



REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-22/94
25/5-1995

DECISION

At a session held on 25/5-1995, in proceedings for assessing constitutionality commenced on the demand of the State Council and on the initiative of the Faculty of Law of the University of Ljubljana and the University of Ljubljana, the Constitutional Court

reached the following decision:

The provisions of the second paragraph of article 60 of the Law on high education (Official gazette RS, no. 67/93) is annulled.

Reasoning

1. The State Council asserts that the impugned provision whereby a regular professor, irrespective of having fulfilled the prescribed conditions for retirement, may occupy a working post cited in the first paragraph of article 60 of the Law on high schools (hereinafter: ZVŠ) only to the age of 65 is in conflict with the Constitution. It states that the impugned provision is in conflict with article 14 of the Constitution because it places regular professors in an unequal position in relation to other university education teachers, research workers and university education associates, to which this restriction does not apply. Similarly, regular professors are claimed to be in an unequal position with all other workers, who by article 101 of the Employment Act (Official Gazette RS, no. 14/90, 5/91, and 71/93) may work until completing the conditions for retirement, irrespective of age. For the same reasons, the Faculty of Law of the University of Ljubljana (hereinafter: the Faculty) challenges the impugned provisions (and a number of other provisions of the law, which the court will treat and decide upon separately). The Faculty further claims that the second paragraph of article 60 of ZVŠ violates the provisions of article 49 of the Constitution, which guarantees freedom of work. Because of the impugned provisions, the prohibition of all forms of discrimination in employment and professions is said no longer to apply to regular professors after 65 years of age - the discriminatory circumstance being age. The University of Ljubljana impugns the cited provisions for contextually the same reasons. They further state that the provision violates article 50 of the Constitution, which ensures the right to social security.

2. The Secretariat for legislation and legal affairs of the National Assembly, in its answer of 20/5-1994, states that the provision of the second paragraph of article 60 sets an age limit for regular professors occupying a working post, whereby it determines that regular professors, irrespective of fulfilling the prescribed conditions for retirement, shall occupy a working post until the age of 65. In the view of the Secretariat it is a provision which is "lex specialis" and which as such derogates the provisions of article 101 of the Employment Act.

3. The Government in its opinion of 23/6-1994 concurs with the basic proposal of the State Council and believes that the impugned legislative provision is in conflict with article 14 of the Constitution which guarantees to all equality before the law. The cited provision in the view of the Government means a double inequality before the law. Regular professors are suggested to be in an unequal position:

- in comparison with other workers, who cease employment on the day on which they fulfill the conditions for obtaining the right to full old age pension, and

- in comparison with other workers in tertiary education (associate professors, senior lecturers, research workers, lecturers and all other workers), since paragraph 2 of article 60 does not apply to them.

4. The government further states that in the National Assembly, in connection with the proposal of the Law on High Schools, in all three readings in 1993, it stood by the view that the provisions of the existing legislation should be used for the retirement of (university) teachers, and that the provision be removed that the Law on oriented education (Official Gazette SRS, no. 11/80, 6/83, 25/89 and 35/89) recognised and according to which (university) teachers who had fulfilled the conditions for full retirement pension may remain employed until 70 years of age. It therefore agreed during the reading of a proposed amendment to the LVŠ in the National Assembly in January 1994 that the disputed paragraph 2 of article 60 of this law be deleted.

5. In its opinion of 18/7-1994, the Secretariat for legislation and legal affairs of the National Assembly RS states that it agrees with the cited opinion of the Government in that part in which it is stated that the impugned provision is in conflict with article 14 of the Constitution, since it places regular professors in an unequal position in relation to other (university) workers (associate professors, senior lecturers, research workers, lectures and other university staff). In relation to the question of possible conflict of the impugned legislative provisions with the Employment Act, the Secretariat states in its opinion contextually the same point of view as in its answer of 20/5-1994.

6. The same Secretariat gave a further answer on 17/11-1994.

There it states that the members of the Committee of the National Assembly for culture, education and sport, dealt with the subject matter at meetings held on 15/6-1994 and 14/11-1994, bearing in mind the opinion of the Government and Secretariat, but they did not wish to adopt a view on the constitutionality of the impugned provisions of the Law. They believed that the impugned provision of the Law is contextually questionable and also unsuitable. The cited Committee had already adopted such an opinion on the renewed voting on the Law in connection with the veto lodged by the State Council. On the initiative of the same Committee, a draft Law on amending the impugned provision was later submitted, but was not adopted by the National Assembly.

7. The Ministry of Education, in its answer (harmonised with the Government Service for Legislation) of 10/2-1994, agrees with the statements of the State Council. The Ministry also finds that the impugned legislative provision signifies a double violation of equality before the law, both in relation to other workers, and especially in comparison with other (university) staff (senior lecturers, associate professors ...). It further states that the Ministry had the same standpoint as stated by the Government in its clarification, throughout the legislative procedure.

B.-I

8. According to article 101 of the Employment Act, a worker's employment shall cease when s/he meets the conditions for obtaining the right to full retirement pension (i.e. according to the provisions of the fourth paragraph of article 39 of the law on pension and invalidity insurance, a man 40 years pension period and 58 years, a woman 35 pension years and 53 years of age), unless the competent body of organisation or employer in accordance with conditions determined by collective contract or general act decides that employment may continue.

9. The impugned provision regulates the employment conditions of regular university professors otherwise than the cited article 101 of the Employment Act does for all other workers. In relation to the possibility of regular professors, regardless of the wishes of the employer, continuing work in the position of regular professor, the impugned provision is more favourable for some regular professors (thus privileges them), and for others, less favourable than the arrangement under the Employment Act (thus discriminatory).

10. Those regular professors who reach 65 years of age without having fulfilled the pension period which is required for obtaining the rights to full retirement pension, because of the impugned provision will be unable to occupy posts cited in the first paragraph of article 60 of the Law, although under the provisions of article 101 of the Employment Act they could continue work at least until meeting the

conditions for obtaining the right to full old age pension. The impugned provision thus places these regular professors in a position which is less favourable than the position which they would have under the general provision of article 101 of the Employment Act.

An interpretation is even possible that the possibility does not exist for regular professors who have reached 65 to continue employment on the basis of a decision by the competent body of the university or college. On that interpretation, the provision of the second paragraph of article 60 of ZVŠ appears even more discriminatory.

11. Those regular professors who have already fulfilled the conditions for obtaining the right to full pension before reaching the age of 65, irrespective of the wishes of the employer, may remain in the post of regular professor until they reach 65, although according to the provisions of article 101 of the Employment Act, employment would cease on the day of meeting these conditions. The impugned provision thus places these regular professors in a position which is more favourable than they would have under the general provisions of article 101 of the Employment Act.

B.-II.

12. In cases in which some regular professors are discriminated against, the impugned provision takes away from these regular professors who do not yet have the conditions for obtaining the right to full old age pension, the right to occupy a working post, and in relation to the first paragraph of the impugned provision it even prevents their allocation to the post of research worker and (university) associate, in relation to which such an age limit is not prescribed. This provision thereby, but not also any other provision of this or any other law, does not determine that such a professor has the right to early retirement. The law also does not define the created position as a basis for establishing that such a professor has been made redundant. In such cases, the impugned provision leaves the legal employment position of such a professor entirely unarranged and is thus in conflict with the principle that Slovenia is a legal and social state (article 2 of the Constitution), and at the same time violates the guaranteed freedom of work (article 49 of the Constitution) and the right to social security (article 50 of the Constitution) of regular professors after 65 years of age.

13. In cases in which the effect is discriminatory, the impugned provision is also in conflict with the principle of equality before the law which is determined by article 14 of the Constitution. Persons with the title regular professor, after reaching the age of 65, would not be able to occupy a working post which can be occupied by another worker of the same age, and even (university) teachers (senior lecturers, associate professors), research workers (research associate, higher research associate and scientific advisor) and (university) associate (assistant, lecturer, technical advisor, higher technical associate, technical associate and science teacher).

It is impossible to see any comprehensible reason for such a differentiation, so as arbitrary, it is clearly in conflict with the constitutional principle of equality.

B.-III.

14. In some cases, as has been said, the impugned legislative provision even places regular professors in a privileged position. The more favourable, above standard position of specific groups in relation to specific rights does not itself signify a violation of the principle of equality in comparison with other groups who enjoy the standard position, if such special favourabilities are logically based and to do not overreach the extent that the reason for which they are given justifies. Such a special arrangement must also be in acceptable relation to the general arrangement of rights and with arrangements to date of such a special field and with general and special social relations in the field which the law regulates. The Constitutional Court finds that the legislator did not from this point of view violate the provisions of articles 2, 14, 49 and 50 of the Constitution. With regular professors as workers on whom the pedagogic process at universities and colleges is based, especially the training of new pedagogic workers, such special reasons exist.

However, regulating the question of whether and in what cases (university) teachers, research workers and (university) associates who have fulfilled the conditions for obtaining the right to full pension can

for special reasons continue in their employment, belongs in the framework of the autonomy of the universities and colleges. In article 101, the Employment Act determines that a worker who has fulfilled the conditions for obtaining the right to full pension may continue in employment if the competent body of the organisation or the employer in accordance with conditions determined by collective contract or general act so decides. The possibility for individual workers to continue employment after meeting the conditions for full pension is thus already validated in the system. A possible arrangement which would introduce this possibility for individual categories of workers at universities as a general obligation of employers, and on the other hand the rights of workers, could be based on respecting the particularities of the pedagogic process, pedagogic work and staff structures in universities and colleges. Precisely a respect for these principles belongs among those questions which are the content of the autonomy of universities defined in the provision of article 58 of the Constitution. The legislative provision which arranged such a question is thus in conflict with the constitutional provision on the autonomy of the university.

C.

The Constitutional Court adopted this resolution on the basis of paragraph 1 of article 21 of the Constitutional Court Act (Official Gazette RS, no. 15/74), composed of: president Dr. Tone Jerovšek and judges Dr. Peter Jambreč, Mag. Matevž Krivic, Mag. Janez Snoj, Dr. Janez Šinkovec, Dr. Lovro Šturm, Franc Testen, Dr. Lojze Ude and Dr. Boštjan M. Zupančič. The resolution was adopted with six votes against two (judges Krivic and Testen voted against). Judges Šinkovec and Zupančič gave an affirmative separate opinion, a negative separate opinion was given by judges Krivic and Testen.

President
Dr. Tone Jerovšek