

SUMMARY

2013/27 No pay discrimination where comparator's income derives from different source (PL)

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Facts

Polish labour law prohibits pay discrimination between employees

-on whatever grounds - if their work is equal or of equal value and their situations are comparable. This means that, for example, a pay discrimination claim may be raised by a male employee performing work that is equal or of equal value to the work performed by another man, even where none of the 'classical' strands of discrimination (gender, race, age, etc.) are

involved, provided there is no relevant difference in the two employees' situations.

The plaintiff in this case was employed by a university hospital as a doctor with a first degree of specialisation. He was also a professor's assistant. His basic salary was PLN 3,743 per month. This was slightly lower than the basic monthly salary of a more junior doctor employed in the same hospital, who had no more than two years' seniority and was enrolled in a programme leading to first degree specialisation (a so-called 'resident' doctor). The salary of the 'resident' - PLN 3,890 – was determined by the Ministry of Health. The reason for the pay differential between the plaintiff and the resident was that the plaintiff's source of income was the health insurance system, which is administered by the National Health Fund, whereas the resident doctor was paid directly out of the Ministry of Health's budget. Although the financial situation of the hospital was difficult, the plaintiff asked to be compensated for the pay differential, which he considered to be discriminatory.

The court of first instance was of the opinion that the plaintiff's work had a higher value than that of the resident. However, if one compared total remuneration rather than basic salary, the plaintiff earned more on account of bonuses, seniority benefits and on-call pay. The court therefore dismissed the plaintiff's claim. He appealed.

The court of second instance dismissed the appeal. In its opinion, the sources of financing were different and therefore the pay differentiation was acceptable.

The plaintiff challenged the appellate court's decision, pointing out that, although the remuneration of the residents could not be influenced by the hospital because it was regulated by the Ministry of Health, the hospital had an obligation not to discriminate against its employees by underpaying them. The plaintiff also argued that comparing total remuneration is not correct, since being on call is an extra effort and should therefore be rewarded additionally.

Judgment

The Supreme Court held that it is possible to treat and remunerate employees differently. However, a difference in treatment must be based on a legitimate need. Employment and pay policy of the state aimed at improving access to the labour market and raising the qualifications of young doctors may constitute such a legitimate need for differentiation. The employment of residents is financed by the Ministry of Health from the Labour Fund, a state fund aimed at combatting unemployment and financed from contributions paid by employers. The aim of the law introducing this system of financing was to stimulate the national health care system and to attract and retain highly qualified medical staff in key medical specialisations. Therefore such economical/financial reasons may justify a preferential

treatment of residents.

The Court avoided the issue of whether the plaintiff's and the resident's work was equal or of equal value and it did not wish to go into the issue of whether remuneration for being on call should be included in the comparison. According to the Court, the employer justified clearly and logically, by invoking the state employment policy towards graduate students of medical schools, why residents are remunerated differently. Therefore, there was no discrimination. In addition, the Court pointed out that discrimination in remuneration may only be claimed where an individual's remuneration differs significantly from that of others performing equal work or work of equal value. Otherwise – where differences are small – the courts would have to shape employers' pay structure, which is not their role.

Commentary

The Supreme Court cited several classical judgments of the ECJ (now CJEU) that seem to lack direct relevance to the case, namely *Bilka Kaufhaus* (170/84), *Jenkins* (96/80), that dealt with indirect gender discrimination, and *Katarina Abrahamsson* (C-407/98), that dealt with positive action. It also cited *Palacios de la Villa* (C-411/05), which could perhaps be relevant here. The Court failed to recall the *Wiener Gebietskrankenkasse* (C-309/97) or *Lawrence* (C-320/00) cases. In *Wiener Gebietskrankenkasse* the ECJ held that there is no 'same work' situation where the same activities are performed by persons with incomparable professional qualifications. In *Lawrence*, the ECJ held that where differences in pay conditions cannot be attributed to a single source, they do not come within the scope of Article 141(1) EC. In this Polish case however, the Supreme Court rather intuitively but - in my opinion - correctly based its judgment, not on the differences between the Labour Fund (which aims to combat unemployment) and the National Health Fund (which aims to finance the health care system), but on general principles of equality.

It is worth pointing out that at the very beginning of its reasoning the judges recalled Article 14 of the European Convention on Human Rights and the ECtHR's case law on discrimination, as well as Article 141 of the EC Treaty. The Court pointed out that there is no infringement of the principle of equal treatment if the measures taken pursue justifiable social policy aims and are adequate and necessary for those aims. The Supreme Court cited the view of the Polish Constitutional Tribunal that it is admissible to treat different situations differently.

In my view one has to refer here to Aristotle's definition of equality: similar situations should be treated similarly and different ones differently, in proportion to their difference. The crucial question in all discrimination cases is: are the compared persons in the same situation? The situation of doctors such as the plaintiff and residents, was not identical. The big difference

lay in the source of financing, which in turn was based on state employment policy. Although the plaintiff's work was of higher value than work of a resident - as the court of first instance correctly pointed out – the employer could not be blamed for inequality since the resident's pay had little to do with the 'market value' of his work. The state's decision to pay resident doctors a certain salary was justified by objective aims of state policy, namely to give relatively high pay to doctors beginning their careers and to ensure specialisation was obtained in fields desired by the state. It may be noted that the proportionality test was not really performed. One has to bear in mind that the state was not the defendant in this case – at least, not directly.

Academic commentary (Professor A.M. Swiatkowski)

The title chosen by the author of this case report: "No pay discrimination where comparator's income derives from different source" is both acceptable and yet contrary to the fundamental principles of European employment law. It is acceptable in that a resident M.D., employed by the hospital where he or she receives an additional education and practical training, cannot be compared with a fully qualified M.D. possessing a medical specialisation. The latter ought to earn more than an 'apprentice'. What was not mentioned in the case is the field specialty of the medical doctors in question and therefore no proper comparison is made here. Obviously, the state cannot maintain preferential treatment of resident doctors in place of individuals who are already employed, are more highly qualified and are more experienced within the same category of medical specialisation. The Polish Supreme Court did not pay attention to this particular issue. Therefore, we do not know whether the two doctors compared by the Polish judiciary were in a comparable situation.

The thesis presented in the headline of this particular case is also contrary to Article 14 of the European Convention on Human Rights, which provides that the enjoyment of the rights and freedoms set forth in that Convention shall be secured without discrimination on any grounds (such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status). This essentially means that the source of financing of an employee's salary ought to have been included, regardless of the state employment policy, as one of the grounds prohibited by the Convention.

As the remuneration paid by the state to a resident doctor was more favourable than the remuneration of a better qualified and better educated doctor employed by the university hospital run by the state, the Polish Supreme Court judgment ought to be reversed.

Subject: Other forms of discrimination

Parties: Not published

Court: Sad Najwyższy (Supreme Court)

Date: 7 April 2011

Case number: I PK 232/10

Internet publication: www.sn.pl > Orzecznictwo > Baza orzecze > Sygnatura > "I PK 232/10"

Creator: Sąd Najwyższy (Supreme Court)

Verdict at: 2011-04-07

Case number: I PK 232/10