

## Case Reports

2019/30

### List of discrimination criteria (PL)

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#### Summary

The Polish Supreme Court has held that a criterion of discrimination may also be a relationship of a social or familial nature that exists in the workplace and whose existence or absence on the part of the employee results in different treatment by the employer.

#### Facts

An employee named D.K. was employed by the Defendant – which had its Office in W. – pursuant to an employment contract for a fixed period of one year, on a full-time basis. The structure of the Office was such that the Centre, managed by Director A.G., was responsible for the coordination of the marketing activities of the Office. Field branches of the Office employed quality consultants, like D.K., who were responsible for contact with clients.

The Office's policy was to hire employees initially for one year, after which the management would extend contracts for another year. Only the third contract would be for an indefinite period of time.

As the expiry of her one-year contract approached, D.K., having agreed this with her supervisor, requested a second contract for one year, after which she went on holiday. Three supervisors supported her request. They were of the opinion that D.K. demonstrated great mobility and expertise in customer service as well as very good performance in her other duties.

The Director rejected the request. According to her, D.K.'s task as a quality consultant was to develop the marketing operations of the Office branch, which she had failed to do in the past 12 months. She had failed to meet specific financial objectives, and the Director con-

cluded that D.K. was to blame. However, D.K. had not been aware that her performance had been evaluated, there never had been any formal need to, and she had never been made aware of the results. Also, she had participated in an internal training programme during which the Director had stated publicly that the Office should “bet on the young”, as they are more flexible – D.K. was more than 50 years old at the time.

D.K. did not get a subsequent contract. She was replaced by two employees. One of them was P.R., 21 years younger than D.K. and with no relevant working experience. Previously, P.R. had reported to the Director, who had supported P.R.'s application.

D.K. asserted that she was discriminated against and sought compensation in court. Both the District Court and the Court of Appeal upheld her claim. The District Court considered that D.K. had been discriminated against based on age. The Court of Appeal added that D.K. presented another prerequisite for being discriminated against by the Defendant in a descriptive, but unambiguous way. The prerequisite consisted in worse treatment due to the lack of specific close relationships, unrelated to work, with influential persons at the workplace. The Court of Appeal referred to these relationships as ‘connections’. The above judgment had been appealed against in whole by a cassation appeal filed by the Defendant. The Defendant attempted to prove before the Supreme Court that D.K. had neither substantiated the facts nor a reason for her being discriminated against.

#### Legal background

The principles of equal rights and of non-discrimination are binding in Polish law pursuant to the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> that prevails over national legislation. The aforementioned principles also result from Article 157 of the Treaty on the Functioning of the European Union and several directives that regulate this issue.

The European Court of Justice has also expressed its opinion on the equality of rights and the non-discrimination principle, pointing, among others, to the fact that the violation of the principle of equal rights/non-discrimination does not occur if the selected measures reflect a justified social policy objective and if they

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1. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Journal of Laws No. 61/1993, item 284 incl. amendments.

are adequate and necessary to achieve such objective. However, it should be noted that the term ‘discrimination’ in the light of EU legislation is limited to a closed catalogue of reasons considered to be discriminative.

The principles of equal rights and of non-discrimination are also reflected in Article 32 of the Polish Constitution. These issues have also been discussed by the Constitutional Tribunal which, in an earlier judgment, emphasised the fact that any deviations from the obligation of equal treatment must be supported by arguments of a substantial and proportional nature and must be related to constitutional values, principles and standards.

In labour law, these principles are realised by the principle of non-discrimination that forbids unequal treatment of a person or group in comparison with others that occurs as a result of a certain difference or distinction and is not justified based on the principle of equal treatment for the performance of the same duties.

## Judgment

The Supreme Court firstly referred to ECJ case law which reverses the burden of proof, once the claimant has presented facts which suggest discrimination.<sup>2</sup> According to the Supreme Court, the ECJ has emphasised that a claimant should present facts that enable the existence of discrimination to be inferred, and if the facts suggest discrimination, the effective application of the equal treatment principle requires the defendant to prove that the principle has not been violated.<sup>3</sup> It also follows from case law that public statements of the employer on a discriminatory employment policy are sufficient to adopt such presumption in the light of establishing employment.<sup>4</sup> Similarly, the application of a non-transparent remuneration estimation system by the employer should be treated in the same way, if the employee claims that the employer has established their remuneration in a discriminatory way.<sup>5</sup>

The Supreme Court held that the case law implied that the employee needed to specify the reason for discrimination. However, this obligation should be understood as serving, first of all, the aim of determining the boundaries of the proceedings to take evidence and of preparing the relevant defence by the employer. On the other hand, if the employer proved that the differentiation of the situations of the employees was based on objective criteria, they would be released from responsibility regardless of the discrimination criterion specified in the claim.

2. ECJ 10 March 2005, C-196/02 (*Nikoloudi*) and ECJ 27 October 1993, C-127/92 (*Enderby*).

3. ECJ 17 July 2008, C-303/06 (*Coleman*).

4. ECJ 10 July 2008, C-54/07 (*Feryn*).

5. ECJ 17 October 1989, C-109/88 (*Handels- og Kontorfunktionærernes Forbund i Danmark*).

The Supreme Court pointed out that D.K.’s responsibility was only to substantiate the fact of discrimination and to indicate the alleged ground for discrimination, which meant supporting the filed motion with such arguments that will at least convince the judge about the probability of the claim related to a certain fact. If the substantiation is effective, the defendant employer has to prove that its denial of the claim of the employee is substantiated in a better way.

The Supreme Court held that, in this case, D.K. only had to prove that she had applied for employment and that she had the required qualifications, while the applicant who ultimately was selected was younger. Then, the Defendant should prove the objective reasons that were the basis for its decision not to employ D.K. These reasons may include, among others, her health condition, actual qualifications, and duration of employment or economic reasons. If the Defendant failed, D.K. was entitled to compensation.

Assessing the facts of the case, the Supreme Court held that D.K. had succeeded in substantiating the alleged age discrimination, as P.R., a younger woman with less qualifications and experience, was hired and because D.K. had not received any feedback about her performance. The difference between the candidates was their age. Due to the fact that discrimination had been effectively substantiated, the burden of proof that the selection of the employee was based on non-discriminatory prerequisites was transferred to the employer. However, the Defendant did not prove the existence of any objective prerequisites that would support the failure to employ D.K. In particular, the truthfulness of the accusations of the Director against D.K., stating that she failed to perform her professional duties correctly was not confirmed.

The Supreme Court also considered the issue of the additional discriminatory prerequisite, namely the issue of ‘connections’ between the Director and P.R. (the candidate who was ultimately selected), which allegedly influenced P.R. being chosen over D.K. The Supreme Court emphasised that the list of characteristics which are grounds for discrimination is not exhaustive. However, the Court specified that this refers to the part of the catalogue which states that employees should be treated equally regardless of their traits and personal attributes. The examples which are actually in the list suggest that these characteristics refer to personal traits and attributes of a person that are not related to the work performed and that are of such social importance that the legislator considered them to be forbidden criteria of discrimination in employment. Other personal traits of high social importance may include: belief, being a carrier of the HIV virus, appearance, citizenship or parenthood. The Supreme Court also emphasised that a discrimination criterion should be of a specific and verifiable nature, hence vague, undefined terms cannot constitute such criteria.

In this context, the Supreme Court noted that it was necessary to define the term ‘connections’ to which D.K. referred descriptively, in a precise way. Moreover,

the Court pointed out that forbidden criteria do not always have to refer to the employee themselves, but may also refer to their friends or relatives in the event of so-called relationship-based discrimination, such as the *Coleman* case of the ECJ – where a parent was discriminated against because of disabled children.<sup>6</sup> According to the Supreme Court, discrimination may also involve relationships (or the lack of) with informal groups of persons that exist in the work environment and that influence decision-making in human resources. These groups are distinguished based on certain traits of members of such cliques and are of a non-professional nature (including kinship, affinity, social relations) if the treatment of employees by the employer depends on the existence of such bonds. However, in the opinion of the Supreme Court, in order to consider it as a discrimination prerequisite, such ‘connection’ would have to be of an actual, real and permanent nature. However, a personal connection established ad hoc, to fill one vacant position, cannot be considered as such. Thus, in this respect the Supreme Court held that D.K. had not substantiated discrimination based on ‘connections’ – in contrast to the age discrimination claim, which was awarded.

## Commentary

The position of the Supreme Court should be considered correct. In the light of the regulations on discrimination the employee has a privileged position in the process of pursuing claims. The burden of proof is transferred to the employer upon substantiation of the fact of discrimination by the employee. The employer may be released from responsibility only by proving that unequal treatment of employees resulted from objective and justified prerequisites.

Moreover, the discussed judgment demonstrates the existence of a trend in interpreting non-discrimination regulations in a manner that extends them for the benefit of the employee. The Supreme Court deemed the discrimination criterion in the form of social or familial relationships, whose existence or absence on the part of employee results in different treatment by the employer, as an acceptable criterion. Discrimination criteria may be defined in a descriptive way and result from phenomena that are complex or difficult to define in simple terms, but they should be actual, real and permanent.

## Comments from other jurisdictions

*The Netherlands (Peter Vas Nunes):* This case illustrates nicely that an event – in this case, the hiring of a replacement – that postdates allegedly discriminatory

behaviour – in this case, non-renewal of an employment contract – can contribute to proving (presumptive) discrimination. In the case reported above, the evidence that age played a role, albeit circumstantial, was strong: three supervisors supported renewal, the employee had not received feedback, the employer failed to substantiate underperformance, it had previously stated in public that the organisation should “bet on the young” as they are more flexible, the replacement had no relevant working experience and she was 21 years younger. In most cases, the evidence is not as strong.

*United Kingdom (Richard Lister, Lewis Silkin LLP):* The finding of direct age discrimination in this case, upheld by the Supreme Court, is not surprising and seems to be the correct result. On the facts stated, an Employment Tribunal in the UK would almost certainly have reached the same conclusion. As one might expect, the UK’s Equality Act 2010 includes provisions that expressly implement EU law on the burden of proof in discrimination matters. There is a significant case law interpreting these rules, but they broadly provide that once there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof ‘shifts’ to the employer to provide a non-discriminatory explanation.

There was clearly sufficient evidence in this case to establish a case of discrimination on grounds of age for the employer to answer – generally known in the UK as a ‘prima facie case’ of discrimination. Indeed, this would have been the case even without the particularly damning finding of the Director’s public statement that the Office should “bet on the young” as they were “more flexible”. Faced with this evidence, it was always going to be an uphill struggle for the employer to prove that its treatment of D.K. was not influenced by her age.

The more novel and interesting aspect of the Supreme Court’s judgment is its acceptance of a new potential ground of unlawful discrimination based on a relationship or “connection” between the employer and another individual, which results in the employer treating the claimant employee less favourably. It would not be possible for a court in the UK – even our Supreme Court – to go so far. The Equality Act 2010 sets out an exhaustive list of nine protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race, religion or belief; sex; and sexual orientation. These categories could only be extended by Parliament enacting amending legislation.

It will be interesting to see whether and to what extent employees in Poland now seek to rely on the Supreme Court’s decision to assert discrimination based on social or familial bonds, despite the contention having failed on the facts of this case. The Court was surely prudent in emphasising that any such personal connection would need to be “actual real and permanent” in nature, which will preclude it being argued in many cases. Nonetheless, in an appropriate situation, this could potentially provide a valid basis for a claim where there is no other

6. ECJ 17 July 2008, C-303/06 (*Coleman*).

apparent protected characteristic on which the aggrieved employee could rely.

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