58/5/A/2013

JUDGMENT

of 13 June 2013

Ref. No. K 17/11*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Sławomira Wronkowska-Jaśkiewicz – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Teresa Liszcz – Judge Rapporteur
Piotr Tuleja,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 13 June 2013, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the National Commission of the Independent and Self-Governing Trade Union – Solidarity (Pl. *NSZZ „Solidarność”*) to determine the conformity of:

> Article 1(4) of the Act of 29 October 2010 amending the Act on the vocational and professional rehabilitation, social reintegration, and employment of persons with disabilities as well as certain other acts (Journal of Laws - Dz. U. No. 226, item 1475) to Article 2 and Article 69 of the Constitution of the Republic of Poland,

adjudicates as follows:

I

* The operative part of the judgment was published on 9 July 2013 in the Journal of Laws - Dz. U., item 791.

Article 15(2) of the Act of 27 August 1997 on the vocational and professional rehabilitation, social reintegration, and employment of persons with disabilities (Journal of Laws - Dz. U. of 2011 No. 127, item 721, No. 171, item 1016, No. 209, item 1243 and 1244 and No. 291, item 1707, of 2012 item 986 and 1456 as well as of 2013 item 73), **as amended by Article 1(4)(a) of the Act of 29 October 2010 amending the Act on the vocational and professional rehabilitation, social reintegration, and employment of persons with disabilities as well as certain other acts** (Journal of Laws - Dz. U. No. 226, item 1475) **– insofar as it correlates the granting of shorter hours of work to persons with severe or moderate disabilities with the obtaining of a medical certificate on the need for shorter hours of work – is inconsistent with Article 2 in conjunction with Article 69 of the Constitution of the Republic of Poland.**

II

The provision indicated in part I, within the scope indicated therein, shall become invalid after the lapse of 12 (twelve) months from the day of the publication of the judgment in the Journal of Laws of the Republic of Poland.

Moreover, it decides:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654)**, to discontinue the review proceedings as to the remainder.**

STATEMENT OF REASONS

[…]

III

The Constitutional Tribunal has considered as follows:

1. The subject of the application and the subject of adjudication.

The National Commission of the Independent and Self-Governing Trade Union - Solidarity (hereinafter: the applicant or the Solidarity Trade Union), in the *petitum* of its application of 25 January 2011, requested the examination of the constitutionality of Article 1(4) of the Act of 29 October 2010 amending the Act on the vocational and professional rehabilitation, social reintegration, and employment of persons with disabilities as well as certain other acts (Journal of Laws - Dz. U. No. 226, item 1475; hereinafter: the amending Act). The said provision introduced changes into the Act of 27 August 1997 on the vocational and professional rehabilitation, social reintegration, and employment of persons with disabilities (Journal of Laws - Dz. U. of 2011 No. 127, item 721, as amended; hereinafter: the Act on Vocational and Professional Rehabilitation or the Act), which entered into force on 1 January 2012.

In accordance with the well-established jurisprudence of the Constitutional Tribunal, the examination of the amending Act after the entry into force of the changes introduced by that Act is appropriate only when the challenged regulation is questioned for procedural reasons which concern the non-compliance with the proper legislative procedure. However, if the doubts of the party initiating the review proceedings concern the essence of changes introduced by the amending Act, the subject of the review should be the amended statute (cf. e.g. the judgments of: 13 March 2007, ref. no. K 8/07, OTK ZU No. 3/A/2007, item 26, part III, point 2.1; 2 September 2008, ref. no. K 35/06, OTK ZU No. 7/A/2008, item 120, part III, point 1).

In the view of the Constitutional Tribunal, in the present case, the latter of the above-mentioned situations occurs. In the light of the principle of *falsa demonstratio non nocet*, it should therefore be deemed that the applicant's intention was primarily to challenge the following: Article 15(2) of the Act on Vocational and Professional Rehabilitation, as amended by Article 1(4)(a) of the amending Act, as well as related Article 15(2a) of the Act on Vocational and Professional Rehabilitation, added by Article 1(4)(b) of the amending Act, as well as Article 15(4) of the Act on Vocational and Professional Rehabilitation, as amended by Article 1(4)(c) of the amending Act.

In the above context, it should be noted that the application submitted by the Solidarity Trade Union was lodged with the Constitutional Tribunal 11 months before the entry into force of the amending Act (on 25 January 2011, whereas the Act entered into force on 1 January 2012). Thus, the subject of the allegation was indicated properly in the

light of the previous legal system, and the necessity to correct it is caused by the time it took the Constitutional Tribunal to examine the case.

At the same time, it should be noted that the entire application by the Solidarity Trade Union focuses on the issue of a change in the hours of work for persons with severe or moderate disabilities, and thus it concerns amended Article 15(2), examined in conjunction with Article 15(1) of the Act on Vocational and Professional Rehabilitation. By contrast, the applicant raises no doubts as to the conformity of Article 15(2a) and (4) of the Act on Vocational and Professional Rehabilitation to the Constitution; nor does the applicant mention any arguments within that scope (the content of the regulations is not even described in the context of the reform that has been introduced). Therefore, the examination of the application with regard to those provisions is not admissible, since there has been the non-fulfilment of requirements enumerated in Article 32(1)(3) and Article 32(1)(4) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), i.e. the lack of allegations of non-conformity to the Constitution and the lack of justification thereof. Therefore, the subject of the substantive review may only be Article 15(2) of the Act on Vocational and Professional Rehabilitation, in the context of its Article 15(1).

2. The applicant's legitimacy to institute review proceedings.

As part of the formal review of the application, it was necessary to determine whether the Solidarity Trade Union – as a party with special legitimacy within the meaning of Article 191(1)(4) in conjunction with Article 191(2) of the Constitution – has the right to effectively institute review proceedings within the scope set above.

What the applicant indicated as a legal basis of its application was the resolution by the Solidarity National Committee No. 1/11 of 25 January 2011 (hereinafter: the resolution), the proper adoption of which is confirmed by an excerpt from the minutes of the meeting of the Committee. Pursuant to § 34(3)(6) of the Regulations of the Solidarity Trade Union (in the version that included amendments adopted on 16 October 2009 by the 22nd National Convention of the Delegates of the Solidarity Trade Union; hereinafter: the Regulations), the National Committee is "a nationwide executive authority" of the Trade Union and is vested *inter alia* with the right to manage the activity of the Trade Union and to represent it in relations with other organisations or institutions (cf. § 41(1) of the Regulations). The right to refer an application to the Constitutional Tribunal by that

authority has not been mentioned explicitly in the Regulations, but arises from § 43 of the said legal act, in accordance with which the executive authorities of the Trade Union are also entrusted with the rights and obligations set out *inter alia* in the resolutions of the National Committee.

The content of the application reflects the findings concerning higher-level norms for review and the subject of the review included in the indicated resolution. The only difference is the lack of an explicit mention of the principle of legal security, which (due to the inclusion of that principle in the principle of protection of citizens' trust in the state and its laws, which was expressed therein) is of secondary importance. Therefore, the applicant's action within the scope of the said authorisation should be deemed indisputable.

Also, doubts are not raised by the fact that the issue of the conformity of Article 15(2) of the Act on Vocational and Professional Rehabilitation to Article 2 and Article 69 of the Constitution falls within the scope of the activity of the Solidarity Trade Union. Pursuant to the requirements of Article 32(2) of the Constitutional Tribunal, the applicant mentioned relevant provisions of the Regulations, within the meaning of which, the Trade Union brings together *inter alia* employees hired on the basis of an employment agreement (cf. § 5(1) of the Regulations), and the purpose thereof is the protection of the dignity as well as workers' (professional and social) rights and interests of employees (cf. § 6(9) of the Regulations). The challenged regulations concerning the hours of work in the case of employees with severe or moderate disabilities in a clear way fall within the scope of the applicant's activity.

3. Constitutional issues.

A constitutional issue in the case under examination is primarily the issue that providing the same number of hours of work for employees with severe or moderate disabilities as for able-bodied employees or employees with mild disabilities (with the proviso that the former group of employees may apply for shorter hours of work) complies with the principle of social justice, expressed in Article 2 of the Constitution.

Secondly, another issue is the admissibility of a change in the regulation of the hours of work for employees with severe or moderate disabilities, to their disadvantage, in the light of the principle of protection of citizens' trust in the state and its laws as well as the principle of legal security, derived from Article 2 of the Constitution.

Thirdly, yet another issue is the conformity to Article 2 of the Constitution (the

principle of appropriate legislation) of the challenged Article 15(2) of the Act on Vocational and Professional Rehabilitation, which - by correlating the granting of shorter hours of work to persons with severe or moderate disabilities with the obtaining of a medical certificate on the need for shorter hours of work – would not specify a procedure for issuing that kind of certificates or any means for appealing the certificates or a procedure for refusing to issue them.

4. The permissible hours of work – general remarks.

4.1. Pursuant to the Act on Vocational and Professional Rehabilitation, disability means "permanent or temporary incapacity to fulfil social roles due to a permanent or long-term loss of abilities, which in particular results in incapacity for work" (cf. Article 2(10) of the said Act). Persons with disabilities within the meaning of the Act are only persons whose disabilities have been confirmed by a relevant medical statement:

– issued by one of medical commissions (a poviat one – in the first instance, and a voivodeship one – the second instance) about the qualification (only with regard to persons who have not yet attained the age of 16, a medical statement on disability is issued without specifying the degree of the disability – Article 1(1) and (3) in conjunction with Article 3, Article 4, Article 4a and Article 6 of the said Act);

– a medical statement on complete or partial incapacity for work, issued by a medical practitioner from the Social Insurance Fund on the basis of separate provisions (Article 1(2) and Article 5 of the Act).

The degrees of disability are defined in the Act on Vocational and Professional Rehabilitation in the following way:

– the term 'persons with severe disabilities' refers to persons who are not able-bodied, are incapable of work or capable of work in the conditions of protected work, and who require – in order to fulfil social roles – continuous or long-term care and support by other persons due to their inability to live independently (Article 4(1) of the Act); the said persons may be employed by an employer who does not guarantee the conditions of protected work, provided that the position is adjusted to the needs of persons with disabilities or the employment of persons working remotely (Article 4(5) of the Act);

– persons with moderate disabilities are persons who are not able-bodied, are incapable of work or capable of work only in the conditions of protected work, and who

require continuous or long-term care and support by other persons in order to fulfil social roles (Article 4(2) of the said Act); similarly to persons with severe disabilities, also persons with moderate disabilities may be employed by employers that do not provide the conditions of protected work as long as they adjust the workplace to the needs of persons with disabilities or the employment in the form of working remotely (Article 4(5) of the said Act).

– 'persons with mild disabilities' are persons who are not able-bodied, who have a diminished ability to perform work, in contrast with persons who have similar qualifications, but who are mentally and physically able, or who may perform social roles to a limited extent with the use of orthopaedic equipment, aids or technology (Article 4(3) of the Act under analysis).

The inability to live independently within the meaning of the cited provisions amounts to "disability to the extent which makes it impossible to satisfy basic needs such as being able to take care of oneself, move from place to place, and communicate" (Article 4(4) of the Act on Vocational and Professional Rehabilitation).

4.2. The employment of persons is an element of their vocational and professional rehabilitation (the definition of that type of rehabilitation is set out in Article 8 of the Act on Vocational and Professional Rehabilitation) i.e. actions aimed at the achievement – with the full involvement of those persons – of "the highest possible level of their activity, quality of life and social inclusion" (a general definition of persons with disabilities is provided in Article 7 of the Act).

Persons with disabilities who are employees have – in comparison with other employees – special rights, some of which are assigned to all persons with disabilities, and some depend on the degree of disability.

Employing or refraining from employing persons with disabilities also has an impact on the situation of employers.

Firstly, employers who hire over 25 employees are obliged to make monthly payments to the National Rehabilitation Fund for Persons with Disabilities (hereinafter: the National Rehabilitation Fund); the said obligation does not lie with employers who hire persons with disabilities in the case where employees with disabilities constitute at least 6% (Article 21 of the Act on Vocational and Professional Rehabilitation).

Secondly, employers who hire persons with disabilities have the possibility of obtaining (on condition that they meet statutory premisses) support from the funds of the National Rehabilitation Fund in the form of:

– a monthly subsidy to the amount of remuneration paid out to employees with disabilities that is proportionate to the degree of their disability (respectively: in the first half of 2012 – 170%, 125% and 50%, in the second half of 2012 – 180%, 115% and 45%; and ultimately, as of 1 January 2013 – 180%, 100% or 40% of the minimal wage, with a possibility to increase it by 40% in the case of the employment of certain categories of persons with disabilities; the said subsidy may not amount to more than 75% or 90% of the costs of work actually incurred – Article 26a(1), (1b) and (4) of the Act on Vocational and Professional Rehabilitation as well as Article 12 of the amending Act) and the hours of work (Article 26a, Article 26b and Article 26c of the Act on Vocational and Professional Rehabilitation);

– the refund of costs incurred due to the adjustment of the workplace to the needs of persons with disabilities, the adaptation or acquisition of devices that make it easier for a person with disabilities to perform work or function in an employment establishment, as well as the purchase and authorisation of software to be used by persons with disabilities (Article 26(1) of the Act on Vocational and Professional Rehabilitation);

– the refund of costs incurred due to the employment of staff members that assist employees with disabilities at work within the scope of activities that facilitate communication with others, as well as activities that are impossible or difficult to be carried out independently by employees with disabilities at the workplace (Article 26d(1) of the Act on Vocational and Professional Rehabilitation);

– the refund of costs incurred due to the preparation of workspace for a newly employed person with disabilities who was previously out of work (Article 26e(1) of the Act on Vocational and Professional Rehabilitation).

Furthermore, the employer has the right to apply for the title of the employment establishment providing protected work environment or the employment establishment promoting occupational activity, which *inter alia* implies tax relief (Article 31 of the Act on Vocational and Professional Rehabilitation) and access to additional funds from the National Rehabilitation Fund (Article 32 of the said Act).

4.3. Due to the fact that the subject of this case comprises the permissible hours of work for persons with disabilities, it is necessary to present the evolution of the legal

regulation pertaining to the said permissible hours.

The first attempt at comprehensively regulating the employment of persons with disabilities as well as their vocational and professional rehabilitation, including their hours of work, was undertaken after the WW II, which was quite late. The decree of 25 June 1954 on universal old-age pensions for employees and their families (Journal of Laws - Dz. U. No. 30, item 116, as amended) required that the Council of Ministers should issue regulations on the rules of the planned employment of persons with disabilities. However, the said right was exercised more than 10 years later, by the issuance of the regulation of the Council of Ministers (dated 5 May 1967) on the planned employment of persons with disabilities (Journal of Laws - Dz. U. No. 20, item 88, as amended; hereinafter: the regulation of 1967), which was in force from 1 June 1967 to 1 January 1983. Pursuant to § 11(1) of the said regulation, the employment establishments were obliged to: "wherever needed, to provide part-time employment with appropriately reduced remuneration to persons with disabilities whose state of health requires this". A person with disabilities was to be employed part-time on the basis of "a decision of a medical committee on disability and employment or a contract entered into by a given employment establishment and a given person with disabilities" (§ 11(2) of the regulation of 1967).

A different approach was adopted with regard to the hours of work for persons with disabilities in the 80s – in two subsequent regulations issued by the Council of Ministers on the hours of work and additional paid holidays for employees included in the 1st and 2nd invalidity group, issued on the basis of Article 129(2) and Article 160 of the Labour Code – dated 11 December 1981 (Journal of Laws - Dz. U. No. 31, item 175; hereinafter: the Regulation of 1981, which was in force from 1 January 1982 to 27 May 1984) as well as 16 May 1984 (Journal of Laws - Dz. U. No. 28, item 143, as amended; hereinafter: the Regulation of 1984, which was in force from 28 May 1984 to 30 June 1991). In both of those executive acts, the hours of work of employees included in the 1st or 2nd invalidity group was reduced by statute in comparison with universal regulations and was 7 hours in the day and 35 hours in the week (§ 1 of the Regulation of 1981 and § 1(1) of the Regulation of 1984), but – unlike in the Regulation of 1967 – this could not result in a decrease in remuneration (§ 2(2) of the Regulation of 1981 and § 2(3) of the Regulation of 1984). However, in 1984, it was provided that there was a possibility of applying the hours of work for those employees – invalids who were covered by the scope of the regulations and who worked as "watchmen" (§ 1(2) of the Regulation

of 1984) and in 1990 – "upon an application by an employee, a social health-care centre that provides him/her with healthcare services recognises that the invalidity and state of health of the employee as well as the type of work carried out makes it possible to employ him (§ 1(5) of the Regulation of 1984, in the wording that was in force until 30 July 1990).

The above-mentioned rules were preserved (with minor modifications) after 1989. In the Act of 9 May 1991 on the employment as well as vocational and professional rehabilitation of persons with disabilities (Journal of Laws - Dz. U. No. 46, item 201, as amended; hereinafter: the Act of 1991 on Vocational and Professional Rehabilitation), which entered into force on 1 July 1991, provided the following:

– the maximum permissible hours of work to be 8 hours in the day and 40 hours in the week for all persons with disabilities (Article 9(1) of the Act of 1991 on Vocational and Professional Rehabilitation), and 7 hours in the day and 35 hours in the week for employees included in the 1st and 2nd invalidity groups (Article 10(1) of the Act of 1991 on Vocational and Professional Rehabilitation; as of 1 September 1997, the 1st and 2nd invalidity groups were replaced in that provision with severe and moderate disabilities – Article 42a of the Act of 1991 on Vocational and Professional Rehabilitation, which was added by Article 8(4) of the Act of 28 June 1996 amending certain acts on old-age pensions and social insurance; Journal of Laws - Dz. U. No. 100, item 461, with the exclusion of employees with disabilities hired as "watchmen" as well as those with regard to whom a medical practitioner who looks after them will grant his/her consent (cf. Article 11 of the Act of 1991 on Vocational and Professional Rehabilitation);

– a prohibition against the employment of persons with disabilities to work at night (Article 9(2) of the Act of 1991 on Vocational and Professional Rehabilitation; in the said Act there was no explicit prohibition against the employment of the said group of employees to do overtime);

– a prohibition against decreasing the amount of remuneration due to the introduction of reduced hours of work (Article 13(1) of the Act of 1991 on Vocational and Professional Rehabilitation).

The same rules were incorporated into the binding Act of 1997, which entered into force on 1 January 1998.

On 1 January 2011, amendments to the Act on Vocational and Professional Rehabilitation entered into force, and they considerably changed the previous solutions. Instead of the reduced hours of work that were applicable to all employees with moderate and severe disabilities, which had been binding since the 1980s, a rule was introduced

which stated that the said permissible hours of work were identical to general norms, and could only be conditionally reduced with regard to a particular employee with disabilities working in a given position, on the basis of a medical certificate that would justify the need to apply the hours of work reduced to 7 hours in the day and 35 hours in the week (Article 15(2) of the Act on Vocational and Professional Rehabilitation). Changes concerning the hours of work for employees with moderate or severe disabilities began to be applicable as of 1 January 2012.

5. The genesis of the challenged regulation and the *ratio legis* thereof.

In order to properly assess the new wording of Article 15(2) of the Act on Vocational and Professional Rehabilitation, it is necessary to present the genesis and *ratio legis* of the said regulation.

A proposal for changing the hours of work for persons with disabilities was included in the amending bill of 20 July 2010 (the Sejm Paper No. 3292/6th term of the Sejm), put forward due to "the necessity for immediate action which would prevent the loss of financial liquidity [the National Rehabilitation Fund] as of 2011" (p. 1 of the explanatory note for the bill).

In the said bill, it was suggested that the wording of Article 15(2) should read as follows: "the hours of work for persons with severe disabilities may not exceed 7 hours in the day and 35 hours in the week", and after paragraph 2, paragraph 2a was to be added: "A medical practitioner that carries out preventive screening of employees, or in the case where there is no such practitioner - a medical practitioner that provides care for persons with disabilities, may issue a certificate which states that the hours of work for a person with moderate disabilities may not exceed 7 hours in the day and 35 hours in the week" (Article 1(5)(a) and (b) of the bill). This meant preserving previous rules (i.e. the permissible hours of work that comprise: 7 hours in the day and 35 hours in the week) with regard to persons with severe disabilities, and modification of the situation of persons with moderate disability, which consists in covering that category of employees with the universal hours of work, with the possibility of shortening that on the basis of a medical certificate.

As it has been indicated in the explanatory note, "the introduction of regulations that reduce the number of working hours for persons with disabilities is aimed at eliminating certain limitations that arise from disability". In the opinion of the authors of the bill, "it is justified to introduce solutions that safeguard persons with severe and

moderate disabilities in that respect, with the proviso that in the case of a lower degree of disability, it is the medical practitioner that should determine that it is justified to reduce the hours of work" (p. 4 of the explanatory note for the bill).

The solution put forward in the bill was critically assessed both by certain experts from the Sejm, as well as by some institutions and organisations that took part in social consultation (all of the below-cited documents are available of documents are accessible at the website (http://orka.sejm.gov.pl/proc6.nsf/opisy/3292.htm).

In one of the two legal opinions on the bill, an expert on legislation in the Bureau of Research in the Chancellery of the Sejm argued *inter alia* that "giving up the reduced hours of work for the persons [with moderate disabilities] may be contrary to criteria for determining the occurrence of moderate disability and may lead to creating the same legal situation for the said persons and persons who are able-bodied". The possibility of a departure from new rules on the basis of a medical certificate was evaluated as advantageous only for "persons who worked in conditions that were not considered as burdensome or who carried out such work, and who would like to work for more hours as well as for employers that could rely on the work of those employees to a greater extent".

At the same time, it was noted that "the authors of the bill had introduced no criteria for determining, by a medical practitioner, whether it was justified to reduce the hours of work for that category of persons", and leaving that issue at the discretion of the medical practitioner might actually result in a situation where every person with moderate disabilities that would refer to a medical practitioner would receive an appropriate certificate. In addition, it was noted that in the explanatory note for the bill, there was no indication of the effects of the planned changes for the legal and occupational situation of persons with disabilities (see M. Szczepańska, "Opinia prawna w sprawie poselskiego projektu ustawy o zmianie ustawy o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych oraz niektórych innych ustaw z 9 września 2010 r.", pp. 5-6). The evaluation of the challenged solution was the subject of the second expert opinion on the bill under analysis.

By contrast, the Polish Confederation of Employers in the Private Sector – 'Lewiatan' (hereinafter: the Lewiatan Confederation), in its opinion on that bill, pointed out that it was necessary to eliminate therefrom "statutory barriers that hinder the employment of persons with disabilities", including the maximum 7-hour workday for persons with moderate and severe disabilities. By proposing the elimination of that solution, the Lewiatan Confederation stated that such permissible hours of work made it

"practically" impossible to employ persons with disabilities, e.g. in a factory where production was carried out without any intervals. In this context, the Lewiatan Confederation assessed in a positive way the elimination of exceptions for persons with moderate disabilities; however, it considered the solution to be partial, and proposed that, in principle, the number of permissible hours of work in the day should be eight for all persons with disabilities, with the possibility of reducing the hours of work only with regard to persons with severe and moderate disabilities on the basis of a medical certificate. In its opinion, the Lewiatan Confederation proposed a new wording of Article 15(1) and (2) of the Act on Vocational and Professional Rehabilitation, which clearly constituted inspiration for further legislative work (cf. pp.3-4 of the opinion).

In its opinion on the amending bill of 27 August 2010, the Solidarity Trade Union criticised the proposed solutions, but for totally different reasons. It held that the proposal about increasing the hours of work for persons with moderate disabilities was "a favour" to employers who in that way were to "compensate loss" which they incurred due to a subsidy reduced by 40% that they received from the National Rehabilitation Fund for this category of employees. The provision that makes it possible to reduce the number of permissible hours of work on the basis of a medical certificate was assessed by the Solidarity Trade Union as a regulation that, in fact, would be "dead". Consequently, it concluded that, apart from lower expenditure incurred by employers, an increase in the hours of work for persons with moderate disabilities had no justification (p. 2 of the opinion).

The Deputy Chief Labour Inspector, in his letter of 15 September 2010 (pp. 2 and 3), presented allegations as regards *inter alia* the fact that the amending bill did not specify persons who were eligible to apply for reduced number of permissible hours of work (at the same time indicating that, in accordance with a purposive interpretation, the said persons should be employees) as well as the fact that employers were not bound by certificates that had been issued by medical practitioners (in that context, he argued that a medical 'certificate' which merely confirms a certain fact or state of affairs should be replaced by a medical 'statement'). He did not analyse the issue of prolonging the hours of work for employees with the most severe disabilities.

In the course of legislative work, in the Sejm subcommittee of the Committee on Social Policy and the Family, the wording of the drafted provisions was modified to adjust it more to what had been suggested by the Lewiatan Confederation, i.e. the scope of new rules was extended to also include persons with severe disabilities. The new

wording of Article 15(2) of the Act on Vocational and Professional Rehabilitation was proposed in a report of 5 October 2010 by a subcommittee and then it was approved in the course of further work (the Bulletin from the sitting of the Committee on Social Policy and the Family dated 6 October 2010, No. 4190/6th term of the Sejm, pp. 7 and 8; the Report of the Committee on Social Policy and the Family, the Sejm Paper No. 3454/6th term of the Sejm).

6. The assessment of the conformity of Article 15(2) of the Act on Vocational and Professional Rehabilitation to Article 2 of the Constitution – the principle of social justice.

6.1. The assessment of the challenged regulations should have been commenced with a statement that – in the light of Article 66 of the Constitutional Tribunal Act – the Constitutional Tribunal shall, while adjudicating, be bound by the limits of the application (i.e. the indicated subject of allegation and higher-level norms for review), but is not bound by argumentation presented therein. Pursuant to Article 19(1) of the Constitutional Tribunal Act, in the course of review proceedings, the Constitutional Tribunal should thoroughly examine the case. Thus, it may not limit itself to the assessment of allegations put forward by the applicant and arguments in support of the allegations, but the Tribunal should take account of the entirety of the content of regulations under comparison – both statutory and constitutional ones.

6.2. The principle of social justice, expressed in Article 2 of the Constitution, is – in the light of the jurisdiction of the Constitutional Tribunal – most frequently linked with the principle of equality, as one of the indicators that it is admissible to introduce differentiation into the situations of similar subjects (cf. in particular the judgment of 21 September 2009, ref. no. P 46/08, OTK ZU No. 8/A/2009, item 124). In this context, it needs to be clearly emphasised that the application lodged by the Solidarity Trade Union does not concern that function of the said higher-level norm for review, which is a consequence of the fact that Article 32(1) of the Constitution has not been indicated as a higher-level norm for this review. However, the essence of the principle of social justice is richer than that of the principle of equality. Indeed, on the one hand, it sets out obligations that are formal in character, which entail that equal subjects should be treated equally as well as that unequal subjects should not be treated equally; on the other hand, it specifies obligations that are substantive in character, and which consist in the requirement of

protection and implementation of several constitutional values, including social solidarity and social security (see the judgment of the Constitutional Tribunal of 19 December 2012, ref. no. K 9/12, OTK ZU No. 11/A/2012, item 136). Thus, it may be said that the application of the principle of social justice may result in the correction of the principle of equality.

The application of the principle of social justice does not permit for excessive (drastic) differentiation in the living standards of members of society from various social groups; it provides for proportionate (adequate) remuneration for merits (work); it ensures that all citizens should be provided with similar opportunities for development; it guarantees the assistance of public authorities when it comes to satisfying the basic needs of those who are not able to satisfy them on their own. The implementation of those principles implies the admissibility of the state's intervention in socio-economic relations on behalf of those disadvantaged persons.

6.3. In order to evaluate Article 15(2) of the Act on Vocational and Professional Rehabilitation from the point of view of the principle of social justice, the challenged provision should have been evaluated from the point of view of the following three categories: persons with disabilities, employers and society as a whole. In the first context, it should be pointed out that the challenged solution constitutes a severe change in the legislator's assumptions as to the treatment of employees with disabilities in the workplace. The solutions that were binding until the end of 2011 had been based on the assumption that all persons with severe and moderate disabilities that were employed should be treated in the same way in respect of the hours of work and on preferential terms in comparison with employees that were able-bodied as well as employees with mild disabilities. The challenged solution constitutes an expression of a different philosophy: employees who are persons with disabilities are to be treated within the scope under analysis, in principle, in the same way as employees that are able-bodied. In other words, the previous exception (the application of universal hours of work) has currently become a rule, and the previous rule – an exception. The said change – in the opinion of the authors of the bill – is aimed at the social integration of that category of employees (in particular, their inclusion in the group of staff members). On the other hand, in the psychological realm, it is to constitute the basis of enhancing the self-esteem of those persons who do not always need (and want) to be treated in an exceptional way, and they may frequently work for the same number of hours of work, as do employees that are able-bodied, and with

comparable results (e.g. blind persons in telemarketing). As provided by the challenged regulation, it depends on a given employee whether s/he will apply – due to his/her own capabilities or the type of work performed – for the reduction of the hours of work or not; thus, the regulation allows for providing them with the possibility of taking initiative as regards matters concerning them.

In the view of the Constitution Tribunal, the said thesis should not be approved. One may not agree with the assumption that, in principle, all persons with severe or moderate disabilities are able to work without any harm for their health for the same number of hours as able-bodied persons (or persons affected by mild disabilities). It should be recalled that the group of persons with severe disabilities included persons who are not able-bodied and who are incapable of work or capable of work in the conditions of protected work, and who require – in order to fulfil social roles – continuous or long-term care and support by other persons due to their inability to live independently. The said group includes *inter alia* persons using wheelchairs whose whole bodies are paralysed (affected by tetraplegia) or who are paralysed from their waist down (affected by paraplegia) (cf. remarks included in part III, point 4 of that part of the statement of reasons). By contrast, persons with moderate disabilities included persons that are capable of work only in the conditions of protected work or who require continuous or long-term care and support by other persons in order to fulfil social roles (cf. remarks included in part III, point 4 of this part of the statement of reasons). Special requirements that need to be met by a person to be categorised as a person with a particular degree of disability are specified by the regulation of 15 July 2003 issued by the Minister for the Economy, Labour and Social Policy with regard to determining disability and the degrees of disability (Journal of Laws - Dz. U. No. 139, item 1328, as amended; hereinafter: the Regulation of 15 July 2003).

Thus, it should also be assumed that persons suffering from such severe disability need, in principle, to make more effort in performing work and they tire out more quickly than healthy persons performing the same work. Extensive time spent in a wheelchair increases their susceptibility to develop bedsores or other health problems. Also, physical limitations related to disability usually cause more stress in the context of work and communication with others. Moreover, persons with severe disabilities need more free time to carry out daily activities and to take care of their health, including *inter alia* activities aimed at preventing bedsores. Thus, it was not accidental that a few decades ago the legislator introduced reduced hours of work with regard to those persons, with the

simultaneous prohibition against decreasing their remuneration, so as to protect their health and subsistence as weaker members of society. At the same time, the current regulation makes it possible for those among them that were able to work full-time with the hours of work meant for able-bodied employees or for those with mild disabilities, upon their request and upon consent granted by a competent medical practitioner, they could be employed for the "standard" number of hours of work. Therefore, it is not true that supposedly only on the basis of the amending Act on Vocational and Professional Rehabilitation employees with disabilities may have an impact on the choice of the permissible hours of work that will apply to their employment relationship, i.e. to be able to make a choice in that respect. In accordance with the previous legal provisions, it was always much easier for them to apply for a change in the hours of work, since this was beneficial to employers; at present, after the enactment of the amending Act, a request for reduced hours of work for employees with disabilities is disadvantageous for employees. Hence, it is not groundless for the applicant to express its concern that the said employees do not wish to fall into disfavour with their employers, and will not apply for the reduction of the hours of work, although their state of health, as well as the type or conditions of work objectively justify that.

In the context of the principle of justice, the applicant also argues that an increase in the hours of work negatively affects the amount of remuneration for employees with disabilities.

Indeed, new permissible hours of work may have – at least in some cases - negative consequences for employees with disabilities, as regards their property rights. Persons whose remuneration is set at an hourly rate or depending on their performance will rather gain from the challenged regulation, as a higher number of hours of work will directly or indirectly translate into (in the case of remuneration based on performance) higher remuneration, as long as the employer will not decrease the hourly rate that they have had so far.

A different situation may be observed in the case of persons with a fixed amount of (usually: monthly) remuneration. Due to the lack of a clear regulation of the said issue in the amending Act, it should be assumed that an increase in their hours of work by 1 hour in the day and by 5 hours in the week will not be linked with an appropriate increase in the remuneration. At the same time, it should be pointed out that, before the entry into force of the amending Act, employees with severe or moderate disabilities who worked for a reduced number of hours of work received remuneration in the same amount as able-

bodied employees performing the same work (of course, as long as there were no other grounds for differentiating that remuneration), to whom the "standard" hours of work applied. The legislator assumed that if employees with disabilities – due to their state of health – had been granted a reduced number of hours of work, then the said reduction should not negatively affect the amount of their remuneration for work. If at present the same employees with disabilities work for the "standard" number of hours (i.e. in accordance with the basic number of hours i.e. 8 hours in the day and 40 hours in the week), and the proper medical practitioner did not find any basis for reducing the number of the hours of work, then the amount of their remuneration should (still) be the same as the amount of remuneration paid out to able-bodied employees performing that same work for the same number of hours.

The applicant also argues that, in the context of the previous legal regulation, persons with severe or moderate disabilities who performed work for longer hours than the applicable (reduced) hours of work (although falling within the basic permissible hours of work) was additionally paid for – just as in the case of overtime, and currently they will have no right to additional remuneration. Indeed, it should be underlined that the hiring of employees with severe or moderate disabilities to do overtime was (and still is) contrary to law, and in particular to Article 15(3) *in fine* of the Act on Vocational and Professional Rehabilitation (cf. the judgments of the Supreme Court ref. no. III PK 51/05 as well as I PK 64/08).

Obviously, it is beneficial for employers to cover all persons with disabilities with the standard permissible hours of work, as they will receive – assuming the most typically used fixed remuneration – for the same current remuneration by circa 32 days more of performed work (approximately 13%). According to the authors of that solution, this is to encourage employers to hire persons with severe and moderate disabilities. However, it may not be ruled out that the effect of the enactment may be opposite – the extension of the hours of work for the disabled that have already been hired may result in the redundancy of hiring new or in dismissing some of them.

What may constitute a certain defect from the point of view of the new regulation may be a decrease in a monthly subsidy for the remuneration of employees with disabilities provided from the National Rehabilitation Fund, especially simultaneously with a decrease in the amounts of subsidies for remuneration for employees with mild or moderate disabilities (respectively: from 60% and 140% of the lowest remuneration until the end of 2011 to 40% and 100% of the lowest remuneration as of the beginning of 2013 – cf.

Article 1(10)(a) of the amending Act and Article 12 of the Act on Vocational and Professional Rehabilitation). Due to the fact that the said subsidy – pursuant to Article 26a of the Act on Vocational and Professional Rehabilitation – is proportionate to the hours of work for a given employee, the said disadvantage will be visible only with regard to employees working part-time (e.g. if they work 5h in the day, with 7-h workday their employers received 5/7 of the subsidy, and under the rule of new provisions they will receive only 5/8 of the subsidy). It may be compensated at least partially by profits generated from longer hours of work performed by employees with disabilities and an increase in a subsidy for employees with severe disabilities pursuant to the amending Act (from 160% of an average monthly remuneration in 2011 to 180% of an average monthly remuneration in 2013; cf. Article 1(10)(a) of the amending Act and Article 12 of the Vocational and Professional Rehabilitation).

From the point of view of entire society, the legal regulation under assessment does not directly introduce significant changes. If it turned out that an increase in the hours of work for persons with severe or moderate disabilities caused an increase in the number of the said employees, then this would definitely be beneficial for society and the state. However, at that stage of the applicability of the challenged provision, it may not be stated whether the said effect will actually take place. After the new regulation has been applied for a year and a half, the Government's Plenipotentiary for Persons with Disabilities does not even have any estimates as to the impact of the number of employees with severe or moderate disabilities. The said hypothetical benefit for the public interest may not affect the assessment of the constitutionality of the said provision.

The only certain effect of the said regulation constitutes a possible increase in the profit of employers who provide employees with disabilities with fixed amounts of remuneration who may for the same remuneration receive five more hours of work in the week.

When assessing the current regulation, in the light of the principle of social justice, it should be stated that unequal persons – able-bodied persons (and persons with mild disabilities) as well as persons with severe or moderate disabilities – have been treated, in principle, in respect of their hours of work in the same way. At the same time, it may not be indicated that constitutional values which would justify such an infringement of the principle of social justice and which should be grated precedence over the protection of health and subsistence of persons with severe disabilities.

For the above reasons, the Constitutional Tribunal has deemed that said legal

solution is inconsistent with Article 2 of the Constitution, i.e. the principle of social justice.

7. The assessment of the conformity of Article 15(2) of the Act on Vocational and Professional Rehabilitation to Article 2 of the Constitution – the principle of protection of citizens' trust in the state and its laws as well as the principle of legal security.

7.1. The principle of protection of citizens' trust in the state and its laws (also referred to as the principle of the state's loyalty towards citizens) and the principle of legal security and certainty of law, which constitutes a component thereof, have a number of times been used as a higher-level norm for the review in review proceedings before the Constitutional Tribunal.

A succinct summary of the established interpretation of those principles was included in the judgment of 19 November 2008 of the Constitutional Tribunal (full bench), ref. no. Kp 2/08, OTK ZU No. 9/A/2009, item 157 (see also numerous rulings and literature on the subject cited therein). It was stated *inter alia* that: "the essence of the principle of the state's loyalty towards citizens may be paraphrased as a prohibition against setting legal pitfalls, making empty promises as well as backing out of promises that have already been made or rules that have been set; it implies that it is inadmissible to provide the organs of the state with possibilities of exploiting their advantaged position with regard to citizens (…)".

At the same time, the Constitutional Tribunal has a number of times pointed out that the principle of protection of citizens' trust in the state and its laws does not imply that everyone may expect that a legal regulation of his/her rights and obligations will not be changed to his/her disadvantage. The evaluation depends on the type of changes introduced by the constitution-maker and the way in which they were introduced, due to the entirety of circumstances as well as the constitutional value system (see the judgments of the Constitutional Tribunal (full bench) of: 28 April 1999, ref. no. K 3/99, OTK ZU No. 4/1999, item 73; the said thesis was maintained *inter alia* in the judgments of: 7 December 1999, ref. no. K 6/99, OTK ZU No. 7/1999, item 160; 13 March 2000, ref. no. K 1/99, OTK ZU No. 2/2000, item 59 and 17 June 2003, ref. no. P 24/02, OTK ZU No. 6/A/2003, item 55).

7.2. When assessing Article 15(2) of the Act on Vocational and Professional Rehabilitation in the light of the principle of protection of citizens' trust in the state and its

laws as well as the principle of legal security, the following should be proved:

Firstly, the challenged solution undoubtedly extends the previous permissible hours of work for persons with severe or moderate disabilities (formerly: persons that belong to the 1st or 2nd disability group). The extension of the permissible hours of work, in particular when there is no simultaneous increase in remuneration, is disadvantageous to employees.

Secondly, the subject of the challenged regulation (permissible hours of work) falls within the scope of issues that are undoubtedly important from the point of view of an employment relationship, and additionally in this case this affects the situation of a particularly sensitive group of employees (and thus they are subject to special protection – Article 86(3) and Article 69 of the Constitution).

Thirdly, the said amendment does not contain any transitional provisions which concern the application of modified provisions to the employment relationship of employees with severe or moderate disability which had been entered into before the provisions became binding. In such a situation, what applies to the already existing legal relations that are permanent in character is usually the principle of the direct application of the new act.

However, determining a temporary rule in cases concerning employment relationships entered into before the entry into force of the new Act, it should be borne in mind that the norms of labour law have a special, semi-imperative character; those norms comprise the challenged norm, arising from Article 18(1) and (2) of the Labour Code. Pursuant to that provision, an employment agreement (or a different act establishing an employment relationship) may not comprise provisions that are less beneficial for employees than the proper provisions of labour law; such provisions of the agreement are invalid and are replaced by the content of a proper legal norm. An employment contract and other acts on the basis of which an employment relationship emerges may, however, constitute solutions that are more beneficial to a given employee than those set out in a relevant legal regulation.

What follows therefrom is that, undoubtedly, employment relationships that were entered into prior the entry into force of the new Act are governed by the provisions of the Act as of its entry into force, provided that they are more beneficial than the previous regulations and appropriate provisions of an employment agreement or a different act that establishes an employment relationship. By contrast, if the Act is less beneficial to employees than the one which was previously in force, then the new Act is applied to an

employment relationship which was established before the entry into force of the Act, on condition that an employment agreement or a different act that establishes an employment relationship does not contain provisions that are more beneficial to employees than relevant provisions of the new Act.

Article 15(2) of the Act on Vocational and Professional Rehabilitation, as amended by the amending Act, is definitely less advantageous to employees with severe or moderate disabilities than the current regulation, at least as regards its direct effects. In that situation, the said Article should be directly applicable to the existing employment relationships, unless a given employment relationship (a different act establishing an employment relationship) contains provisions that are more advantageous to employees with disabilities as regards the permissible hours of work.

It should be noted that by the Act of 14 November 2003 amending the Labour Code as well as certain other acts (Journal of Laws - Dz. U. No. 213, item 2081), an obligation was introduced into Article 29(1) of the Labour Code; it required that the hours of work be specified in an employment agreement. However, 'the hours of work' in the light of Article 29(1) of the Labour Code is understood not only as the 'time spent at work' (although this may also be set out in an employment agreement), but only as an indication that a given employee is to work for the full number of hours of work determined by statute ('full-time') or for a fraction of those hours of work ('part-time'). The full number of hours of work ('full time') arises from provisions that regulate the hours of work for a given category of employees. Under Article 15(2) of the Act on Vocational and Professional Rehabilitation in the version before the entry into force of the amending Act, 'full time' with regard to employees with severe or moderate disabilities meant 7 hours in the day and 35 hours in the week.

If an employment agreement entered into by an employee with disabilities explicitly provides that the employee's hours of work are 7 hours in the day and 35 hours in the week, then undoubtedly it should be deemed that this is contractual determination of the required hours of work in the case of a given employee; after the enactment of the amending Act, the said determination is still binding as one that is more advantageous for an employee. In the view of the Constitutional Tribunal, also when a given employment agreement entered into by a person with disabilities does not explicitly specify the hours of work, but it refers to a relevant statutory regulation or uses phrases as 'full-time', 'part-time' or 'reduced hours of work', the content of the employment agreement, after the change of the provision concerning the hours of work, "maintained" more beneficial hours

of work that arise from the provisions that were binding at the time when the agreement was signed. However, the previous reduced hours of work, after the entry into force of the new Act, may be raised to – by means of an appropriate legal instrument – i.e. termination of the employment agreement on the grounds of working conditions or remuneration (by analogy with Article 241^{13}(2) of the Labour Code).

However, if a given employment agreement does not contain a provision on the hours of work, then new hours of work (the obligation to work longer hours) apply to employees with disabilities that were hired before the entry into force of the amending Act as of the date of the entry into force. An employee with disabilities who would like to maintain reduced hours of work will have to submit a medical certificate on the need for the further application of such hours of work in his/her case.

7.3. What follows from the previous findings is that at least with regard to some of employees with severe or moderate disabilities, hired before the entry into force of the challenged provision, the said provision was directly applicable as of the date of its entry into force. As to the other employees whose employment agreements specified the hours of work that were the same as a statutory norm before the entry into force of the new Act, the new, higher number of hours of work may be introduced at a given moment of time by the employer by means of terminating the agreement on the grounds of working conditions or remuneration (the so-called amending termination). Many of them were employed for many years for reduced hours of work, which had been applicable as of the beginning of the 80s for persons with severe disabilities. Under the rule of those provisions, there was a steady increase in the number of employed persons with disabilities, despite their shorter hours of work. The reduced hours of work, together with a prohibition against lowering remuneration due to such reduction, allows them to gain remuneration to support themselves without excessive exploitation of their bodies that have already been weakened considerably. In the opinion of the Tribunal, they had the right to expect that the well-established solutions would remain, as they were advantageous to them and their employers, who generated lower profits from the employment of persons with disabilities and who were compensated for this with subsidies from the National Rehabilitation Fund.

A change that was disadvantageous to them in this respect, in the form of longer hours of work and, in principle, the same hours of work that were applicable to able-bodied employees distorted that mechanism of employment and vocational rehabilitation that had been functioning well. A departure from rules that had been applicable for several decades

happened without any justification in the form of a change in objective circumstances and there are no grounds in constitutional values which would require stronger protection that support for persons with disabilities. Thus, the Tribunal has concluded that the challenged provision which extends the hours of work for persons with severe or moderate disabilities also infringes the principle of the state's loyalty to citizens as well as the principle of legal security, which have been derived from Article 2 of the Constitution.

8. The assessment of the conformity of Article 15(2) of the Act on Vocational and Professional Rehabilitation to Article 2 of the Constitution – the principle of appropriate legislation.

8.1. The principle of appropriate legislation is functionally linked with the principle of protection of citizens' trust in the state and its laws as well as with the principle of legal security. In the jurisprudence of the Constitutional Tribunal, two aspects of that principle have been noticed, which – for the sake of this discussion – may be referred to as technical (formal) and praxeological.

Firstly, the principle requires that it should be avoided to enact provisions "in a way that is imprecise or ambiguous and one that causes serious legal doubts", as well as regulations that rely on terms that are not defined or that are incomprehensible (cf. the judgment of 17 December 2002, ref. no. U 3/02, OTK ZU No. 7/A/2002, item 95 as well as the criteria for the assessment of provisions from the point of view of the said principle in the judgments of: 27 November 2006, ref. no. K 47/04, OTK ZU No. 10/A/2006, item 153 and 5 December 2007, ref. no. K 36/06, OTK ZU No. 11/A/2007, item 154). To determine the non-conformity of the provision to the principle of appropriate legislation is necessary when its imprecision is so far-reaching that discrepancies that arise therefrom may not be eliminated by applying ordinary means aimed at eliminating inconsistencies in the application of law, but depriving a given provision of its binding force should be regarded as a final means only applicable when the other methods of eliminating ambiguity from the content of provisions will prove insufficient (see the judgments of: 20 June 2005, ref. no. K 4/04, OTK ZU No. 6/A/2005, item 64; 3 December 2002, ref. no. P 13/02, OTK ZU No. 7/A/2002, item 90). The infringement of the principle of appropriate legislation may also involve insufficient specificity of the content thereof which makes it impossible to implement a right arising therefrom.

Secondly, "the principles of appropriate legislation also comprise the stage of

formulating goals that are to be achieved by determining a given legal norm, which is basic from the point of view of law-making process. They constitute the basis of (…) assessment whether legal provisions formulated in a final way express the said norm as well as whether they are suitable for the realisation of a set goal" (that aspect of the principle of appropriate legislation was clearly emphasised by the Constitutional Tribunal in its judgment of 24 February 2003, ref. no. K 28/02, OTK ZU No. 2/A/2003, item 13, and later on it was taken into consideration in over ten subsequent rulings – in particular, in the judgment of 16 December 2009, issued by the full bench, ref. no. Kp 5/08, OTK ZU No. 11/A/2009, item 170). At the same time, the ruling in that respect may not be transformed in the assessment of the accuracy of the legislator's activities in the light of social or economic choices made by him out of various available solutions that fall within the realm outlined by the Constitution – indeed, this remains outside the jurisdiction of the Constitutional Tribunal, which should intervene only when the legislator in a clear way exceeds the limits of his regulatory freedom (cf. more on that, in particular, the judgments of: 17 May 2005, ref. no. P 6/04, OTK ZU No. 5/A/2005, item 50 and 14 May 2009, ref. no. K 21/08, OTK ZU No. 5/A/2009, item 67).

As it clearly follows from the way in which the application has been formulated, doubts raised by the Solidarity Trade Union with regard to the principle of appropriate legislation refer to the other of the two aspects indicated as a higher level norm for the review. The allegation about the inadequacy of selected means for the achievement of set goals may not be assessed at this stage in a final way, since it is difficult, in abstract terms, to assess the long-term consequences of changes the implementation of which has just begun. Thus, for objective reasons, the analysis must be limited to comparing the declared goals of the Act with the expected impact of the challenged solution. With such a narrow scope of the review, determining the non-conformity of the regulation under examination to the indicated aspect of the principle of appropriate legislation would only be possible if it really made it impossible to achieve the intended purpose of the Act.

Unlike the applicant, the Constitutional Tribunal holds that, in this context, one should take account of the aim of the amending Act (which was limited to a change in the principles concerning subsidies for persons with disabilities), but also the *ratio legis* of all possible regulations on persons with disabilities. What follows from the Act on the Vocational and Professional Rehabilitation (including the amended provisions) is that the legislator considers the activation of persons with disabilities to be a desirable element of their rehabilitation, and in further perspective – a way of guaranteeing them an appropriate

living standard and social reintegration (cf. in particular Article 7(1) of the said Act). In accordance with the above-discussed documentation of the legislative process (part III point 2.5. of this statement of reasons), new standards regarding permissible hours of work were to – in the view of the authors of the amendments – make the employment of persons with disabilities more attractive for employers, and in particular were to make it possible to employ a larger number of persons falling within that category in posts where, due to the organisation of work, it was necessary to work for 8 hours in the day and 40 hours in the week.

The effectiveness of that solution will be verified in practice in the next few years, it may not be regarded at this stage that it is contradictory with the *ratio legis* of the Act on the Vocational and Professional Rehabilitation and the related amending Act.

8.2. In the context of the principle of appropriate legislation, what needs to be examined is one more allegation raised by the applicant with regard to another principle derived from Article 2 of the Constitution, namely, that the challenged provision, insofar as it correlates the granting of shorter hours of work to persons with severe or moderate disabilities with the obtaining of a medical certificate on the need for shorter hours of work, does not in any way regulate a procedure for issuing it, medical examination that needs to be carried out by a medical practitioner or an appellate procedure.

Indeed, neither the provision that is the subject of the constitutional review conducted by the Constitutional Tribunal nor any other provision specifies directly or indirectly by reference to a different legal act, a procedure for issuing a medical certificate on the need for reduced hours of work or an appellate procedure in this case.

Certain doubts are raised by the very name of that document – ‘a certificate’, which *prima facie* evokes associations with the institution of a certificate regulated in part VII of the Act of 14 June 1960 – the Code of Administrative Procedure (Journal of Laws - Dz. U. of 2013, item 267; hereinafter: the Code of Administrative Procedure), where a certificate is official confirmation of facts or a legal situation, which follows from documentation kept by a competent organ of public authority, registers or other data stored by that authority (Articles 217 and 218 of the Code of Administrative Procedure). There is no doubt that the medical certificate referred to in the challenged provision does not fall within the category of certificates of that type. What arises from Article 15(2) in conjunction with Article 15(4) of the Act on Vocational and Professional Rehabilitation is that the issuance thereof must be preceded by the examination of an employee. The result

of the said examination should suffice for a medical practitioner to assess whether the health condition of a disabled employee makes it possible for him/her to perform particular work full time, or whether it is justified (needed) that s/he should work for a reduced numbers of hours. Thus, the certificate in that respect does not differ, in its essence, from medical statements issued by medical practitioners (medical committees), after carrying out examination for other purposes that are provided in various legal acts. In particular, the said acts are the following: the Act of 17 December 1998 on old-age and disability pensions from the Social Insurance Fund (Journal of Laws - Dz. U of 2009 No. 153, item 1227, as amended); the regulation of 30 May 1996 issued by the Minister for Health and Social Welfare as regards carrying out medical checks for employees within the scope of preventive screening as well as medical decisions for the purposes provided for in the Labour Code (Journal of Laws - Dz. U. No. 69, item 332, as amended; hereinafter: the regulation on medical examination of employees); the regulation of 15 May 1996 issued by the Minister for Labour and Social Policy as regards the procedure for justifying absence in the workplace as well as for granting leaves of absence to employees (Journal of Laws - Dz. U. No. 60, item 281, as amended; hereinafter: the regulation on the procedure for justifying absence in the workplace); the regulation of 22 July 2005 issued by the Minister of Health with regard to determining temporary incapacity for work (Journal of Laws - Dz. U. No. 145, item 1219).

A majority of the above-mentioned and other legal acts concerning the medical examination of employees or insured persons mention the term ‘statement’ for a document issued by a medical practitioner after carrying out medical examination. However, § 3(1) of the regulation on the procedure for justifying absence in the workplace deems that one type of evidence that justifies the absence of an employee is “a medical certificate about temporary incapacity for work that has been issued in compliance with the provisions”, whereas pursuant to § 3(4) of the regulation on carrying out medical checks – “medical statements shall be issued in the form of certificates”.

In the light of the above, there is no doubt that the certificate referred to in the challenged provision is a type of a medical statement. However, this does not undermine the validity of the allegation that the Act on Vocational and Professional Rehabilitation does not specify a procedure for issuing such a certificate, as legal acts that concern carrying out medical examination and issuing medical statements have strictly specified scope *ratione materiae* which does not comprise medical examination for purposes provided in the challenged provision. In particular, the said medical examination does not fall under the category of preventive screening enumerated in Article 229 of the Labour Code and a regulation issued on the basis thereof in the case of carrying out medical examination of employees.

Provisions on carrying out the medical examination of employees and the documentation thereof provide certain means of appeal against medical statements issued on the basis of the examination, which also do not refer to certificates mentioned in Article 15(2) of the Act on Vocational and Professional Rehabilitation. The legislator has not provided for a proper application of appellate procedures set out in the regulation of 15 July 2003, which was issued on the basis of the Act on Vocational and Professional Rehabilitation.

In accordance with the binding legal regulations, the only legal act which could constitute grounds for appealing against ‘a medical certificate’ confirming the usefulness of applying reduced number of permissible hours of work, or against refusal to issue such a certificate, is the Act of 6 November 2008 on patients’ rights and the Ombudsman for Patients (Journal of Laws - Dz. U. of 2012 item 159, as amended; hereinafter: the Act on Patients’ Rights). It is perceived as such a basis by the Sejm and the Public Prosecutor-General. Pursuant to Article 31 of the said Act, a patient or his/her representative may appeal against a medical opinion or statement set out in Article 2(1) of the Act of 5 December 1996 on the professions of medicine and dentistry (Journal of Laws - Dz. U. of 2011 No. 277, item 1643, as amended; hereinafter: the Act on the professions of medicine and dentistry) if the opinion or statement has an impact on the rights or obligations of patients that arise from the provisions of law. An appeal is lodged with the Medical Committee in the office of the Ombudsman for Patients, with the Ombudsman acting as an intermediary, within the time-limit of 30 days from the date when the opinion or statement is issued. The Committee issues its statement on the basis of medical documentation, if needed - after the examination of a given patient, within the time-limit of 30 days from the filing of the appeal. No appeal may be lodged against the Committee’s

determination.

Opinions and statements mentioned in the Act on the professions of medicine and dentistry are issued as part of health-care services defined in the Act of 15 April 2011 on medical activity (Journal of Laws - Dz. U. of 2013 item 217; hereinafter: the Act on medical activity) as "actions aimed at preserving, recovering, restoring or improving health as well as other medical activities ensuing from the course of treatment or arising from separate provisions that regulate rules for carrying out those activities". To put it mildly, it is questionable whether it may be deemed that examination carried out in order to determine the usefulness of the reduced hours of work in the case of employees with moderate or severe disabilities falls under the category of health-care services, and in particular – whether it may be included in the category of "other medical activities that arise from (…) separate provisions that regulate rules for carrying out those activities", since the Act on Vocational and Professional Rehabilitation does not regulate those rules.

Finally, it should be pointed out that the right of appeal referred to in Article 31(1) of the Act on Patients' Rights, has been granted to a given patient and his/her statutory representative; pursuant to Article 3(1)(4) of the said Act, the term 'patient' is defined as a person who requests health-care services or who is a beneficiary of such services. If examination carried out for the purpose of determining the usefulness of the reduced hours of work does not qualify to be regarded as a health-care service then an employee with disabilities applying for a certificate in that respect is not legitimate to file an appeal. Such an interpretation of Article 31 of the Act on Patients' Rights has been assumed by the Polish Ombudsman for Patients, who in his letter addressed to the Constitutional Tribunal confirmed that he refuses to control such certificates in accordance with Article 31 of the Act on Patients' Rights. Apart from that, Article 31 of the Patients' Rights may definitely not constitute the basis of the challenged certificate by a given employer who may also have a legal interest in that respect.

In the light of the above, the Tribunal has stated that the challenged provision and other binding legal provisions do not regulate a procedure in that regard or a procedure for appealing against medical certificates confirming the usefulness of applying the reduced hours of work to employees with moderate or severe disabilities, which raises doubts as to the applicability of the said provision, rendering the right granted to the employees to be very difficult to exercise. Thus, the Constitutional Tribunal has deemed that Article 15(2) of the Act on Vocational and Professional Rehabilitation is inconsistent with Article 2 of the Constitution, insofar as it concerns the principle of appropriate legislation.

8.3. By contrast, the Constitutional Tribunal has not shared the applicant's view about the lack of means for safeguarding employees against their employer's refusal to accept a medical certificate confirming the need to reduce the maximum permissible hours of work. The activity of the employer – also in the realm of the implementation of the Act on Vocational and Professional Rehabilitation – is subject to review by labour courts and the National Labour Inspectorate. Moreover, on the basis of reference mentioned in Article 66 of the Act on Vocational and Professional Rehabilitation, Article 281(5) of the Labour Code, pursuant to which the employer who infringes provisions on the hours of work shall be subject to a fine ranging from PLN 1000 up to PLN 30 000.

9. The assessment of the conformity of Article 15(2) of the Act on Vocational and Professional Rehabilitation to Article 69 of the Constitution.

9.1. In review proceedings before the Constitutional Tribunal, Article 69 of the Constitution is relatively rarely mentioned as an independent and substantive higher-level norm for the constitutional review of challenged provisions that usually concern family benefits (in particular, a care allowance – cf. the judgments of: 23 October 2007, ref. no. P 28/07, OTK ZU No. 9/A/2007, item 106; 15 November 2010, ref. no. P 32/09, OTK ZU No. 9/A/2010, item 100; 19 April 2011, ref. no. P 41/09, OTK ZU No. 3/A/2011, item 25 and 20 December 2012, ref. no. K 28/11, OTK ZU No. 11/A/2012, item 137; the only ruling that concerns another matter is the judgment of 6 February 2007, ref. no. P 25/06, OTK ZU No. 2/A/2007, item 9 – on the form of providing information about employees with disabilities).

The interpretation of the indicated higher-level norm for review in all the above-mentioned rulings takes account of and elaborates on findings established in the first of the rulings, i.e. in the judgment P 28/07. The Constitutional Tribunal has stated *inter alia* that Article 69 of the Constitution: "mentions that public authorities shall provide aid to disabled persons to ensure their subsistence, adaptation to work and social communication. The said provision contains only a statement that there is an obligation on the part of public authorities to create relevant legislative mechanisms which make it possible to carry out that task. Article 69 refers to a relevant statute both as regards the level of satisfying the needs of persons with disabilities as well as the subject of the regulation in that respect. Thus, the said provision may not be regarded as the constitutionalisation of a certain level

of benefits, their form, a specific scope or procedure for the obtaining thereof. The indicated higher-level norm for the review should be regarded as an obligation on the part of public authorities to create a mechanism for carrying out tasks that are indicated therein. The said mechanism must guarantee the effective achievement of the goal".

However, in the judgment in the case P 25/06, the Constitutional Tribunal deemed that: "there are no grounds for interpreting Article 69 of the Constitution in a narrow sense (as one which only specifies direct relations between the state and persons with disabilities), the infringement of which could merely consist in limiting the rights of persons with disabilities by such regulations that could directly affect the subsistence, adaptation to work and social communication of persons with disabilities. Article 69 of the Constitution also safeguards persons with disabilities against practices that indirectly (and sometimes in a covert way) lead to an infringement of their rights".

In other rulings, the Tribunal has stressed that the Constitution grants the legislator considerable freedom to select means that are aimed at the achievement of goals enumerated in Article 69 of the Constitution (as in the judgment of the Constitutional Tribunal of 23 February 1999, ref. no. K 25/98, OTK ZU No. 2/1999, item 23), which also arises from the fact that rights specified in the said provision may be asserted only within the scope set out by statute (Article 69 in conjunction with Article 81 of the Constitution).

9.2. In the view of the Constitutional Tribunal, there are no grounds to deem that Article 15(2) of the Act on Vocational and Professional Rehabilitation in its current version is inconsistent with Article 69 of the Constitution, regarded as an independent higher-level norm for the review of the constitutionality thereof. Indeed, one may not determine that the challenged provision constitutes a serious threat to the subsistence of persons with disabilities or their "adaptation to work". However, undoubtedly, the direct effects of the entry into force of that provision – in the form of an increase in the hours of work for those persons – are disadvantageous to them. In some cases, they may even constitute a threat to their health. Taking account of the fact that the challenged change is not justified by a need to protect other constitutional values that take precedence over the right of persons with disabilities to be provided with aid by public authorities, it should be stated that they definitely do not manifest the fulfilment of that obligation by those authorities towards persons with disabilities. Thus, there is also a ground to regard Article 69 of the Constitution as an additional higher-level norm for the review (one to be read in conjunction with others), apart from Article 2 of the Constitution, which enhances

arguments in favour of the unconstitutionality of the challenged provision that considerably worsens the situation of persons who are in a particularly difficult life situation and are therefore entitled to be protected by the state.

10. The effects of the judgment.

The judgment in the case under examination determines that the challenged provision is unconstitutional within a certain scope. When deciding in favour of such a solution, the Constitutional Tribunal took account of the need to minimise the negative effects of ruling that entire Article 15(2) of the Act on Vocational and Professional Rehabilitation was unconstitutional. The effect of declaring that the said provision is unconstitutional in its entirety would result in the elimination from the legal system of a legal norm that provides for hiring employees with severe or moderate disabilities for a reduced number of hours of work. What would remain in the legal system would only be Article 15(1) of the Act on Vocational and Professional Rehabilitation, which provides the following maximum permissible hours of work: 8 hours in the day and 40 hours in the week.

At the same time, the Constitutional Tribunal deferred the date on which the challenged provision was to cease to have effect by 12 months. At that time, the legislator should carry out relevant changes in the Act on Vocational and Professional Rehabilitation in order to adjust the content of the Act to the constitutional standard.

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.