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## Constitutional judgment 3-3-1-86-15

### JUDGMENT

in the name of the Republic of Estonia

Case number 3-3-1-86-15

Date of judgment 30 June 2016

Composition of court Chairman: Priit Pikamäe; members: Peeter Jerofejev, Henn Jõks, Eerik Kergandberg, Hannes Kiris, Indrek Koolmeister, Ants Kull, Saale Laos, Viive Ligi, Jaak Luik, Nele Parrest, Ivo Pilving, Jüri Põld, Paavo Randma, Peeter Roosma, Malle Seppik and Tambet Tampuu

Participants in the proceedings Appellant Margit Tooming  
Respondent Social Insurance Board

Contested judicial decision Tallinn Court of Appeal judgment of 27 August 2015 in administrative case No 3-14-52199

Basis for proceedings in the Supreme Court Appeal in cassation by Margit Tooming

Hearing Written procedure

### OPERATIVE PART

**1. To declare that the first sentence of § 3(7) of the Parental Benefit Act (in the wording in force from 14 May 2013 to 31 December 2013) was in conflict with the Constitution to the extent to which it prescribed reduction of parental benefit so that due to delay by the employer the total of the income received during the period of receiving parental benefit and parental benefit itself was less than if the**

employer had not delayed payment of remuneration.

2. To declare that the first sentence of § 3(7) of the Parental Benefit Act (in the wording in force from 1 September 2007 to 13 May 2013) was in conflict with the Constitution to the extent to which it prescribed reduction of parental benefit so that due to delay by the employer the total of the income received during the period of receiving parental benefit and parental benefit itself was less than if the employer had not delayed payment of remuneration.

3. To declare the first sentence of § 3(7) of the Parental Benefit Act (in the wording in force from 1 January 2014) to be in conflict with the Constitution and repeal it to the extent to which it prescribes reduction of parental benefit so that due to delay by the employer the total of the income received during the period of receiving parental benefit and parental benefit itself is less than if the employer had not delayed payment of remuneration.

4. To allow the appeal in cassation by Margit Tooming in part.

5. To reverse the Tallinn Administrative Court judgment of 12 December 2014 and the Tallinn Court of Appeal judgment of 27 August 2015 in case No 3-14-52199.

6. To enter a new judgment in the case, allowing the appeal in part.

7. To annul Social Insurance Board precept No 9.TL15.2-2/9946 of 27 June 2014 with regard to recovery of a sum exceeding 130 euros and 67 cents.

8. To order the Social Insurance Board to pay 15 euros in favour of Margit Tooming for procedural expenses incurred.

9. To refund the security paid upon filing the appeal in cassation.

## FACTS AND COURSE OF PROCEEDINGS

1. By decision of 18 September 2012, the Social Insurance Board (SIB) granted Margit Tooming parental benefit in the amount of 702 euros and 30 cents a month for the period from 18 November 2012 to 26 January 2014 in connection with raising a child born on 10 September 2012.

2. By **precept No 9.TL15.2-2/9946 of 27 June 2014**, the Social Insurance Board ordered M. Tooming to refund parental benefit in the amount of 168 euros and 84 cents paid to her without a legal basis. According to the precept, in October 2013 the company Rekrum Eesti OÜ paid to M. Tooming 870 euros which included remuneration for work in August and September as well as a redundancy payment, and exceeded the benefit rate (290 euros in 2013). Thus, under § 3(7) of the Parental Benefit Act (PBA), in October 2013 M. Tooming should have received parental benefit in the amount of 488 euros and 58 cents. The exceptions for non-reduction of benefit as laid down in § 3(7<sup>1</sup>) of the PBA do not apply. Thus, for October 2013 M. Tooming's parental benefit was calculated in the excess amount of 213 euros and 72 cents and she was overpaid the benefit in the amount of 168 euros and 84 cents (the calculated benefit minus income tax).

3. M. Tooming lodged an **action** with Tallinn Administrative Court, seeking annulment of the precept. The applicant explained that she had been working while receiving parental benefit but her monthly remuneration was below the minimum statutory threshold. The respondent failed to take into account that income in excess of the threshold in October 2013 was caused because the employer simultaneously paid the applicant a redundancy payment along with outstanding remuneration for the previous two months.

4. The applicant has been treated unequally in comparison with those employees who were made redundant but do not receive parental benefit. Thus, in essence the applicant, for whom as a parent of a small child it is

in any case more difficult to find a new job, is essentially deprived of compensation prescribed in the case of redundancy. Moreover, under § 3(7<sup>1</sup>) cl. 3) of the PBA parental benefit is not reduced if in the event of insolvency of an employer a redundancy payment is made by the Unemployment Insurance Fund. The applicant asserted that by way of analogy § 3(7<sup>1</sup>) cl. 3) of the PBA should also apply in her case. If this is impossible, the regulatory arrangements under the Parental Benefit Act should be declared unconstitutional.

**5. By judgment of 12 December 2014**, Tallinn Administrative Court dismissed the action. The court found that under § 3(7) of the PBA parental benefit is reduced if, during a benefit payment month, a benefit recipient receives any other income subject to social tax that exceeds the rate of the benefit. When reducing parental benefit, the moment of receiving income is taken into account and not the moment when entitlement to income originated. Thus, it is not relevant that in October 2013 the applicant was paid remuneration for the previous months. This is also not income to which the applicant became entitled prior to entitlement to parental benefit, so that the exception set out in § 3(7<sup>1</sup>) cl. 4) of the PBA is not applicable.

**6.** Redundancy payment also constitutes income subject to social tax, which therefore had to be included in the applicant's income for October 2013. The exception set out in § 3(7<sup>1</sup>) cl. 3) of the PBA is not applicable by way of analogy. By enacting § 3(7<sup>1</sup>) cls 3) and 4) of the PBA, the legislator wished to compensate for distortions in the amount of parental benefit caused by delays in payments. The legislator did not wish to make an exception to the general rule for receiving benefit in any other cases.

**7.** Those receiving parental benefit are not in a comparable situation with those not receiving parental benefit. The state is not reclaiming from the applicant the redundancy payment but overpaid parental benefit. Comparable groups include those whose parental benefit is reduced, as well as those whose parental benefit is not reduced on the basis of the exception set out in § 3(7<sup>1</sup>) cl. 3) of the PBA. It is correct that the situation constitutes interference with the fundamental right to equality. However, the situation is not unconstitutional as the state has assumed the obligation to pay parental benefit out of goodwill, and reduction or non-reduction of parental benefit is the state's social policy decision. The court cannot interfere in the state's margin of manoeuvre.

**8.** M. Tooming lodged an **appeal** seeking reversal of the Administrative Court judgment. The appellant contends that in her case the circumstances set out both under § 3(7<sup>1</sup>) cl. 3) as well as cl. 4) of the PBA are present: the employer's insolvency and payment of outstanding remuneration while receiving parental benefit. It is not the appellant who is at fault for the accumulation of payments but the employer, who was unable to discharge its obligations on time. If the employer had complied with its obligations and paid remuneration every month, the appellant would not have incurred a duty to repay the parental benefit. The legislator has laid down regulatory arrangements under which individuals are entitled to work while receiving parental benefit and to receive remuneration below the parental benefit minimum threshold without reduction of parental benefit. The appellant also cannot file a claim against the employer as the employer is bankrupt. The appellant does not agree with the court's position that she cannot be compared to those who have been made redundant but are not receiving parental benefit. The appellant is also being treated unequally in comparison with those parental benefit recipients to whom a redundancy payment is made by the Unemployment Insurance Fund.

**9. By judgment of 27 August 2015**, Tallinn Court of Appeal dismissed the appeal and upheld the Administrative Court judgment. The Court of Appeal held that no basis for applying the law by analogy existed, as regulation under the PBA was clear. In the event of payment of remuneration for several months in one calendar month, reduction of parental benefit is justified. The redundancy payment also had to be taken into account in reducing parental benefit. Someone made redundant but not receiving parental benefit does not receive remuneration in the months following redundancy, while a parental benefit recipient continues to receive benefit until the end of the benefit payment period. The Court of Appeal held that § 3(7<sup>1</sup>) cl. 3) of the PBA did not contravene § 12 of the Constitution.

**10.** M. Tooming lodged an **appeal in cassation** seeking reversal of the judgments of the Administrative Court and of the Court of Appeal and remitting the case for re-examination to Tallinn Administrative Court.

The appellant finds that in the opinion of the Chancellor of Justice cited by the Court of Appeal, the Chancellor has not dealt with the situation where wages for several months are paid within the same month due to a violation by an employer. Reduction of the appellant's parental benefit due to the employer's fault is not justified. Even in the case of a single payment of two month's remuneration and redundancy payment, the employer should have declared the remuneration in tax returns for different months (i.e. the "TSD" tax form for income and social tax, mandatory funded pension payment and unemployment insurance payment). In that case, the appellant's parental benefit would not have been reduced.

## **ORDER OF THE SUPREME COURT ADMINISTRATIVE LAW CHAMBER**

**11.** The Supreme Court Administrative Law Chamber found that in the case of the appellant the right to equal treatment arising from § 12(1) (first sentence) of the Constitution was interfered with. First, the appellant is being treated unequally in comparison with those who were working while receiving parental benefit and who received their remuneration on time, i.e. at the time prescribed in the contract concluded with the employer. Unlike in the case of the above group of individuals, the appellant's parental benefit is reduced for reasons beyond her control (breach of contract by the employer). The appellant also had no effective opportunity to claim from the employer compensation for damage caused by breach of contract, as prior to recovery of parental benefit Rekrum Eesti OÜ had been declared bankrupt (on 21 May 2014).

**12.** Second, the appellant is being treated unequally in comparison with those who, through the fault of an employer, during a calendar month of payment of parental benefit receive remuneration which was outstanding from the time prior to the start of entitlement to parental benefit. The parental benefit of these individuals is not reduced under § 3(7<sup>1</sup>) cl. 4) of the PBA. The group of persons in a situation most similar to the appellant are those who were not awarded smaller monthly parental benefit due to late receipt of remuneration. These are individuals who in a calendar month of receiving parental benefit also receive remuneration that they should have received before the start of the period of payment of parental benefit but during the same calendar year when their entitlement to parental benefit arises. As the amount of parental benefit is calculated based on income received in the previous calendar year (§ 3(1) and (2) PBA), then in the case of those individuals delayed receipt of income does not affect the amount of monthly parental benefit (on this, see also Supreme Court Constitutional Review Chamber judgment of 27 December 2011 in case No 3-4-1-23-11, para. 52).

**13.** A possible justification for unequal treatment could be simplicity of administration of parental benefit. Parental benefit falls within the area of social policy where the state itself has assumed the task of granting the benefit. This means that upon weighing different arguments it should be taken into account that this is a bonus or a benefit granted to individuals on the basis of goodwill and the political aims of the state, and not provision of assistance under § 28(2) of the Constitution.

**14.** The Administrative Law Chamber found that simplicity of administration cannot justify unequal treatment in a situation where the appellant's parental benefit was reduced due to the employer's breach of contract, which the appellant had no opportunity to prevent. The aim of allowing a person to earn remuneration while receiving parental benefit is to support reconciliation of work and family life. It would be contrary to that aim if the parental benefit of a person working while receiving benefit were reduced merely due to a breach by the employer.

**15.** The Chamber admitted that interference with the rights of the appellant in the instant case was not serious. However, assuming that recovery of benefit on account of receiving redundancy payment was justified, the appellant's parental benefit was reduced by approximately 38 euros due to late payment of wages. Interference with the rights of persons in a similar situation could, however, turn out to be significantly more serious.

**16.** The Administrative Law Chamber found that the case should be referred for adjudication to the Supreme Court *en banc* for assessment of the constitutionality of § 3(7) of the PBA to the extent that it prescribes reduction of parental benefit due to late payment of remuneration through the fault of the employer.

**17.** The Chamber agreed with the Administrative Court and the Court of Appeal that reduction of parental benefit due to receipt of a redundancy payment does not violate the appellant's right to equal treatment. Similarly to the appellant in case No 3-4-1-23-11, M. Tooming received the redundancy payment on time. Thus, the appellant's situation differs from the situation of those to whom a redundancy payment is made by the Unemployment Insurance Fund because of the insolvency of the employer. The Chamber admitted that the situation of the appellant as someone made redundant differs from the situation of those whose employment contract ends due to expiry of the term. Unlike expiry of a fixed-term employment contract, redundancy is often unexpected and may thus cause greater inconvenience and greater difficulties in daily life. However, in the opinion of the Chamber, the difference was not as significant as to warrant declaring the interference unconstitutional.

## **OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS**

**18. – 38.** [Not translated].

## **CONTESTED PROVISIONS**

**39.** § 3 „Calculation of the amount of benefit”, subsection (7) (first sentence), of the Parental Benefit Act (in the wording in force from 1 September 2007 to 13 May 2013):

„(7) If the benefit recipient receives income subject to social tax (including from another Contracting Party to the EEA Agreement or from the Swiss Confederation), except income from self-employment (hereinafter *income*), which exceeds the benefit rate, during the calendar month of payment of benefit, the amount of benefit shall be equal to the sum of the benefit and of the income exceeding the benefit rate, divided by 1.2, from which the income exceeding the benefit rate is deducted.”

**40.** § 3 „Calculation of the amount of benefit”, subsection (7) (first sentence), of the Parental Benefit Act (in the wording in force from 14 May 2013 to 31 December 2013):

„(7) If the recipient of benefit receives income subject to social tax (including from another Contracting Party to the EEA Agreement or from the Swiss Confederation), except income from self-employment (hereinafter *income*), which exceeds the benefit rate, during the calendar month of payment of benefit, the amount of benefit shall be equal to the sum of the benefit and of the income exceeding the benefit rate, divided by 1.2, from which the income exceeding the benefit rate is deducted.

[...]

[RT I, 16 May 2013, 42 – entered into force 14 May 2013 – Judgment of the Supreme Court Constitutional Review Chamber declares to be in conflict with the Constitution and repeals the first sentence of § 3(7) of the Parental Benefit Act in the part under which the parental benefit received by a person shall be reduced so that the total income of the person is less than the parental benefit initially granted to the person.]”

**41.** § 3 „Calculation of the amount of benefit”, subsection (7) (first sentence), of the Parental Benefit Act (in the wording in force from 1 January 2014):

„(7) If the benefit recipient receives income subject to social tax (including from another Contracting Party to the EEA Agreement or from the Swiss Confederation), except income from self-employment (hereinafter *income*), which exceeds the benefit rate, during the calendar month of payment of benefit, the amount of income exceeding the rate of the benefit divided by two shall be deducted.”

## **OPINION OF THE COURT *EN BANC***

**42.** The Supreme Court *en banc* will first assess the constitutionality of the Parental Benefit Act to the extent questioned by the Administrative Law Chamber – in the part prescribing reduction of parental benefit if an

employer delays in paying remuneration. The Court *en banc* will identify the relevant provision (I), spell out the unequal treatment arising from the contested provision (interference with the fundamental right to equality) (II), and assess the constitutionality of the unequal treatment (III). Finally, the Court *en banc* will resolve the appeal in cassation (IV).

## I

**43.** The provision of which the Court *en banc* will assess the constitutionality must be relevant for adjudication of the case (§ 3(3) (second sentence) Constitutional Review Court Procedure Act). While receiving parental benefit (in August and September 2013), the appellant was working, so that she was entitled to remuneration under an employment contract. In October 2013 the employer paid the appellant remuneration for August 2013, later than prescribed under the contract, along with remuneration for September. Late payment of remuneration to the appellant led to a situation where during a calendar month when receiving parental benefit the appellant's income subject to social tax was higher than the benefit rate (290 euros), and under § 3(7) of the PBA the Social Insurance Board reduced her parental benefit. If the employer had paid remuneration to the appellant on time, the appellant's income in October 2013 would not have exceeded the benefit rate and her parental benefit for October 2013 would not have been reduced. The Court *en banc* is of the opinion that it is relevant to the case that § 3(7) (first sentence) of the PBA prescribes that parental benefit is reduced if during a benefit payment month the recipient's income subject to social tax exceeds the benefit rate.

**44.** Section 3(7<sup>1</sup>) of the PBA, which sets out exceptions for non-reduction of parental benefit, cannot be considered relevant. A provision is relevant if in the event of its validity the court should adjudicate differently than if it were invalid. None of the exceptions set out in § 3(7<sup>1</sup>) of the PBA applies in respect of the appellant, so that the Court cannot assess its constitutionality or declare a provision unconstitutional and repeal it. The fact that in the case of establishing interference with the fundamental right to equality the appellant is compared with those in respect of whom any of the exceptions set out in § 3(7<sup>1</sup>) of the PBA apply does not in itself render § 3(7<sup>1</sup>) of the PBA a relevant provision.

**45.** Of relevance is § 3(7) (first sentence) of the PBA in the wording in force in October 2013 when the appellant's income subject to social tax exceeded the benefit rate. Section 3(7) (first sentence) of the PBA was enacted with the Act Amending the Parental Benefit Act (1085 SE, Riigikogu X composition), which entered into force on 1 September 2007. However, it should also be taken into account that on 14 May 2013 in case No 3-4-1-7-13 the Supreme Court Constitutional Review Chamber issued a judgment declaring § 3(7) (first sentence) of the PBA unconstitutional and repealing it in the part under which parental benefit received by a person is reduced so that the total income of that person is less than the parental benefit initially granted to them. Thus, the Supreme Court Constitutional Review Chamber judgment modified the rule laid down in § 3(7) (first sentence) of the PBA, and § 3(7) (first sentence) of the PBA had to be read in conjunction with the operative part of the Supreme Court Constitutional Review Chamber judgment of 14 May 2013.

**46.** By the Act Amending the Parental Benefit Act (470 SE, Riigikogu XII composition), which entered into force on 1 January 2014, § 3(7) (first sentence) of the PBA was enacted in new wording (in force). On that basis, § 3(7) (first sentence) of the PBA in the wording in force from 14 May 2013 to 31 December 2013 should be considered relevant.

## II

**47.** Parental benefit does not fall within the scope of protection of § 28(2) of the Constitution laying down entitlement to government assistance in the case of old age, incapacity for work, loss of provider, or need, but in granting and restricting the right to receive parental benefit the legislator must observe the principle of equal treatment (cf. Supreme Court Constitutional Review Chamber judgment of 20 March 2006 No 3-4-1-

33-05, para. 25, and the judgment of 27 December 2011 in case No 3-4-1-23-11, para. 68). The fundamental right to equality enshrined in § 12(1) of the Constitution prohibits treating people in a similar situation unequally. To assess interference with the fundamental right to equality, the Court *en banc* will identify the points of departure for comparison and specify the comparable groups.

**48.** In calculating the amount of parental benefit, the Parental Benefit Act proceeds from cash-based accounting. The amount of benefit is calculated on the basis of a benefit applicant's average calendar monthly income (during the calendar year prior to the date of entitlement to benefit), whereas the calculation takes account of the applicant's individually registered social tax in the national pension insurance register (§ 3(1) and (2) PBA). On the other hand, the law allows a person to work while receiving parental benefit and to receive income additional to parental benefit. The precondition is that the benefit recipient's income subject to social tax during a benefit payment month may not be higher than the benefit rate (§ 3(7) PBA). The benefit rate is established by the state budget for each budgetary year (§ 3(6) (second sentence) PBA). If during a parental benefit payment month the benefit recipient's income subject to social tax exceeds the benefit rate, parental benefit is reduced pursuant to the formula set out in § 3(7) (first sentence) of the PBA. Thus, cash-based accounting also applies in the event of reduction of parental benefit, except when the exception set out in § 3(7<sup>1</sup>) cl. 4) of the PBA applies.

**49.** Under § 3(7<sup>1</sup>) cl. 4) of the PBA, reduction of benefit laid down in § 3(7) of the PBA does not apply with regard to loss of income before the right to parental benefit arises where that income is paid during a calendar month of payment of parental benefit if later payment was the fault of the payer of social tax. In this regard, it should be borne in mind that the exception set out in § 3(7<sup>1</sup>) cl. 4) of the PBA covers two different situations. If the income which the payer of social tax delayed in paying had been earned during a period for which social tax paid was taken as the basis for calculating the benefit (the calendar year preceding the date of entitlement to benefit, § 3(2) PBA), late payment of income first affects the amount of parental benefit granted – the recipient's parental benefit will accordingly be lower. In addition, late payment of income while receiving parental benefit would lead to reduction of benefit in the calendar month when the income is received (§ 3(7) (first sentence) PBA), but the exception set out in § 3(7<sup>1</sup>) cl. 4) of the PBA would not apply. If income of which payment is delayed during a parental benefit payment month was not earned in the period for which social tax paid had been used as a basis for calculating the amount of benefit, late payment of the income does not affect the amount of a person's parental benefit nor does it lead to reduction of parental benefit due to the exception set out in § 3(7<sup>1</sup>) cl. 4) of the PBA.

**50.** The Court *en banc* finds that it is appropriate to compare parental benefit recipients who, in a calendar month of receiving parental benefit, receive, through the fault of the payer of social tax, delayed payment of income which could not affect the amount of parental benefit. The first comparable group includes benefit recipients who, in a calendar month of receiving parental benefit, receive, through the fault of the payer of social tax, delayed payment of income to which they became entitled while receiving parental benefit (the appellant). The second comparable group includes benefit recipients who, in a calendar month of receiving parental benefit, receive, through the fault of the payer of social tax, delayed payment of income to which they became entitled prior to entitlement to parental benefit.

**51.** Comparable groups are treated unequally. If payment of income to which a person became entitled while receiving parental benefit is delayed, and the income exceeds the benefit rate, the benefit is reduced under § 3(7) (first sentence) of the PBA. If payment of income to which a person became entitled prior to entitlement to parental benefit is delayed, the exception set out in § 3(7<sup>1</sup>) cl. 4) of the PBA applies.

**52.** Next, the Court *en banc* will assess whether such unequal treatment is constitutionally justified.

### III

**53.** The fundamental right to equality under § 12(1) is guaranteed subject to a simple statutory reservation; thus it can be restricted for any reason compatible with the Constitution (Supreme Court *en banc* judgment of 7 June 2011 in case No 3-4-1-12-10, para. 31). To assess the constitutionality of unequal treatment, the

Court *en banc* will weigh the interference with the fundamental right to equality in light of its aims.

**54.** The Court *en banc* will first assess whether the aim of the exception set out in § 3(7<sup>1</sup>) cl. 4) of the PBA justifies unequal treatment in the instant case. Section 3(7<sup>1</sup>) cl. 4) of the PBA was enacted in 2007 by the Act Amending the Parental Benefit Act. According to the explanatory memorandum to the Draft Act Amending the Parental Benefit Act (1085 SE, Riigikogu X composition), the reason for inserting § 3(7<sup>1</sup>) cl. 4) in the PBA was the Supreme Court Constitutional Review Chamber judgment of 20 March 2006 in case No 3-4-1-33-05. That case involved a situation where, in a month of receiving parental benefit, the employer paid the person outstanding remuneration for the previous three years. The Court found that a person “to whom payment of income subject to social tax for the period based on which the amount of parental benefit is calculated was delayed through the fault of the employer, and it was taken into account only in reducing parental benefit and not in granting the person parental benefit, was treated unequally in comparison with other parents whose employers paid their income subject to social tax on time, i.e. when it was taken into account in granting parental benefit” (para. 28 of the judgment). According to the explanatory memorandum to the Draft Act, the aim of the exception laid down in § 3(7<sup>1</sup>) cl. 4) of the PBA was to compensate for and reduce distortions in the amount of parental benefit caused by delays in payment through the fault of the payer of social tax.

**55.** In the opinion of the Court *en banc*, this aim cannot justify unequal treatment. The exception set out in § 3(7<sup>1</sup>) cl. 4) of the PBA also includes situations where payment was delayed through the fault of the payer of social tax but did not result in granting parental benefit in a smaller amount. Thus, not all situations regulated in § 3(7<sup>1</sup>) cl. 4) of the PBA involve distortions in granting parental benefit (cf. Supreme Court Constitutional Review Chamber judgment of 27 December 2011 in case No 3-4-1-23-11, para. 62).

**56.** Cash-based accounting makes administering the system of benefit payment simpler and less costly, which was one of the aims when preparing the Parental Benefit Act (this was pointed out by the drafter during the first reading of the Draft Parental Benefit Act (125 SE, Riigikogu X composition)). As calculation of benefit takes account of social tax actually received, i.e. for which information exists in national registers, the Social Insurance Board as administrator of the system does not itself need to collect and verify additional information. In the case of accrual-based accounting, where the moment that entitlement arises to a proprietary right is important (e.g. a claim against an employer for payment of remuneration), the administrator of the system should collect information on whether, when and in what amount a benefit applicant acquired the right to claim against an employer. This would make administering the system significantly more complicated and costly. The fact that the amount of benefit is calculated on the basis of social tax actually received also reduces possibilities for abuse of the system. However, the shortcoming of cash-based accounting is that if a person’s income is defined in terms of individually registered social tax (for the calendar year prior to entitlement to benefit), it may not correctly reflect the prior income of a benefit applicant. An employer might not pay remuneration to a benefit applicant at the time agreed in the employment contract or pay social tax at the time prescribed in the Social Tax Act. Consequently, a benefit applicant’s income (for the calendar year prior to the date of entitlement to benefit) and parental benefit may be smaller than if the applicant had been paid remuneration on time. Considering that parental benefit is not included within the scope of protection of the fundamental right ensured under § 28(2) of the Constitution (government assistance in case of need), as well as one of the aims of the Parental Benefit Act – to maintain previous income by granting state support for persons whose income has diminished due to raising children (§ 1(1) PBA) – cash-based accounting and the resulting simplicity of administering the system and smaller administration costs in calculating the benefit could be considered as aims which might justify inequalities arising from the system. However, in the instant case the dispute does not relate to the constitutionality of the principles for calculating the amount of benefit (§ 3(1) and (2) PBA).

**57.** The Court *en banc* finds that even in the case of reduction of benefit (§ 3(7) (first sentence) PBA) the simplicity of administration and cost-saving arising from cash-based accounting can be seen as justification for unequal treatment.

**58.** Under § 5(1) of the PBA, a benefit recipient is obliged to notify the Social Insurance Board (SIB) if



during a calendar month of payment of benefit they receive income subject to social tax which is higher than the benefit rate. In 2007, when enacting the exception from cash-based accounting set out in § 3(7<sup>1</sup>) cl. 4) of the PBA, the legislator laid down the obligation of a benefit recipient in § 5(2) of the PBA to submit to the SIB a certificate by the payer of social tax concerning receipt of income, a court judgment or order which has entered into force, a decision of a labour dispute committee or other relevant documents. Thus, a benefit recipient is obliged to prove that the right to income arose prior to entitlement to parental benefit. The SIB must then verify whether the information submitted by the benefit recipient is correct. In its opinion to the Supreme Court, the SIB explained that upon receipt of the above documents the SIB must initiate special proceedings to verify when and what sums should have been paid to the person. Special proceedings indisputably increase the burden and costs for the SIB.

**59.** However, neither the SIB nor the Minister of Social Affairs have presented information on how much the costs of administering the parental benefit system increased after enactment of the exception under § 3(7<sup>1</sup>) cl. 4) of the PBA in 2007, and how much they might increase if cash-based accounting is also turned into an exception in cases involving delay in payment of income to which a person became entitled while receiving parental benefit. The SIB noted that they have not kept records on the number of cases where an employer has delayed payment of income earned by a person during a parental benefit payment period. According to explanations by the SIB, normally such cases come to their attention when a person either reports it or contests a decision or a precept, but probably such cases number fewer than ten a year. Thus, simplicity of administration and cost-saving achieved by unequal treatment in the instant case is relatively small.

**60.** The intensity of interference with the fundamental right to equality depends on the amount of income that a payer of social tax delays in paying and on how much the sum exceeds the benefit rate, i.e. on the amount of remuneration of a particular person. The intensity of interference with the fundamental right to equality is aggravated by the fact that if payment of income is delayed through the fault of a payer of social tax, a benefit recipient has mostly no effective opportunity to influence when the income is paid.

**61.** In view of the foregoing and the fact that the only difference between the comparable groups lies in the fact that in one case income paid to a person while receiving parental benefit was earned by them prior to receipt of parental benefit, while in the other case the person became entitled to income while receiving parental benefit, the Court *en banc* is of the opinion that simplicity of administering the system and cost-saving do not justify unequal treatment arising from § 3(7) (first sentence) of the PBA in the instant case.

**62.** The Court *en banc* agrees with the opinion of the Chancellor of Justice (see para. 30 of the judgment) that, in order to eliminate the inequality, it is not justified to extend the exception set out in § 3(7<sup>1</sup>) cl. 4) of the PBA and also include persons subjected to delay in payment of income to which they became entitled while receiving parental benefit. In that case, a person who works while receiving parental benefit and to whom remuneration is paid later could be in a more favourable situation than a person who works and to whom remuneration is paid on time. This would essentially nullify the rule set out in § 3(7) (first sentence) of the PBA that income earned while receiving parental benefit may not exceed the benefit rate. Unequal treatment would be eliminated if persons to whom an employer delayed in paying income earned while receiving parental benefit were to be placed in the same situation as persons to whom remuneration was paid on time.

**63.** Relying on § 15(1) cl. 5) of the Constitutional Review Court Procedure Act, the Supreme Court *en banc* holds that § 3(7) (first sentence) of the Parental Benefit Act (in the wording in force from 14 May 2013 to 31 December 2013) was in conflict with the Constitution to the extent to which it prescribed reduction of parental benefit so that due to delay by the employer the total of the income received during the period of receiving parental benefit and parental benefit itself was less than if the employer had not delayed payment of remuneration.

**64.** Arising from the need to ensure legal clarity and avoid possible future disputes similar to that resolved in the instant case concerning constitutionality of the provisions regulating parental benefit, the Court *en banc* also extends the scope of review to the version of § 3(7) (first sentence) of the PBA in force prior to 14 May

2013 and after 31 December 2013.

**65.** The Court *en banc* declares § 3(7) (first sentence) of the PBA (in the wording in force from 1 September 2007 to 13 May 2013) to be in conflict with the Constitution to the extent to which it prescribed reduction of parental benefit so that due to delay by the employer the total of the income received during the period of receiving parental benefit and parental benefit itself was less than if the employer had not delayed payment of remuneration.

**66.** The Court *en banc* declares § 3(7) (first sentence) of the PBA (in the wording in force from 1 January 2014) to be in conflict with the Constitution and repeals it to the extent to which it prescribes reduction of parental benefit so that due to delay by the employer the total of the income received during the period of receiving parental benefit and the parental benefit itself is less than if the employer had not delayed payment of remuneration. The Court *en banc* repeals this provision as of its entry into force on 1 January 2014.

#### IV

**67.** As the Court *en banc* declared § 3(7) of the PBA unconstitutional in part, the appeal in cassation must be allowed as regards delayed payment of remuneration through the fault of the employer.

**68.** In addition to wages, in October 2013 the employer paid the appellant a redundancy payment in the amount of one monthly wage, as a result of which under § 3(7) (first sentence) the appellant's parental benefit for October 2013 was reduced. In her appeal in cassation, the appellant contended that reduction of parental benefit due to the redundancy payment is unconstitutional. The appellant believes she is being treated unequally in comparison with others who are not receiving parental benefit at the time of receiving a redundancy payment. Second, she is being treated unequally in comparison with those to whom a redundancy payment is made by the Unemployment Insurance Fund under the Unemployment Insurance Act because of the insolvency of the employer. In that case, the exception set out in § 3(7<sup>1</sup>) cl. 3) of the PBA applies, under which no reduction of benefit is applied with regard to benefit paid upon insolvency of an employer under the Unemployment Insurance Act if it is paid during a calendar month of payment of parental benefit.

**69.** By order of 29 March 2016, the Supreme Court Administrative Law Chamber held that reduction of parental benefit due to receipt of a redundancy payment does not violate the appellant's right to equal treatment, and in this regard did not seek assessment of the constitutionality of the regulatory arrangements under the Parental Benefit Act. The Court *en banc* agrees with the positions of the Administrative Law Chamber (see para. 17 of the judgment) and does not consider it justified to initiate constitutional review proceedings in this regard. With regard to reduction of parental benefit due to the redundancy payment, the Court *en banc* dismisses the appeal in cassation.

**70.** The appellant received simultaneously two months' wages and a redundancy payment; as a result her parental benefit was reduced based on the formula by 168 euros and 80 cents ( $702.3 - (((702.3 + 580) \div 1.2) - 580) = 213.7$ ; thus 168.80 after withholding income tax). If only the redundancy payment together with the wage had been received, parental benefit would have been reduced by 130 euros and 67 cents ( $702.3 - (((702.3 + 290) \div 1.2) - 290) = 165.4$ ; thus 130.67 after withholding of income tax (21%)). Thus, due to late payment of wages the appellant's parental benefit was reduced by 38 euros and 13 cents, which cannot be recovered from the appellant due to declaring the contested provision unconstitutional. In this regard, the appeal must be allowed.

**71.** On that basis, the Court *en banc* reverses the judgments of the Administrative Court and of the Court of Appeal. The Court *en banc* enters a new judgment by which it allows the appeal in part and annuls the contested precept to the extent exceeding 130 euros and 67 cents.

**72.** Procedural expenses are to be borne by the party against whom judgment was given (§ 108(1) Code of Administrative Court Procedure).

**73.** The appellant in cassation has paid the state fee of 30 euros both when filing the action and the appeal. As the appeal is allowed in part, the Social Insurance Board should be ordered to pay the state fee of 15 euros in favour of the appellant (§ 108(2) Code of the Administrative Court Procedure). With regard to the remaining expenses, the appellant in cassation has not submitted a list of procedural expenses or expense receipts, so that the expenses are to be borne by herself (§ 109(1) (last sentence) Code of Administrative Court Procedure).

**74.** The security must be refunded (§ 107(4) Code of Administrative Court Procedure).

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