

Anonymised version

Translation

C-16/19 - 1

Case C-16/19

Request for a preliminary ruling

Date lodged:

2 January 2019

Referring court:

Sąd Okręgowy w Krakowie, VII Wydział Pracy i Ubezpieczeń Społecznych (Poland)

Date of the decision to refer:

27 November 2018

Applicant and appellant:

VL

Defendant and respondent:

Szpital Kliniczny im. dra J. Babińskiego, Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie

[Or. 1] [...]

Grounds for the decision of 27 November 2018

Request for a preliminary ruling

Referring court

Sąd Okręgowy w Krakowie, VII Wydział Pracy i Ubezpieczeń Społecznych (Regional Court, Kraków, 7th Labour and Social Insurance Division)

Parties to the main proceedings

Applicant: VL

[...]

Defendant: Szpital Kliniczny im. dra J. Babińskiego, Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie (Dr J. Babiński Clinical Hospital, Independent Public Health Care Institution in Kraków)

[...]

Subject matter of the dispute in the main proceedings and relevant facts

- 1 The main proceedings in the case concern a demand for payment of an allowance that was paid monthly to employees with disability certificates and for payment of compensation for breach of the principle of equal treatment in employment. According to the applicant, the payment of the monthly allowance solely to employees who obtained disability certificates after 1 September 2014, while denying it to the applicant because she obtained a disability certificate before that date, constitutes discrimination in pay.
- 2 The applicant, VL, was employed at the Dr J. Babiński Clinical Hospital, Independent Public Health Care Institution in Kraków as a psychologist, [originally] from 21 November 2011 to 30 September 2011 and subsequently from 3 October 2011 to 30 September 2016. On 8 December 2011, VL obtained a certificate attesting to moderate permanent disability. She submitted that certificate to her employer on 21 December 2011 [Or. 2].
- 3 The defendant was obliged to make monthly contributions to the Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych (State Fund for the Rehabilitation of Persons with Disabilities, ‘the Fund’), and the amount of those contributions depended on an index based on the number of disabled workers whom it employed. The director of the defendant hospital decided to grant and pay the monthly allowance to those employees who submitted disability certificates to the employer after the date of his meeting with the staff, which took place in the second half of 2013. The allowance was granted only to those persons who submitted disability certificates after the date of the meeting, irrespective of whether a certificate was obtained after the 2013 meeting or was obtained before the date of the meeting but had not been submitted to the employer prior to that date. The purpose of the measure was to reduce the employer’s contributions to the Fund. The allowance was granted to individual employees on the basis of a unilateral decision taken by the director of the defendant hospital. It was paid to 13 employees – exclusively those who submitted their disability certificates after the meeting between the director of the defendant hospital and the staff. On the other hand, the allowance was not paid to 16 employees who had obtained disability certificates and submitted them to the employer before the meeting, including the applicant.
- 4 The Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie IV Wydział Pracy i Ubezpieczeń Społecznych (District Court for Kraków-Nowa Huta in Kraków, 4th Labour and Social Insurance Division, Poland), which ruled on the case at first instance, dismissed the claim in a judgment of 5 December 2017.

- 5 With respect to the claim for payment of the allowance, the court stated that, pursuant to Article 9, Article 29(1)(3) and Articles 77¹-78 of the Kodeks Pracy (Labour Code), remuneration for work and other benefits related to work is determined in the contract of employment, remuneration regulations, a collective labour agreement or a collective bargaining agreement based on statute. The applicant, it found, was not entitled to claim payment of the allowance amounting to PLN 250 per month (PLN 6 000 in total), since the right to that allowance had not been stipulated in any internal rules in force at the defendant hospital, nor did it result from the provisions of her contract of employment. Neither was such an allowance granted to her by her employer's decision. **[Or. 3]**
- 6 With respect to the claim for compensation in respect of discrimination, the court held, citing Article 18^{3a} of the Labour Code, that discrimination occurs where employees are treated differently as a result of the application of any of the prohibited criteria listed in that provision. Referring to the case-law of the Sąd Najwyższy (Supreme Court, Poland), [...], the court of first instance noted that the prohibited criteria set out in Article 18^{3a} of the Labour Code included an exhaustive list of work-related criteria as well as other criteria, which were not listed exhaustively. Therefore, in addition to the prohibited criteria listed in the provision, the employer must not treat employees differently on the basis of other prohibited criteria, with the proviso that those criteria must constitute the employees' personal characteristics which are of social significance.
- 7 The court of first instance pointed out that the differing treatment of employees in the case in question did not concern their remuneration or any benefits related to the performance of their duties; the benefit paid was unconnected to the performance of their work and did not constitute remuneration for work.
- 8 The court found that the criterion for treating employees differently was the date on which the disability certificate was submitted to the employer, and hence there was no other criterion for the differing treatment of persons with disabilities with respect to the granting of the allowance in the case that would constitute a prohibited criterion listed under Article 18^{3a} of the Labour Code. In particular, the employer did not treat employees differently on the basis of disability, since such different treatment occurs when the situation of disabled employees differs from that of non-disabled employees in terms of certain employment conditions.
- 9 The applicant challenged the above judgment on appeal, arguing that the employer granted the allowance to a group of employees who shared a common characteristic of disability, but on condition that they submitted disability certificates after a certain date, thus precluding payment of the allowance to those employees who had previously submitted such certificates **[Or. 4]**, thereby helping to reduce the amount of the contribution payable by the employer to the Fund.
- 10 The applicant also argued that, as indicated in recital 12 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in

employment and occupation, any discrimination against persons with disabilities in the field of employment should be prohibited, and, pursuant to Article 2 of the Directive, ensuring equal treatment means no direct or indirect discrimination whatsoever. According to the applicant, the defendant used the arbitrary and unjustified criterion of the date of submission of the disability certificate in order to determine the granting of the allowance, which constituted discrimination against the applicant and resulted in her being treated, without justification, differently from other disabled persons employed at the defendant hospital, ultimately resulting in a breach of the principle of non-discrimination. The applicant requested that the court of second instance refer a question for a preliminary ruling to the Court of Justice of the European Union.

Subject matter and legal basis of the reference

- 11 Interpretation of Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).
- 12 Article 267 of the Treaty on the Functioning of the European Union.

Legal provisions and case-law of the European Union

- 13 Recital 12 and Article 2(1) and (2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
- 14 Judgments of the Court of Justice of the European Union: of 11 July 2006, *Chacón Navas*, C-13/05, EU:C:2006:456; of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222; and of 18 January 2018, *Ruiz Conejero*, C-270/16, EU:C:2018:17.

[Or. 5] National legislation and case-law

- 15 Article 11³ of the Ustawa z dnia 26 czerwca 1974 r. – Kodeks pracy (Law of 26 June 1974 – Labour Code) (consolidated text: *Journal of Laws* [Dz. U.] of 2018, item 917, as amended):

Any discrimination in employment, direct or indirect, in particular on grounds of gender, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, as well as on grounds of being employed for a fixed term or for an indefinite term or on a full-time or part-time basis, shall be prohibited.

- 16 Article 18^{3a} of the Labour Code:

§ 1. *Employees should be treated equally with respect to the establishment and termination of an employment relationship, employment conditions and promotion conditions, as well as access to training in order to improve professional qualifications, in particular regardless of gender, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, as well as regardless of whether they are employed for a fixed term or for an indefinite term or on a full-time or part-time basis.*

§ 2. *Equal treatment in employment means that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in § 1.*

§ 3. *Direct discrimination is taken to occur where an employee, on one or more of the grounds referred to in § 1, is, has been or would be treated less favourably than other employees in a comparable situation;*

§ 4. *Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice places or would place all or a considerable number of employees belonging to a particular group distinguished on one or more of the grounds referred to in § 1 at a disproportionate disadvantage, or at a particular disadvantage in relation to the establishment and termination of an employment relationship, employment conditions, promotion conditions, as well as access to training in order to improve professional qualifications, unless that provision, criterion or practice is [Or. 6] objectively justified by a legitimate aim to be achieved and the means of achieving that aim are appropriate and necessary.*

...

17 Article 18^{3b} of the Labour Code:

§ 1. *An employer treating an employee differently on one or more of the grounds referred to Article 18^{3a}(1) shall be considered to be in breach of the principle of equal treatment in employment, subject to §§ 2-4, where the effects of such different treatment include, in particular:*

(1) *a refusal to enter into, or the termination of, an employment relationship;*

(2) *establishing disadvantageous remuneration for work or other disadvantageous terms of employment, the employee not being selected for promotion or not being granted other work-related benefits;*

(3) *...*

– unless the difference of treatment is justified by objective considerations demonstrated by the employer.

...

18 Article 18^{3d} of the Labour Code:

A person with respect to whom the employer has breached the principle of equal treatment in employment shall be entitled to compensation amounting to at least the minimum remuneration for work as determined on the basis of separate provisions.

19 Judgments of the Sąd Najwyższy (Supreme Court) [...].

Grounds for the reference

- 20 While examining the applicant's appeal against the aforementioned judgment of the District Court for Kraków-Nowa Huta in Kraków, the Regional Court in Kraków encountered certain doubts as to the interpretation of Article 2 of Directive 2000/78/EC and also as to whether discrimination – direct or indirect in the sense referred to in the Directive – may be taken to occur in cases where the employer differentiates between employees within a single group **[Or. 7]** which is distinguished by the same protected characteristic – in this case, disability.
- 21 In national case-law, there is a presumption that discrimination occurs where an employee is subject to worse treatment, not for objective reasons, but due to his personal characteristics or traits unrelated to his work and which are socially significant, for instance those listed in Article 18^{3a} of the Labour Code, or on the grounds of being employed for a fixed term or for an indefinite term or on a full-time or part-time basis [...]. On the other hand, inequality which is not caused by reasons considered discriminatory does not constitute discrimination [...].
- 22 The Court of Justice of the European Union has also ruled on the issue of discrimination on grounds of disability. In its judgment of 11 July 2006 in Case C-13/05, the Court pointed out in paragraph 48 that unfavourable treatment on grounds of disability undermines the protection provided for by Directive 2000/78 only in so far as it constitutes discrimination within the meaning of Article 2(1) of that directive. Subsequently, in its judgment of 11 April 2013 in Joined Cases C-335/11 and C-337/11, the Court noted in paragraph 40 that defining the scope of Directive 2000/78 by reference to the origin of the disability would run counter to the very aim of the directive, while in paragraph 71 it stressed that a disabled worker covered by that directive must be protected against all discrimination in comparison with a worker not so covered. The Court expressed the same view in paragraph 36 of its judgment of 18 January 2018 in Case C-270/16.
- 23 The national case-law and Court of Justice judgments cited above, as well as the literal wording of the provisions on discrimination, including recital 12 and Article 2 of Directive 2000/78/EC, do not provide an answer to the question whether the differing treatment of individual members of a group distinguished by its protected characteristic of disability may be a form of discrimination if the employer treats individual members of this group differently on the basis of an apparently neutral criterion, and that **[Or. 8]** criterion cannot be objectively

justified by a legitimate aim and the measures taken in order to achieve that aim are not appropriate and necessary.

- 24 In the case at issue, the measures taken by the defendant employer did not result in disabled employees being treated less favourably than non-disabled ones. Explaining that his actions were dictated by his intention to reduce contributions to the Fund, the employer, however, by paying an allowance to only some of the disabled employees, treated some of the disabled employees differently from other employees who were disabled as well. Such conduct does not amount to direct discrimination since, pursuant to Article 2(2)(a) of the Directive, such discrimination is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1, that is, on the grounds of religion or belief, disability, age or sexual orientation. However, the Regional Court has doubts as to whether such action may be taken to constitute indirect discrimination, as the wording of the aforementioned provisions of the directive does not make it clear whether indirect discrimination is possible within a group of employees who have the same protected characteristic, such as, for instance, disability.
- 25 Undoubtedly, treating employees differently in terms of remuneration may amount to discrimination if this occurs on the basis of a prohibited criterion. While Directive 2000/78/EC does not impose an obligation to treat all employees equally (also in terms of remuneration), it does define certain criteria that cannot be used to justify differing treatment of employees, and this also determines the legal solutions adopted in the Polish Labour Code. In the opinion of the Regional Court, Article 2 of the directive needs to be interpreted in order to determine whether the criterion applied by the defendant (the date of submission of the disability certificate to the employer) as a condition for the granting and payment of an allowance to disabled persons constitutes a discriminatory criterion prohibited by that directive despite the fact that the differing treatment occurred only within the group of disabled employees rather than [Or. 9] vis-à-vis non-disabled employees, since differing treatment on prohibited grounds alone amounts to discrimination.

Question referred

- 26 Owing to the doubts raised above, the Regional Court has decided to refer the following question to the Court of Justice of the European Union for a preliminary ruling:

‘Should Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the differing treatment of individual members of a group distinguished by a protected characteristic (disability) amounts to a breach of the principle of equal treatment if the employer treats individual members of that group differently on the basis of an apparently neutral

criterion, and that criterion cannot be objectively justified by a legitimate aim, and the measures taken in order to achieve that aim are not appropriate and necessary?’

WORKING DOCUMENT