

SUMMARY

2016/3 Supreme Court allows transferee to differentiate between ‘own’ and acquired employees (PL)

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Facts

The plaintiff in this case was W.G. He was originally an employee of a company called P.PR. On 1 September 2009, the part of this company in which W.G. was employed was transferred to another company, P.I.

Before the transfer, W.G.’s terms of employment were governed by the collective agreement in force at P.PR. Following the transfer, P.I. initially continued to apply that collective agreement

to the employees it had taken over from P.PR. However, it stopped doing this from 1 January 2011, when the term of the P.PR collective agreement expired. As from that date, P.I. applied its own collective agreement to all of its employees, i.e. both to the transferred staff and the staff it had employed before the transfer. It did this in such a way that the transferred employees were paid a lower salary than that of the original staff employed in the same positions. For example, where the collective agreement set the salary that goes with a certain position at between € 1,000 and € 1,200 per month, the transferred employees would be paid according to the minimum of this range, whereas the original staff were paid at a higher level within that range. This was possible because the basic pay of both groups of employees, as provided in their contracts, differed.

Although the differential remuneration of the two groups of employees was in line with the collective agreement, W.G. believed it to be in breach of Article 18(1)(c) of the Labour Code which transposes Directive 2000/78. It provides that “Employees have the right to equal remuneration for equal work or work of equal value”. He brought a case before the court of first instance.

Both the court of first instance and the appellate court found in favour of P.I., denying W.G.’s claim. He appealed to the Supreme Court.

Judgment

The Supreme Court noted that Article 18(1)(c) of the Labour Code forms an integral part of a set of provisions of which Article 18(1)(a) is the first. It prohibits employers from treating their employees unequally on the basis of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, denomination, sexual orientation or employment status (i.e. full versus part time and fixed versus permanent contract). Given this fact, the court interpreted Article 18(1)(c) purposively, not literally, holding that it deals only with differential remuneration on the said protected grounds. Differentiating between employees on the basis of their employment history (in this case, on whether they were transferred employees or original staff) is not discriminatory.

The court noted that there are two types of criteria that might be recognised as discriminatory: (i) unequal treatment on the grounds of personal characteristics or traits (e.g. race or gender) and (ii) unequal treatment on the grounds of being employed on a part-time basis or on the basis of a fixed-term contract. Differential payment based on any of these criteria is prohibited. Differential remuneration on other grounds is not prohibited by anti-discrimination law.

However, there is also the more general doctrine of equal rights in employment, as provided in

Article 11(2) of the Labour Code. It states that “Employees have equal rights for equal performance of the same duties”. An employee claiming infringement of this obligation need not allege detriment on the grounds of any personal characteristic such as age or sex. However, the snag is that infringement of Article 11(2) carries no sanction, other than that the employee has the right to resign for cause, but that is rarely a practical solution. In any event, the Supreme Court did not elaborate on this. It merely made a distinction between discrimination on a protected ground on the one hand and the general doctrine of equal treatment on the other.

Commentary

The position adopted by the Supreme Court should be recognised as the correct one. The Supreme Court rightly narrowed the catalogue of discriminatory criteria to only specifically determined situations. Such an interpretation allows the erroneous implementation of an EU directive by the Polish legislator to be ‘repaired’. The EU directives on equal treatment establish a closed catalogue of discriminatory premises, whereas the Polish law transposing them has formulated an open catalogue of prohibited differentiation criteria which result in discrimination. The position taken by the Supreme Court, which allows differential pay between employees of an acquiring employer and those of an acquired employer after the transfer of the enterprise, should be recognised as extremely courageous. Simultaneously, it should be noted that the Supreme Court did not mention the issue of the length of time such a differentiation could persist. Undoubtedly, a difference in pay should not exist for an unlimited period of time.

Subjects: transfer of undertakings, terms of employment

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