

## Pay discrimination in Polish labour law

Sylwia Stala  
Jagiellonian University

**Rezumat:** Un principiu important în dreptului muncii este acela al egalității de remunerare între angajați pentru aceeași muncă sau pentru o muncă de aceeași valoare. La baza interzicerii acestei discriminări stă art. 157 TFUE, prevedere obligatorie pentru toate statele membre UE. O implementare incompletă a acestui principiu poate lăsa loc de interpretări în defavoarea angajaților, astfel cum este cazul Poloniei și al angajaților dintr-un grup de societăți.

**Cuvinte cheie:** discriminare, remunerație, dreptul muncii, Polonia, UE.

The foundation of the EU regulations banning discrimination in employment is the Treaty of Rome of 1957. Article 119 (currently article 157 TFEU) introduced the principle of equal pay for men and women for equal work. Admittedly, even then the principle of equal treatment was considered as one of the basic principles of Community law, but with the exception of the prohibition of sex discrimination, it was not regulated in detail. EU actions to fight against racial discrimination, ethnic discrimination, due to age, religion, disability or sexual orientation discrimination have become noticeable in the last twenty years. Having joined the European Union, Poland was obligated to adapt its national legislation to the anti-discrimination standards contained in the EU directives.<sup>1</sup> As a result of the implementation of anti-discrimination provisions into the Labour Code, a clear prohibition of discrimination in employment was introduced. With time, a new chapter - IIa entitled Equal Treatment in Employment appeared in the Labour Code. Under so-called The Equality Law, clarified, among others concepts of direct and indirect discrimination or unequal treatment. The evolution of anti-discrimination regulations in Polish labour law has been relatively long, but the current regulations are quite extensive, and the introduced amendments have led to almost full compliance of Polish anti-discrimination laws with EU standards.<sup>2</sup>

At the outset, it should be noted that the structure of anti-discrimination provisions contained in the Polish Labour Code are specific and may be misleading. The legislature interchangeably uses the terms of discrimination and equal treatment, which may suggest their identity. However, the principle of discrimination should be distinguished from the principle of equal rights. The scope of the concepts of discrimination and equal rights are not included in themselves, and even more so, they are not identical, at most it can be said that their ranges overlap.<sup>3</sup> Equal treatment means a situation where all legal entities characterized by a given significant feature are treated equally, according to the same measure. Discrimination, on the other hand, is worse treatment of an individual or a group of persons with respect to the whole, while the element that differentiates both concepts is a specific criterion, usually age, gender, sexual orientation, religion, nationality or political beliefs. The application of such differentiation criteria is a particularly reprehensible and socially harmful manifestation of

<sup>1</sup> S. Stala, *Zakaz dyskryminacji w zatrudnieniu w świetle judykatury* [Prohibition of discrimination in employment in the light of judicature] (Cracow: Jagiellonian University, 2019), 2.

<sup>2</sup> M. Kuba, *Zakaz dyskryminacji w zatrudnieniu pracowników* [Prohibition of discrimination in employment] (Warsaw: WoltersKluwer, 2017), 51-63.

<sup>3</sup> P. Korus, *Kodeks pracy. Komentarz 2018* [Labour Code. Commentary 2018], ed. A. Sobczyk (Warsaw: C.H.Beck, 2018), 69-70.

inequality of treatment.<sup>4</sup>As Supreme Court explains in the judgement of 9 January 2007, discrimination, in contrast to "ordinary" unequal treatment, means worse treatment of the employee due to employee's characteristic or feature, referred to in the Labour Code as the cause of discrimination, in particular on the basis of sex, age, disability, race, nationality, political or religious beliefs, and trade union membership. As can be seen from the above, not all different treatments of an employee as compared to other employees constitutes discrimination, but only that which is harmful from the point of view of justice.

The indicated concept partially overlaps with the rule of equal rights contained in article 32 of the Constitution of the Republic of Poland, which proclaims the equality of everyone before the law and in treatment by public authorities, and prohibits discrimination in political, social or economic life for any reason. It does not mean, however, that the law is to be the same for everyone. The Constitutional Tribunal emphasizes that equality of rights is applied fairly, when it assumes an equal treatment of the same subjects in terms of relative characteristics to the content of a given regulation, and allows accordingly different treatment of entities that differ in terms of such features. The jurisprudence shows that an employer, when granting specific rights to individuals, cannot freely define the circle of entitled persons, but must grant them to all entities characterized by a given feature.<sup>5</sup>Such an employer cannot be accused of discrimination, because he is a contractor of obligations imposed on him by the state.

The legal situation of employees, including the amount of remuneration, can be differentiated due to the determination of the disparity resulting from their personal characteristics and differences in the performance of work. Such differentiation is justified when it is in a proper relation to the diversity existing between specific groups. As the Supreme Court argues in the judgement of 14 May 2014, the anti-discrimination provisions of the Labour Code, likewise Community law, do not contain a standard from which it would appear that all employees of a given employer should be treated equally. Workers in a comparable situation should be treated equally. Court of Justice of European Union stands in a similar position, according to which the principle of equality and non-discrimination in employment means that workers who are alike should be treated alike. The jurisprudence emphasizes that diversification in employment is not only possible but also indicated when it is based on objective premises, that is fully justified legal criteria, such as the type of work, working conditions, qualifications or professional experience. We face discrimination when the reason for differentiating employee status determines a legally prohibited criterion.

An extension of the general prohibition of discrimination is the principle of equal treatment in remuneration, according to which employees have the right to equal remuneration for equal work. The provision contains a very broad definition of remuneration, which applies only to anti-discrimination regulations. Within the meaning of this principle, the remuneration covers all components of salary, regardless of their name and character, as well as other work-related benefits, granted to employees in a form other than financial.<sup>6</sup>Therefore, when determining whether in a given workplace occurs pay discrimination, it is necessary to take into account the circumstances when some employees use additional non-cash, property or service benefits, e.g. a flat, car or business phone, medical care, etc., which other employees are not entitled to. Within the meaning of Polish anti-discrimination regulations, the prize is also recognized as remuneration. As can be seen from the above, the remuneration in the light of anti-discrimination provisions includes not only mandatory salary but also some optional benefits, which distinguishes them from the concept of remuneration for work in its strict sense.<sup>7</sup>Polish definition of remuneration is based on the definition contained in article 157

<sup>4</sup> T. Niedziński, *Dyskryminacja w zatrudnieniu* [Discrimination in employment] (Warsaw: Aspra, 2018), 52.

<sup>5</sup> *Ibidem*, 37.

<sup>6</sup> K. Kędziora, K. Śmieszek, *Dyskryminacja i mobbing w zatrudnieniu* [Discrimination and mobbing in employment] (Warsaw: C. H. Beck, 2010), 70.

<sup>7</sup> S. Stala, *op. cit.*

TFEU, according to which the remuneration includes basic salary and allowances of all kinds, bonuses, additional benefits paid to the employee in cash or made available to him in kind. The wide scope of definitions confirms the extensive jurisprudence of the Court of Justice of European Union, according to which the remuneration is also severance payment (Case C-33/89), the allowance for overtime work (Case C-300/06), reimbursement of training costs (Case C-12/81) or special bonuses paid by the employer on holidays (Case C-333/97).

Polish labour law provides employees the right of equal remuneration for equal work or for work of equal value. The terms of equal work and work of the equal value should not be equated. The labour law doctrine assumed that the equal work is the same in terms of type, qualifications necessary for its performance, the conditions in which it is provided, as well as quantity and quality. In the light of Polish labour law work of equal value is that which requires from employees comparable professional qualifications, confirmed by documents provided for in separate regulations or professional practice and experience, as well as comparable responsibility and effort. Professional qualifications and experience must remain in relation to the work provided. Responsibility should be understood as the negative consequences that an employee may encounter in the case of improper performance of duties, such as a threat to life and health or property, criminal, disciplinary or compensatory sanctions.<sup>8</sup> It is also important if the employee is only liable for his own actions or omissions, or due to supervision over subordinates, which increases the scope of its responsibility. The premise of work evaluation is also the accompanying effort, both mental and physical. At the same time, it is a matter of objectively measured effort - the expenditure of physical or psychical energy - necessary to perform a given work, not the subjective severity of work, the feeling of which depend on the psychical or physical strength of the employee. For these criteria to be considered comparable, they should be analyzed together.

In the judgement of 28 February 2013 in Case C- 417/11, *Margaret Kenny and others v. Minister for Justice, Equality and Law Reform, Minister for Finance, Commissioner of An Garda Síochána* the European Court of Justice held that, in order to determine whether employees perform the same work or work to which equal value can be attributed, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation. According to the European Court of Justice views, the objective criteria for differentiating remuneration are also legitimate needs of the employer such as: increased availability, mobility, ability to adapt to job requirements in different places and irregular working hours, some market factors, e.g. situation on the labour market requiring higher payment for work for which there is demand. The Supreme Court similarly emphasized that it is possible to treat workers differently in terms of employment, including remuneration, but this must result of a justified need for which such a differentiation is allowed. In the judgment of 17 October 1989 in Case C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening*, the Court of Justice recognized that rewarding the experience gained, which usually enables the employee to perform his duties better, is the legitimate aim of the remuneration policy.

In the Court of Justice's assessment, only employees in the same, similar or comparable situation can perform identical, comparable or equally valuable work. This does not mean, however, that it is only justified to make comparisons of the work provided by employees employed by the same employer. For the above to apply, the terms of remuneration of comparable workers employed by different employers must result from the same source of law. The Court allows the possibility of comparing remuneration by various employers while maintaining the abovementioned premises. The position of the Tribunal in the Polish reality should be referred in particular to employers who are internal organizational units of the same legal person.<sup>9</sup> In particular, it concerns the situation of entities

<sup>8</sup> P. Korus, ed. A Sobczyk, *op. cit.*, 80.

<sup>9</sup> M. Kuba, *op. cit.*, 68-69.

related to each other in financial and organizational terms, operating within the same capital group. It happens that employees employed by one of the employers are remunerated less favourably than employees providing work for the other employer from the same capital group. It is important that both of them perform the same type of work, in the same organizational conditions, often dealing with the same clients using the same tools.<sup>10</sup> In such a situation, payment disproportions should be assessed as unfair and unethical. Another legal problem is also the other external circumstances, which are not directly related to the conditions of work, and can be taken into account when determining remuneration for work, e.g. the cost of living in the place where the employer's head office is based or the company is located.

In the Polish labour law system, it is assumed that the employer is obliged to treat his employees equally. Therefore, the comparison of the legal situation of employees can only be made within the same employer. The employee cannot, in order to substantiate the allegation of discrimination, claim that he is paid less favourably than employees providing the same or similar type of work in a competitive company. The employer is not obliged to take into account the remuneration rates applicable to the competition. However, as already stated, it is not uncommon that the extent of the employer's legal liability is abused. This problem is also recognized by Polish jurisprudence. The Supreme Court assumes in the judgement of 18 September 2014, that in the case of abuse by the parent company of the legal personality structure, the assessment of violation of the principle of equal treatment in employment may take place by comparing the situation of the employee of the subsidiary which is the employer with the situation of the employees of the parent company.

The problem described above was also tried by the Committee of Independent Experts of the Council of Europe, stating that national legislation cannot wrongly restrict the field of employment comparison by limiting it to only the same enterprise. This view is shared by The Committee of Experts on the Application of Conventions and Recommendations of ILO, according to which the principle of equal remuneration for work of equal value implies the possibility and need to compare differentiated work for different employers. These assumptions seem right, otherwise protection against pay discrimination would not be effective.<sup>11</sup>

Responsibility for violation of provisions prohibiting discrimination in employment is borne by the employer. Such an arrangement of legal liability is fully justified, because the employing entity has a real impact on the situation of employees and it should ensure a work environment free from discrimination. Violation of this obligation may be the basis for immediate termination of the employment contract by the employee. However, regardless of whether the discriminated employee decides to take advantage of this possibility, he is entitled to compensation in the amount not lower than the minimum remuneration for work.<sup>12</sup> Formulation above, without specifying the upper limit, assumes a differentiation in the amount of compensation depending on the circumstances of the particular case. The judicature claims that the compensation should be effective, proportionate and deterrents. It should compensate for the damage suffered by the employee, while maintaining an appropriate balance between compensation and breach of the employer's obligation to treat employees equally. Compensation should also be preventive.

A person interested in claiming compensation from an employer is in a rather unusual procedural situation. The legislator decided about a special distribution of the burden of proof, consisting in the fact that initially it rests on the worker itself, and then it is passed on the employer. This principle was introduced into European law by jurisprudence. In the judgment given in Case C-109/881, after the plaintiff claim that the average wage of a much larger number of women employed by the defendant employer is lower than employed men, the EU judicial authority

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<sup>10</sup> *Ibidem*.

<sup>11</sup> S. Stala, *op. cit.*

<sup>12</sup> M. Kuba, *op. cit.*, 195.

has demanded from the employer's defendant to prove that the remuneration method, applied to all employees, does not cause discriminatory consequences. Above principle contained in the legal maxim *Actori incumbit onus probandi*, was introduced into the European labour law in the directives 2000/43/EC and 2000/78/EC, and then implemented into national regulations. Therefore, to activate the burden of proof mechanism, an employee who was discriminated in his opinion, should indicate the reason for discrimination and circumstances that prove unequal treatment for this reason.<sup>13</sup> Only if they are probable, the burden of proof passes to the employer, who should prove that if unequal treatment actually occurred, was objectively justified and did not constitute discrimination.

It must again be pointed out that the anti-discrimination provisions contained in the Polish Labour Code, contrary to their literal wording, are only about discrimination and not about equal treatment. The basis for seeking compensation is therefore a violation of the prohibition of discrimination, not a violation of the principle of equal treatment of employees. The provisions of the Labour Code relating to the prohibition of discrimination do not apply in cases of unequal treatment not caused by reason recognized as the basis for discrimination. The violation of the principle of equal rights by itself does not result in the employer's liability for damages, but the possibility for the employee receiving inferior benefits to supplement them to a higher level. Of course, cases of unequal rights and discrimination can overlap. In this situation, the employee may claim supplementary claims for violation of the principle of equal rights and compensation due to violation of the prohibition of discrimination.<sup>14</sup>

Employee can exercise the rights due to the employer's breach of anti-discrimination provisions and it may not be the basis for unfavourable treatment of the employee or result in any negative consequences for the employee. Reaching an employee who is a victim of discrimination for his or her rights cannot, in particular, be the reason justifying the employer's termination of the employment relationship. This regulation is important for employees who are generally afraid of the consequences of taken actions. Cited censure of victimization also applies to an employee who has provided support to a worker who is a victim of discrimination in any form. In principle, this solution should encourage employees to provide assistance to people experiencing discrimination in employment.<sup>15</sup>

Discrimination is one of the most contemporary issues of great social significance. Most judgments of Polish courts, which concern the violation of the prohibition of discrimination, concern the area of employment. In practice, most conflict situations arise in the context of remuneration for work. This is the area of employment most susceptible to the occurrence of discriminatory practices. Despite the prohibition of discrimination in Labour Code, there are still many prejudices that affect behaviour and decisions taken in work environment. It is therefore important to provide appropriate tools to prevent discrimination and counteract its consequences. Polish legislator presents an open catalogue of discrimination's grounds and the right to compensation claims that an employee is entitled to for an unlawful violation of the principle of equal treatment in employment. It should ensure broad and effective protection against abuse. However, the Polish anti-discrimination provisions contained in the Labour Code do not fully comply with the recommendations included in Community directives. The national jurisprudence, although more and more extensive, in relation to certain issues or areas of life, also does not respond to the interpretation doubts arising in the application of anti-discrimination provisions in practice. Therefore, the recommended and helpful source of knowledge should be the jurisprudence of international courts, which sets an extremely high level of protection against unequal treatment, is a guide for interpreting provisions prohibiting discrimination, and its knowledge seems indispensable for the correct application of national solutions.<sup>16</sup>

<sup>13</sup> A. M. Świątkowski, *Prawopraczy Unii Europejskiej* [Laborlaw of the European Union] (Warsaw: C.H. Beck, 2015), 106.

<sup>14</sup> A. Sobczyk, ed. A. Sobczyk, *op. cit.*, 15.

<sup>15</sup> M. Kuba, *op. cit.*, 211.

<sup>16</sup> S. Stala, *op. cit.*