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Prohibition of Discrimination in Wages

1 INTRODUCTION

The subject stated in the title is one of the most controversial ones not only in labor law jurisprudence and practice, but also in human resources management. It requires to answer the question of what "discrimination" means as opposed to objectively justified differentiation of employees" pay. Such differentiation often faces resistance, in particular of those who are paid less and employees" representatives fighting for egalitarian treatment. On the other hand, one must consider the term "pay for work", which is hard to define for in majority of organizations it does not relate to only a basic pay, but also to other benefits, which make employees want to work for a particular employer. This study is an attempt to provide answers to certain problems related to the above issue. This work draws on decisions of the Polish and European courts, literature and practical expertise of the author, who participated in setting forth the principles of pay in many organizations.

2 PROHIBITION OF DISCRIMINATION IN PAY FOR WORK IN THE LIGHT OF INTERNATIONAL AND EUROPEAN REGULATIONS

Prohibition of discrimination, especially in respect of pay has been one of the major areas of interest of the International Labor Organization – further:

ILO[1]. As early as in1951 the organization adopted the Convention No. 100 concerning equal pay for men and women for work of equal value[2], supplemented by the Recommendation No. 90 of the same title. These documents gave, for the first time, a very broad definition of the term "pay", which means ordinary, basic or minimum wages or salary and any other consideration, paid, directly or indirectly, in cash or in kind, by an employer to an employee in respect of his/her employment. Emphasizing the necessity of applying to all employees the principle of equal pay for working men and women for the work of equal value, they stated that it is not contradictory with this principle of differentiating pay rates which reflect, irrespective of gender, differences resulting from objective valuation of performed works.

The Convention No. 111 of 1958 concerning discrimination in employment and occupational activity[3], supplemented by the Recommendation No. 111 of the same title, which prohibits any differentiation, resulting in deprivation or infringement of equal opportunities or treatment in employment and occupational activity, with the exception of differentiation, exclusion or preferential treatment based on qualifications required for a particular job.

The activities of the Council of Europe relied on the standards adopted within ILO[4]. The prohibition of discrimination in pay can be found in its fundamental legal acts concerning social problems, and in particular in Art. 4 section 3 of the European Social Charter[5] and in the Revised European Social Charter. In accordance with these documents, member states undertake to recognize the right of employees, men and women, to equal pay for work of equal value[6].

The highest importance to the problem was attached by the European Community and later the European Union. Art. 119 of the Treaty of Rome obligated member states to secure implementation of the principle of equal treatment of male and female employees for the same work or for work of equal value and it provided a definition of pay[7].

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1 For more on the ILO's activities in this field see: N. Valticos, *Droit international du travail*, Dalioz, Paris 1970, pp. 466 et seq., and in Polish literature: A.M. Świątkowski, *Międzynarodowe prawo pracy*, Book I, Vol. 2, Wydawnictwo C.H. Beck, Warsaw 2008, pp. 180 et seq.

2 This Convention has been ratified by Poland and published in the Journal of Laws of 1955, No. 38, item 238.

3 This Convention has been ratified by Poland and published in Journal of Laws of 1961, No. 42, item 218.

4 For more see: N. Valticos, op. cit., pp. 159 et seq.

5 Ratified by Poland and published in the Journal of Laws of 1999, No. 8, item 67.

6 For more see: A.M. Świątkowski, *Karta praw społecznych Rady Europy*, Wydawnictwo C.H. Beck, Warsaw 2006, pp. 144 et seq.

7 M. Wandzel, *Równe traktowanie mężczyzn i kobiet. Prawo socjalne Unii Europejskiej i Rady Europy*, Universitas, Cracow 2003.

In the famous case C 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aerienne Sabena,* the ECJ stated that the principle of equal treatment of men and women set forth in art. 119 of the Treaty constitutes one of the fundamental principles of the Community. It can be invoked before national courts, which are obligated to secure protection of rights guaranteed to individuals by that provision, in particular against discrimination originating from laws or collective bargains and when men and women do not receive equal pay for equal work performed in the same organization, whether private or public.

That principle was elaborated in more detail in the Directive 75/117 of 10.02.1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women[8]. In accordance with that document the principle of equal pay means that in seting forth each element and term of pay, for equal work, or for work of equal value, any discrimination in respect of gender should be eliminated. In particular, where for determination of pay an occupational classification is applied, it should be based on the criteria common for both men and women, and set forth in the manner preventing discrimination in respect of sex[9]. The above act has been supplemented by the Directive 97/80 of 15.12.1997 on the burden of proof in cases of discrimination based on sex[10]. Both acts have been replaced by the Directive 2006/54 of 05.07.2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[11].

Similar regulations concerning prohibition of discrimination in pay can be found in the Directives:

- No. 2000/43 of 29.06.2000 implementing the principle of equal treatment of persons irrespective of racial or ethnic origin[12];
- No. 2000/78 of 27.11.2000 establishing a general framework for equal treatment in employment and occupation[13];
- No. 97/81 of 15.12.1997 concerning the Framework for part-time occupation[14];

8 OJ L 45, p. 19.

9 L'egalité des chances entre les femmes et les hommes Europe Sociale 3/1991.

10 OJ L 14, p. 6.

11 OJ L 204, p. 23.

12 OJ L 180, p. 22.

13 OJ L 303, p. 16.

14 OJ L 14, p. 9.

- No. 99/70 of 28.06.1999 concerning the Framework for workers employed for specified period of time[15].

3 THE CONCEPT OF EQUALITY AND DISCRIMINATION

The analysis of Polish law one should start, in my opinion, with the question of what is the meaning of the concept of discrimination.

According to the Universal Dictionary of the Polish Language[16], discrimination means the impairment or the persecution of individuals or social groups due to their origin, social class, nationality, race, religion etc. According to A. Kisielewicz "discrimination means unjustified inequality (...) one may refer to equality or inequality of any person when comparing his/her situation with others. Discriminated person is the one who is treated worse, less advantageously than other persons, without objective justified reasons"[17]. These views are far from the concept of absolute formal equality. They suggest, however, the necessity of objective justification of existing differentiation. Also in the opinion of the Supreme Court, the infringement of the principle of equal treatment of workers (Art. 11 section 2 of the Labor Code and the principle of non-discrimination in employment (Art. 11 section 3)) may occur only when the differentiation of workers results from a prohibited criterion applied by the employer, that is when differentiation of occupational rights is not based on the scope of their duties, performance or qualifications[18].

In the statement of reasons the Supreme Court held that provisions of art. 11 section 2 of the Labor Code allow for differentiation of workers, who either perform different duties or the same duties but not in the same way[19]. Even equal performance of the same duties is not equivalent to equal right to promotion. Such right depends on the length of service and qualifications. It has been recognized as "the right of any person" in art. 7 letter c of

[15] OJ L 175, p. 43.

[16] S. Dubisz (ed.), Vol. 1, WN PWN, Warsaw 2006, p. 747

[17] A. Kisielewicz, Gloss to SAC [NSA] judgments of 24.01.03–II SA/Łd 1887/99 and of 27.06.02–SA/Bk 230/02, OSP 2003, No. 12, item 155.

[18] Supreme Court judgement of 05.10.2007. II PK 14/07–OSNP 2008, No. 21–22, item 311.

[19] I PKN 182/01 OSNAPiUS 2003, No. 23, item 571, p. 1083.

the International Charter of Economic, Social and Cultural Rights of 1996, ratified by the Republic of Poland in 1997[20]. Such interpretation complies with the judgments of the Constitutional Court[21]. Thus differentiation of legal position of workers is admissible in respect to particular circumstances resulting from their personal attributes and differences in performance of work[22]. Therefore one can agree with the opinion Art. 11 sec. 2 do not exclude differentiation of occupational rights and obligations, on the contrary, implies it[23].

The Supreme Court defined discrimination in a judgment of 10.09.1997[24], as an illegal depravation or limitation of rights related to employment or unequal treatment of workers due to their sex, age, disability, nationality, race, beliefs, in particular political or religious, and trade union membership, as well as granting due to such reasons of limited rights as compared to those enjoyed by other workers being in equal factual and legal situation.

In conclusion, attention should be drawn to proportionality of differentiation, where it is not determined in any regulation or in case-law. What concerns me most is this: although an employee performs work of just slightly lower value, such a difference may suffice to pay considerably less. I agree in this respect with the opinion of M. Wandzel, who opts for interpretation taking into account proportionality. The above case may involve discrimination, which should be counteracted by law[25].

4. PROHIBITION OF DISCRIMINATION IN PAY FOR WORK IN POLISH LEGISLATION

European regulations have been introduced into the Polish legal system by the Act of 14.11.2003 which modified Chapter IIa of Title I of the Labor

[20] The Journal of Laws of 1977 No. 38, item 1.

[21] For example K 3/94, OTK 1995, p. 142.

[22] For example K 4/93, OTK 1994, pp. 317–318.

[23] J. Iwulski, W. Sanetra, *Kodeks pracy, Komentarz*, Lexis Nexis, Warsaw 1999, p. 51.

[24] I PKN 246/97 OSNAPiUS 1998, No. 12, item 260.

[25] See: M. Wandzel, *Wynagrodzenie proporcjonalne do wartości pracy jako realizacja zasady równego wynagradzania pracowników za taką samą pracę lub pracę o takiej samej wartości w prawie wspólnotowym*, in: Studia z zakresu prawa pracy i polityki społecznej, Liber Amicorum prof. A.M. Świątkowski, Uniwersytet Jagielloński, Cracow 2009, pp. 585 et seq.

Code[26] renamed as "Equal treatment in employment". In accordance with Art. 18(3c) § 1 Labor Code employees have the right to equal pay for equal work or for work of equal value. And in accordance with § 2 of that article a work of equal value requires comparable professional qualifications, certified by documents or practice and professional expertise, comparable liability and effort.

Whilst Art. 18(3b) § 1 states that the differentiation by an employer between the of workers which results in unfavorable pay for work or other terms of employment is in violation of the principle of equal treatment, unless the employer proves to have applied objective measures. One should also remember that discrimination may be of indirect nature, where it may result, unwillingly, from apparently neutral behavior.

5 PAY FOR WORK IN REGULATIONS CONCERNING NON-DISCRIMINATION

According to art. 18(3c) § 3 LC, which relies on the European legislation, the term "pay for work" is understood as including all elements of pay, irrespective of their name and character, as well as other benefits in cash or in other forms. In addition, in the concept of prohibition of indirect discrimination pay includes what the employee might have received. The concept appears in many ECJ judgments which define pay for example as:

- free of charge public transportation (case C 12/81 *Garland*);
- benefits from occupational pension scheme (case C 170/84 *Bilka*);
- benefits from organization social security schemes (case C 262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*);
- pensions received by office workers if dependent directly on the period of service if the amount due becomes part of a salary (case C 46/07 *European Commission v. Republic of Italy*);
- severance pay due to termination of employment (case C 33/89 *Maria Kowalska v. Freie und Hansestadt Hamburg*);

[26] Journal of Laws No. 213, item 2081.

- hourly rate for work in respect of full-time and part-time employment contracts (case C 96/80 *J.P Jenkins v. Kingsgate Clothing Production Ltd*);
- family pensions from the mandatory occupational pension scheme (case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*).

In *Lewark,* C 457/93, the Court stated that the principle of equal pay excludes national legislation, which, not being sufficiently justified by social policy, limits the pay for the periods of training of worker council members employed on a part-time basis, although the training was carried out on a full-time basis.

On the other hand, pension benefits included in the social security system (case C 80/70 *Defrenne I*) have not been recognized as remuneration. Additionally ECJ judges hold that the differentiation of certain benefits is not discriminatory. Thus, in accordance with the judgment C 399/92 (*Helmig and Schmidt*) art. 119 (now 141) TEC and the Directive 75/117 do not prohibit collective bargains limiting pay for overtime work only to such cases when working time, determined for full-time employees, is exceeded. In this context, in my opinion, introduction in art. 151 § 5of the Labor Code of the possibility of different determination of additional pay for overtime work for persons employed on the basis of part-time employment contracts as compared to the full time employees is doubtful[27].

Important elements of pay differentiation are pregnancy and maternity. That matter was addressed in the case C 218/98 *Abdoula:* a one-time benefit paid to a woman taking maternity leave, although an element of pay, is aimed at compensating obstacles in professional career of women and therefore cannot be interpreted as discriminatory to men.

As far as other causes justifying differentiation of pay are concerned, the ECJ recognized "mobility" as one of them. The term should be understood as flexibility in adaptation to varying working hours and places of work, if it is important for performance of specific tasks assigned to an employee. A similar approach applies to justification based on a degree of "professional training". In such a case the employer must prove that the required training is important for the performance of specific tasks assigned to employees (case C 109/88 *Danfoss*).

[27] K. Walczak, *Zakaz dyskryminacji w wynagrodzeniu w świetle przepisów prawa i praktyka jego wdrażania*, Studia z zakresu prawa pracy i polityki społecznej, 2005, p. 76.

Job seniority, despite certain doubts, is an acceptable reason for the differentiation in pay. However, as justly stated by jurisprudence, it is not determined what length of service should be taken into account. In most cases it is service in a company, in some cases, an industry[28], or, like in the public sector, anywhere. Which of them is relevant in a dispute is decided by court *in casu*.

The fact that the provisions of art. 18 sec. 3b § 2 item 2 have been amended proves that that the matter is very controversial. Until the end of 2008 the length of service was the base for general differentiation of employees" rights, whereas now it can differentiate the principles of employees" pay, justifying different treatment of employees due to their age.

6
REFERENCE GROUPS IN REGULATIONS CONCERNING NON-DISCRIMINATION IN PAY

Having defined the meaning of pay, the fundamental question arises who can be compared with whom and when. The ECJ established that the obligation to ensure protection concerns employees of the opposite sex performing work in the same plant or service organization – both private and public. Thus, the ECJ limited the possibility of comparing the performance of work by employees only to particular situations within the same enterprise (plant).

However, if differentiation takes place within the same capital group where constitutive units cannot pursue their independent policy of employment and granting benefits, then, in my opinion, the prohibition of non-discrimination should be considered in a wider perspective.

As far as comparison of pay between the industries is concerned certain doubts may arise in respect of the Remuneration of Persons Managing Certain Legal Entities Act of 2000[29] and the Negotiation System in Determination of Increase of the Average Pay in Enterprises Act of 1994[30], which

[28] K. Walczak, *Zasady wynagradzania w branży energetycznej w świetle układów zbiorowych pracy. Czy dają one podstawę do motywowania pracowników*?, Studia z zakresu prawa pracy i polityki społecznej (yearbook) 2009, Liber Amicorum prof. A.M. Świątkowskiego, pp. 575 et seq.

[29] Journal of Laws No. 26, item 306 as amended.

[30] Journal of Laws of 1995, No. 1, item 2 as amended.

without justification, limit the benefits for employees in the public sector[31] in comparison with their counterparts in the private sector[32].

In *Macarthys Ltd. v. Wendy Smith* (case C 129/79) the ECJ held that work does not have to be performed at the same time to be comparable, although considerable passage of time may be a differentiation factor for possible change in the economic situation.

The ECJ seems to accept justification of the existing differences in pay by an attempt to attract candidates to less popular professions. Should this be the case it is necessary for a national court to examine whether the increase was justified and proportionate (case C 12/92 *Enderby*). However, in this context, the the Polish Supreme Court found in 200733 that an old and new employee deserve the same pay if they have equal qualifications. Employers seeking to attract new employees with higher pay must not forget about the principle of equal treatment.

Differentiation in access to certain benefits is also admissible in respect of various groups of employees. For example, in 2001 the Supreme Court stated that denying managers additional compensation for termination of employment, when such compensation was foreseen in a social protection scheme, or an employee and trade union package, is not a breach of the principle of equality (Art. 11 section 2 of the Labor Code) or the prohibition of discrimination in employment (Art. 11 section 3).

Differentiation in pay for particular work cannot be justified according to the time of payment in case of payment for the result. Therefore, as the Supreme Court established in 1996[34], not giving to a former employee of consideration, being part of the pay, infringes on the principles of 1) paying for the work done performed (Art. 80 of the Labor Code), 2) relating pay to the quantity and quality of work (art. 78 of the Labor Code) and 3) equal treatment of employees (Art. 11 sec. 2 of the Labor Code). The principle of equal treatment in employment should result in the increased considerations for employees treated less favorably. There is no provision which deprives some employees of certain benefits and thus favors others. Pursuant to Art. 9 § 4 of the Labor Code the employee treated less favorably may request the rights granted in the collective labor agreement to

31 K. Walczak, *Komin a sprawa polska w kontekście zasad sprawiedliwości społecznej*, Monitor Prawa Pracy, 2005, No. 8, pp. 207 et seq.

32 At the time of writing there have been works in progress concerning revoking or amendment of these provisions.

33 I PK 242/06 MoPr – *Z sali sądowej*, 2007, No. 7, p. 336.

34 I PRN 94/96 OSNAPiUS 1997, No. 8, item 131.

employees treated more favorably. This does not mean that the employees treated more favorably are automatically deprived of these rights[35].

7. REGIONALIZATION OF THE PAY

In my opinion, admissibility of differentiation of pay concerning the place of performance should be separated at least in connection with different costs of living for the reason of "social sensitivity"[36]. This issue is not regulated in the European nor Polish legislation, and therefore such practices should be analyzed on the grounds of general labor law. Thus, Art. 78 of the Labor Code establishes in section 1 that the pay for work should be determined in a manner corresponding in particular with the type of work and qualifications required for its performance, as well as the quantity and quality of work. A collective labor agreement or a salary regulation must determine – pursuant to Art. 78 § 2 of the Labor Code – the amount and the principles of fixing pay rates for work of a particular type or on a particular position as well as the principles of fixing additional elements of pay in respect of performance of specific work.

It is apparent that the general principles of labor law do not authorize directly and do not prohibit applying different principles of pay based on the costs of living, because under the law they should correspond with the type of work performed and the qualifications required for its performance. This means that the list of calculation principles established in the Code remains open. A very interesting analysis concerning regionalization of pay has been made by M. Wandzel in his article "Equal remuneration of employees irrespective of the place of performance"[37]. He describes cases where the European Union law allows an extra pay to cover the differences in the costs of living in different locations . He names the following economic factors: the level of economic development in the region in which the work is performed, unemployment rate, competition on the labor market, the differences in the costs of living and the

[35] Supreme Court judgment of 12.09.2006, I PK 89/06 MoPr 2007, No. 2, p. 88.

[36] Similar view of A. Sobczyk, *Z problematyki równego traktowania w sferze wynagrodzeń*, *Studia z zakresu prawa pracy i polityki społecznej*. 2006, p. 77.

[37] Labor Law Monitor 11/2006.

purchasing power of the currency. Speaking of the latter, regulations on remuneration of the European Community servants prove that the differences in the costs of living and in the purchasing power of the currency pay the most. The Occupational Regulation concerning the servants of the European Communities (Regulation 1962/31 as amended) states in Art. 64 that "the servant's remuneration amount (...) shall be adjusted according to the coefficient which, depending on the conditions of living in various places of employment, shall be higher, lower or equal 100%". In accordance with the second paragraph of art. 64 such coefficients are determined by the Council upon the motion of the Commission. And thus, the Council Regulation (EC, Euratom) no. 1067/2006 of 27.06.2006 adjusting correction coefficients applicable to remuneration and pensions of servants and other employees of the European Communities sets forth such coefficient for Lithuania at 80.01 effective as of 1 January 2006. Whereas the Council Regulation No. 2300/94 sets forth such coefficient for the United Kingdom effective from 01.07.1993 at 107,03. In practice, servants classified to the same group and of the same rank, working at different locations may receive different remuneration because of different purchasing power of respective currencies.

Examples of regionalization can be found in Polish law as well. The Ordinance of the Minister of Internal Affairs and Administration of 06.12.2001 on detailed principles of receiving and the amount of the pay of policemen established a "capital city allowance" for policemen employed in Warsaw[38]. Its introduction was justified by the special features of the Warsaw labor market and higher costs of living as compared to other regions of Poland.

Such practice was found to be justified by the Supreme Court in a judgment of 06.03.2003[39]. It expanded the criteria of differentiation of pay for legal advisors, going beyond the quality and quantity of work, to include market factors such as "the supply of legal services on the local labor market". To do it on a larger scale, one needs to analyze different remuneration markets which can be based on pay reports.

[38] Journal of Laws No. 152 item 1732.

[39] I PK 171/02, OSNP 2004 No. 15, item 258.

8
EVIDENCE

In matters of discrimination European law, and subsequently Polish law, transferred the burden of proof from the employee (plaintiff) to the employer (defendant), although it does not mean that the former is absolutely passive. The ECJ applies the above rule to remuneration. For example, in the case C 109/88 *Danfoss*, the Court established that when the remuneration system is not transparent obstructing identification of the criteria for differentiation of pay, then the burden of proving the absence of discrimination is on the employer. The employee must only demonstrate – on a relatively large sample – that the average pay for employees of the same sex is lower than that of the employees of the opposite sex.

Similarly, in the case C 236/98 *Jamstalldhetsombudsmannen*, the Court held that if the difference in pay between two comparable groups exists and if statistical data indicate that in the group with lesser pay the percentage of women is considerably higher, the employer has to justify the differentiation by objective reasons. That rule was confirmed by the ECJ judgment (C 400/93 *Royal Copenhagen*): To determine whether work performed by a particular persons is "equal" or "of the equal value" it is necessary to establish – by taking into consideration a number of factors, such as the type of the work, training requirements, conditions of work – whether such persons were in a comparable situation.

In the case C 309/97 *Wiener Gebietskrankenkasse* the Court established that persons with totally different professional qualifications and competences, designated to perform different tasks or duties, cannot be in a comparable situation. Therefore even if the same duties are performed through a relatively long period of time but on a different basis the concept of equal work within the meaning of Art. 141 of the ECT does not apply[40].

The above judgments indicate that the employer may relieve itself of the charges of discrimination upon proof that objective criteria for determination of the principles of remuneration were applied. Such proof requires to compare the value of different positions[41]. Comparison could demonstrate

[40] The case was about performance of work of psychotherapists by psychologist and general practitioners.

[41] For more see: K. Walczak, *Wartościowanie stanowisk pracy ustawowym obowiązkiem pracodawcy*, Monitor Prawa Pracy, 2004, No. 9, passim.

that the difference in remuneration is not the result of discrimination, but of a different value of such positions for the organization, which is justified under law[42].

Such view, however, is not prevailing. For example in the opinion of B. Wagner the weight of the criteria, referred to in Art. 78 of the Labor Code is not equal. Priority is given to the type of work and qualifications of the employee[43]. The Supreme Court is also ambiguous on the matter of valuation. In its judgment of 09.02.2007, it established that "Remuneration increase only for one employee, omitting those employed in different positions, does not mean unequal treatment in employment or a breach of prohibition of discrimination, if the employer has not introduced a system of work valuation. It may, however, be assessed according to the criteria of incompliance with the principles of social fairness"[44].

[42] It should be stressed that the practice of secrecy about remuneration, common in Poland, puts employers at a disadvantage. I do not refer to making public the remuneration of particular employees, but the lack of information, including absence of a pay scale etc. Such practice renders even the best carried valuation negligible. K. Walczak, *Regulamin wynagrodzeń a zasada tajności indywidualnego wynagrodzenia za pracę*, Monitor Prawa Pracy 2009, No. 3.

[43] B. Wagner, *Zasada równego traktowania i niedyskryminacji pracowników*, Praca i Zabezpieczenie Społeczne 2002, No. 3, p. 5.

[44] I PK 226/06, OSNAPiUS 2008, No. 11–12, item159.