

Position Number 1/2007.TT
of the Advisory Board of the Equal Treatment Authority
on the questions eligible to be asked by employers at job interviews

The provisions of Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities (hereinafter called: the Equal Treatment Act) prohibits direct discrimination when applying the processes preceding and facilitating the establishment of employment relationships and other relationships aimed at work. As it is impossible to draw an exhaustive list, only on the basis of considering all the circumstances related to each individual case it is possible to judge which of the questions asked by the employer during job interviews may result in direct negative discrimination. As a hint, it may be stated that direct negative discrimination may be created particularly by questions concerning private life, personal partnerships, family life, planned children, sexual habits, domicile, origin, religious or political conviction, judgement of political events, financial situation, health status. On the basis of the provisions included in Article 22a), any employer may be released from this responsibility if the question asked during the job interview justified by the characteristics or nature of the work and is based on all relevant and legitimate terms and conditions considered during the hiring.

Legal provisions to be applied

According to the provisions in Article 5d) of the Equal Treatment Act, employers in respect of employment relationships, and persons entitled to give instructions in respect of other relationships aimed at work and relationships directly related thereto shall observe the principle of equal treatment in respect of the relevant relationships. On the basis of Article 3a), employment relationship: employment, public service relationship, civil service relationship, judicial service relationship, legal service relationship, prosecution service relationship, professional and contracted service relationship, professional foster parent relationship. According to Article 3b), other relationship aimed at work: work-from-home relationship, relationship created pursuant to a contract for work, membership in a professional group and elements of the co-operative membership and partnership activities under economic and civil law involving personal contribution and aimed at work.

According to the provisions in Article 21, It is considered a violation of the principle of equal treatment in particular if the employer inflicts direct or indirect negative discrimination upon an employee, especially when the following dispositions are defined or applied:

a) for access to work, especially in public job advertisements, hiring, and regarding the conditions of employment;

b) for a disposition made before the establishment of the employment relationship or other relationship related to work, related to the procedure facilitating the establishment of such a relationship.

According to Article 8, All dispositions as a result of which a person or a group is treated or would be treated less favourably than another person or group in a comparable situation because of his/her *a)* sex, *b)* racial origin, *c)* colour, *d)* nationality, *e)* origin of national or ethnic minority, *f)* mother tongue, *g)* disability, *h)* state of health, *i)* religious or ideological conviction, *j)* political or other opinion, *k)* family status, *l)* motherhood (pregnancy) or fatherhood, *m)* sexual orientation, *n)* sexual identity, *o)* age, *p)* social origin, *q)* financial status, *r)* part-time nature or definite term of the employment relationship or other relationship aimed at work, *s)* membership in an organisation representing employees' interests, *t)* any other status, characteristic feature or attribute (hereinafter collectively: characteristics) are considered direct discrimination.

According to Article 9, those dispositions are considered indirect negative discrimination, which are not considered direct negative discrimination and apparently comply with the principle of equal treatment but put any persons or groups having characteristics defined in Article 8 at a considerably larger disadvantage than other persons or groups in a similar situation were or would be.

On the basis of the above provisions, it is obvious that the scope of the Equal Treatment Act covers all employment relationships and other relationship aimed at work. The Equal Treatment Act expressly prohibits the application of direct and indirect discrimination when defining and applying the dispositions relating to the processes preceding and facilitating the establishment of an employment relationship or another relationship aimed at work. A job interview is a discussion preceding the establishment of an employment relationship or another relationship aimed at work, which helps the employer or the persons entitled to give instructions (hereinafter called: the employer) choose the most appropriate employee. Following from this, the prohibition of direct and indirect discrimination also relates to the job interview as well.

Pursuant to Article 59(1) of the Constitution of the Republic of Hungary, in the Republic of Hungary, everyone is entitled to the right of protection of personal data. Pursuant to Article 2 of Act LXIII of 1992 on the protection of personal data and the publicity of data of public interest (Data Protection Act) personal data: data associated or suitable to be associated with a particular private individual, the conclusion, which can be drawn from the data, relating to the person concerned. Personal data keep their above defined quality in the course of data handling until their connection with the person concerned can be restored. A person shall be particularly considered associated or suitable to be associated if he or she may be identified directly or indirectly on the basis of his/her name, identification code, as well as of one or more factors characteristic for any physical, physiological, mental, economic, cultural or social identity. The following data are qualified as special data: personal data relating to a) racial origin, national and ethnic minority status, political opinion or party affiliation, religious or other conviction, membership in any interest representing organization; b) health status, abnormal addiction, sexual life and personal criminal record.

In its position on the questions asked during a labour recruitment procedure, as well as the related data handling procedures (900/A/2006-3.), the commissioner for data protection established that those questions of the employer violate the principles of the Code of Labour and the personality rights protected by any other laws or regulations, which are aiming at the purposeless handling of the data related to the person concerned. According to decision no. 15/1991 (IV.13.)AB of the commissioner for data protection, to record and use personal data is allowed only with the consent of the concerned party, and the complete route of data processing must be made traceable and controllable to everyone. By virtue of the position, based on the provisions of the Data Protection Act, the employee is entitled to refuse answering a question resulting in a data handling without proper purpose. Further, no sanction shall be applied against the employee, if he/she answers a question violating his/her personality rights in such a way that it does not reflect the truth.

Rules relating to questions eligible to be asked at job interviews

The application of job interviews is not mandatory, therefore it may be applied at the discretion of the employer. Employers often take advantage of this possibility, as it provides them a good opportunity to have a better understanding of the applicants, to assess his/her suitability. For that reason, the employer is free to ask the potential employees such questions which are important in terms of establishing an employment relationship. However, this is not an unlimited right of the employer, as this right is limited, inter alia, by the obligation of adhering to the principle of equal treatment. However, provisions related to the employment relationships, and related to the other relationships aimed at work must be handled separately.

For the employment relationships listed in Article 3(a) of the Equal Treatment Act (hereinafter called: the employment) the provisions included both in the Code of Labour (CL) and in the Equal Treatment Act shall be applied. In that sense, the following description shall also be applicable to civil service relationships, public service relationship and service relationships as well. Pursuant to Article 77(1) of the CL, during the establishment of an employment, the employee may be requested to make such a statement or complete such a form, and/or he/she may be subjected to such an aptitude test, which does not violate his/her personality rights, and which may provide significant information in terms of the establishment of the employment. This provision does not concern procedures preceding the establishment of the employment, because the scope of effect of the LC only covers the established employment (Article 1(1)), and at the time when the job interviews are conducted, the employment is not established yet. There is only one exception to this rule: i.e. the obligation of equal treatment. On the other hand, according to the provisions in Article 349(3) of Act III of 1952 on civil procedure, any claim based on laws directly related to the employment (e.g. procedures preceding the establishment of an employment relationship) may be enforced also in labour court disputes.

According to Article 5(1) of the CL, the obligation of equal treatment must be adhered to in relation to the employment. The obligation of equal treatment is such a labour principle which must be respected in the course of any procedure related to the employment. This is reinforced by the provisions of Article 2 of the Equal Treatment Act, stating that the provisions related to the obligation of equal treatment defined in separate laws and regulation must be applied in accordance with the provisions of the Equal Treatment Act. As the provisions of Article 21 of the Equal Treatment Act expressly prohibits the application of direct and indirect discrimination in relation to the procedures preceding and facilitating the establishment of an employment relationship, based on the provisions in Article 5 of the CL and in Article 21 of the Equal Treatment Act, a labour related legal dispute may be instigated if the employer violates the obligation of equal treatment in relation to the job interview. Adherence to the principle of equal treatment may be examined during labour audits as well.

A job interview is a procedure directly connected to the establishment of an employment relationship, to which the principles of labour laws may be applied. According to the principle of proper legal practices, the rights and obligations defined in the Code of Labour must be exercised and met properly (Article 4 (1)). It is not enough just to refrain from violating the law, the procedures must be in accordance with the objectives of the particular rule or regulation. It follows from the obligation of equal treatment and the principle of the proper application of the law, as well as from the provisions of Article 77 of the CL, that during job interviews, only such questions may be asked, which may provide such information that could be important in terms of the establishment of the labour relationship, but at the same time does not violate the personality rights of the employee.

To this end, the provisions of Article 77(2) of the CL name one particular scope of questions. In relation to the establishment of an employment relationship, it is prohibited to oblige the employee to undergo any test in order to establish the fact of pregnancy and/or to oblige the employee to present a test result to this end, except for cases when it must be done on the basis of a relevant legislative regulation within the scope of a job aptitude test and evaluation. It follows from the above principle of labour laws (proper application of the law), as well as from the above rule (Article 77(2)) that a statement on pregnancy may be requested from a potential employee only if, based on the laws and regulations, it has a special importance for taking the particular job, e.g. in terms of labour protection.

The Equal Treatment Act does not include any definite provisions regarding the questions that may be asked at job interviews. However, the provisions in Article 21 of the Equal Treatment Act may be interpreted in such a way that the prohibition of direct and indirect discrimination must be applied appropriately also to the questions eligible to be asked as well. A question asked during a job interview violates the obligation of equal treatment if, as a result, the employee is treated less favourably than another person or group in a comparable situation because of his/her actual or assumed characteristic included in the list defined by Article 8. If the employer refuses to establish an employment relationship with an applicant because of his/her answer given to a question violating the obligation of

equal treatment asked during a job interviews, or because of the applicant's refusal to answer that particular question, it is qualified as negative discrimination. Conceptually, the prohibition of direct or indirect negative discrimination is precluded in relation to the questions asked during job interviews, as the discrimination is always based on the assumed characteristics.

Asking one or more questions violating the obligation of equal treatment in itself does not provide a ground for direct negative discrimination. Direct negative discrimination may be established only if the measure taken by the employer causes disadvantage. Such a disadvantage may be the failure to establish the employment relationship, or the application of conditions less favourable than those applied for the other employees of the employer being in a comparable situation. Such a disadvantage may also be, in particular, in the course of establishing the employment relationship, that the employer enters into an employment relationship for a definite period of time or for a trial period only, with reference to the family status of the applicant, while with the other employees, the employer signs the labour contract for an indefinite period of time.

Based on the above, it is obvious that it is impossible to provide an exhaustive list of all the questions which may not be asked by the employer in the course of job interviews. Therefore, only taking into consideration all the circumstances of a case may give a ground to judge, which questions provide a basis for the establishment of direct negative discrimination. In accordance with the above-mentioned principles and provisions of the CL, and with the provisions of the Equal Treatment Act, those qualify discriminative, which are of no importance in relation to the particular employment, because they are not necessary to decide whether the potential employee would be able to carry out that particular work. As a hint, it may be declared that direct negative discrimination may be caused particularly by questions aiming at private life, personal partnerships, family life, planned children, domicile, origin, religious or political conviction, judgement of political events, financial situation, health status, sexual habits. These questions violate the obligation of equal treatment because they refer to the existence or lack of those protected characteristics which are listed in Article 8 of the Equal Treatment Act, and/or they may be associated directly or indirectly with any of those protected characteristics. On the other hand, a relief of the employer may still be ensured even in such cases, as e.g. the domicile of the applicant may be important in the case of a workplace accessible in several hours' travel. In relation to asking about the domicile, the employer may receive a relief, because according to Government Degree 78/1993 (V.12.) on the refunding of expenses related to going to work, all employers falling under the scope of the Code of Labour (CL), the Act on the legal status of public service employees (Ktv.), and the Act on the legal status of civil service employees (Kjt.) are obliged to refund the expenses related to going to work.

The other employment relationships listed in Article 3b) of the Equal Treatment Act form a mixed group, to some of which the rules of the CL must also be applied, while the same rules are not relevant to others. It is possible to judge whether the above principles and rules of the CL must be applied in relation to a case or not, if the conditions of the particular legal relationship are known. This issue, however, is relevant only from the aspect of a labour law dispute, because the rules of the Equal Treatment Act must be applied to all other employment relationships aimed at work.

Relief of the employer

The employer may be released from this responsibility on the basis of article 22 of the Equal Treatment Act, which includes two rules of relief.

Any employer may be released from this responsibility on the basis of the provisions of Article 22a) according to which the question asked during a job interview is not considered violating the obligation of equal treatment if it is justified by the characteristics or nature of the work and is based on all relevant and legitimate terms and conditions considered during the hiring. It is impossible to provide an exhaustive list of the questions justified by the

characteristics or nature of the work and based on all relevant and legitimate terms and conditions considered during their application.

Therefore, only on the basis of considering all the circumstances related to each individual case it is possible to judge which of the questions do not violate the obligation of equal treatment. As a hint, it may be stated that such questions could be, in particular,

- questions important in relation to the protection of the health and security of the employee, justified by the characteristics or nature of the work, which may concern the health status of the employee,
- questions justified by the plan of work, the schedule of worktime, the workload, the characteristics or nature of work, related to the significant and legitimate terms and conditions considered during the hiring, particularly related to the working capacity and flexibility of the employee. However, questions relating to the working capacity and flexibility of the employee may not be aiming at the family situation of the employee, such as the number of his/her children, or whether he/she could undertake extra work, etc.

Employers within organizations based on religious or other ideological convictions, as well as on national or ethnic origin may be released from the responsibility exclusively, based on the provisions in Article 22a). Questions asked by the employer of such organizations are not considered violating the obligation of equal treatment if they follow directly from the mentality basically determining the nature of the organization, if they are based on proportional and genuine employment requirements justified by the content or nature of the particular job or activity.

Possibilities for legal remedy

On the basis of the provisions in Article 199(1) of the CL, in order to enforce his/her interests following from employment, the employee may instigate an employment related legal dispute. If the employer violates the obligation of equal treatment in relation to the job interview, the party whose rights suffered may instigate an employment related legal dispute. In addition to the employment related legal dispute, the employee may instigate a procedure at the Equal Treatment Authority, which shall proceed and carry out an employment audit on the basis of the above-mentioned rules of the Equal Treatment Act and the Code of Labour.

Rules of evidence

On the basis of Article 19 of the Equal Treatment Act, the employee shall render it probable that

- a) all of the questions asked by the employer and found by the employee prejudicial are in connection with a characteristic which is qualified as protected on the basis of Article 8. In such cases, the employee may not necessarily possess that particular characteristic, but the employer assumes so;
- b) the employer, following the job interview, did not establish an employment relationship or another relationship aimed at work, or that the employer established the employment with him/her under less favourable conditions than with its other employees being in a comparable situation.

The employee is not obliged to prove the relation of cause and effect between the question and the disadvantage. It may be important in relation to the excuse of the defendant what answer was given by the claimant to the question. On the basis of all of the above, the employer or the person entitled to give instructions must prove that

- a) its procedure did not violate the obligation of equal treatment: i.e. no such question was asked which could be qualified as direct negative discrimination, and/or the refusal to employ the applicant, or the less favourable conditions (disadvantage) was not in a relation of cause and effect with the question asked and the answer given to the question by the employee, or

b) it was not obliged to adhere to the obligation of equal treatment: i.e. that the question asked and the procedure following the question complied with the conditions provided for in Article 22 of the Equal Treatment Act.

In general, it is possible to act against discriminating questions including quasi norm-like stipulations and questionnaires on the basis of the right of *actio popularis*. This means that the court or authority investigates into the complaints not at the initiative of one specific individual person, but based on the initiative of an organization authorized by the Equal Treatment Act and acting in the interests of the injured group (e.g. the prosecutor, the Authority, social and interest representation organizations, etc.), because the particular question that was asked concerned a larger group of the society having a characteristic protected by the law. In the case of an *actio popularis*, it is enough for the claimant or plaintiff to refer to the discriminating question or questionnaire relating to the protected characteristic and to render the potential occurrence of the disadvantage possible.

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