

SUMMARY

2020/31 Comparing job descriptions is insufficient for checking whether work is equally valuable (BG)

The Bulgarian Supreme Administrative Court in a decision of 24 June 2019 has ruled that the mere comparison between the job descriptions of employees is not sufficient basis for establishing whether the employees are carrying out the same work or work of equal value and the courts should also take into consideration the practical aspects of the work, the specific working conditions and the tasks actually carried out.

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Legal background

Pursuant to Article 14(1) of the Bulgarian Law on Protection Against Discrimination ('LPAD'), the employer shall ensure equal pay for the same work or for work of equal value. 'Same work' within the meaning of Article 14(1) means work performed by different individuals who have the same or similar qualification, who practice the same profession, and who carry out work of the same or similar nature. 'Work of equal value' pursuant to the consistent case law of the Supreme Administrative Court means different types of work performed by different individuals who, considering their positions, capabilities, responsibilities, qualifications, efforts and working conditions, are deemed as equal.

According to the legal doctrine, both the criteria ‘same work’ and ‘work of equal value’ are objective. They are indicators for the quality of the workforce. It is pointed out that the equal pay principle aims at the monetary assessment of labor, which is given in the form of remuneration, to be based solely on the objective qualities of labor and nothing else.

Furthermore, it is worth to be noted that pursuant to the case law of the Supreme Court of Cassation, the equal pay principle is applicable not only to the basic salary but also to any results-based additional remunerations payable to the employees. In view of this, the employer is not only entitled, but is also obliged to introduce uniform criteria for performance assessment.

The equal pay principle is also proclaimed in the Bulgarian Labour Code. However, Article 243 prohibits unequal pay only on the grounds of gender. Nevertheless, this principle applies in general and prohibits differences in the labour remuneration for the same work or for work of equal value on any ground as Article 18 of the LPAD provides that the employer is obliged in general to take effective measures to prevent all forms of discrimination in the workplace.

Facts

The applicant was employed by the State Enterprise Radioactive Waste (the ‘State Enterprise’), which is responsible for the management of the Nuclear Power Plant Kozloduy (‘NPP Kozloduy’) consisting of four units. The labour remuneration of the employees at NPP Kozloduy differs depending on the unit they work for. The applicant worked as ‘operator main switchboard 1 and 2’ with a monthly base salary of BGN 1740, while his colleagues working as ‘operator main switchboard 3 and 4’ had a monthly base salary of BGN 2074. The job descriptions of the two positions were identical.

The applicant filed a complaint with the Commission for Protection Against Discrimination (the ‘Commission’) for discrimination on the part of the State Enterprise in its capacity as an employer for the period March 2013 to December 2014, on the grounds that the employer had failed to fulfil its obligation to ensure equal pay for the same work or for work of equal value enshrined in Article 14(1). The Commission ruled in favour of the applicant and, as a result, imposed a pecuniary sanction on NPP Kozloduy of BGN 2000.

Subsequently, the employer appealed against the decision before the Administrative Court – city of Sofia. The Court reviewed the job descriptions of the employees and concluded that the positions were identical. Therefore, said the Court, the difference in the labour remuneration was not justified and constituted discrimination. The Court upheld the Commission’s

decision, after which the employer took the case to the Supreme Administrative Court.

Judgment

According to the Supreme Administrative Court, the Commission had not analysed the specific labour functions of the employees working as ‘operator main switchboard 1 and 2’ and ‘operator main switchboard 3 and 4’. The identical content of the presented job descriptions, said the Court, was not sufficient to establish whether the two comparable groups of employees carry out the same work or work of equal value. The Supreme Administrative Court referred to recital (9) of Directive 2006/54/EC, which states:

“In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.”

In this respect, the Supreme Administrative Court held that, to conclude that employees carry out the same work/similar work, not only the job description is relevant but also the practical aspects of the work, the specific working conditions and the actual tasks of the employee.

Commentary

The judgment illustrates some of the general difficulties that may occur in cases related to discrimination where the courts have to assess whether the respective employees carry out the same work or work of equal value. The Supreme Administrative Court specifically noted that, regardless of the identical job descriptions, the courts must always consider all other relevant factors. The courts should place great emphasis on the practical aspects of the work and on the factual circumstances related to the work carried out by the specific employee.

This approach makes it more difficult for employees to prove that they are treated discriminatorily in terms of remuneration since, even in cases where the employees have identical obligations pursuant to their job descriptions, minor differences in their tasks and working conditions will be deemed as justifying unequal pay.

In order to avoid potential problems, employers should consider providing a detailed description of all obligations and tasks of the employees in the job descriptions so that all factual circumstances are included and all differences between the job positions are addressed.

Comments from other jurisdictions

Austria (Andreas Tinhofer, Zeiler Floyd Zadkovich): An Austrian court would have annulled the decision of the lower court too. Whether specific work is of 'equal value' compared to another work must not only be judged with respect to the job description. The criteria cited by the Bulgarian Supreme Administrative Court correspond to the well-established case law of the ECJ (cf. C-400/93, *Royal Copenhagen*, Slg 1995, I-1275) and recital (9) of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

However, it is important to note that Directive 2006/54 also contains special rules on the burden of proof. In somewhat long-winded language Article 19(1) provides that Member States shall ensure that, when the plaintiff establishes facts before the court from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. In Austria, there has been an ongoing debate in legal writing for a long time on whether these rules have been transposed correctly. In the current case, however, it seems highly likely that the burden of proof would have shifted to the respondent upon presentation of two identical job descriptions by the plaintiff.

Croatia (Dina Vlahov Buhin, Vlahov Buhin i Šourek d.o.o.): In Croatia, the provisions on non-discrimination are generally covered by the Croatian Labour Act and the Croatian Anti-Discrimination Act. In addition to general provisions on non-discrimination, the Croatian Labour Act, implementing Council Directive 75/117/EEC, prescribes equal pay for both women and men for equal work and work of equal value, while specifying how and by what criteria the equal value of work performed is to be established: (i) when the individuals perform the same work under the same or similar conditions or if they could substitute one another at the workplace, (ii) when work one of them performs is of a similar nature to that performed by another, and the differences between the work performed by them and conditions under which it is performed have no significance in relation to the overall nature of the work or they appear so rarely that they have no significance in relation to the overall nature of the work, or (iii) when the work one of them performs is of equal value as that performed by another, taking into account criteria such as qualifications, skills, responsibilities and conditions under which the work is performed and whether the work is of a manual nature or not.

The Croatian case law and legal theory take a similar view on the legal issue in question. In Croatian case law, cases of remuneration inequality are more common among individuals of different gender, however, legal theory considers that there is no obstacle to applying these provisions in cases where employees are individuals of the same gender as well. Furthermore, legal theory adopts the position that it is possible that individuals have different

remunerations for the same or similar jobs if there are predetermined objective and justified reasons which make two jobs so different that it would actually be unfair for two employees to have the same remuneration. To this end, the Supreme Court of the Republic of Croatia, in judgment number Revr-135/09-2, took the legal position which goes along the lines of the position of the Bulgarian Supreme Administrative Court in the reported case: "*This court accepts the position of the lower courts that the job title or position itself does not automatically entitle another to the remuneration of another employee of the same job title but that the remuneration depends on the specific work and responsibilities of each employee.*" Such court's position clearly puts the employees in a more difficult position when proving that they are treated discriminatorily in terms of their remuneration, as the minor differences in the individual's tasks, responsibilities and working conditions could be decisive and therefore be to the detriment of the 'discriminated' employee.

Germany (Lucas Dahlmeier, Luther Rechtsanwaltsgesellschaft mbH): Also in the German legal system a conflict between the general principle of equal treatment and contractual freedom exists. However, there is no generally valid basis of entitlement in Germany according to which the same wage is to be paid for the same work. Freedom of contract takes precedence in this matter. However, freedom of contract is restricted by the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, "AGG") and the Pay Transparency Act (*Entgelttransparenzgesetz*, "EntgTranspG"). Therefore, the employer is forbidden from differentiating and paying different wages because of one of the characteristics mentioned in Section 1 AGG. For this reason, lower pay based for example on gender or age is illegal. But the principle of equal pay for the same work applies if the remuneration is granted according to a general principle such as a wage scale. As far as such a payment system exists, which provides for objective criteria for the wage, the employer must adhere to this system. In this case the employee is entitled to equal pay according to their classification in the pay system. Then employees with the same job are to be compensated equally unless there are no other objective reasons according to the system. When introducing remuneration systems, the employer must also comply with the anti-discrimination principles. Decisive for the application of the principle of equal treatment is therefore the formation of a remuneration system set by the employer. Otherwise the salary can be freely negotiated as long as there is no discrimination, for example in relation to gender, age or disability.

Given this background, the Federal Labour Court decided in its judgment of 21 June 2000 (5 AZR 806/98) that the plaintiff was not entitled to the same remuneration as other employees even if they performed the same work. In justification, the Court stated that the principle of equal treatment is only applied with regard to self-imposed compensation systems and, in addition, no arbitrary discrimination of individual employees is allowed. Furthermore, no

non-substantial groups may be formed within the compensation system. In this case, the compensation system was legitimate. The plaintiff was not entitled to the same salary as his colleagues. Also the Regional Labour Court of Berlin-Brandenburg has ruled in its judgment of 5 February 2019 (16 Sa 983/18) that the lower pay of a woman compared to male colleagues with the same job was only inadmissible if the lower pay was due to reasons of gender. The plaintiff could not prove this. In this respect, it is evident that the German jurisdiction differs from the Bulgarian jurisdiction on this point. In Germany, too, the problem of gender pay gap is well known to politicians and the government. For example, the EntgTranspG was introduced so that the salary structure in large companies is disclosed and differences can be identified. The aim of this law is to enforce the principle of equal pay for women and men for equal work or work of equal value.

Subject: Discrimination

Parties: [Employee] – v – State Enterprise Radioactive Waste

Court: ||||| ||||| ||||| ||||| ||||| (Supreme Administrative Court)

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