



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT

on behalf of the Republic of Latvia

Riga, 10 July 2020

in Case No 2019-36-01

The Constitutional Court of the Republic of Latvia composed of the Chairperson of the court hearing Ineta Ziemele, Justices Sanita Osipova, Aldis Laviņš, Gunārs Kusiņš, Daiga Rezevska, Jānis Neimanis and Artūrs Kučs, following an application by the Supreme Court,

pursuant to Article 85 of the Constitution of the Republic of Latvia and Section 16(1), Section 17(1)(9), Sections 19¹ and 28¹ of the Constitutional Court Law

at the court hearing held on 10 June 2020 examined the following case in a written procedure

On compliance of Section 6(2) of the Law on State Social Insurance (in the wording that was in force from 1 January 1998 to 31 December 2002) with Articles 91 and 109 of the Constitution of the Republic of Latvia.

Statement of Facts

1. On 2 November 1995, *the Saeima* adopted the Law on Social Tax that came into force on 1 January 1996. Pursuant to Section 2 of this law, the social tax is a mandatory payment to the special state social insurance budget that establishes the right of a socially insured person to an old age pension, disability pension, survivor's pension, sick benefit, maternity benefit, unemployment

allowance and funeral allowance. Pursuant to Section 3 of the Law, the social tax was payable by persons who had the status of a resident pursuant to the Law on Taxes and Duties and were in a legal employment relationship with an employer, as well as self-employed persons.

On 1 October 1997, *the Saeima* adopted the Law on State Social Insurance, and with the coming into force of this law on 1 January 1998 the Law on Social Tax expired. In its initial wording, the Law on State Social Insurance provided for the following types of social insurance in Latvia:

- 1) old age pension insurance
- 2) social insurance in case of unemployment
- 3) social insurance in case of accident at work and occupational disease
- 4) disability insurance
- 5) maternity and sickness insurance.

Section 6 of the Law set out the list of persons subject to social insurance. Pursuant to Part 1 of the Section, employees are subject to all types of social insurance, whereas Part 2 of the Section in its initial wording (hereinafter – the contested provision) contained a special provision for specific groups of employees. Pursuant to this part, employees of an age entitling them to the state old age pension and people with Group I and II disabilities are subject to:

- 1) pension insurance
- 2) maternity and sickness insurance, and
- 3) insurance in case of accident at work.

Pursuant to Section 3 of the Law ‘Amendments to the Law on State Social Insurance’ of 6 June 2002 (hereinafter – the Amendments), the wording of Section 6(2) of the Law on State Social Insurance was amended as follows: ‘Employees of an age entitling them to the state old age pension are subject to pension insurance, maternity and sickness insurance and insurance in case of accident at work. Employees with Group I and II disabilities are subject to pension insurance, disability insurance, maternity and sickness insurance and

insurance in case of accident at work.’ Pursuant to Section 9 of the Amendments, the Transitional Provisions of the Law on State Social Insurance were supplemented with paragraph 23, which provided that the amendments to Section 6(2) making employees with Group I or II disabilities subject to the disability insurance came into force on 1 January 2003.

2. The Applicant – the Supreme Court (hereinafter – the Applicant) – holds that the contested provision is not in line with Articles 91 and 109 of the Constitution (*Satversme*) of the Republic of Latvia (hereinafter – the Constitution) insofar as it prevents subjecting employees with Group I or II disabilities to disability insurance.

The Applicant is examining an administrative case, which was initiated following an application by an individual regarding the issuance of a favourable administrative act, by which the applicant would be eligible for a disability pension. The applicant, who had been disabled since childhood, was an employee between October 1997 and October 2000. In 2016, the State Social Security Agency (hereinafter – VSAA) declined to grant a disability pension to the applicant because it found that the period of their employment between January 1998 and October 2000 could be counted towards their insurance period on the grounds that, pursuant to the contested provision in force during the period in question, employees with Group I or II disabilities were not subject to the disability insurance. Therefore, no mandatory state social insurance contributions for the disability insurance purposes were paid for employees who had Group I or II disabilities during the period of validity of the contested provision, and the time of employment of such persons during this period did not count towards the insurance period required for a disability pension.

The Applicant states that a disability pension is to be deemed a social service that falls within the scope of the right to social security guaranteed by Article 109 of the Constitution and in this respect the State must act in accordance with the principle of legal equality. However, a situation where persons with

Group I or II disabilities are not permitted to make use of the disability insurance and are therefore denied the right to a disability pension contradicts the principle of legal equality and, hence, is not in line with Article 91 of the Constitution.

In the situation in question, numerous groups of persons are in circumstances that are comparable according to specific criteria.

Firstly, the following persons are in circumstances that are comparable according to specific criteria:

- 1) employees found to have Group I or II disabilities following at least three years of employment, and
- 2) employees found to have Group I or II disabilities prior to at least three years of employment, including employees found to have Group I or II disabilities before the commencement of their employment.

The above groups are comparable because persons in both groups can face a situation where they are no longer able to fully participate in the labour market because of their disability and, therefore, cannot maintain the level of income they had previously.

The contested provision establishes a different treatment of these groups of persons. At the time when the contested provision was in force, employed persons without disabilities were covered, *inter alia*, by the disability insurance. If such a person was found to have Group I or II disability after at least three years of employment, this employment period counted towards the employment period required for the disability pension and the individual was eligible for a disability pension. At the same time, employees found to have Group I or II disability before the commencement of their employment were prevented from making use of the disability insurance by the contested provision, and if such a person ceased their employment because of their disability, they were not eligible for a disability pension because of insufficient employment period for the purposes of this pension.

Secondly, the following persons are also in circumstances that are comparable according to specific criteria:

1) persons with Group I or II disabilities who were employed between 1 January 1998 and 31 December 2002 (namely, during the period of validity of the contested provision), and

2) persons with Group I or II disabilities who were employed between 1 January 1996 and 31 December 1997 (namely, during the period of validity of the Law on Social Tax) and/or from 1 January 2003 to the present moment (namely, after the coming into force of the Amendments).

Both the legal regulation in force before the contested provision, and the legal regulation in force after the contested provision provide that employees with Group I or II disabilities are subject to, *inter alia*, the disability insurance. It follows that the contested provision established a different treatment of groups of persons who are in equal and comparable circumstances.

The legitimate aim of the different treatment established by the contested provision allegedly is, firstly, to ensure that only individuals facing actual risk of disability are subject to the disability insurance, in this way protecting public welfare, and, secondly, to encourage employment of persons with disabilities.

It is alleged that the means chosen by the legislature are not adequate for achieving the legitimate aim, i.e. ensuring that only individuals facing actual risk of disability are subject to the disability insurance. The system of social insurance regulated by the Law on State Social Insurance as a set of measures organised by the State is aimed at ensuring that in case of adverse events specified in the law a person is insured against the risk of losing income from employment. Therefore, the risk the person is insured against when making social security contributions for the purposes of the disability insurance is the risk of losing income from employment as a result of disability, rather than the risk of disability as such. An employee can face a situation when their functional restrictions caused by an existing disability increase, wherefore they lose the ability to work and can no longer maintain the same income from employment as before the condition of their health deteriorated.

Such provision does not allow achieving the aim of ensuring public welfare either, because in fact it subjects a specially protected group of employees, who require greater social protection, to the risk of being denied adequate replacement of income in the form of a disability pension in case of loss of employment income.

Finally, the legitimate aim, i.e. the encouragement of employment among persons with disabilities, does not justify the different treatment established by the contested provision and its consequences. The Applicant admits that the reduction of social security contributions for employees with Group I or II disabilities by more than 5 per cent may have encouraged employers to employ such individuals; however, the Applicant notes that the legislature should have looked for other solutions for adopting a provision that would not have prevented insuring the group of employees in question against the risk of losing employment income because of disability.

Even if it could be accepted that the contested provision is an adequate and necessary means of achieving the legitimate aim, it is evidently disproportionate.

In the case under examination, it is necessary to balance the interests of persons with Group I or II disabilities to receive adequate social security from the State when necessary, on the one hand, and the interests of the State to encourage employment of persons with disabilities, thus protecting general public welfare, on the other hand.

A disability pension as a social security means is more favourable for an individual than a state social benefit, because its amount depends on the social insurance contributions made by the individual and the individual's employment period; furthermore, even the minimum amount of a disability pension for persons with Group I or II disabilities exceeds the amount of the state social security benefit. Despite this, when adopting the contested provision, the legislature failed to take into account the fact that in case of loss of employment income because of disability, an employee with Group I or II disability will be provided the less favourable means of social security as a result of applying the

contested provision.

The benefit gained by the public as a result of the different treatment established by the contested provision, i.e. encouraging employment of persons with disabilities that may hypothetically have a positive impact both on the welfare of persons with disabilities and public welfare in general, is not proportionate with the disadvantage faced by persons with Group I or II disabilities. Furthermore, it follows from the case materials available to the Applicant that there was no significant increase in employment among persons with disabilities when the contested provision was in force, and therefore its legitimate aim was not achieved.

In order to give judgment in the administrative case, the Applicant requests that the contested provision be declared void in respect of the applicant from the moment it was applied to them.

3. In the opinion of **the body issuing the contested legislation – *the Saeima*** – the contested provision is in line with Articles 91 and 109 of the Constitution.

With the coming into force of the Law on State Pensions on 1 January 1996, Latvia introduced the principles of a mandatory state pension insurance system, in accordance with which every individual who has made social insurance contributions, in case of an insurance risk, is entitled to receive payments that depend on the contributions made by them, with the procedure and amount of the payments being specified in the law. The aim of the Law on State Social Insurance was to establish the general principles of social insurance and to regulate its financial and organisational structure. One of the aspects taken into account when making individuals subject to specific types of social insurance concerned the insurance cases that can actually occur and their impact on a specific group of persons.

The groups specified by the Applicant – employees found to have Group I or II disabilities following at least three years of employment and employees

found to have Group I or II disabilities prior to at least three years of employment – are not in equal and, according to specific criteria, comparable circumstances. This conclusion follows from the fact that the contested provision in itself does not specify who is eligible for a disability pension. It only follows from the contested provision that persons with Group I or II disabilities are not subject to the disability insurance.

The aim of the disability pension system is to guarantee that an individual who is no longer able to fully participate in the labour market because of condition of their health receives income replacement in accordance with their social insurance contributions. The insurance risk occurs along with the disability, namely, when the individual cannot fully perform their job responsibilities and therefore lose their employment income partially or completely, whereas for people without disabilities the insurance risk has not yet occurred, and making them subject to the disability insurance is justified.

Persons with Group I or II disabilities who were employed during the period of validity of the contested provision and persons with Group I or II disabilities who were employed after the coming into force of the Amendments cannot be compared because the second group in the comparison did not exist during the validity period of the contested provision. Likewise, persons with Group I or II disabilities who were employed during the validity period of the Law on Social Tax and persons with Group I or II disabilities who were employed during the validity period of the contested provision cannot be compared in the case under examination because the contested provision has no retroactive affect and does not specify the types of social insurance applicable to people employed before its coming into force.

If it is assumed that persons with Group I or II disabilities are subjected to a different treatment in comparison with some other group of persons, this treatment has been established by a legal provision adopted in a procedure set out in legislation, it has a legitimate aim – protecting public welfare, which includes encouraging the employment of persons with disabilities and enhancing stability

of the social security system – and it also complies with the principle of proportionality.

The contested provision enabled employers employing persons with Group I or II disabilities to pay mandatory state social insurance contributions to the budget at a rate that was 6.75 per cent lower than employers who employed people without disabilities or people with Group III disabilities. The regulation that provides for a reduced tax burden for employers who employ persons with Group I or II disabilities is aimed at the inclusion of groups of people at risk of poverty in the working and professional life and at ensuring that such persons receive employment income and can meet their needs at least partially. This facilitates welfare of both the specific group of society and society in general. Furthermore, social insurance of people against the risks that they are more likely to face facilitates the proportionality of the social contributions and social insurance services they are eligible for.

The contested provision is adequate for achieving the legitimate aim. Reducing the tax burden is a generally accepted means of encouraging employment of persons with disabilities. What is more, at the time in question there were no other means that would allow achieving the legitimate aim with similar quality while making persons with Group I or II disabilities subject to social insurance for the disability insurance purposes. Decisions with regard to cases when people are provided support and the amount of such support falls within the legislature's discretion and are taken on the basis of an evaluation of the economic possibilities of the State and sustainability of the social insurance budget, needs of the public and other considerations.

In assessing if the benefit gained by the public exceeds the infringement of an individual's rights and legal interests, it is necessary to take account of the fact that the contested provision was adopted at the time when enterprises faced considerable financial difficulties. Adopting the contested provision resulted in a reduction of the rate of social insurance contributions payable by employers that employed persons with disabilities, thus encouraging employment of such

persons. As a consequence, such persons were able to provide the necessary means of subsistence for themselves and to accumulate old age pension capital. This benefit exceeds the restriction preventing such persons from being subject to the disability insurance. Furthermore, if the contested provision had not been adopted, the possibilities of employment for persons with Group I or II disabilities in the difficult financial circumstances would have been significantly restricted. It follows that the different treatment established by the contested provision is proportionate with its legitimate aim.

In addition, *the Saeima* notes that declaring the provision void will not change the fact that no social insurance contributions were paid for persons with Group I or II disabilities during the validity period of the contested provision. At present, it would not be possible to recover these contributions from employers that ceased their operations. Imposing the obligation to cover all the expenses on the State would have a negative impact on the stability of the budget and the State's ability to guarantee the rights of other people. It would also contradict the basic principle of social insurance, whereby eligibility of an individual to receive payments from the social insurance funds is proportionate to and closely connected with the obligation to make the respective contributions to the special-purpose budget, and would also be unjust to other people who paid such contributions.

4. The joined party – the Ombudsman – notes that the contested provision does not comply with Articles 91 and 109 of the Constitution, Articles 5, 27 and 28 of the Convention of the Rights of Persons with Disabilities (hereinafter – the Convention) and Article 2(2) and Article 9 of the International Covenant on Economic, Social and Cultural Rights (hereinafter – the Covenant).

The Ombudsman agrees with the Applicant's reference to both comparable groups of persons.

The Ombudsman stated as early as 2010 that the aim of the different treatment – to make people subject to the types of social insurance against the

risks that are likely to occur – cannot be deemed legitimate. Firstly, such practice contradicts the principles of social insurance, because the main principle of social insurance is the replacement of previous income if a specific social insurance risk occurs or continues. Secondly, the contested provision established an absurd situation, preventing persons with disabilities to accrue a three-year employment period necessary to be eligible for a disability pension. As a result of the contested provision, persons with Group I or II disabilities who had not accrued the necessary employment period (and which it was impossible to accrue) continued to receive the state social security benefit instead of a disability pension, which would have been greater and subject to revision in accordance with the law. Thirdly, both employees and self-employed people at the age that makes them eligible for an old age pension were (and are at present) subject to the pension insurance, i.e. an insurance against the risk that had already occurred, wherefore the above principle does not apply to these people.

The inclusion of persons with disabilities in the labour market is a legitimate aim, but in this case it has not been achieved, since there was no increase in employment among persons with disabilities. It follows that this aim does not justify the infringement of the person's rights either. Furthermore, as evidenced by measures used to encourage the employment of persons with disabilities at present, this aim could have been achieved with other means that were less restrictive of persons' rights.

Likewise, it is not possible to achieve the aim of ensuring public welfare by excluding persons with Group I and II disabilities, i.e. one of the specially protected groups of people, from the social insurance system.

When amending provisions with regard to the social and economic rights, the State must follow the aim set out in Article 2 of the Covenant, i.e. improving the realisation of the social and economic rights to the extent possible. Should the State adopt a decision that undermines the realisation of the social and economic rights, the State must take utmost care to consider these

amendments and give an exhaustive justification for the necessity of restricting the rights.

Furthermore, the Ombudsman holds that the compliance of the contested provision with Article 91 of the Constitution is to be considered through the prism of non-discrimination. When adopting the contested provision, the legislature did not properly assess its necessity. Acting on the basis of erroneous considerations, by adopting the contested provision, the legislature enabled different treatment on the grounds of a prohibited criterion – disability.

Finally, the Ombudsman agrees that, within the social insurance system, the right to receive payments from the social insurance funds is closely connected with the obligation to make the respective contributions to the special-purpose budget. The payment of social contributions is an important unifying factor in cases where common and differentiating factors of groups of recipients of social services are assessed. However, in this case the groups under comparison are to be assessed on the basis of the status of an employee rather than the payment of contributions for disability insurance purposes. Given that the State unjustifiably infringed the right of persons with Group I or II disabilities to the disability insurance, the State must assume the responsibility and establish a mechanism to correct this irregularity.

The Ombudsman enclosed with the opinion of the joined party copies of the letters sent in 2007, 2010 and 2013 to *the Saeima's* Social and Employment Matters Committee with regard to the non-compliance of the contested provision with the Constitution.

5. In the opinion of **the joined party – the Ministry of Welfare** – the contested provision is in line with Articles 91 and 109 of the Constitution.

Persons with grave disabilities were initially in a different situation than healthy persons who are able to work and persons with mildly limited ability to work. The ability of persons with disabilities to provide for themselves with income received from work is in the public interest, but this interest has to be

considered within the context of the willingness and capability of employers to employ such persons.

The basic principle of social insurance consists in insuring persons against risks that can occur in the future. The risk of disability is a risk of loss of employment income as a result of disability. It follows that cases where the risk of grave disability has already occurred, e.g. disability since childhood, and cases where the risk of disability occurs after a person who is able to work or a person with mildly limited ability to work has been employed are to be assessed differently. Therefore, persons found to have grave disabilities before the commencement of employment and persons who had no disability (or had mild disability, i.e. mildly limited ability to work) before the commencement of their employment belong to comparable groups of persons. A different treatment of persons for whom the insurance risk has already occurred is not only permissible – it is necessary. Persons with Group I or II disabilities were not subject to insurance against the disability risk because for these persons the risk had already occurred. In view of the above, it should be acknowledged that the contested provision is in line with the principle of legal equality.

The contested provision had two aims: 1) to insure persons against risks that could occur in the future and that could result in these persons losing their employment income, and 2) to encourage inclusion of persons with grave disabilities in the labour market.

The system of social security has been established based on the assumption that persons who are able to work provide for themselves, whereas social aid is provided only to those persons who are unable to provide employment income for themselves. For that reason, as of 1 January 1996, with the transition to the social insurance system based on individualised mandatory social insurance contributions, the rate of the social tax for persons with disabilities was increased from 8 per cent to 38 per cent, with a respective increase of the rate of the mandatory state social insurance contributions payable by employers.

The contested provision was adopted following requests of organisations

representing persons with disabilities to retain the reduced social tax rate and in accordance with the basic principle of insurance, as well as in order to protect persons with very limited abilities to work and promote their participation in the labour market.

During the validity period of the contested provision, the boards of physicians mostly found persons with Group I or II disabilities unable to work. Therefore, the risk of loss of employment income for these persons was not as significant as the likelihood of total exclusion from the labour market and being prevented from earning extra income. It was necessary to reduce the cost of employing persons with disabilities for employers in order to keep and involve these people in the labour market.

Additionally, one of the objectives of the Law on State Social Insurance consisted in making employees subject to social insurance against risks they were likely to face. For persons with Group I or II disabilities this insurance risk – grave disability and very limited ability to work – has already occurred.

In view of the historic context, especially the economic situation in Latvia, the assumption of seriousness of Group I and II disability and very significant loss of ability to work, as well as the fact that persons with Group I and II disabilities were particularly protected by means of social aid, the selected means were justified and adequate for the achievement of the legitimate aims of the contested provision. It follows that the contested provision was proportionate and adequate for achieving both legitimate aims.

Amendments to the contested provision were adopted in order to ensure that the system based on the insurance principles enables revision of the amount of the disability pension, namely, making payments for risks that people were not insured against, while preserving the sustainability and stability of a self-financing insurance system.

In addition to the above, the Ministry of Welfare notes that the state social insurance system is based on the mandatory social insurance contributions for the specific insurance risk. Undermining the state social insurance system caused by expenditure that was not initially provided for and that is not financially covered by the mandatory social insurance contributions is not permissible. This would

pose a threat to the existence of the social insurance system in the long term. Based on estimates made in 2006, compensating the unpaid mandatory social insurance contributions for the purposes of disability insurance in the period between 1 January 1998 and 1 January 2003 required LVL 1.3 million or EUR 1.849 million. At present, the additional funds required would amount to approximately EUR 3 million.

6. In the opinion of **the joined party – the Association for Cooperation of People with Special Needs in Latvia SUSTENTO** (hereinafter – Sustento) – the contested provision established a situation of inequality on the labour market, because everyone, persons with and without disabilities alike, should receive similar social protection for work in similar conditions.

Sustento does not agree that the groups referred to by the Applicant, i.e. employees with Group I or II disabilities who were found to have the disability after they accrued a three-year employment period and employees with Group I or II disabilities who were found to have the disability before they accrued a three-year employment period, can be compared because the possibilities of employment for persons with disabilities as a group are incomparable with the possibilities of employment for persons without disabilities. People cannot be compared even within the same disability group, because specific disabilities cause different limitations. However, it should be admitted that all people in similar circumstances must receive similar social protection.

Disability is not a static condition, functional disorders can worsen and sometimes even improve. When a disability occurs or worsens, the individual's ability to work decreases, along with their income, whereas expenses required to meet such basic needs as healthcare, rehabilitation and auxiliary aids increase. For that reason, the possibility of insurance against the risk of disability is a very important component of social security also for employees who already belong to a disability group. A disability pension is one of the factors that motivates persons with disabilities to participate in the labour market.

The social security system provides persons with disabilities with a minimum financial support, which is significantly below income from employment. At the same time, state social security contributions for the purposes of the disability insurance allow persons with disabilities to receive a disability pension that is proportionate to their social contributions, should their disability worsen.

The means chosen by the legislature to encourage the employment of persons with disabilities created a situation of inequality especially for those employees with disabilities who had already been employed, because the conditions of insurance were amended without the employees' consent.

Conclusions

7. The Applicants requests that the Constitutional Court assesses compliance of Section 6(2) of the Law on State Social Insurance (in the wording that was in force from 1 January 1998 to 31 December 2002) with Articles 91 and 109 of the Constitution. Pursuant to the contested provision, employees of an age making them eligible for the state old age pension and persons with Group I or II disabilities were subject to the pension insurance and the maternity and sickness insurance, as well as the insurance against the risk of accident at work.

The Constitutional Court has stated on numerous occasions: if the contested provision refers to a wide variety of situations, it is necessary to establish the extent to which it will consider the provision in question (*cf. paragraph 6 of the Constitutional Court Judgment of 28 May 2009 in Case No 2008-47-01 and paragraph 13 of Judgment of 19 December 2011 in Case No 2011-03-01*). It follows from the Application that the Applicant does not contest the compliance of the entire Article 6(2) of the Law on State Social Insurance (in the wording that was in force from 1 January 1998 to 31 December 2002) with the Constitution, but holds that only the part of the contested provision that prevented persons with Group I or II disabilities from

being insured against the risk of disability and accruing the employment period required for a disability pension is not in line with the Constitution. Specifically, neither the exemption of employees of an age making them eligible for the state old age pension from the insurance against disability or unemployment, nor the exemption of persons with Group I or II disabilities from the insurance against unemployment are contested.

For that reason, in the case under examination the Constitutional Court will assess the compliance of the contested provision with Articles 91 and 109 of the Constitution insofar as it does not provide for the insurance of persons with Group I or II disabilities against disability (hereinafter – the contested regulation).

8. The Applicant holds that the contested regulation is not in line with the principle of equality enshrined in the first sentence of Article 91 of the Constitution and the right to social security enshrined in Article 109 of the Constitution.

If compliance of legal provisions with numerous provisions of superior legal force is challenged, the Constitutional Court, taking account of the nature of the case, must determine the most efficient approach to assessing this compliance (*e.g. cf. paragraph 14.2 of the Constitutional Court Judgment of 8 March 2017 in Case No 2016-07-01*).

The principle of equality enshrined in the first sentence of Article 91 of the Constitution is generally applicable in conjunction with other fundamental rights. The rights enshrined in Article 91 of the Constitution are relative; namely, they may require equal treatment, but in itself they cannot reveal what this treatment must be, i.e. whether it must be favourable or unfavourable. In order to choose one of these solutions, it is necessary to take into account other considerations that are not in the scope of the equality concept.

The right of an individual to social security is enshrined in Article 109 of the Constitution. Pursuant to Article 109 of the Constitution, everyone has the right to social security in old age, in case of a work disability, unemployment and

in other cases as provided by law. Article 109 of the Constitution guarantees everyone the right to a stable and predictable, as well as efficient, just and sustainable social security system which ensures proportionate social security (*e.g. see paragraph 13.1 of the Constitutional Court Judgment of 16 May 2019 in Case No 2018-21-01*). The social security system established by the State comprises social insurance services, social aid and other services (*see paragraph 10 of the Constitutional Court Judgment of 21 June 2012 in Case No 2011-20-01*). Therefore, matters of social insurance fall within the scope of Article 109 of the Constitution.

Given that the arguments of the Applicant refer to violation of the principle of equality in the social insurance system, the compliance of the contested provision with Article 91 of the Constitution is to be assessed in conjunction with Article 109 of the Constitution, specifically, the compliance with Article 91 is to be assessed by verifying the observance of this Article in the social rights area.

Therefore, the Constitutional Court will assess the compliance of the contested regulation with Article 91 of the Constitution in conjunction with Article 109 of the Constitution.

9. In the opinion of the Applicant, persons with Group I or II disabilities are subject to a potentially unacceptable different treatment, as a result of which they are denied access to a segment of the social insurance system. Specifically, employees who had already been found to have Group I or II disabilities during the validity period of the contested regulation did not have access to the disability insurance and the respective disability pension and still do not have this access on par with other persons. This situation is not in line with the principle of equality enshrined in Article 91 of the Constitution. Furthermore, the Ombudsman has observed that it is necessary to verify the compliance of the contested regulation with the principle of non-discrimination enshrined in the second sentence of Article 91 of the Constitution, because this unequal treatment is based on one of the prohibited criteria, i.e. disability.

Article 91 of the Constitution: ‘All human beings shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.’ This Article enshrines two closely related principles: the principle of equality and the principle of non-discrimination. The principle of equality enshrined in the first sentence of Article 91 of the Constitution allows and even requires different treatment of persons whose circumstances differ, and it also allows different treatment of persons whose circumstances are equal if there are objective and reasonable grounds for such treatment (*see paragraph 9 of the Constitutional Court Judgment of 29 June 2018 in Case No 2017-28-0306*). The non-discrimination principle enshrined in the second sentence of Article 91 of the Constitution is an aspect of the equality principle used to specify this principle and help in its application in specific cases.

The objective of non-discrimination is to eliminate unequal treatment based on some of the prohibited criteria. These criteria reflect the decision as to aspects considered fundamentally unacceptable in society as grounds for a different treatment. Therefore, the essence of the non-discrimination principle enshrined in the second sentence of Article 91 of the Constitution is as follows: to prevent the possibility of infringement of the fundamental rights of a person in a democratic rule-of-law state on the basis of some of the prohibited criteria (*cf. paragraph 22 of the Constitutional Court Judgment of 19 June 2020 in Case No 2019-20-03*).

According to the Convention, disability is one of the principles on the basis of which discrimination is prohibited (*see Article 5 of the Convention*). The States Parties to the Convention must recognise the right of people with disabilities to social protection and to the enjoyment of this right without discrimination on the basis of disability (*see Article 28 of the Convention*). This prohibition is contained also in other instruments in the field of human rights binding on Latvia. For example, the reference made in Article 2(2) of the Covenant to the State Parties’ commitment to guarantee that the rights enunciated in the Covenant ‘will be exercised without discrimination of any kind – as to [...]

other status' comprises discrimination on the basis of disability (*see: UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 5: Persons with Disabilities', 9 December 1994, E/1995/22, Para 5*). The case law of the European Court of Human Rights also acknowledges that Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the European Convention on Human Rights) that prohibits discrimination covers also discrimination on the grounds of disability (*see paragraph 82 of the European Court of Human Rights Judgment of 24 October 2019 in Case 'J. D. and A. v. the United Kingdom', Applications Nos 32949/17 and 34614/17*). Finally, the prohibition of discrimination on the basis of disability also follows from the European Social Charter (*see paragraph 132 of the European Committee of Social Rights Decision of 11 September 2013 in Case 'European Action of the Disabled (AEH) v. France', Application No 81/2012*).

Pursuant to Article 89 of the Constitution, the State shall recognise and protect fundamental human rights in accordance with the Constitution, laws and international agreements binding upon Latvia. It follows from this Article that the aim of the legislature is to harmonise the human rights provisions enshrined in the Constitution with provisions of international law. International human rights provisions binding upon Latvia and the practice of their application at the constitutional level also serve as a means of concretisation in order to determine the content and scope of the principles of a democratic rule-of-law state, insofar as it does not reduce the protection of the fundamental rights enshrined in the Constitution (*cf. paragraph 15.1 of the Constitutional Court Judgment of 12 May 2016 in Case No 2015-14-0103*). Hence, disability is one of the criteria covered by Article 91 of the Constitution on the grounds of which discrimination is prohibited.

It follows that the Constitutional Court has to establish whether the social insurance system where persons with existing Group I or II disabilities were not subject to the disability insurance, whereas persons without

disabilities were subject to this type of insurance, is in line with Article 91 of the Constitution in conjunction with Article 109 of the Constitution, specifically, whether the prohibition of discrimination against persons with Group I or II disabilities has been violated.

10. In order to establish whether preventing employees with existing Group I or II disabilities from making use of the disability insurance violated the non-discrimination principle, the Constitutional Court needs to establish the following:

- 1) if and which persons (groups of persons) are in equal and, according to specific criteria, comparable circumstances;
- 2) if the contested regulation established equal or different treatment of these persons;
- 3) if such treatment is determined by a legal provision adopted in a procedure established by legislation;
- 4) if such treatment is justified, i.e. if there are objective and reasonable grounds for it (*see paragraph 21 of the Constitutional Court Judgment of 9 July 2020 in Case No 2019-27-03*).

11. The Constitutional Court has acknowledged the following: in order to establish if and which persons are in equal and comparable circumstances, it is necessary to identify the factor that these groups have in common (*e.g. cf. paragraph 18 of the Constitutional Court Judgment of 15 May 2018 in Case No 2017-15-01*).

In the Applicant's opinion, it is necessary to compare employees found to have Group I or II disabilities following at least three years of employment and employees found to have Group I or II disabilities prior to at least three years of employment, including employees found to have Group I or II disabilities before the commencement of their employment. *The Saeima* holds that these groups are not in equal and, according to specific criteria, comparable circumstances,

because the contested regulation itself does not specify who is eligible for a disability pension. It only follows from the contested regulation that persons with Group I or II disabilities are not subject to the disability insurance, whereas provisions of the Law on State Pensions are not considered in the case under examination.

The Constitutional Court has acknowledged that a common factor for the groups specified by the Applicant is the fact that, during the validity period of the contested provision, persons belonging to both groups were employed, all these persons had been employed for at least three years and all of them had Group I or II disabilities. It follows that the two groups are comparable. The fact that the contested regulation itself does not specify who is eligible for a disability pension cannot be considered a factor indicating that these groups of persons are not in equal and, according to specific criteria, comparable circumstances. This matter is to be examined within the scope of an assessment of different treatment.

Therefore, employees found to have Group I or II disabilities following at least three years of employment and employees found to have Group I or II disabilities prior to at least three years of employment, including employees found to have Group I or II disabilities before the commencement of their employment are to be considered groups of persons in equal and, according to specific criteria, comparable circumstances in the context of the contested provision.

12. Since employees found to have Group I or II disabilities following at least three years of employment and employees found to have Group I or II disabilities prior to at least three years of employment are in equal and comparable circumstances, it is necessary to establish if the contested provision establishes different treatment of these groups of persons.

The right of a person to a disability pension is laid down in Section 14(1) of the Law on State Pensions. Pursuant to this legal provision, insured persons who have accrued an insurance period of at least three years are eligible to a

disability pension before the age specified in Section 11 of this law, if they are found to have a disability and no special provisions of the law apply.

Therefore, one of the necessary conditions for a person to be eligible for a disability pension is an insurance period of at least three years. According to the definition given in Section 1(1) of the Law on State Pensions, the insurance period is the time period expressed in full years that the socially insured person has personally made social insurance contributions or these social insurance contributions have been made or had to be made for them. Namely, insured persons make provisions for social services, including a disability pension, in case of an insured risk.

The contested regulation exempted persons with Group I or II disabilities from the disability insurance, namely, they were directly excluded from the scope of persons who have the social insurance contributions for disability insurance purposes paid for them or who pay such contributions themselves. As a result, these persons could not make social insurance contributions for the specific type of insurance and accrue an insurance period required for eligibility for a disability pension in accordance with the Law on State Pensions. Therefore, persons with Group I or II disabilities, who during the validity period of the contested regulation were employed, were unable to meet the conditions required for a disability pension and could not, and still cannot, receive a disability pension even after three years of employment. Employees who were found to have Group I or II disabilities after they had accrued a three-year employment period made social insurance contributions during the period of validity of the contested regulation and became eligible for a disability pension following the onset of a disability.

Furthermore, disability is among the defining criteria for the different treatment, because persons belonging to one of the groups already had disabilities at the time of their employment, whereas persons in the other group became disabled later, i.e. they had no disabilities at the time of their employment. The applicability of the contested regulation directly depended on whether the person

had a disability at the specific time.

It follows that the contested regulation establishes a different treatment on the basis of disability for the groups of persons in equal and comparable circumstances.

13. A different treatment must be established according to a legal provision adopted in a procedure set out in legislation, i.e. ‘in accordance with the law’ (e.g. cf. paragraph 15.2 of the Constitutional Court Judgment of 16 May 2019 in Case No 2018-21-01).

The Applicant observes that it is not disputed whether the contested provision has been adopted in a procedure set out in legislation. This opinion is shared by *the Saeima*.

The Constitutional Court also has concluded that materials in the case do not indicate to any aspects of adoption and promulgation of the contested provision that would give rise to any doubts that the different treatment contained in the contested provision was not established in accordance with a duly adopted law. The matter of whether the different treatment established by the contested provision is permissible in essence is to be analysed in the context of other criteria used to assess the prohibition of discrimination.

It follows that the different treatment is determined by a legal provision adopted in a procedure established by a duly adopted law.

14. Once it has been found that the contested regulation establishes a different treatment for persons with Group I or II disabilities, it is necessary to assess whether this treatment is justified, i.e. whether there are objective and reasonable grounds for it.

14.1. There are different criteria underlying different treatment. The justifiability of the use of a criterion may differ depending on the specific nature of the criterion and the circumstances of the specific case. Namely, there are criteria the use of which cannot be justified and criteria the use of which can be

justified in certain cases (*see paragraph 19 of the Constitutional Court Judgment of 19 June 2020 in Case No 2019-20-03*).

The case law of the European Court of Human Rights has acknowledged that there must be ‘very weighty reasons’ to justify a different (restrictive) treatment of persons with disabilities (*see paragraph 42 of the European Court of Human Rights Judgment of 20 May 2010 in Case ‘Alajos Kiss v. Hungary’, Application No 38832/06*).

14.2. In accordance with the State’s responsibility to improve the situation of vulnerable social groups derived from the principle of a socially responsible state, measures that improve the condition of persons with disabilities and facilitate their integration into society are permissible (*see Levits E. Commentary to Article 91. Book: Balodis R. (zin. red.) Latvijas Republikas Satversmes komentāri. (Balodis R. (acad. ed.) Commentaries to the Constitution of the Republic of Latvia.) Chapter VIII. Fundamental human rights. Riga: Latvijas Vēstnesis, 2011, page 113*). The European Court of Human Rights has observed that states may treat comparable groups differently in order to correct factual inequalities between them; indeed, in certain circumstances the state’s failure to attempt to correct inequality through different treatment may in itself give rise to a breach (*see paragraph 175 of the European Court of Human Rights Grand Chamber Judgment of 13 November 2007 in Case ‘D. H. and Others v. the Czech Republic’, Application No 57325/00*). The Committee on Economic, Social and Cultural Rights also has stated that, in order to eliminate discrimination, Member States may, and in certain cases must, take specific measures to reduce conditions that facilitate discrimination. Such measures are lawful insofar as they amount to reasonable, objective and proportionate means of reducing discrimination and they are removed when actual equality is achieved (*see Committee on Economic, Social and Cultural Rights, ‘General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)’, 2 July 2009, E/C.12/GC/20, Para 9*). Specifying possible action, Article 5(3) of the Convention sets out the

responsibility of the State to make reasonable accommodations, whereas Article 5(4) sets out the right of the State to implement specific measures.

Hence, the State may, and in certain cases must, require other persons to make reasonable accommodations in order to make sure that persons with disabilities can exercise their rights equally to other groups of society. In accordance with Article 2 of the Convention, 'reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Such accommodation does not place a specific group of persons in a more favourable situation compared to other groups, and can therefore be applied in the long term. Reasonable accommodation may include, for example, reorganising activities, rescheduling work, adjusting curricula learning materials and teaching strategies, adjusting medical procedures, or enabling access to support personnel without disproportionate or undue burden (*see Committee on the Rights of Persons with Disabilities, 'General Comment No. 6 on Equality and Non-Discrimination', 26 April 2018, CRPD/C/GC/6, Para 23*).

Likewise, the State may also implement temporary specific measures, introducing a different treatment that favours persons that are usually placed in an unfavourable situation, in order to eliminate the existing inequality and prevent imbalance in the future. In such cases, from the point of view of the beneficiary, i.e. a person with a disability, the more favourable treatment is based on the person's protected features, whereas from the point of view of the person placed in a less favourable situation the treatment is based on the argument that this person does not have a specific feature, e.g. disability. Examples of specific measures are allocation and/or reallocation of resources, targeted employment, systems of quota, advancement and empowerment measures, as well as respite care and technological aids (*see Committee on the Rights of Persons with*

Disabilities, 'General Comment No. 6 on Equality and Non-Discrimination', 26 April 2018, CRPD/C/GC/6, Para 28).

Reasonable accommodation is directly connected with non-discrimination, whereas specific measures ensure more favourable treatment of people with disabilities, so as to correct historical and/or systematic and systemic exclusion of these persons from exercise of their rights (*see Committee on the Rights of Persons with Disabilities, 'General Comment No. 6 on Equality and Non-Discrimination', 26 April 2018, CRPD/C/GC/6, Para 25(c)*). Furthermore, reasonable accommodation by its nature tends to be individual, whereas specific measures are normally general and target all members of the group placed in a socially unfavourable condition. However, both kinds of measures have the same objective in common, i.e. to ensure that persons with disabilities enjoy factual equality.

14.3. *The Saeima* has stated that the different treatment was established in order to individualise and reduce the tax burden for persons with disabilities and to encourage inclusion of these persons in the labour market. The Ministry of Welfare holds the same opinion.

It is alleged that one of the aspects taken into account when making individuals subject to specific types of social insurance concerned the insurance cases that can actually occur and their impact on a specific group of persons. Persons with Group I or II disabilities were purposefully exempted from the disability insurance because, in the opinion of the legislature, the insurance risk for these persons had already occurred before the commencement of their employment, i.e. they were no longer able to perform their job duties and earn the same income as before the onset of the disability. At the same time, for people who were not found to have disabilities before commencement of their employment the insurance risk had not yet occurred, and making them subject to the disability insurance was justified. In accordance with the principle of social insurance, i.e. to insure against the risk as a result of which the person loses their income, exempting persons with Group I or II disabilities from the insurance

against disability in fact released them from unnecessary contributions, i.e. it helped ensure that contributions made by socially insured individuals are proportionate with the social insurance services they are eligible for.

In the opinion of the legislature, the regulation that reduced the rate of the social insurance contributions for employers that employed persons with Group I or II disabilities by exempting such persons from the disability insurance also sought to include the groups of persons facing the risk of poverty in the working and professional life. Overall, the rate of social contributions for employers decreased by approximately 6.75 per cent. This step was important at the time the contested regulation came in force because of economic changes and a crisis. The State's responsibility to take action in order to encourage employment of persons with disabilities derives, *inter alia*, from Article 27 of the Convention.

The Constitutional Court agrees that persons should not make social insurance contributions for the risks that cannot occur to them. The Constitutional Court has previously acknowledged that insurance contributions are the person's long-term investment that guarantees their social security in the future (*see paragraph 19.2 of the Constitutional Court Judgment of 19 October 2017 in Case No 2016-14-01*). If the employee has a specific kind of mandatory social insurance, they are entitled to the respective security when the insured risk occurs (*see paragraph 11 of the Constitutional Court Judgment of 26 March 2004 in Case No 2003-22-01*). Hence, if a person is not eligible for a specific social insurance measure in the future because they cannot face the specific insurance risk, it would not be practicable for this person to pay contributions for such a service.

The Constitutional Court has acknowledged that the social security system established by the State must motivate people who are able to work to enter legal employment relationships (*cf. paragraph 27 of the Constitutional Court Judgment of 9 July 2020 in Case No 2019-27-03*). Even though the reduction of social insurance contributions achieved by exempting persons with disabilities specifically and only from the disability insurance is lower than the overall

6.75 per cent quoted by *the Saeima*, because the total reduction comprises also the exemption from the social insurance contributions for the risk of unemployment, the Constitutional Court acknowledges that the reduced tax burden could encourage employers to take on persons with Group I and II disabilities. The argument about the economic situation in Latvia at the time of adopting the contested provision should also be taken into account. It follows that the aim quoted by *the Saeima* may be in favour of persons with disabilities.

14.4. However, the Constitutional Court emphasises that specific measures must comply with concrete criteria. Pursuant to Article 5(4) of the Convention, specific measures are necessary to accelerate or achieve de facto equality of persons with disabilities. It follows that, essentially, only such specific measures can be permitted that are aimed at facilitating independence, personal autonomy and equality of persons with disabilities. The commentary to the Convention also states that ‘specific measures adopted by States parties under Article 5(4) of the Convention must be consistent with all its principles and provisions. In particular, they must not result in perpetuation of isolation, segregation, stereotyping, stigmatization or otherwise discrimination against persons with disabilities’ (*see Committee on the Rights of Persons with Disabilities, ‘General Comment No. 6 on Equality and Non-Discrimination’, 26 April 2018, CRPD/C/GC/6, Para 29*). Namely, the aim and result of specific measures must seek to achieve effective and inclusive equality. Therefore, the practical operation of the different treatment established by the adopted specific measure needs to be verified.

For the different treatment to be recognised as part of the specific measure, it is necessary to verify that the different treatment is favourable for persons with Group I or II disabilities and that this group of persons gains respective benefits in line with the objective of the specific measure.

Therefore, the Constitutional Court needs to assess if the different treatment of persons with Group I or II disabilities results in their inclusion in society.

15. The Applicant has stated the following: although the aims quoted by the legislature seek to achieve positive consequences for the group of persons affected by the contested regulation, the different treatment excluded persons with Group I or II disabilities, who as a group of persons are most at risk of losing employment income because of disability, from the social insurance for the purposes of the disability insurance. Therefore, this different treatment caused negative consequences for these persons. In the opinion of the Applicant, persons who had already been found to have Group I or II disabilities also had to be insured against this risk, because they also were subject to the risk of disability.

In order to establish if the different treatment allows to ensure social inclusion of persons with disabilities, the Constitutional Court needs to assess if the exemption of this group of persons from the disability insurance resulted in favourable or unfavourable consequences for this group, i.e. if the contested regulation exempted persons with Group I or II disabilities from unnecessary contributions (contributions unrelated to social insurance services expected in the future) or prevented them from making contributions that might prove significant in the future. To answer this question, the Constitutional Court first of all needs to identify the moment at which the risk of disability can be deemed to have occurred to the person and they became eligible for the respective rights and a disability pension, i.e. what is the specific risk that a person is normally insured against when paying the respective social insurance contributions and when it can occur.

15.1. Most kinds of social insurance only concern persons who are employed or self-employed or have a similar status. It means that persons who have social security contributions paid for them or pay these contributions themselves are employed, and the social insurance is inseparable from their employment.

As follows from the contested regulation, other legal instruments and also materials in the Case, persons with Group I or II disabilities could work during the validity period of the contested regulation. Statistical data also suggest that a

certain number of persons with Group I or II disabilities were employed during that time. Therefore, even though according to the description of Group I and II disabilities these disabilities are associated with significant loss of ability to work, some of these persons, whose health condition would allow it, were still able to work in their profession in conditions adjusted for their needs and with an individual working schedule or following retraining in another profession or, in case of a graver disability, were able to perform small scale jobs in conditions adjusted for their individual needs. Namely, most persons with disabilities were most likely unable to work, but there was a certain number of people who could be employed in specific professions. Furthermore, disability is associated with functional restrictions and social and environment factors interrelated with it, wherefore while some persons with disabilities are unable to work, other persons with similar health problems, but in a different social or employment situation, may be able to work with sufficient efficiency (*see ILO. Questions on Disability and Work. Key issues on promoting employment of persons with disabilities, 15 April 2020, Point 14*). Also at present, persons with disabilities have a right to be employed on par with any other person, and the State is responsible for encouraging such employment.

Employment may continue for as long as the condition of physical and psychological health of the person allows it, along with the compatibility of social and environment factors with the respective kind of work. Specific functional restrictions of persons with disabilities may become aggravated to the extent that prevents them from performing their previous work responsibilities. This was noted by the joined party Sustento, which emphasised that disability is not a static condition and functional disorders can become aggravated. Likewise, it is possible that a person with an existing functional disorder can face other health issues or new functional disorders. The example of the applicant in the administrative case examined by the Applicant proves that it is possible that the condition of a person's health improves, making it possible for them to work for a period, and then worsens again, with the respective change in the disability

group. Such circumstances, along with the absence of new adjustments, can result in the person's inability to continue working and therefore losing their employment.

The Constitutional Court has previously acknowledged that the objective of the social insurance system is to ensure that in case of unfavourable circumstances specified in the law a person is insured against the risk of losing employment income (*cf. paragraph 1 of Conclusions in the Constitutional Court Judgment of 25 February 2002 in Case No 2001-11-0106 and paragraph 14.1 of the Constitutional Court Judgment of 15 February 2018 in Case No 2017-09-01*). The aim of the disability pension system is to guarantee income replacement for a person who is no longer able to fully participate in the labour market that is proportionate to their social insurance contributions (*see paragraph 18 of the Constitutional Court Judgment of 11 December 2014 in Case No 2014-05-01*). Therefore, the disability pension system is also associated with a decrease or total loss of a person's income. Taking into account the fact that persons with existing Group I or II disabilities also can face aggravation of the existing functional restrictions, new functional restrictions, or their health condition can worsen in some other way, resulting in the termination of a legal employment relationship and loss of employment income, it can be concluded that such persons are also subject to the risk of disability.

This conclusion is also corroborated by the fact that persons with Group III disabilities were still insured against the risk of disability, i.e. even though they had been found to have a disability, they were insured against the risk whereby the aggravation of functional restrictions would result in the loss of employment income. It follows that the disability insurance is not associated with the onset of disability as such, which was an established fact for the persons in question, but specifically with the loss of employment income.

Taking into account the fact that persons with existing Group I or II disabilities can both work and face a situation where they are no longer able to participate in the labour market because of condition of their health, the

Constitutional Court concludes that this group of persons is subject to the risk of disability.

15.2. Recognising that persons with existing disabilities can also face the risk of disability associated with the social insurance against disability, the Constitutional Court concludes that also these persons were to be provided access to this kind of insurance.

The Constitutional Court agrees with the Applicant that persons with existing disabilities are in particular danger of aggravation of their condition of health, and therefore replacement of their previous income in case of the disability risk is especially important for them. It should therefore be concluded that the willingness of the legislature to exempt the persons from unnecessary contributions was not implemented legally and persons with Group I or II disabilities were deprived of the right to a social insurance service applicable to them. Namely, the aim of the specific measure – to encourage the inclusion of persons with Group I or II disabilities in the labour market – could not be associated with preventing them from making the social insurance contributions that could have ensured for these persons access to a social insurance service that might be applicable to them in the future.

The circumstances of the administrative case examined by the Applicant indicate that the different treatment established by the legislature did not promote the rights of an already employed person with Group I or II disability either, because this person no longer required the State's intervention in encouraging their employment. Furthermore, the person had been making the social insurance contributions for the purposes of the disability insurance for some time before the contested provision came into force, and despite this they were not allowed to use these contributions for income replacement in case of the disability risk. Hence, this person without any objective justification is placed in an evidently unfavourable situation compared to other employed persons.

Persons who were found to have a disability after the contested regulation was adopted, but before they had been employed for three years and accrued the

respective insurance period, were also placed in an especially unfavourable situation. Specifically, these persons are only eligible for a state social security benefit, but not a disability pension, even if these persons were able to work for some time after the onset of the disability and did so. Also in this context there is no objective justification for the different treatment and such treatment resulted only in negative consequences for the persons concerned, i.e. instead of a specific measure aimed at promoting the rights these persons only experienced a reduction of their rights.

Finally, the Constitutional Court observes that the contested provision in its wider scope – Section 6(2) of the Law on Social Insurance – did not provide for insurance of persons with Group I or II disabilities against the risk of unemployment either. It can be concluded from this scope of the provision that as a result of adoption of the contested provision persons with Group I or II disabilities were denied any kind of security in case of the loss of employment not connected with maternity, sickness, accident at work or the age necessary to be eligible for an old age pension, because such cases are not covered by any social insurance service.

Therefore, the different treatment was not aimed at promoting the rights and possibilities for persons with Group I or II disabilities, and not only did it fail to achieve the aim of the specific measure and to ensure the de facto equality of persons with disabilities, but it also worsened their legal situation.

The Committee on Economic, Social and Cultural Rights stated that through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities (*see Committee on Economic, Social and Cultural Rights, 'General Comment No. 5: Persons with Disabilities', 9 December 1994, E/1995/22, Para 15*). The Constitutional Court admits that the contested regulation may have been based on the legislature's *bona fide* willingness to reduce the tax burden on persons with Group I or II disabilities;

however, the contested regulation needs to be assessed on its compliance with the aim of the specific measure consisting in promoting employment of people with disabilities. The contested regulation results in negative consequences associated with disability, preventing persons with disabilities from exercising the rights they are entitled to and failing to promote inclusive equality. Such different treatment is unjustifiable.

It follows that the different treatment established by the contested regulation and the contested regulation itself are not compliant with Article 91 of the Constitution in conjunction with Article 109 of the Constitution.

16. Taking into account the fact that the contested regulation lapsed, the Constitutional Court does not need to take decision as to the time of its repealment (*see paragraph 11 of the Constitutional Court Judgment of 14 January 2004 in Case No 2003-19-0103*). However, the Applicant requests that the contested regulation with regard to the applicant be declared void from the moment of infringement of the applicant's rights, i.e. from the moment the contested regulation was applied. This is necessary in order to deliver a judgment in the administrative case under examination, i.e. to declare the applicant eligible for a disability pension. Furthermore, on 21 February 2020 the Constitutional Court received a letter from the Supreme Court stating that the Court had suspended proceedings in a similar case. It cannot be excluded that some other person may have wished to protect their rights infringed by the contested regulation.

The Constitutional Court concludes that only declaring the contested regulation void from a specific point in the past will make the applicant and other persons in a comparable situation eligible for a disability pension. However, in its rejoinder *the Saeima* stated that such a measure may have a negative impact on the stability of the budget and the capability of the State to ensure the rights of other persons, because no social insurance contributions were paid for persons

with disabilities who were employed during the validity period of the contested regulation. It would also contradict the basic principle of social insurance, whereby eligibility of an individual to receive payments from the social insurance funds is closely connected with the obligation to make the respective contributions to the special-purpose budget, and would also be unjust to other people who made such contributions. The opinion of *the Saeima* is shared also by the joined party, the Ministry of Welfare, which has stated the following: if periods of time when no mandatory social insurance contributions for the respective risk were paid were counted towards the insurance period, and the amount of a pension or benefit were calculated on the basis of income that was not subject to the mandatory social insurance contributions for the purposes of the specific type of insurance, it would pose a risk for the long-term existence of the social insurance system. VSAA has observed that, taking into account the number of employed persons with Group I or II disabilities between 1998 and 2002, the amount subject to contributions for these persons, the rate of contributions for the purposes of the disability insurance in the respective year, and adjusting the results of the respective estimate in 2020 prices, the additional funds required to cover the social security contributions for the disability risk for employees with Group I or II disabilities amount to EUR 1.8 million.

Therefore, when considering the moment from which the contested regulation is to be declared void, it is necessary to take account of the impact of the judgment on the national budget.

The Constitutional Court agrees that the actual situation in the case under examination contradicts the basic principles of social insurance. In order for a person to be eligible for a social insurance service, it is important that social insurance contributions have been paid or were to be paid (*see paragraph 10 of the Constitutional Court Judgment of 26 March 2004 in Case No 2003-22-01*). In comparison with other persons who receive social insurance services, a person may not be provided a service that is not proportionate with social insurance

contributions paid by this person (*see paragraph 12.1 of the Constitutional Court Judgment of 31 January 2013 in Case No 2012-09-01*).

However, it is necessary to take into account the fact that this situation is a result of the legislature's activities, i.e. establishing a different treatment on the basis of a prohibited criterion and thus preventing persons with disabilities from making social insurance contributions that would ensure their access to a disability pension in the future. At the same time, pursuant to Section 16(2) of the Law on State Pensions, a disability pension for persons with Group I or II disabilities is at least 1.6 times higher than the state social security benefit in case of disability.

If an infringement of a person's rights results directly from unacceptable activities of the State, the State may not justify failure to correct the infringement by the costs of the corrective measure, insofar as these costs are not disproportionately high. Such justification is even more unacceptable in cases where socially vulnerable groups are placed in an even worse situation on the basis of a discriminative criterion. Therefore, in accordance with the principle of equality, the period of employment of persons with Group I or II disabilities during the period of validity of the contested regulation is to count towards the insurance period of these persons.

It follows that the contested regulation is to be declared void from the moment of its coming into force with respect to all persons with Group I or II disabilities.

Substantive Part

Pursuant to Sections 30–32 of the Constitutional Court Law, the Constitutional Court

held:

to declare Section 6(2) of the Law on State Social Insurance (in the wording that was in force from 1 January 1998 to 31 December 2002), insofar as it does not provide for the disability insurance of persons with Group I or II disabilities, non-compliant with Articles 91 and 109 of the Constitution of the Republic of Latvia and void from the moment of its coming into force.

The judgment is final and not subject to appeal.

The judgment enters into force on the day of its publication.

Chairperson of the court hearing

Ineta Ziemele