

REPUBLIC OF SLOVENIA
ADVOCATE OF THE PRINCIPLE OF EQUALITY

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Date: 4 September 2019
Subject: 0700-30/2019/15

In proceedings initiated on an *ex officio* basis against the alleged offender BSH HIŠNI APARATI d.o.o. Nazarje, Savinjska cesta 30, 3331 Nazarja in the matter of the determination of discrimination, in accordance with the Protection Against Discrimination Act (Official Gazette of the Republic of Slovenia, no. 33/16 and 21/18 - ZNOrg, hereinafter referred to as "ZVarD") and the General Administrative Procedure Act (Official Gazette of the RS no. 24/06 - official consolidated text, 105/06 - ZUS-1, 126/07, 65/08, 8/10 and 82/13, hereinafter referred to as "ZUP"), the Advocate of the Principle of Equality (hereinafter referred to as: "the Advocate") hereby issues the following

DECISION

- 1. BSH HIŠNI APARATI d.o.o. Nazarje, Savinjska cesta 30, 3331 Nazarje is found to have acted in violation of the prohibition of indirect discrimination provided for under the ZVarD** by setting out criteria for assessing individuals' eligibility for the business performance bonus and the share (%) of the bonus for individual employees in the Agreement on Employee Earnings for the Year 2019, dated 9 April 2019, which are dependent on the individual employee's workplace attendance, where a predefined sliding scale is used to calculate deductions based on their absence from work due to all health-related reasons, maternity leave, paternity leave and unpaid leave.
2. No costs were incurred in the course of the procedure.

BACKGROUND

The Advocate of the Principle of Equality received a Discrimination Complaint, claiming that on 9 April 2019 the company BSH HIŠNI APARATI d.o.o. Nazarje, Savinjska cesta 30, 3331 Nazarje (hereinafter referred to as: "BSH") adopted the Agreement on Employee Earnings for the Year 2019 (hereinafter referred to as: "the Agreement"), which presumably introduces discriminatory criteria. According to the anonymous complainant's allegations, the company BSH seeks to influence the amount of sick leave within the company by imposing discriminatory conditions referring to the business performance bonus. The first criterion refers to the quantity of absence from work, and the second refers to the number of uninterrupted absences/multiple absences. In the complainant's opinion, the second criterion is particularly discriminatory against employees who have (non-)school aged children and against employees who are providing care for the elderly. As an example, the Discrimination Complaint mentions that an employee who is absent from work for medical reasons for up to 100 hours during a calendar year receives 100% of the business performance bonus, whereas employees absent from work between 101 and 274 hours receive 85% of the bonus, all the way up to 1493 hours, where the employee receives 20% of the bonus. The company also introduced an additional criterion tied to the frequency of an employee's absence from work, namely: if an employee is absent from work for medical reasons on more than two occasions, the third absence will incur a 5% deduction, whereas each subsequent absence from work will incur a further 10% deduction.

The Advocate considers this to be a case of general significance to ensuring protection from discrimination, not just for BSH employees, but also for all subsequent identical or similar cases where employers will make bonus

payouts contingent on the (justifiable) absence of employees from work¹. In accordance with the first paragraph of Article 34 of the ZVarD, the Advocate undertook the procedure on an *ex officio* basis.

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In the process of determining the existence of discrimination under Article 37 of the ZVarD (document ref. no. 0700-30/2018/3), the Advocate received relevant clarifications and documentation from BSH to better understand the circumstances in the matter concerned. BSH replied to the Advocate's request by transmitting its letter of response, dated 13 May 2019. In its letter of response, it voiced its disagreement with the allegation that the criteria set out in the Agreement on Employee Earnings for the Year 2019 were discriminatory. BSH claimed that the defined criteria in no way discriminate against anyone - on the contrary, if anything. They are of the view that if the bonus were to be paid out equally to all employees, without any criteria being defined and regardless of their work attendance record, this would in fact be discriminatory or unfair to those employees who had performed their work duties for most of their mandatory attendance, and as such demonstrably contributed more to the company's overall performance results than those who were absent from work. Inter alia, BSH argued that the matter of paying out the business performance bonus, as well as defining the criteria to qualify for the payout, falls within the employer's autonomous discretion (no regulations govern this aspect). In its letter of response BSH explains that in a company which employs approximately 1400 people, 20% of its employees are frequently absent from work for periods of three or more days - in some cases as frequently as 28 times per year. On the other hand, 80% of the workers are not absent from work for the same reasons, or their absence is limited to a maximum of 2 times per year. The reason for this is not that 80% of the employees have no need for taking such leave, but rather that these employees, due to having a responsible work ethic and being loyal to the company, they find other ways to finish their work. Such solutions, which all production workers can take advantage of, comprise: changing work shifts, taking extra annual leave days, which employees receive for that purpose specifically on top of their normal annual leave days - up to 4 days, using overtime, etc. Employees working in so-called management fields perform their work duties on flexible hours, which means that they can rearrange their work duties, are able to work from home (the "Home Office" arrangement - they can rearrange their scheduled obligations which would have otherwise required them to use sick leave). 20% of the employees are not considering using these options, and are "just using the rights they are entitled to" - i.e. absence for health-related reasons. In its response, BSH asks for an explanation as to how exactly these defined criteria discriminate against the employees who are absent from work due to personal (including health-related) reasons, since they are only receiving a reduced business performance bonus, in addition to a reduced salary due to health-related reasons - sick leave and remuneration for caregivers amount to just 80% of the salary, whereas remuneration for accompanying family members amounts to 70% of the salary. According to BSH's understanding, this would also mean that the Employment Relations Act (hereinafter referred to as: "ZDR-1") and the Compulsory Health Insurance Rules (which sets out the remuneration amounts) are discriminatory. In conclusion, the company BSH adds that it provides its employees facing various health issues (either themselves or through their family members) various forms of assistance: awarding solidarity aid, covering certain medical expenses, covering the cost of medical devices, funding additional medications through their Humanitarian Foundation, which they set up specifically for that purpose, etc.

With respect to the payout of the employee performance bonus, which is based on the quantity and frequency of work absenteeism, the Advocate turned to the Labor Inspectorate of the Republic of Slovenia for clarifications (document ref. no. 0700-30/2019 of 4 June 2019). In its response, the Inspectorate explained, inter alia, that in 2018 they registered two cases of violations, where in the course of the inspection procedure, the inspector found that the employer had applied discriminatory criteria when awarding the business performance bonus, specifically: in one case, the employer only paid out the employee performance bonus to employees who were employed before 2017, and not to those who were hired in 2017; in the second case, the employer paid out the Christmas bonus only to employees who were on its payroll on 30 November 2017, whereas those employees whose employment had terminated prior to said cut-off date did not receive it despite having contributed to the employer's corporate results. They added that in the year 2019, one of the labor inspectors is working on a case where the employer paid out some type of cash bonus in December 2018 under an agreement signed with a

¹ All expressions used in the masculine gender are neutral and apply equally to both genders.

representative labor union. This bonus was defined as a type of extra holiday allowance awarded specifically to employees who had perfect work attendance in 2018 - i.e. employees who had used no sick days because of illness or injury, and as a result (according to the employer) their work efforts contributed to improving the company's operating result. In this case, the inspector introduced a minor offense procedure, which was still ongoing at the time of writing their response. The Inspectorate added that there are virtually no cases of complaints for violations which involve criteria for allocating business performance bonuses. Occasionally, the Inspectorate does receive requests for expert guidelines (rather than complaints for suspected violations) – about whether or not the practice of an employer taking into consideration the employee attendance at work (and temporary absence from work for health-related reasons) as a criterion when awarding business performance bonuses linked to the company's results is appropriate, i.e. whether it complies with the law. In such cases, their response to such applicants is that cases where an employer would take into consideration the employees' attendance at work or employees' absence from work on account of being on sick leave could be problematic for two reasons at the very least. The first reason is indirect discrimination of employees: the seemingly neutral nature of the criterion of "employee attendance at work and therefore their larger contribution to the employer's productivity" can put persons having certain personal circumstances at a disadvantage compared to persons who do not have such personal circumstances. The second reason is linked to encouraging "presentism", i.e. a practice where the employer rewards employees for not taking absences from work, or to appear at the workplace rather than take a sick day. This can be a highly problematic practice in terms of maintaining workplace safety and protecting occupational health, and some expert opinions argue that this in fact presents a greater cost to the employer than absenteeism itself.

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The Advocate sent BSH a letter containing some of his interim findings and the clarifications provided by the Labor Inspectorate of the Republic of Slovenia (document ref. no. 0700-30/2019/8) and informed BSH that, pursuant to Article 146 of the ZUP, with reference to Article 9 of the ZUP, BSH had the right to explain its position in writing, within the set time limit, about the facts and circumstances which could bear relevance to the decision. BSH requested an extension of the time limit, which the Advocate granted.

BSH then submitted the Clarification dated 26 June 2019 (document ref. no. 0700-30/2019/13), which contained essentially the same explanation as its previous response of 13 May 2019, therefore the Advocate will refrain from repeating all the arguments presented therein. In this Clarification, BSH emphasized that it does not consider the fact that it is applying the agreed eligibility criteria for awarding the business performance bonus as an act of discrimination, adding that Article 126 of the Employment Relations Act (ZDR-1) stipulates that a constituent element of the salary is (can be) the remuneration for business performance, which employees are not automatically entitled to under the law and which is subject to a "suitable" agreement with the employer. BSH pointed out the first paragraph of Article 44, Subsection 12 of the Personal Income Tax Act (ZDoh-2), and added that the clarifications provided by the Financial Administration of the Republic of Slovenia (FURS) show that the law does not require that all employees receive exactly the same amount, but instead stipulates that all employees who meet the criteria must receive the [bonus] part of the salary, whereas such criteria must be known and defined in advance. BSH explains that the Agreement defines a 1.000 EUR payout in the case of 100% achievement of the defined targets/results (if the targets are surpassed, the aforesaid amount can also reach as high as 2.000 EUR), and that the agreed amount of the bonus may be distributed among the employees if, and only if, the targets are achieved. For the purpose of distribution among the employees, criteria are used to determine eligibility for the bonus and the respective proportional share (%) of the bonus. These criteria specify:

- that all persons who were employed with the employer during 2019 shall be entitled to receive the business performance bonus. Employees are entitled to a pro-rata share of the bonus based on the duration of their employment with the employer in 2019.
- that the percentage of the bonus payout is determined based on each employee's actual work attendance vs. planned work attendance during the calendar year (a sliding scale is defined).

Absence from work is defined so as to include: absences for all health-related reasons, maternity leave, paternity leave and unpaid personal leave.

BSH explained that it has been stipulated that those employees who actually contributed more to achieving the targets would be eligible for a higher percentage of the bonus - and employees who contributed more are in fact those who effectively performed the work. This means that each employee is entitled to a bonus which corresponds to their contribution: the work actually performed (i.e. attendance at work). BSH believes that there is no discrimination to be found in the criteria thus defined, where the amount of the bonus payout is tied to the individual's level of contribution (also because the bonus award does not depend just on a particular employee's work attendance levels but is also based on certain tolerance thresholds: employees with up to 100 hours work absence are eligible for the full amount of the bonus, whereas the minimum bonus award level is set at 20% of the full amount of the bonus), since the bonus is awarded based on an autonomous system, where the set criteria are the same for all employees and known in advance, and there is no statutory regulation which requires that the bonus must be paid out to all employees in equal absolute amounts. No one is treated less favorably based on their personal circumstances, the criterion is instead based on the individual employee's contribution to the company's operating results. And employees who effectively put in more work are not in a comparable situation in relation to those who worked less, since those who worked more also contributed more. In conclusion, BSH argues that even the Inspectorate's reasoning confirms that the Inspectorate's own assessment of the business performance bonus eligibility criteria is based on the individual's contribution to the end result - it argues that those who worked in fact contributed more compared to those who were absent, and that factoring-in the importance of an individual employee's contribution to the operating result can also be found in existing case-law (Higher Labor and Social Court Ruling **VDDS** and decision no. PdP 1331/2008 and Higher Labor and Social Court Ruling **VDDS** no. Pdp 709/2010).

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The Advocate initiated discrimination assessment proceedings in an *ex officio* capacity, pursuant to the second paragraph of Article 34 of the Protection Against Discrimination Act (ZVarD). ZVarD provides protection against discrimination for each individual, as well as groups of individuals and legal entities, if the nature of the circumstances which could form the basis for discrimination refers to such persons. In the case concerned, pursuant to the first paragraph of Article 1 of the ZVarD, protection against discrimination is afforded to individual employees of BSH and its subsidiaries, regulated under the applicable BSH Collective Agreement. In conducting the *ex officio* proceedings pursuant to the second paragraph of Article 34 of the ZVarD, the Advocate did not seek consent from the persons subjected to discrimination, since the case involves a (larger) group of persons, and does not relate to any particular individual or individuals.

The case being considered by the Advocate is an administrative proceeding, which the suspected offender is a party to, and the person discriminated against has the right to attend the proceedings, as explicitly stipulated in the third paragraph of Article 34 of the ZVarD. As explained above, the Advocate did not attract any of the potentially discriminated-against parties into the proceedings, nor did it assess BSH's actions in specific cases, since the 2019 business performance bonus has not yet been paid out, however, provided the requirements are met, the payout will be carried out in December based on the estimated end-of-year results, as stipulated in the Agreement on Employee Earnings for the Year 2019. The Advocate performed an assessment of the criteria for awarding the bonus, and the share (%) of the payout per individual employee, as stipulated in the Agreement. The act which concludes the case under consideration before the Advocate is an administrative fact-finding act, which is not enforceable as such. However, the Advocate's determination is compulsory and therefore bears relevance for subsequent courses of action, which always aim to rectify the effects of discrimination and prevent future cases of discrimination. Accordingly, the Advocate in this case undertook a review of discrimination and issued a fact-finding decision, as outlined in Section 1 hereinabove.

Article 4 of the ZVarD defines *discrimination* as any undue actual or legal unequal treatment, differentiation, exclusion, limitation or failure to act due to personal circumstances, the result or consequence of which is hindrance, reduction or nullification of equal recognition, enjoyment or exercise of human rights and fundamental freedoms, other rights, legal interests and benefits. In order to confirm a finding of discrimination, a specific personal circumstance must be the decisive reason for comparably worse treatment. In accordance with Article 1 of the ZVarD, such personal circumstances comprise gender, nationality, racial or ethnic origin, language, religion

or belief, disability, age, sexual orientation, gender identity or gender expression, social status, financial situation, education, or any other personal circumstance. These circumstances are either inherent or acquired personal characteristics, features, conditions or statuses, which, as a rule, are either permanently and inalienably linked to a particular individual and their personality, in particular their identity; or cannot easily be changed by the individual.

In the case under review, the Advocate recognizes that personal circumstances, based on which individuals are afforded protection from discrimination, comprise pregnancy, parenthood, gender, family and health status. ZVarD specifically mentions gender as a personal circumstance, which is afforded special protections under the laws of the Republic of Slovenia. While the under the ZVarD pregnancy, parenthood, family status and health situation are classified under "other personal circumstances", they enjoy legal protection (all the same). In labor law, one's health and family statuses are explicitly protected under Article 6 of the ZDR-1. Any action which constitutes discrimination based on any personal circumstance is explicitly prohibited, barring exemptions provided for in Article 13 of the ZVarD. In the case of parenthood, which is not a special protected category under the EU's *acquis*, unequal treatment is permissible if a lawful aim justifies such discrimination and if the means taken to achieve said aim are appropriate and necessary.

Direct discrimination occurs if a person, or a group of people, are, were or could be treated less favorably in the same or similar circumstances due to certain personal circumstances compared to how another person or a group of people is, was or would be treated (first paragraph of Article 6 of the ZVarD).

Indirect discrimination occurs when a person or a group of people in certain personal circumstances is, was or could be in a less favorable position compared to other people due to an apparently neutral regulation, criterion, or practice, unless such provision, criterion, or practice is objectively pursuing a legitimate objective and the means of attaining this objective are appropriate and necessary (second paragraph of Article 6 of the ZVarD).

Discrimination, or unequal treatment, are prohibited in all aspects of social life. The Advocate has found that the case under review concerns the area of labor relations, which includes employment and working conditions, including termination of employment contracts and wages (third indent of the first paragraph of Article 2 of the ZVarD).

The principle of a reversal of the burden of proof applies in proceedings involving assessment of discrimination (Article 40 of the ZVarD). This means that in case of suspected discrimination, it falls to the suspected offender to prove their practices were justified.

Article 6 of the ZDR-1 also explicitly stipulates that the employer must ensure that workers during their employment relationship are afforded equal treatment, irrespective of their nationality, race or ethnic origin, national or social background, gender, skin color, state of health, disability, faith or beliefs, age, sexual orientation, family status, trade union membership, financial standing or other personal circumstances in accordance with this Act, the regulations governing the implementation of the principle of equal treatment and the regulations governing equal opportunities for women and men.

The ZDR-1 also stipulates that the employer must ensure equal treatment in respect of the personal circumstances for workers, especially regarding access to employment, promotion, training, education, re-qualification, salaries and other benefits from the employment relationship, absence from work, working conditions, working hours and the cancellation of employment contracts. Furthermore, the ZDR-1 also stipulates that direct or indirect discrimination based on any personal circumstance referred to are prohibited. It is explicitly stipulated that less favorable treatment of workers in connection with pregnancy or parental leave is also deemed discriminatory.

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The Advocate first performed an assessment of whether the criteria for determining eligibility for awarding the bonus, and for determining the share (%) of the bonus for the individual employee, constitute indirect discrimination, as referred to in the second paragraph of Article 6 of the ZVarD. Indirect discrimination occurs

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

The Advocate finds that the criteria for awarding the bonus, and for determining the share (%) of the bonus for the individual employee, as stipulated in the Agreement, do not directly put any of the employees in an unequal position because of a particular personal circumstance, they give the appearance of neutrality and apply equally to all employees. In order to be able to argue indirect discrimination, one must first determine whether certain seemingly neutral criteria contained in the Agreement did, or could, put an individual employee having a particular personal circumstance at a disadvantage in relation to others. The Advocate finds that, while the criteria were laid out as neutral in terms of personal circumstances and while they apply equally to all employees, the effect of these criteria could be such that it could in fact put at a disadvantage certain employees having specific personal circumstances which they have no control over. Moreover, certain employees already had said personal circumstances at the time of signing the Agreement, while others may not, and at the same time such a personal circumstance (for example: pregnancy in female employees or parenthood in male employees, and illness or worsening of a particular medical condition etc.) may manifest itself during 2019 in any employee affected by the Agreement.

The Advocate finds that, in accordance with the second paragraph of Article 126 of the ZDR-1, the business performance bonus is defined as a constituent element of the salary if so laid down in the collective agreement or employment contract. The salary is a basic right stemming from the employment contract (eighth indent of the first paragraph of Article 31 of the ZDR-1). The business performance bonus is referred to in the vernacular with various terms, including the thirteenth salary, the fourteenth salary, the Christmas Bonus, the annual bonus and similar. In any case, the business performance bonus constitutes remuneration for work performed, and as such falls under the term of "salary", as referred to in the third indent of the first paragraph of Article 2 of the ZVarD.

BSH is bound under the Collective Agreement for Slovenia's Electrical Industry (Official Gazette of the RS no. 108/05, 95/06, 82/07, 32/08, 70/08, 75/09, 10/10, 84/11, 104/11, 32/13, 26/15, 58/17 and 84/18), which stipulates in Article 46 that the criteria for determining the business performance bonus as a part of the salary are defined by the employer and the labor union at the time of passing the annual business plan. The Agreement was adopted on that basis, containing the criteria under review in this proceeding. The Advocate finds that the Agreement was executed by and between the management of BSH and the employees' representatives - the employees' council and the labor unions. Despite the fact that this was an agreement, the Advocate is of the view that this agreement should not be regarded as a classic civil-law agreement, which is governed under the rules of obligation law. Instead, this agreement essentially constitutes a labor law document - it is an employer's internal legal document which regulates the rights of all employees, including those who were not (in)directly involved in its adoption. Therefore, it applies to third parties, which is a characteristic of labor law acts, rather than just to the parties who signed the agreement. In this legal relationship, the company BSH acts as the employer and the stronger party, which is bound to comply with labor law regulations, of which a constituent element are the rules on equal treatment of treatment, and with the rules provided for under the ZVarD, as a result of which it is only BSH that holds the position of a potential offender for the purposes of these proceedings.

It follows from the publicly accessible clarifications of the Financial Administration of the Republic of Slovenia², the Personal Income Tax Act³ - ZDoh-2 (Point 12 of the first paragraph of Article 44), the portion of the salary corresponding to the business performance bonus is excluded from the tax basis, up to the amount of 100% of the last known national monthly average employee salary in Slovenia. More favorable taxation applies to payouts

² Taken from the collection *Dohodek iz zaposlitve, Dohodek iz delovnega razmerja, 5th edition, July 2019, pp. 11-12*

³ Official Gazette of the Republic of Slovenia, no. 13/11 - official consolidated text, 9/12 - Constitutional Court Ruling, 24/12, 30/12, 40/12-ZUJF, 75/12, 94/12, 52/13-Constitutional Court ruling, 96/13, 29/14-Constitutional Court ruling, 50/14, 23/15, 55/15, 63/16, 69/17, 21/19 and 28/19

of business performance bonuses which will, at some time during the calendar year, be paid out to all eligible employees, provided:

1. that the right to this payout is set out in the employer's general internal regulations, which employees are informed of in advance, and at the same time all employees are entitled to the business performance bonus portion of the salary (the criteria to qualify must be set out equally for all employees), or
2. that the right to this remuneration is set out in a collective agreement, which sets out the criteria to be eligible for it (it is not required that the criteria be set out equally for all employees).

On the subject of Point 1 above, the Financial Administration of the Republic of Slovenia adds: The provision does not specify that all employees must receive exactly the same amount, but rather that the **part of the salary [bonus]** is paid out to all employees who meet the criteria, whereas such criteria must be known and defined in advance (by way of an example: employees who had an active employment agreement on a specific cut-off date/in a given period are eligible for the employee performance bonus).

As a criterion to qualify for the bonus and for the determining of the share (%) of the bonus to be paid out, the Agreement sets out the frequency of an individual employee's absences (i.e. how frequently a particular employee was absent) during a calendar year and the employee's rate of attendance at work, whereas the percentage of the bonus payout is stipulated in the Agreement based on the number of full-time equivalent hours (FTEs). Absence is defined so as to include: absence for all health-related reasons, maternity leave, paternity leave and unpaid leave. Unpaid leave is provided for in Article 20 of the BSH Collective Agreement and is defined as an absence which is not eligible for wage compensation and is subject to a written agreement signed between the employer and the employee on pre-agreed terms. Absences for health-related reasons, absences related to maternity leave and paternity leave, constitute justified absences from work, which are covered by relevant forms of wage compensation (from various sources). An employee is entitled to absence from work in cases of temporary incapacity for work due to illness or injury and in other cases in accordance with the regulations on health insurance (Article 167 of the ZDR-1), which includes the right to compensation due to childcare or care for a family member, accompanying a family member etc.). The employer is obliged to ensure the employee the right to absence from work or to part-time work for the purpose of using parental leave stipulated by an Act (Article 186 of the ZDR-1).

The Advocate finds that while the Agreement does not infringe upon the employees' rights to being absent from work, it does affect the employees' situation when they actually exercise these rights in practice. These employees find themselves at a disadvantage, which is reflected in the lower percentage of the business performance bonus they receive as part of their salary compared to employees who do not exercise these rights, either because they have no need for it or because they use alternative forms of absence provided by the employer (telecommuting, using overtime hours, taking advantage of extra days of annual leave). Thus the decreased payouts adversely affect those employees who are either absent more frequently or absent for longer periods of time, which, as the Inspectorate notes in its response of 4 June 2019, can mean employees having certain personal circumstances, such as pregnant employees, employees with chronic or long-time illnesses which require major medical procedures or rehabilitation, persons officially recognized as disabled employees, persons providing care for or accompanying a family member in the event of illness or injury (minor children, partners, parents requiring extra care and attention), single parents facing difficulties balancing their work and family life, older employees, etc. Due to their personal circumstances, which they are unable to change (health status, disability, family status, pregnancy, motherhood, fatherhood, age, etc.), these employees will find it more difficult to achieve the target attendance at work or absence due to health-related reasons, which puts them in a disadvantaged position compared to employees who are not faced with such circumstances. In this context, the Advocate finds that, in accordance with the first indent of the second paragraph of Article 5 of the ZVarD, equal treatment is also afforded to a person who is actually or legally connected to a person who is in certain personal circumstances, which includes employees who are not absent from work for their own health-related reasons but as a result of their connection to another person (such as the right of a parent to accompany a blind child to a treatment regimen in a health resort). For example, criteria set out in this manner might also put in a disadvantaged position an employee who, while not absent from work all year due to an illness, becomes a father and takes paternity leave

(and then also parental leave). The Parental Protection and Family Benefits Act gives a father the right to take parental leave at the time his child is born (or his children are born), for a period of 30 days. This right is non-transferrable. The father makes use of the first part of his paternity leave for a term of at least 15 uninterrupted days in the form of full or partial absence from work from the birth of the child until no later than one month after the expiration of parental leave in an uninterrupted segment of time, or the right to parental allowance for this child. If he uses less than 15 days, he forfeits the remaining portion of the difference up to 15 days. This means that in case he decides to take 30 days, which is the extent of his right, he would be absent from work for approx. 176 hours, which means that under the Agreement, just based on exercising this right afforded to him by law would make him eligible only for the reduced portion of the bonus (85%). This goes against the purpose⁴ for which parental leave was introduced into Slovenian law in the first place, i.e. the transposition of the EU's *acquis* into Slovenian law and helping to reduce the differences between women and men in the labor market, since this would allow women to keep actively working in the labor market after giving birth to a child. Another aim is to promote a more balanced distribution of childcare obligations between men and women.

In its response, BSH argued, *inter alia*, that the matter of paying out the business performance bonus, as well as defining the criteria to qualify for the payout, falls within the employer's autonomous discretion. It follows from the Commentary to the Employment Relations Act (ZDR-1)⁵ that the decision to pay out part of the business performance bonus as part of the salary (referred to as the Christmas bonus) is left to the employer's autonomous discretion (in terms of whether such bonus will even be paid out, and in what amount), however such discretion is limited by the statutory prohibition of discrimination and the provisions on equal pay. The commentary also indicates that since this concerns the business performance of the entire company as such, as a rule, all of the employees are entitled to the business performance bonus as a portion of their salary under the collective agreements. In the Advocate's assessment, the above speaks to the nature of the business performance bonus as a portion of the salary. Namely, it is essentially a bonus which, provided that the company has good business results, is paid out to all employees - rather than a bonus which is paid out to an individual employee, which would correspond to his or her specific contribution to the company's business performance. The ZDR-1 also makes a distinction between the *business performance bonus* as a portion of the salary on the one hand, and the *employee performance bonus* (i.e. *individual work performance*). As noted in the Commentary,⁶ the individual work performance as a part of the salary is paid out to employees only where an employee is achieving the work-related results stipulated in the employment agreement or in the collective agreement; the disbursement of the business performance bonus as part of the salary is dependent on the company's overall performance and is within the employer's autonomous discretion. If the criterion is defined in such a way that the payout of the business performance bonus is based on the employee's individual contribution, the Advocate believes that this makes it no longer a business performance bonus, but rather an individual work performance bonus, which is not taxable under more favorable conditions (point 12 of the first paragraph of Article 44 of the ZDoh-2). The Advocate is therefore of the view that just as non-achievement of work results by an employee does not affect the amount of minimum wage, which is paid out to both employees who achieved and even surpassed the set work targets and to employees who did not achieve these targets as a result of not performing the work in a timely or quality manner (for such cases, the employer has other labor law instruments at its disposal - including termination of employment on grounds of incompetence as an extreme measure), so should the employee's annual attendance at work, or the frequency of their absence from work, not affect the amount of the business performance bonus to be paid out. While the company BSH argues that an employee who is effectively working contributes more to the company's performance, the Advocate is of the view that the mere fact that an employee is present at the workplace does not correlate to their work performance. The Advocate agrees with BSH's argument that in the context of awarding the business performance bonus, it is essential to determine whether an employee being evaluated for the business performance bonus did in fact contribute to the company's performance. Indeed, while this position is confirmed by case-law which BSH references, the issue at hand in the referenced judicial proceedings was the justification for the bonus payout, not the criteria, or rather the amount of the business

⁴ <https://siol.net/novice/slovenija/spodbuianie-ocetov-k-vecjemu-korisceniu-starsevskega-dopusta-72776>

⁵ Employment Relations Act (ZDR-1) with Commentary, IUS Software, GV Založba, 2016, Irena Bečan ... et al., p. 760

⁶ p. 759

performance bonus to be paid out to the employee concerned. The court assumed the position (Judgment of the Higher Labor and Social Court and Decision Pdp 1331/2008), that the business performance bonus must be paid out to the employee who was no longer employed with the employer (the payor) of the performance bonus at the time the bonus was being paid out, but was in fact employed during the year which the company's business performance bonus referred to. The Advocate finds that the court did not perform an assessment of how much this employee effectively worked, it merely assessed whether or not they were employed in the company during the specified evaluation period, and since he was, the court took the position that he was entitled to receive the business performance bonus for said period.

The Advocate is of the view that the criteria used to determine eligibility for the bonus and the share (%) of the bonus payout based on the Agreement constitutes unequal treatment of employees based on the aforementioned personal circumstances, which manifests itself as a curtailing, or as a reduction of the business performance bonus, which constitutes a part of their salaries.

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Since the Advocate confirmed a curtailing, or a disadvantaged position of persons having a certain personal circumstance, he continued by performing an assessment of determining whether the provisions from the Agreement are objectively pursuing a legitimate objective, and if the means to achieving this goal are appropriate and essential.

In accordance with Article 40 of the ZVarD, the reverse burden of proof principle applies in procedures involving protection against discrimination, which stipulates that if facts are demonstrated which justify the assumption that the prohibition of discrimination has been violated, the suspected offender must demonstrate that they did not violate the prohibition in the case under review, or that unequal treatment is permissible and in compliance with this law. The company BSH was explicitly informed of this in the letter no. 0700-30/2019/8 of 12 June 2019. Both in its response of 13 May 2019 and in its clarification letter of 26 June 2019, BSH maintained that it was not in fact engaging in discriminatory conduct. As shown above, the Advocate found that persons having a certain personal circumstance were in a disadvantaged position, and over the course of these proceedings, BSH did not demonstrate, nor did it argue, that it was pursuing a legitimate goal in adopting the Agreement and setting out the criteria, or that the means it used to achieve said goal were appropriate and essential. Based on BSH's response, the Advocate has concluded that BSH was essentially pursuing the goal of reducing absenteeism of employees, which can be an entirely legitimate goal, however the Advocate is of the view that the means employed in achieving this goal were not appropriate, nor were they essentially necessary. The Advocate therefore finds that, considering its burden of proof, the company BSH was unable to demonstrate that unequal treatment, or the setting out of the criteria stipulated in the Agreement and subject to the Advocate's review, was permissible under the ZVarD, and therefore it was unable to justify exemption from the prohibition of indirect discrimination.

In accordance with the first paragraph of Article 35 of the ZVarD, the procedure conducted by the Advocate is free of charge for the parties involved, and no special expenses were incurred over the course of the proceedings, therefore the Advocate decided as per Point 2 of the declaratory section of this Decision.

Legal notice: No appeal may be lodged against this decision; however, an administrative dispute may be raised. An administrative dispute may be raised by way of legal action, lodged within 30 days of delivery of the decision, before the Administrative Court of the Republic of Slovenia, Fajfarjeva 33, 1000 Ljubljana. The action may be lodged before the competent court either directly in writing, or sent by mail. The action and any enclosures thereto must be lodged in no less than three counterparts. The action must be accompanied by this decision, either the original or a photocopy.

Proceeding conducted by:
Sergeja Oštir /signed/
Independent advisor to the Advocate

Miha Lobnik
ADVOCATE OF THE PRINCIPLE OF EQUALITY
/signed/

/stamp: "REPUBLIC OF SLOVENIA, ADVOCATE OF THE PRINCIPLE OF EQUALITY, 1"/

Sent to:

- BSH HIŠNI APARATI d.o.o. Nazarje, Savinjska cesta 30, 3331 Nazarje - personal delivery under the General Administrative Procedure Act (ZUP),
- documentary archives.