

Equal Treatment in Employment. Wages and Seniority



Equal treatment in employment and the complementary prohibition of discrimination constitute basic principles of labor law (Art. 112 and 113 of the Labor Code (LC)). They are also part of the general constitutional principle of equality (Art. 33 of the Constitution). Developed and specified in international law¹ and EU law² they are fundamental directives for the employers on how to organize the employment conditions.

Generally speaking, the principle of equal treatment and non-discrimination in employment is understood as a prohibition of discriminatory treatment of groups of employees or individual employees identified on the basis of the discriminatory criteria, the non-exhaustive list in Art. 183a par. 1 of the LC. However, differentiation, on the basis of permissible criteria, of the rights of employees who fulfill equal duties equally also constitutes a breach of that principle.

The principle of equal treatment and non-discrimination does not exclude the differentiation of employee rights altogether since Art. 112 of the Labor Code directly provides for the differentiation of the legal

¹ See:

- The Universal Declaration of Human Rights of the UN of 1948, which in Art. 23, in particular, expressly stipulates the right to equal pay for equal work.
- Art. 7 of the International Covenant on Economic, Social and Cultural Rights of the UN of 1966, Journal of Laws of 1977 No. 38, item 169.
- Convention no. 100 of the International Labor Organization of 1951 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Journal of Laws of 1955, No. 38, item 238).

² See:

- Art. 119 of the Treaty of Rome providing for the principle of equal pay for male and female workers.
- Art. 235 of the Treaty of Rome stipulating the principle of equality.
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L No. 204,
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L No. 180,
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L No. 303.



situation of employees due to their personal features and performance of work.

Equal right to remuneration is defined in Art. 183c of the Code, according to which employees are entitled to equal pay for equal work or work of equal value. In the light of legal theory “equal” work means work identical as to its type, qualifications necessary to perform it, conditions under which it is performed, its amount and quality³. As to the criteria for the evaluation of equal value Art. 183c par. 3 of the Code mentions, comparable professional qualifications confirmed by documents required by law (e.g. certificates or diplomas confirming various levels of schooling, postgraduate studies, courses, etc., or comparable professional practice and experience. Notwithstanding the above, the scope of responsibility and the effort put in performance may serve as an auxiliary criterion.

The aforementioned legal regulations correspond to the provision of Art. 78 par. 1 of the Code which contains an non-exhaustive catalogue of guidelines for fixing salaries. It is addressed, on the one hand, to competent authorities or parties to collective labor agreements laying down the rules on remuneration, and on the other hand, to employers setting terms of remuneration for employees in employment agreements. According to the above provision, the basic criteria for the determination of the amount of remuneration include:

- 1) the type of work performed,
- 2) qualifications necessary to perform the work,
- 3) the amount and quality of work.

Although the said provision does not say it expressly, judging by the catalogue of criteria of how determine remuneration, closely and directly related to the amount and quality of work and the qualifications, it refers to remuneration in a narrow sense. Remuneration then is the part of employee’s economic benefits resulting from employment. It represents on the one hand, the value of work (e.g. salary expressed in currency) and, on the other hand, the effects of personal efforts (e.g. premiums, awards, commissions, etc.). Thus, it does not include the benefits, which usually depend on factors not related to the quality or amount of the work (e.g. additional medical insurance, gift vouchers and other non-pecuniary benefits) but are given on the basis of other criteria (e.g. seniority or the mere fact of being an

³ Cf. Z. Salwa (ed.), *Kodeks pracy. Komentarz*, Lexis Nexis, Warsaw 2004, p. 71; U. Jackowiak, *Kodeks pracy z komentarzem*, Fundacja Gospodarcza, Gdynia 2004, p. 48.



employee). This observation is important as the provisions on equal treatment in remuneration (Art. 183c par. 2 of the LC) define remuneration very broadly and include in it not only all its permanent components but also all other benefits related to work, i.e. generally speaking, all economic benefits, both pecuniary and non-pecuniary, obtained by an employee within the employment relationship. In this paper I will refer to remuneration in this broader meaning.

III

As mentioned above, Art. 78 of the Labor Code contains a catalogue of basic criteria for the determination, and thus differentiation, of individual pay for equal work or work of equal value. It refers, first of all, to the amount and quality of the work, its type and necessary qualifications. Obviously, it does not exhaust all possible criteria of differentiation, however, going beyond the list requires particular caution. Caution is advised due to the fact that the theory of labor law has never dealt with those issues in detail leaving the fundamental dilemmas without a thorough analysis. This applies to a fundamental question of practical importance: can the employer, in addition to the type of work, qualifications, quality and amount of work, take into account the employee's know-how, experience and skills, if currently they are not used but may be of significant value in future? For instance, can the knowledge of languages be a permissible differentiation criterion if in the context of future needs (e.g. planned export of products)? This is a question whether the employer can pay for a potential of knowledge and skills of an employee, which are currently not being used and which results in the differentiation of remuneration. What are the limits in motivating employees to continue their employment with the same employer.

Though legal theory does not elaborate on this issue, the decisions of the Supreme Court contain certain guidelines indicating, among other things, the need to closely relate remuneration to the work currently performed. Therefore, according to the thesis of the judgment of 5 October 2007, file ref. II PK 14/07, "the principle of equal treatment of employees (Art. 112 of the LC) and the principle of non-discrimination in employment (Art.113 of the LC) may be breached when an employer differentiates pay by applying an illegal criterion, in particular, when the



differentiation of employee rights is not based on the differences in their duties, performance or qualifications”⁴.

Of course, this does not lead to the general prohibition of differentiation in pay based on different criteria than those listed in Art. 78 par. 1 of the Labor Code⁵. First of all, such opinion is not justified by the content of this provision which contains only an exemplary list of criteria differentiating remuneration. Moreover, the list of differentiation criteria accepted both in practice and in court decisions as being objective and justified is already extensive and includes criteria which are not directly related to the quality or amount of the work done or qualifications.

The case-law of the Court of Justice of the European Union (ECJ) has established a number of specific criteria for justified differentiation of remuneration, including factors closely related to work (the quality of work or professional qualifications) and a number of other criteria including some objective factors of the employer’s economic environment (e.g. situation on the labor market demanding a higher pay or the place of performance)⁶. Market factor creating pressure for the differentiation of pay were acknowledged in the Supreme Court judgments issued prior to Poland’s accession to the European Union. An example may be the justification of a judgment dated 6 March 2003, case file ref. I PK 171/2002 (OSNP 2004 No. 15, item 258), which accepted, among other things, the differentiation of remuneration of legal advisers on the basis of the market criterion – the supply of legal services on the labor market.

Irrespective of the list of permissible objective reasons for the differentiation of remuneration, directly indicated in Art. 18 [3b] par. 1 *in fine*, the next paragraph i.e. par. 2 *in fine*, which contains a general and, basically, unconditional permission to differentiate remuneration due to seniority. Such permission obviously leads to a question whether seniority in itself, i.e. regardless of whether and to what an extent it affects the amount or quality of the work, can be treated as an objective criterion for the differentiation in pay.

The ECJ’s judgments acknowledged seniority as one of the most neutral and thus legally acceptable criteria for the differentiation of employee

⁴ The Supreme Court’s Judgements (OSNP) 2008 No. 21–22, item 311.

⁵ See: K. Walczak, *Zakaz dyskryminacji w wynagradzaniu w świetle przepisów prawa i praktyka jego wdrażania*, in: *Studia z Zakresu Prawa i Praktyki Społecznej*, Cracow 2005.

⁶ See: M. Wandzel *Równe wynagradzanie pracowników niezależnie od miejsca świadczenia pracy*, *Monitor Prawa Pracy* 2006, No. 11 and the judgment of the ETJ cited therein; A. Świątkowski, *Europejskie prawo socjalne*, Vol. II *Europejskie Prawo Pracy*, Dom Wydawniczy ABC, Warsaw 1999.



remuneration. This is because the length of service leads directly to the professional experience of employees which, in turn, translates into knowledge and skills ensuring work of better quality. This stance was partly modified by the ECJ in its judgment of 7 February 1991 issued in the *Nimz case*⁷, in which it stated that seniority as a criterion for the differentiation of remuneration could in some exceptional circumstances result in discrimination of employees as to their gender, since in the EU countries women enter the labor market usually later than men or give up their employment due to pregnancy and maternity⁸. In the ECJ's opinion, due to these circumstances, it must be acknowledged that seniority can be treated as an objective criterion for the differentiation of employee remuneration only in cases where professional experience is necessary to perform a given work. Consequently, the differentiation of remuneration with respect to seniority of employees performing the same work or work of similar value – if it results in the differentiation of remuneration due to a specific discriminatory criterion – will be permissible, provided that professional experience is objectively necessary for the performance of certain works.

Therefore, where greater professional experience is not necessary, the seniority criterion may expose an employer to a risk of being accused of discriminatory differentiation in remuneration. Due to these circumstances, taking into account the motivational function of pay in the private sector, it is quite common that seniority is no longer considered in setting employee remuneration. In creating the incentive systems and shaping individual salaries criteria such as knowledge are perceived as the most important. The same refers to skills or competence – most closely linked to performing work on a specific position. Seniority is never treated as a value in itself. It becomes a value only when it translates into the quality of work.

Therefore, for example, if remuneration for relatively simple installation works at a production line, which can be mastered in a few months or even weeks, were determined by reference to seniority (which is almost negligible for the quality and amount of work performed), this could result both charges of discrimination and effectively demotivate junior employees.

The majority of the so-called “budget sector” i.e. state and local government authorities, state schools of all levels, public health institutions,

⁷ C-184/89, 1991 ECR 297; 1992 3 CMLR 699)

⁸ See more in: A. Świątkowski, op. cit., pp. 200–201.



agencies and various government institutions remain a polar opposite of such remuneration practices.

In these above institutions the seniority factor is usually a value in itself in setting remuneration, which leads to differences in wages between employees who perform equal work or work of equal value. The source of this peculiar inequality are compensation systems, which include seniority allowance and other forms of seniority bonuses as an obligatory component of a salary. A typical example may be a seniority allowance for civil servants.

Under Art. 22 sec. 1 of the Civil Service Act of 16 September 1982⁹, a civil servant is entitled to an allowance in the amount of 5% of a monthly basic salary after five years of work for a longstanding service for a government authority. It is increased by 1% each subsequent year of work until it has reached 20% of a monthly basic salary.

The above scheme is representative for similar pay systems thought the public sector for it is based on the same criterion. Firstly, it is a criterion for granting allowance, i.e. the fulfillment of the seniority condition understood as a period of employment in certain institutions on certain positions. Secondly, it becomes a claim if the seniority criteria are objectively satisfied. At the same time, it is irrelevant whether a given work in the institution requires professional experience or not.

The criteria for granting seniority allowances to civil servants and employees of other public institutions usually have nothing in common with the criteria for the determination, and consequently, differentiation of wages specified in Art. 78 of the Labor Code. They are closely and directly related to the work performed, and in particular the quality and amount of work, or qualification requirements. Frequently, such allowance is a typical benefit resulting from employment relationship. They are granted on the basis of such a universally acceptable criterion as seniority seems to be; the benefit is not related normatively to the quality or amount of the work performed. Seniority benefits such as anniversary bonuses and severance pays due if employment are terminated for reasons not attributable to employees¹⁰. Seniority as a reason for better treatment of an employee (higher salary) seems to become increasingly

⁹ Journal of Laws of 2001, No. 86, item 953, as amended.

¹⁰ Art. 8 of the Act on specific rules of terminating employment relationships with employees for reasons not attributable to the employees of 13 March 2003, Journal of Laws, No. 90, item 844, as amended.



natural in labor law at its all levels – from statutes to internal rules and regulations.

From a historical point of view, it is understandable. Seniority allowances as permanent components of salaries became popular in Poland as early as in the 1930s. Their introduction had various goals. For example, in the case of work dependent on physical fitness, allowances enabled pay to remain at the same level even though the efficiency of workers decreased with age. Allowance was also an incentive for experienced and reliable employees who become strategic resource of the employer. Allowances helped to keep such workers from leaving.

Today, introducing seniority allowances by statutes, ordinances and autonomous sources of labor law (remuneration rules, collective employment agreements) is usually not accompanied by reflection on their goals and grounds, even though a significant number of reasons for which seniority allowances had been created in the past have lost their validity. Its roots can be traced back to the development of new technologies making work less dependent on physical fitness, and, on the other hand, to the changes in a significant part of the labor market where professional experience has been systematically losing its significance. The colossal increase of competitiveness on the labor market, which resulted from the proliferation of higher education which weakens (although does not exclude) the necessity to motivate experienced employees, is also important.

This tendency is supported by the fact that the EU states must come up with new instruments assisting employment of experience professionals who encounter increasing problems in finding a job.

The affirmation of youth, its dynamism, lack of routine, risks taking, creativity, ability to adjust to changes and learning new techniques and technologies has been increasingly potent, as transpires from a perfunctory reading of press and internet job announcements. Although these tendencies affect wages in the private sector by a universal departure from rewarding seniority, in a broadly understood public sector seniority allowances still seems to be a nearly universal principle, so far questioned neither by scholars nor by courts.

The neutrality of seniority allowance, based on Art. 18 3b par. 2 of the Labor Code, can be safely used for the differentiation of wages either in the form of specific components of remuneration (e.g. seniority allowances) or without them.



In conclusion, the provisions providing for seniority allowances make the right thereto and their amount dependent on purely formal criteria (specified seniority, i.e. the length of employment), regardless of whether, and to what an extent, professional experience is required. In a potential lawsuit regarding discrimination, the employer does not have to prove the higher quality and quantity of work or higher skills of the employees receiving such allowances, in comparison to those who perform equal work without such allowance.

Even if the seniority criterion may result in pay discrimination (e.g. due to gender) as a rule, it should be considered a neutral (non-discriminatory) criterion of pay (with due regard to reasonable proportions), regardless of whether a longer period of service results in higher quality of work or knowledge and skills needed at work.