Štefko, Martin. (2019). Notice for reasons of redundancy as a measure for discrimination on grounds of age. *Central European Journal of Labour Law and Personnel Management*, *2* (1), 61-73. doi: 10.33382/cejllpm.2019.02.05

Notice for redundancy as a discriminatory measure on grounds of age

Martin Štefko[1]

[1] Faculty of Law, Charles University, Prague, Czech Republic, Attorney at Kocián, Šolc, Balaštík Law Firm

Received: 08. April 2019, Reviewed: 21. May 2019, Accepted 10. June 2019

Abstract
Sociological investigations and a number of court decisions support the idea that redundancy dismissals are legal tools that can be misused easily for wrongful discharged based on an illegal age discrimination reason. This article analyses trial and appeal courts´ case law in order to clarify, what makes this particular reason for discharge so attractive for age discrimination perpetrators. Although Czech law does not recognize At-will Doctrine, and the Eu-Law forces an employer to proceed in relation to any elderly employee equally, redundancy has been proved to be the right instrument for employers that enables them to decide, who they do not work with, who they fire.

Key words
Labour Law, Termination of Employment Relationship, Notice of Dismissal, Wrongful Dismissal, Age Discrimination

DOI: 10.33382/cejllpm.2019.02.05

JEL classification: K31, K41, M12

Introduction

Almost twenty years ago, in 2000, the Czech legislator harmonized labour laws and claimed to reach the same antidiscrimination standard as seen in Western European countries. The Czech Labour Code (Act No. 262/2006 Collection as amended) and, since 2009, the Antidiscrimination Act (Act No. 198/2009 Collection), protect all employees from discrimination on the basis of age in hiring, promotion, discharge, compensation or terms, conditions or privileges of employment. Czech labour law bans mandatory retirement with narrow exceptions for military, police officers and state servants. In addition, there is a strong protection of employees against dismissals.

However, sociological investigations, even those from last years, have not identified any recognizable decrease of age discrimination. As usual, studies and analyses elaborate that the majority of Czech society maintains prejudice against older people. This phenomenon is also present in other countries, as it is evidenced by studies (Bell, 2019). Other countries are fighting against the unfair discrimination of the young workforce on the labour market (Blackham, 2019). A separate group is formed by those discriminated on gender basis (Buribayey, Khamzina, 2019; Fapohunda, 2017). The issue is complicated, special attention is devoted to the problem by scientists and professionals from practice as well. These phenomena formulate resp. distort the labour market in many countries (Kádár, 2017; Sychenko, 2019). Not only legal instruments, but also intervention of a third party e.g. Ombudsman is required to solve the issue. The Ombudsman carried out a relatively vast interview survey in 2014 and 2015, which confirmed the reasons of a relatively unfavourable balance in fighting against age-related discrimination (The final research report of February 27, 2015 „Diskriminace v ČR: oběť diskriminace a její překážky v přístupu ke spravedlnosti" (Discrimination in the Czech Republic: Victims of discrimination and obstacles to justice for them), docket file No. 46/2014/DIS; hereinafter the Report of 2015). Although discrimination on grounds of age has been evaluated to be the third most frequent reason of discriminatory behaviour, as the Ombudsman report reveals: „*The overwhelming majority among the respondents who made experience with discrimination personally, resigned and didn´t complain anywhere. The discrimination non-reporting ratio in the Czech Republic reaches up to 90 %*." Nevertheless, some people with burning ambitions have sued out their employers and were, to large degree, unsuccessful.

Paradoxically, such a situation may be desired or enforced also by co-employees. Court protocols do list namely these employee stereotypes who defended themselves against them, who were being dismissed on grounds of redundancy, by pointing to the fact that the employer was to select other employees as redundant, namely those who had already reached retirement age (Cf. Supreme Court decision of 6 September 2011, docket file No. 21 Cdo 2534/2010). Such employees explicitly demanded in Supreme Court decision of 20 November 2014, docket file No. 21 Cdo 4442/2013, e.g.: „…*the organizational changes were to have been carried out predominantly via dismissing retirement-aged employees.*" Another example stating the same comes from the same dispute, where the plaintiff pointed to the fact that „lately", the defendant hired new employees, who had already reached „retirement age", although – according to her (the plaintiff´s) opinion the organizational changes were to have been: *„addressed mainly by dismissing retirement-aged teachers.*"

From legal efficiency perspective, elderly or aged workers get fired all the time and almost none of them is able to assert to age discrimination claim. This paper analyses relevant laws and all redundancy cases, in which employees raised the age discrimination to identify why age discrimination claims fall under the table.

Theoretical background

Modern public law of Czech Republic´s predecessors has always recognized mandatory retirement (Cf. Section 28 of Decree No. 145/1902 Coll. o pomocném personálu kancelářském při státních úřadech a ústavech (on Ancillary Personnel by State Agencies). The same is true in current legislation for the military (Section 19 I Lit. a) zákona o vojácích z povolání (Act on Professional Soldiers)), police officers, fire fighters, custom and immigration officers, secret service agents etc. (Section 74 I Lit. h) of Act No. 234/2014 Sb. o státní službě (on Civil Service), as amended).

In contrast to previous labour law regulations, the Labour Code currently doesn´t regulate the compulsory or voluntary employment termination on grounds of age. In contrast to the previous legislative practice, according to which an employee was entitled to terminate an employment with a shorter period of notice and doing so on grounds of having reached the retirement age/on grounds of a pension entitlement having arisen, such a regulation is not necessary today, as the employee is entitled to terminate the relationship without stating the reason (Cf. Section 51 I Lit. c) of Act No. 65/1965 Coll. Labour Code as amended till 31 December 1988). An employer´s right to terminate the employment on grounds of the retirement age having been reached or due to the entitlement for a pension having arisen was stipulated by the 1950s legal regulation (Section 58 of Act No. 55/1956 Coll. Section 19 II Lit. e) of Act No. 66/1950 Coll. o pracovních a platových poměrech státních zaměstnanců (Working and Wage Conditions for Civil Servants)) and also later on in the first Labour Code (Section 51 I Lit. c) of Act 65/1965 Coll. set forth retirement. Employees eligible to old-age pension could be dismissed based on this reason). Yet the latter regulation tried to protect also older employees, which was due to specific reasons linked to the centrally planned economy with full employment (Cf. two governmental decrees: No. 209/1962 and 254/1964). Firstly, this referred to prolonging the period of notice (Section 45 II of Act No. 65/1965 Coll.) and secondly, it was linked to the condition of acquiring a consent given by the District National Committee (Section 50 of Act No. 65/1965 Coll.).

The current approach towards an employee´s age is different. Age isn´t irrelevant neither in general labour law, yet if the employer has doubts whether the employment in a given sector within the Czech economy is appropriate, then the labour law or other public law regulation most frequently increases the minimum age for entering this sector. Another example is the definition of maximum exposure periods. In a way, also the stricter medical examinations or other type of examinations have a certain impact, as far as general labour law regulation is concerned and these conditions are mostly listed in connection with working for the security forces. Higher age represents a qualification criterion for more frequent medical examinations also as far as civil employees in more exposed professions are concerned (Cf. Section 87a of Act No. 361/2000 Coll. as amended, that sets forth rules for drivers). Nevertheless and in contrast to previous regulation, it is generally valid that age itself cannot serve as a reason for termination. It is a prohibited reason for discrimination both according to Czech (Section 16 of the Labour Code) and according to the European Union law. The Court of Justice of the European Union has ruled in the Marshall case (Cf. CJEU judgment of 26 February 1986, C 152/84, M. H. Marshall; and CJEU judgment of 6 November 2012, C-286/12, Commission v. Hungary) that an employer cannot select redundant employees only based upon the fact that the respective employee has already reached retirement age, and it has thus been provided for him/her via the pension (Cf. Article 21 of the Charter of Fundamental Rights of the European Union). This problem analysed some authors (Van der Mei, Pieter, 2017).

The employment relationship with a potentially too old employee (according to an employer´s opinion) may thus only be terminated in a limited number of cases (Agranovich, 2019). If it is not about an employment relationship for a definite period of time; it is not the case of an employment, where the trial period has not elapsed; it is not an employment relationship with a foreigner, who needs an employment permission to be entitled to work; or it is not the case of an employee willing to accept the proposal to terminate an employment on grounds of an agreement, then the employer has a relatively small room to manoeuvre.

Unless the employer wants to wait until such an employee fulfils a reason to terminate the employment due to his/her health status, performance or behaviour, then the employer can make use of the so-called organizational measures for this purpose. As it is hardly imaginable that an employer would simulate so-called large-scale organizational changes leading to respective employee´s post or parts thereof being abolished or the employer or sections of the employer being relocated, the termination reason on grounds of redundancy according to § 52 letter c) of the Czech Labour Code appears to be the most appropriate measure.

Both according to the doctrine and according to case law, the applicability of this termination reason depends upon several conditions being met, with the fulfilment of these conditions being examined by the court in such a case when the validity of the decision is being assessed. It´s about the following cases:

- (internal) organizational changes,
- the employee´s redundancy,
- causality between the organization changes and the employee´s redundancy.

The employer´s decision about an organizational change represents the first condition (requirement) for a termination on grounds of redundancy. Such a decision has to have been adopted prior to the notice of termination, as the validity of legal actions, including legal actions directed at dismissal is to be assessed at the given moment and with respect to the conditions under which the legal actions were taken. Following the Supreme Court jurisprudence, an employer´s decision may be classified into the following categories: decisions regarding the employer´s changed tasks, decisions regarding a change of the technical equipment, staff downsize decision for efficiency increase purposes and decisions regarding other decision types with reference to organizational changes. Identifying, to which decision type the respective decision actually pertains, is relevant in order to assess, which causality there has to be and how the organizational change has to be carried out (change of tasks or technical equipment).

Decisions regarding organizational changes represent a decision-making process that changes an employer´s organizational structure. The employer´s decision does not represent a legal action, which means that it is impossible to defend against it directly. Nevertheless, court practice has effectively forced the employer to decide whether certain specific employees are redundant, and specify the impacts of such an organizational change as well.

If doubts arise, whether an employer has made a decision linked to organizational changes, a court may only assess whether such a decision has actually been adopted, and whether it has been made by a person entitled to do so. As the Supreme Court elaborated (Supreme Court decision 11 April 2002, docket file No. 21 Cdo 1105/2001, published in Právní rozhledy No. 10, 2002, C. H. Beck, pgs. 512 to 517), it is generally valid that „*...a person entitled to take legal actions on behalf of the employer is also entitled to take factual activities, and this person is then also obliged by such an action in this sense."* As far as the form of the decision regarding the organizational change is concerned, the Supreme Court (Supreme Court decision of 15 November 2001, docket file No. 21 Cdo 2521/2000) has decided that the form via which such an action is carried out is irrelevant, and that this applies in spite of the fact that the employer´s internal regulations list the decision form regarding the organization change and in spite of this form not being fulfilled. It is hitherto possible to apply the Prague High Court´s ruling that the decision regarding an organizational change needn´t be „announced" or published in any other manner. The employee affected by the organizational change has to be made acquainted with it, but such an action may occur only as late as in the notice of termination of the employment relationship.

If the employer is the only one who makes decisions regarding changes within the internal organization, then it´s also the employer, who decides whether a specific employee is redundant (Sborník stanovisek, zpráv o rozhodování soudů a soudních rozhodnutí Nejvyšších soudů ČSSR, ČSR, SSR (Statements and Restatements of Law Prepared from Supreme Courts´ Decisions), volume IV, SEVT, Prague: 1986, p. 189). Both decisions can be made at once or one after another, yet the decision regarding an organizational change always precedes, due to its nature, the decision whether a specific employee is redundant pre-defining and delimiting such a decision at the same time.

When selecting redundant employees, an employer should always follow this three-step process:

- defining the employees who will be part of the selection procedure,

- defining the criteria (data) that shall be considered during the selection,

- selecting the unnecessary, or redundant employees.

If a job position is to be cancelled, it is necessary to include all employees into the decision pool, who are work on the same level or carry out comparable tasks to those that are to be performed by the employee fulfilling the job position that is to be cancelled. Employees carrying out the same type of work agreed upon in the employment contract are encompassed in the selection pool (Supreme Court decision of 29 January 1991, docket file No. 6 Cz 1/91, published in Sbírka soudních rozhodnutí a stanovisek (Collection of Court´s Decisions) under No. 3, 1991, pgs. 100 to 103). An employee is redundant, if the employer has no opportunity to assign work to this employee, which has been agreed upon in the employment contract. The reasons for this impossibility may consist in the fact that the employer does not need the work performed by such an employee any more, be it either at all, and/or at least within the previous scope (content). This is the case if the employer´s task or his technical equipment changes, if the staff volume is decreased due to work efficiency increase or due to other organizational changes.

An employee may not always be redundant already at the moment when the notice of termination is given and this can be deduced from § 52 letter c) of the Czech Labor Code, which states that: *„if the employee becomes redundant…"*. Nevertheless, neither the mere existence of internal organizational change nor the mere redundancy of the given employee is enough, as the settled case law requires that there is a causality between the organizational change and the redundancy of the given employee (Cf. Supreme Court decision of 23 July 1968, docket file No. 6 Cz 49/68, published in Sbírka soudních rozhodnutí a stanovisek (Collection of Court´s Decisions) No. 9, 1968, p. 535, Supreme Court decision of 21 June 2001, docket file No. 21 Cdo 1630/2000). If a certain decision is to be the actual cause for an employee becoming redundant, then the employer has to give the notice of termination due to redundancy at a moment that makes the employment relationship end, based upon this notice (due to the period of notice having elapsed) at the earliest one working day prior to the adopted changes becoming effective (Supreme Court decision of 29 June 1998, docket file No. 2 Cdo 1797/97, published in Sbírka soudních rozhodnutí a stanovisek (Collection of Court´s Decisions) No. 54, 1999, p. 431). Thus, the courts assess, whether it was the organizational change which have led to a staff reduction or to another structural composition of the staff, i.e. that the given employee became redundant explicitly due to such a decision (or rather the implementation thereof at the employer´s premises).

An employee´s redundancy is not caused by an employer´s decision regarding an organizational change, if the presupposed staff decrease (stated by the organizational change) is to occur another way (without the necessity to dismiss), e.g. when another employee terminates the employment relationship, or the term agreed upon within the employment contract for a definite term has elapsed for other employees (Supreme Court decision of 27 April 2004, docket file No. 21 Cdo 2580/2003, published under No. 45 in Sbírka soudních rozhodnutí a stanovisek (Collection of Court´s Decisions), 2005).

Material and methods

Although redundancy dismissal is subject to a mixture of specific developments as derived by both the legislator and relevant jurisprudence, the aim of this article is to consider lower and higher courts´ case law. Courts remain to be the main factor that influences age discrimination clam´s effectivity. Of course, the Czech Republic is not a common law country, without the court´s approval the gradual development of the specific decision regarding an organization change (i.e., informality, secrecy, and non-contestability) would have never been possible. Courts have developed the employer´s right to decide on the organizational change and the employer´s immunity in this regard (Cf. Supreme Court decision of 25 September 1998, file docket No. 2 Cdon 1130/97, published Soudní rozhledy No. 11, 1999, p. 374; or Supreme Court decision of 11 April 2002, docket file No. 21 Cdo 1105/2001, published in Právní rozhledy No. 10, 2002, C. H. Beck, p. 512).

The same has happened in connection with severance pay (Supreme Court decision docket file No. 21 Cdo 5285/2016) as well as with so-called the option to move into a different job. The latter can be used as an example. The Parliament approved the abolishment of the employers´ duty to offer a new job to chosen redundant employees, but it was the Supreme Court, which has to confirmed in several border-line cases, that the duty has vanished entirely (Supreme Court decision of 26 September 2012, docket file No. 21 Cdo 1520/2011; and another decision of 28 November 2017, docket file No. 21 Cdo 1628/2017).

Thus, the first important step was to identify all relevant cases. To find and collect all redundancy cases, in which the claimant claimed to suffer age discrimination, the author used commercial search machines, public or private published reports and books, and his own legal actions. Firstly, the author used all commercial search machines operated in the Czech Republic and separate search tools provided for cases issued by the Supreme Court, the Supreme Administrative Court and the Constitutional Court. Secondly, the set of identified cases was confronted with other published searches (for example Report of 2015 or research, which was conducted by E. Šimeckova and published in her book Šimečková, E.: *Formy násilí na pracovišti* (Types of Violance at Workplace), Brno, MU PF 2017, p. 45). Thirdly, the author has delivered his formal application to every particular trial or appellate court in this country be given all redundancy cases in last 20 years). After those three steps, there was a list prepared of relevant age discrimination cases as follows: Regional Court in Ostrava docket file No. 16 Co 232/2013, District Court in Karvina docket file No. 25 C 61/2012, Regional Court in Ostrava docket file No. 16 Co 241/2001, District Court in Ostrava docket file No. 85 C 145/2009, Municipal Court in Prague docket file No. 23 Co 318/2013, District Court in Prague 4 docket file No. 25 C 127/2012, District Court in Prostějov docket file No. 5 C 2/2013, District Court for Prague 1 docket file No. 17 C 122/2012.

Having identified all relevant lower court cases (the higher had been known, because they were published in official Collections of Supreme or Constitutional Court decisions), the author examined all of them to learn the apparent lack of efficiency on the side of fired aged employees.

Results and discussion

The author has managed to identify only two trial court decisions out of all the labour disputes, where the employee as a plaintiff was successful. (Cf. District Court in Ostrava docket file No. 16 Co 232/2013 (District Court in Karvina heart the case as a trial court, case recorded under docket file No. 25 C 61/2012) a District Court for Prague 1 docket file No. 17 C 117/2012. In both cases, dismissed employees sued to obtain a judgment that notices of dismissal due to redundancy are null and void.) Altogether, there were 9 redundancy cases with recorded age discrimination claim. The sole fact that the numbers are so low seems to confirm that the redundancy dismissal is a proven powerful tool for age discrimination in no-termination-at-will country.

Based on law in books, results should be different. As the Supreme Court confirmed (See the most recent Supreme Court´s decision of 24 January 2013, docket file No. 21 Cdo 444/2012), the claimant is equipped with a relatively strong arsenal. The employer has to prove that a decision regarding the change of the respective employee´s duties, or regarding the technical equipment, or regarding staff downsizing has been made in order to increase work efficiency or other to put through organizational changes and that it´s precisely these changes due to which the employee became redundant. In reviewed case, judges were active and intended to scrutinize employer´s behaviour. Firstly, courts have examined, whether an employer or an organization has adopted a decision as a result of which the respective employee became redundant, whether this employee is redundant and subsequently, the causality between the decision concerning the organizational change and the respective employee´s redundancy is being scrutinized (Cf. Supreme Court decision of 11 April 2002, docket file No. 21 Cdo 1105/2001, published in Právní rozhledy No. 10, 2002, C. H. Beck, p. 513). However, the judge control has failed because of the settled doctrine of the exclusively employer-related

aspect (Cf. Regional Court in Brno decision of 3 January 1967, docket file No. 7 Co 612/66, published in Sbírka soudních rozhodnutí a stanovisek No. 8, 1967, p. 484).

A court cannot scrutinize whether e.g. another structural type change at the employer might have become more effective, whether the employer is not to carry out other organizational changes as well, or whether another employee should have been dismissed as well (e.g. due to social reasons). Neither has the employee who has been assessed by his/her employer to be redundant an option to legally apply to have this decision reviewed. Another very problematic issue is the implementation of an organizational change in the shape as it is accepted by courts, in cases, where the previously defined conditions for such a change have not been met (Supreme Court decision of 28 November 2017, docket file No. 21 Cdo 1628/2017).

The causality of redundancy is neither hampered by a staff increase occurring later on. There has been a court ruling in a case, where an unsuccessful objection had been raised in relation to discrimination on grounds of age that although the number of radiology assistants was increased later on, the decisive factor is that: „*…the number thereof has remained the same for 8 months and that the employer cannot be restricted to react via the staff number towards the development of the demand, i.e. to react towards the number of patients.*" Cited from District Court in Ostrava decision of 29 March 2011, docket file No. 85C 145/2009-148.

The analysed court decisions reveal that the employee, i.e. the plaintiff, usually asserts to the objection himself based upon discrimination on grounds of age. In a case ruled by the Karviná District Court (District Court in Karvina docket file No. 25C 61/2012), an employee did so by a claim regarding his retirement age, to be more precise by the fact that he had been in service for 4 excess years already, and by pointing out that the employer made use of the same method also regarding other retirement age employees (where the employer also decided to dismiss them on grounds of redundancy). In a case occurred in the Moravian city of Brno an employee deduced that discrimination on grounds of age occurred because he was the oldest employee of a tertiary school department (Municipal Court in Brno decision of 17 February 2016, docket file No. 38 C 137/2015-19).

If the first instance court is insufficiently active, even the court of appeal may direct the evidence proceedings on this path. Such an issue occurred e.g. in a case where the Ostrava Regional Court (Regional Court in Ostrava decision of 2 November 2010, docket file No. 16 Co 179/2010) ordered the first instance court to: „*…assess whether the employees´ age has not been selected as a criterion for selecting redundant employees – be it openly or in a covert manner*.“ The ruling that discrimination on grounds of age didn´t occur has then to be based upon the respective evidence proceedings.

Yet analysing the court jurisprudence reveals that both lower and higher instance courts are hesitant in deciding that discrimination occurred. Within the dispute bearing the reference number 85 C 145/2009, the court decided that discrimination on grounds of age did not occur, because even after the plaintiff was dismissed, there had remained radiology assistants of similar age at the oncology clinic in comparison to the plaintiff or even older colleagues.

The second employee (radiology assistant) who was dismissed as well, was 38 years old at the time of her dismissal. In Brno case (Municipal Court in Brno decision of 17 February 2016, docket file No. 38 C 137/2015-19), the court decided that no discrimination had occurred due to evidence which proved that: „*…there were at least three other employees at the civic education department within the decisive period, who were of similar age in comparison to the plaintiff, which means that no systematic removal of these persons and their replacement by younger ones had occurred (in the past, this department´s employees had been replaced only based upon previous employees having left or due to the death of a previous employee)*." The court of appeal (Regional Court in Brno decision of 2 August 2016, docket file No. 15 Co 112/2016-39.) added that the head of department´s letters revealed that there were reproaches regarding the plaintiff´s personality (unpopular among students, low percentage of lessons provided in core subjects within the accredited program and problematic communication with other department members). Not even in the case where the dismissal on grounds of redundancy was declared as invalid by the Karviná District Court, did the court take the view that discrimination on grounds of age had occurred. The court based its judgement on witness reports and on the documents presented. Said decision file No. 25 C 61/2012-60 was overruled by the Supreme Court decision of 24 January 2013, docket file No. 21 Cdo 444/2012. However, the Supreme Court did not decide the case because of *prima facie* age discrimination.

From the factual point of view, it´s no help for potential victims even if the higher instance courts rule that „*questions regarding the issue when a plaintiff retires, undoubtedly represent the usual type of communication occurring between the superiors and subordinates, and in this sense – such an issue cannot be regarded as fulfilling the characteristics of discrimination.*" As elaborated in Regional Court in Prague decision of 16 April 2014, file No. 23 Co 28/2014-160; and Supreme Court decision of 19 February 2016, docket file No. 21 Cdo 4619/2014.

If the dismissal was finally found out to be invalid then the invalidity was not due to discrimination on grounds of age, but due to a missing causality (the staff decrease would have occurred also otherwise; Supreme Court decision of 22 November 2017, docket file No. 21 Cdo 5600/2016). The reason is that it´s usually impossible to prove that the employer was following discriminatory purposes – in contrast to the separate dispute regarding the outstanding payments of an exceptional increased redundancy payment (Supreme Court docket file no. 21 Cdo 5763/2015. For EU context, see SDEU C-499/08, Andersen).

The fact that there isn´t a representative amount of court decisions available where the courts would have found out that the dismissal was motivated by the employee´s age, is suspicious and stimulates considerations about strengthening the protection of ageing employees against this issue. Within the given legal regulation, technological progress and jurisprudence tolerating the use of concealed recording devices by the employee during negotiations about the notice of termination on grounds of redundancy bring by an evolution. Using these devices, it might be proven which reasons actually lead the employer to decide that the respective employee is redundant (Cf. Supreme Court decision 21 Cdo 5281/2016).

If we are to consider more revolutionary changes, it´s necessary to reject the reactivation of a permission system from the first Czechoslovak Labour Code. A compulsory information similar to the regulation in cases of mass dismissals, when the employer is obliged to inform about aspects (criteria) for the selection of dismissed employees, would not solve anything as the employers would be able to apply strategies effectively, which work during judicial reviews whether notices of termination for reasons of redundancy are valid. Prolonging the period during which the abolished work post cannot be established might help, yet this would affect all redundancy cases generally (Cf. Section 61 III of Act 311/2001 Coll. zákonník práce (Labour Code of the Slovak Republic)). Re-establishing the duty to make an offer selectively to employees who reach retirement age should also be considered, and in this case, the Labour Office of the Czech Republic could be the one entitled to exempt the employer from this duty (Cf. Supreme Court decision of 31 October 2017, docket file No. 21 Cdo 5285/2016).

Taking into consideration the ageing population, we cannot determine a generally valid limit, from when the work potential of an employee is marginal (CJEU judgment of 13 September 2011, Prigge, C-447/09.). That´s why it is correct that no such limit exists. It does not mean that sectoral age limits might not exist – irrespective whether the reason would be the fight against unemployment (CJEU judgment 16 October 2007, Palacios de la Villa, C-411/05, or judgment of 5 July 2012, Hörnfeldt, C-141/11), enabling the employers to act more flexibly when dealing with workforce (CJEU judgment of 5 March 2009, The Incorporated Trustees of the National Council for Ageing, C-388/07; and judgment of 18 November 2010, Georgiev, C-250 to C-268/09), or the aim would be the social policy (CJEU judgment of 12 January 2010, Petersen, C-341/08), or any combination of these aims. That´s why it is appropriate to open up this issue for a social dialogue and strengthen the option to agree upon a compulsory termination of an employment relationship, if an adequate financial arrangement would be provided for in the collective agreements (CJEU judgment 12 October 2010, Rosenbladt, C-45/09). It´s not the individual employees, but the social partners who could find an equilibrium consisting of a dignified work career termination in exchange for an acceptable financial compensation, stipulating such a thing in company-internal collective agreements or even in branch-covering collective agreements. In this case, there is at least a potential advantage for the employer as well. The employee representatives participating in the negotiations of criteria, according to which the selection of redundant employees will be carried out as this would in turn simplify the employer to prove in possible future court proceedings the dismissal validity, whether these criteria are appropriate or not (Cf. CJEU judgment of 16 February 1982, Arthur Burton, C 19/81; CJEU judgment 17 December 201, Barber, C 262/88. More recent, CJEU judgment 21 July 2011, Fuchs and Köhler, C-159 and 160/10; a judgment of 6 December 2012, ODAR, C-152/11).

Conclusion

This unique evolution has helped to create a powerful legal instrument for terminating the employment relationship with an employee who is (from the employer´s subjective point of view) too old, although the reason for such a decision is not based upon the respective employee´s performance or behaviour.

The correctness of considering that a termination of employment on grounds of redundancy is being misused in order to dismiss „old" employees substantially more often than other termination reasons is being confirmed as well by sociological investigations carried out by the Ombudsman, and furthermore confirmed by the Ombudsman advices in specific cases, and also by individual court rulings. This concept thus replaces – to a certain extent – the compulsory or permitted termination of employment when reaching retirement age, which is a measure currently missing within general law. In court trials, raising an objection against discrimination isn´t effective, as it is necessary to take into consideration that one has to prove the employer´s intention.

It is also necessary to consider the whole issue of elderly working employees comprehensively, i.e. especially from the point of view of universal, compulsory, publicly funded pension scheme. Our fundamental aim is actually the dignity of the individual, which equally applies to pensioners. Isn´t the older employers´ eager desire to work predominantly caused by the volume of their retirement pensions? If so, financial incentives to terminate an employment relation and to enjoy pleasant autumn years could represent a conceptual solution. If the pension benefit payments, which would be increased by supplementary pension schemes reached a sufficient level, it would be easier to reach an agreement with older employees to decrease their eagerness to work. Raising the pension benefit payments is a task for decades.

Yet seen from short-term perspective, it would be possible to do a lot. Today´s managers dismissing redundant older employees will find themselves in the old or elderly employee category as well. That´s why even these people could understand from the point of view of intergenerational solidarity that a situation where elder employees do have to leave on grounds of redundancy does not represent a pleasant state of affairs. Many of these dismissed employees do actually then get the impression that they are useless and nobody needs them. This approach seems to be unacceptable since it is still possible, if not very desirable to involve these employees.

Investigating the hitherto occurred disputes, where discrimination occurred or might have occurred makes us consider that the social partners´ task should be to set up adequate conditions for a dignified retirement; yet this is a task the legislator is hesitant to refer to them, although he himself does not provide another solution.

Acknowledgement

The article has been written and published thanks to the financial support of the grant project "Soukromé právo a výzvy dneška " [Civil Law and Challenges of the Day], identity code Q03.

References

1. Agranovich, ML. 2019. Chances to be Employed for Employees at Pre-Retirement and Retirement Age. Ekonomicheskaya Politika, 14 (2), 90-109
2. Bell, GR. 2019. Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice. British journal of industrial relations, 57 (1), 217-219
3. Blackham, A. 2019. Young Workers and Age Discrimination: Tensions and Conflicts. Industrial Law Journal, 48 (1), 1-33

4. Buribayev, YA., Khamzina, ZA. 2019. Gender equality in employment: The experience of Kazakhstan. International Journal of Discrimination and the Law, 19 (2), 110-124.
5. Cf. Court of Appeal in Prague decision of 27 January 1994, docket file No. 6 Cdo 8/1993, published in Právní rozhledy No. 7, 1996, p. 334
6. Cf. Supreme Court decision of 30 October 1984, docket file No. 5 Cz 30/84.
7. Diskriminace v ČR: oběť diskriminace a její překážky v přístupu ke spravedlnosti Discrimination in the Czech Republic: Victims of discrimination and obstacles to justice
8. for them), docket file No. 46/2014/DIS
9. District Court in Ostrava docket file No. 85 C 145/2009
10. District Court in Karvina docket file No. 25 C 61/2012
11. District Court for Prague 1 docket file No. 17 C 122/2012
12. District Court in Prague 4 docket file No. 25 C 127/2012
13. District Court in Prostějov docket file No. 5 C 2/2013
14. Fapohunda, T. M. 2017. Gender and impression management in the workplace. Acta Oeconomica Universitatis Selye, 6 (2), 47 – 56
15. Gavlas, M. 2002. K zajímavému rozhodnutí Nejvyššího soudu k výpovědi z pracovního poměru podle § 46 odst. 1 písm. c) ZP. Práce a mzda, 7 (8), 95.
16. Hochman, J. 1992. Pracovní právo v soudní praxi, Právní vztahy a nároky zaměstnanců a zaměstnavatelů, Prague: Sevt, p. 35
17. Kádár, B. 2017. Including labour market proposals in higher education offers. *Acta Oeconomica Universitatis Selye* 6 (2), 89 – 100
18. Municipal Court in Prague docket file No. 23 Co 318/2013;
19. Sychenko, E. 2019. The Development of Russian Labor Law. Region, 8 (1), 75-92
20. Van der Mei, Pieter, A. 2017. Analysis and Reflections Collective Redundancies: Judicial Fine-Tuning of a Classic Concept of EU Labour Law. European Law Review, 42 (1), 82-91
21. Regional Court in Ostrava docket file No. 16 Co 241/2001
22. Regional Court in Ostrava docket file No. 16 Co 232/2013
23. Sborník stanovisek, závěrů, rozborů a zhodnocení soudní praxe, zpráv o rozhodování soudů a soudních rozhodnutí Nejvyššího soudu 1964-1969, III volume, Prague: 1980, p. 144
24. Sborník stanovisek, zpráv o rozhodování soudů a soudních rozhodnutí Nejvyšších soudů ČSSR, ČSR, SSR (Statements and Restatements of Law Prepared from Supreme Courts´ Decisions), IV volume, Prague: 1986, SEVT
25. Supreme Court decision of 29 January 1991, docket file No. 6 Cz 1/91, published in Sbírka soudních rozhodnutí a stanovisek (Collection of Court´s Decision) No. 2-3, 1992, volume XLIV, pgs. 100 to 103
26. Supreme Court decision of 29 June 1998, docket file No. 2 Cdon 1797/97, published in Sbírka soudních rozhodnutí a stanovisek (Collection of Court´s Decisions) No. 54, 1999, pgs. 431 to 435
27. Supreme Court decision of 25 September 1998, docket file No. 2 Cdon 1130/97, published in Soudní rozhledy No. 11, 1999, p. 374; or decision of 11 April 2002, docket file No. 21 Cdo 1105/2001, published in Právní rozhledy No. 10, 2002, C. H. Beck, p. 512
28. Supreme Court decision of 11 April 2002, docket file No. 21 Cdo 1105/2001, published in Právní rozhledy No. 10, 2002, C. H. Beck, p. 514
29. Supreme Court decision of 31 October 2017, docket file No. 21 Cdo 5285/2016
30. Šimečková, E. 2017. *Formy násilí na pracovišti*, Brno, MU PF 2017, p. 45

Author contact

doc. JUDr. Martin Štefko, PhD., an associated professor at Department of Labour Law and Social Security Law of Faculty of Law, Charles University, address nám. Curieových 901/7, 116 40 Prague, Czech Republic. Email: stefkom@prf.cuni.cz

Authors´ ORCID: *https://orcid.org/0000-0003-1060-6682*