautious. Concerning age discrimination in the case of dismissal for organizational reasons it only admitted that this could be a case of age discrimination, but did not state a clear opinion; further, it only referred to an inappropriate assessment of evidence. However, it is our opinion that the Constitutional Court should approach the whole issue of age discrimination in a more comprehensive way and at least help to define the basic outlines of this intolerable form of discrimination. One of the reasons being that this is a negative phenomenon, which – as follows from the analysis of suggestions and complaints to the Ombudsman – occurs rather frequently in our society.⁵³

⁵³ For comparison we present the procedure of the Federal Constitutional Court in case of violation of the principle of equality. The Court states that the regulation in question is incompatible and asks the legislator to remove the anti-constitutional state without delay or within a certain period. Basically this existing regulation becomes inapplicable; unless the Court orders its preliminary or time-limited applicability due to the reason of legal security or it itself formulates a temporary regulation in its decision. In an extreme case the Court itself can order a regulation, which will enter into force if the legislator in the specified period does not remedy the situation. See ROTHERMUND, K. – TEMMING, F. *Diskriminierung aufgrund des Alters, Antidiskriminierungsstelle des Bundes*. p. 86, <http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen>.