



## SLOVAK NATIONAL CENTRE FOR HUMAN RIGHTS

Laurinská 18, 811 01 Bratislava 1, Slovakia  
phone: +421 2 208 501 11  
e-mail: info@snslp.sk, www.snslp.sk

### **Expert Opinion under Article 1, para. 2, subpar. f) of the Act No. 308/1993 Coll. on Establishment of the Slovak National Centre for Human Rights as amended**

Slovak National Centre for Human Rights (hereinafter referred to as the “Centre”) was established by the Act of the National Council of the Slovak Republic No. 308/1993 Coll. on Establishment of the Slovak National Centre for Human (hereinafter referred to as the “Act on Establishment of the Centre”). Article 1 paras. 2 and 3 of the Act on Establishment of the Centre lists the tasks of the Centre, including legal aid to victims of discrimination and victims of intolerance [Article 1 para. 2 subpar. b)] and issuing expert opinions concerning the observance of the principle of equal treatment under the Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, and on amending and supplementing certain other laws as amended (the Antidiscrimination Act) upon request of natural persons or legal entities or upon its own initiative.

Within preparation of this expert opinion the Centre consulted international and national legislation on the prohibition of discrimination, expert literature and the complaint, materials and statements provided by the applicant. The expert opinion refers to the job positions (in italics) of particular employees as described and provided by the applicant.

In this expert opinion, the Centre refers only to the merits that seem relevant for the subject of this opinion. The opinion is based on the merits provided for this purposes in form of personal statements concerning the relevant issues and on email communications.

The expert opinion is issued upon request of **a client** with regards to the alleged unequal treatment from superior workers and workers of the department of human resources.

#### **Merits**

On 06.07.2015, the client (hereinafter referred to as the “applicant”) addressed the Centre with his written electronic request for personal consultation concerning the alleged unequal treatment and breaches of the rights of workers towards his person. In the personal consultation held on 10.07.2015 the applicant explained the Centre his case and alleged breaches of his rights as a worked under the Labour Code as well as unequal treatment of his person. Such treatment of the applicant shall be initiated towards the applicant from the moment when he gave notice of termination with 1 month notice period in accordance with the Labour Code (i.e. on 29.06.2015).

- **Antidiscrimination legislation of the Slovak Republic**

The main national legislative act concerning the protection from discrimination in the Slovak Republic is the Act No. 365/2004 Coll. on Equal Treatment in Certain areas and Protection against Discrimination, and on amending and supplementing certain other laws as amended (hereinafter referred to as “the Antidiscrimination Act”). The Antidiscrimination



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Act grants the general framework for the observance of the principle of equal treatment. It particularly defines basic terms such as the principle of equal treatment and discrimination, lays down the forms of treatment, omission or other conducts or manifestations which may constitute discrimination (i.e. forms of discrimination), lists areas within which the prohibition of discrimination applies (social security, health care, provision of goods and services, education and labour relations) and lists grounds upon which unequal treatment is prohibited (i.e. protected grounds). The Antidiscrimination Act also regulates exceptions from the principle of equal treatment and the option to file an action to court concerning breaches of the principle of equal treatment.

Observance of the principle of equal treatment shall lay, in accordance with Article 2 of the Antidiscrimination Act, in the prohibition of discrimination on the grounds of: sex, religion or belief, race, nationality or ethnic origin, disability, age, sexual orientation, marital or family status, colour, language, political affiliation or other conviction, national or social origin, property, lineage or other status or on grounds of reporting of crime or any other wrongdoing.

Forms of discrimination under the Antidiscrimination Act are direct discrimination, indirect discrimination, harassment, sexual harassment, instruction to discrimination, incitement to discrimination and victimisation.

### Under **Article 2a paras. 2-8 of the Antidiscrimination Act**

(2) **Direct** discrimination shall mean *any action or omission where one person is treated less favourably than another person is, has been or would be treated in a comparable situation.*

Pursuant to **Article 3 para. 1 of the Antidiscrimination Act, everyone is obliged to adhere to the principle of equal treatment in the field of employment and similar legal relations, social security, and healthcare, the provision of goods and services and education.**

Pursuant to **Article 9 paras. 1 and 2 of the Antidiscrimination Act, every person shall be entitled to equal treatment and protection against discrimination. Every person who considers himself/herself wronged in his/her rights, interests protected by law and/or freedoms due to the fact that the principle of equal treatment has not been applied **may pursue their claims in judicial proceedings.**** He/she may, in particular, seek that the person violating the principle of equal treatment be made to refrain from such conduct and, where possible, rectify the illegal situation or provide adequate satisfaction.

Under the legal definition of the principle of equal treatment, the content of the EU Antidiscrimination directives and the established case-law of the European courts it results that the aim of the given legislation should be the protection of persons from unequal treatment based on the particular ground defined as the ground of discrimination (such as e.g. age, gender, disability, nationality etc.), the so called "protected ground". Not every unequal treatment can be defined as discrimination, either from the objective or subjective perspective, alternatively as the breach of the principle of equal treatment under the Antidiscrimination Act. However such treatment can entail to the breach of other rights or legitimate interests of a person under other legislative acts.

**In order to be able to qualify a certain treatment as discriminatory under the Antidiscrimination Act it is required to establish the existence of the so called comparator – a subject with which a person, who alleges present, past or possible less favourable treatment, compares himself/herself.**

- **Chicane (bossing) as abuse of rights within the scope of exercising rights and obligation under labour relations**

The Labour Code in Article 13 para. 3 states that *the enforcement of rights and obligations arising from labour relations must be in compliance with good morals. Nobody may abuse such rights and obligations to damage of another participant to a labour-law relation, or co-employees.* In line with interpretation of this provision, the abuse of subjective rights can have a form of chicane at workplace. Chicane can, hence, be understood as a specific form of abuse of rights.<sup>1</sup> An employee, who assumes that his/her rights or interests protected by law were aggrieved by failure to comply with the abovementioned conditions, may in line with Article 13 para. 6 of the Labour Code have recourse to a court and claim legal protection granted by the Antidiscrimination Act. Since chicane is a specific form of abuse of rights, provisions of the Antidiscrimination Act concerning legal protection and proceedings regarding violation of the principle of equal treatment apply respectively.<sup>2</sup>

According to the Centre, **the abuse of rights and obligations under the labour relations damaging the other party** can be defined as a **chicane** entitled to protection under the provisions of the Antidiscrimination Act concerning legal protection and procedure regarding the breach of the principle of equal treatment, including the concept of the shifted burden of proof.

The basic distinction between the concept of chicane as abuse of right and chicane as a form of discrimination is as follows. Concerning chicane in form of harassment under the Antidiscrimination Act, the discriminated employee must prove a certain characteristic (i.e. protected ground). If an employee is persecuted on other ground (as on the grounds covered by the antidiscrimination legislation), such treatment does not entail to discrimination. However, it may constitute chicane in form of abuse of subjective resulting from the labour relation. In terms of chicane as a specific kind of abuse of rights, in contrary to chicane as harassment in breach of the Antidiscrimination Act, it is hence not required to state an exact protected ground and a comparator exists in any other employee.

- **Legal analysis of the merits**

From the documents and statements provided by the applicant the Centre concludes that the definition of discrimination could be fulfilled towards the applicant in relation to the following merits. The area of discrimination covered is labour relations. In each situation it is possible to consider the merits as chicane in form of abuse of rights and obligations resulting from the labour relations, irrespective of the establishment of all parts of definition of discrimination.

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<sup>1</sup> Judgment of the Regional Court of Banská Bystrica, reg. no. 16CoPr/11/2012 of 13.8.2013.

<sup>2</sup> BARANCOVÁ, H. *Labour Court. Commentary. 4<sup>th</sup> Edition.* Praha: C. H. Beck, 2015, p. 242-243.



### **Examination or treatment of an employee in a medical facility**

The applicant stated, that upon filing a notice of termination he was orally informed by his *people advisor at the department of human resources* that during the notice period the applicant is no more entitled to the right to leave for the purposes of examination or treatment in a medical facility. The applicant asked for written statement of this fact, however it was denied to him.

In line with Article 141 para. 2, subpar. a), section 1 of the Labour Code an employer must grant an employee time off from work for the reason of examination or treatment of an employee in a medical facility with a wage compensation for a necessary period of time, at most for 7 days in a calendar year, if the examination or treatment could not be performed out of working time. This right is given to the employee during the whole duration of the labour-law relation, hence also during the notice period. The applicant is thus entitled to draw time off from work for the purposes of examination or treatment in a medical facility, proportionally with regards to the duration of contract in the calendar year and time off already drawn for this purpose in the calendar year.

The applicant also stated that he was aware of such restriction not being communicated to his colleague who also gave notice of termination and is also a person in a statutory notice period. Different status of the applicant and his colleague resides in the applicant's Spanish nationality and the Slovak nationality of the comparator. This unequal treatment can constitute direct discrimination of the applicant on the ground of nationality.

In case that the applicant would be refused the right to leave for the purposes of examination or treatment in a medical facility in practice, it could cause a violation of rights of the employee by the employer in breach of the Labour Code.

In terms of development of the merits since filing of the notice of termination by the applicant, such treatment of the applicant can become a part of the abuse of the rights of the employer damaging the applicant on the ground of other status caused by the notice of termination filed by the applicant and the subsequent notice period. Such treatment as a whole is liable to establish chicane in terms of abuse of subjective rights under Article 13 para. 3 of the Labour Code.

### **Draw of Holidays**

The applicant stated that upon giving notice of termination he was told by his *people advisor at the department of human resources* that from the moment of filing notice of termination until the termination of his labour relation it was no more possible to draw holidays the entitlement to which arose within the duration of the contract in the material calendar year. Subsequently, the applicant consulted the possibility to take 3 days of holidays with his *supervisor*. The applicant requested the draw of leave for the days 15.-17.07.2015, particularly in the amount of one day from regular statutory leave and two days as overtime compensation leave. The *supervisor* informed the applicant that he can take the leave for the requested days if her *direct boss of a supervisor* and *high manager subordinate* approve the draw of the leave. This action was seen unusual by the applicant, since the *supervisor* can decide on the draw of annual leave without approval of the abovementioned persons. The *supervisor*, however, instructed the applicant to do so referring to the fact that the applicant addressed his notice of termination to these persons. By email of 10.07.2015, the *supervisor* announced the applicant that she reserved the



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requested three days of holidays for the applicant. Subsequently, the applicant consulted the holidays with the *direct boss of a supervisor* and *high manager subordinate*, who approved it under the condition that the applicant would duly finish with all his work tasks. The applicant informed about this fact his *supervisor*, who no longer replied to his email. On grounds of the previous communication, the approval of the *direct boss of a supervisor* and the *high manager subordinate* as well as in terms of the reserving email, the applicant booked and paid holidays abroad in these particular days. Consequently, the applicant was approached by his *closest manager*, who announced him that they will deal with his holidays personally no sooner than on 13.07.2015.

Pursuant to Article 111 (1) of the Labour Code, the draw of paid holidays shall be determined by an employer upon negotiation with an employee taking into account the employer's tasks and the justified interests of the employee. In line with Article 112 (1) of the Labour Code an employee shall be obliged to reimburse and employee for costs that arose to him/her through no fault of his/her own as a result of the employer changing the employee's draw of leave or due to calling him/her out from a paid holidays.

Pursuant to the abovementioned it is a right of the employer to determine the draw of holidays by the applicant. **In case the draw has been determined**, in the particular case with regards to the communication between the applicant, the *supervisor*, the *direct boss of a supervisor* and the *high manager subordinate*, which gave grounds to conclusion that if the draw is approved by the *direct boss of a supervisor* and the *high manager subordinate*, the *supervisor* would grant the draw of holidays by the applicant in for the reserved days, **upon changing the draw of leave the employer is obliged to reimburse costs arose to the applicant as a result of changing of the applicant's draw or upon calling him from the holidays.**

Generally, not approving the draw of leave by an employer whenever an employee requests so does not constitute discrimination. The employer is entitled under the Labour Code to determine the draw of annual and overtime leave by the employee. However, within the context of the development of the merits from filing notice of termination by the applicant, the described action by towards the applicant can become part of the abuse of rights damaging the applicant on ground of other status defining the applicant as a person in term of notice upon notice of termination filed by the applicant. Such treatment as whole may constitute chicane in terms of abuse of subjective rights under Article 13 para. 3 of the Labour Code.

### Conclusion



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Taking into account the merits as known to the Centre, the Centre concludes that there is a reasonable assumption of **abuse of rights of the employer damaging the applicant** in a workplace of the applicant on the ground of other status of the applicant, as well as of a possible direct discrimination on the ground of nationality. According to the Centre, the applicant is entitled to legal protection under the Antidiscrimination Act (within the scope of interpretation of the Article 13 para. 6 in connection with Article 3 of the Labour Code), irrespective of presence of the protected ground, on the ground of abuse of subjective rights by the supervisors of the applicant.

The Centre highlights that the merits as provided by the applicant are liable to establish such treatment that represents direct discrimination of the applicant on the ground of other status and/or nationality under the Antidiscrimination Act. The abovementioned merits also establish abuse of rights and obligations stemming from labour relations damaging the applicant. It is, however, the role of a court to conduct complex evidencing and to evaluate the established merits.

Yours faithfully,

*Mgr. Marian Mesároš  
Executive Director*