

NON-DISCRIMINATION PRINCIPLES AND THE NEED FOR THE SPECIAL TREATMENT OF OLDER EMPLOYEES (CONSIDERATIONS BASED ON POLISH LEGAL REGULATIONS)

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Abstract

The study investigates the influence of legal statutory regulations in the area of non-discrimination principles on the basis of age, and the legal instruments that strengthen the efforts taken to combat discrimination among older employees. The author presents some considerations related to substantive assessment of the significance of legal instruments provided in Polish legal regulations based on the results of a study. The presented paper is also written in an attempt to provide certain conclusions that will be used in the final monograph, entailing scientific research results concerning the model of legal instruments taken to combat unemployment among older citizens.

Keywords: *ageism, discrimination on the basis of age, older employees, retirement age, dismissals, mandatory retirement.*

1. Introduction

Age as a legal category used in various law disciplines, reflects the capacity to perform acts in legal terms and could be subject to different rights and obligations. As a source of social security, rights also affect the situation of an employee (Wagner, 2001). For the purpose of the presented topic it is essential to determine the threshold for the age which is the starting point for protection against age discrimination. As a result, the question arises about the meaning of that notion. It is beyond doubt that the notions of an elderly or old person as well as old age may be understood differently. Additionally, different meanings are given to these notions in scientific, social, economic or legal sciences (Mikolajczyk, 2012). Therefore, the understanding of this notion depends on both the context as well as the purposes of the discipline in which it is used. Moreover, in legal sciences different meanings of old age are given for the purpose of combating unemployment or fostering employability, to provide lifelong learning or vocational training, as well as to guarantee employment protection.

Provisions in the Polish Labour Code do not explain, nor use this notion. The provisions that state the non-discrimination principle provide age only as a prohibited criterion in general, without connecting it with the old or young. However, the legislator mentions retirement age or, more precisely, when speaking about employment permanence, refers to an employee who in no more than 4 years will reach retirement age (Article 39 of the Labour Code (LC)). Thus, it seems justified to refer the discussion also to those older employees for whom the guarantee of permanence of employment has been introduced or excluded. Taking this into account, the discussions will oscillate mainly around two of categories of employees, i.e. employees at pre-retirement age and employees who have reached retirement age. Needless to say that these regulations are complementary to provisions for the equal treatment of employees.

Additionally, with reference to older employees – there is also the need to analyze widely understood employment relationships: concluding of employment contract, employment protection during pre-retirement age and the termination of employment contracts on the basis of old age. The platform for the legal considerations and conclusions related to all of the above mentioned tasks provide the non-discrimination principle. It is important to underline that the legal analysis of the mentioned principle should contain both: prohibition of discrimination and any possible differentiation that might not be treated as discrimination.

2. The Right to Work as the Core Point for Legal Regulations

The value of work cannot be underestimated in today's world as it brings both material and non-material benefits. This also generates the question about the right to work and the government's responsibilities (Mantouvilou, 2015). For older people who stay in employment or who try to gain employment, according to their need, the right to work has special meaning. Consequently, taking into account certain groups of workers who are understood as the group at risk in the labour market, it is possible to address the right to work for them in particular, e.g. older workers, the disabled.

In this paper there is no place for a discussion about the understanding of the right to work, what duties or rights it entails and which part could be held to be in breach of this. Despite this, taking into account the guaranties for the right to work provided by international documents as well as by national constitutions or other statutory regulations, discussions about the level of protection become substantial.

Many people will agree with the statement that the right to work for older employees should not be understood as providing the right to obtain work, but rather as giving adequate protection through legislation. The legal provisions that guarantee non-discrimination principles are the milestones in this area. Therefore, to embody the right to work, originating from man's dignity, there is an unquestionable need to provide appropriate, crucial legal instruments.

The Constitution of the Republic of Poland of 2nd April 1997 does not provide expressly the right to work, but, according to its provisions, everyone shall be free to choose and exercise a profession. The obligation to work may be imposed only by statute (article 65). The regulations that set out the freedom to work contain two aspects: positive and negative. With reference to the first of the abovementioned, freedom includes the right to freely choose your employment, employer, workplace etc. The second is interpreted as giving freedom from the duty to work. There is rich literature in which differing views on the understanding of constitutional guarantees are presented. The constitutional provisions do not express explicitly the right to work. Therefore, we can encounter the statement that the Polish Constitution does not provide the right to work. It is important to stress that there are also strong arguments for replacing the right to work by more adequate guarantees – i.e. freedom to work (Sobczyk, 2015). Despite this, nowadays it is clear that the significance, as well as the role of the analyzed principle is not at odds with the lack of written provisions. There is no need to express the right to work in constitutional provisions in order to state that this right is provided, even if this state would not be understood as uncontested and satisfying. This right may result from other provisions. These considerations underpin the statement that ignoring the right to work would lead to violation of another constitutional principle, under which work is protected by the Republic of Poland (article 24).

According to the provisions of article 32 of the Constitution, all people are equal and have the right to equal treatment by public authorities, as well as that no one may be discriminated against in political, social or economic life for any reason whatsoever. This principle does not specify any criteria for prohibited forms of discrimination, but enforces the main basis for the statutory regulations that support the right to work.

3. The Scope of Protection According to Non-Discrimination Principles

Special attention in this field should be given to the Polish Labour Code. Until 2010, the Labour Code was the main source of Polish antidiscrimination legislation. Eventually, from the 1 of January 2011, the law on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment entered into force. This act widens the scope of protection against age discrimination. Accordingly, not only employees but also persons employed under civil contracts are also covered. So in general, there are no categories of workers who are excluded from the protection against age discrimination, as prohibition of age discrimination covers employees (agency workers), job applicants, the self-employed and those working on the basis of civil law contracts. It should be stressed that the abovementioned law of 2011, in contrast to the Labour Code, which regulates employment under a labour contract within the meaning of article 2 of LC, contains an exhaustive list of the grounds for discrimination: gender, race, ethnic origin, nationality, religion, beliefs, political opinion, disability, age and sexual orientation.

Polish legislation prohibits “any discrimination” in the field of employment on the grounds of age. Encouragement to discriminate and harassment (including sexual) are also a form of discrimination. The prohibition of discrimination is related to different levels of employment relationships: the stage before concluding the employment contract, the rights and obligations exercised during employment and termination or dismissals procedure when employment relations come to an end.

It is essential to set an age limit that will be the key point for the employment protection of older employees. As a result of such a necessity, a question arises about the semantic scope of that notion. It should be pointed out that the Labour Code, which constitutes the main point for legal analysis, does not use the phrase “old worker”, nor “old age”. Nonetheless, old age is an important factor when analyzing exceptions from the principle of equal treatment.

The provisions that lay down prohibition of discrimination mention “age” in general. However, the legislator only refers to the employment protection of an employee who will reach retirement age in less than 4 years. So special attention should be paid to the scope of the employment protection of older employees. As has been mentioned

before, this protection is varied. Its level depends on the category of employees: employees during pre-retirement age are treated in one way while those who have reached retirement age in another.

The Polish legislator gave a special and privileged position to employees during pre-retirement age. As has been previously noted, that special protection includes employees prior to reaching the general or early retirement age, on condition that the length of employment entitles the employee to a retirement pension after reaching that age. Protection under Article 39 includes the prohibition to terminate with notice employment contracts during the indicated period of protection. Therefore, the employment contract's termination is only legal if it takes place before the prescribed period of protection.

Older employees who have reached retirement age are in quite a different situation. In their case, special protection (under article 39 of LC) is excluded. This leads to the application of general protective guarantees that are a part of the general (universal) protection of employment stability. Thus, special attention should be given to the analysis of the legal situation of those employees, leading to the question about the right to work after reaching retirement age (Hajn, 1993). Does having reached retirement age justify employment termination or does it violate the non-discrimination principle on the basis of age, here old age?

After the Labour Code entered into force, Article 39, in conjunction with Article 40, caused serious doubts. In both case law and labour law doctrines different opinions were formulated. Article 40 of LC was interpreted as a provision which authorized employers to terminate employment contracts on the grounds that retirement age had been reached. What should also be mentioned here is the resolution of SC of 27 June 1985(III PZP 10/85), which specified the interpretational guidelines concerning Article 45 of LC, and recognized the reaching of retirement age as a reason that justifies the termination of an employment contract. Despite severe criticism of the adopted statement, it was rather consistently followed by other courts and the doctrine, even with some modifications (Hajn, 2009, Sanetra, 1997). However, what is interesting is the fact that in the case of re-employed pensioners, it was necessary to provide a reasonable cause for dismissal. For example, as a permissible cause, SC recognized the need to employ a younger or more capable person.

The opinion recognizing the retirement age as a legitimate reason for terminating employment contracts was quite consistently maintained in the subsequent judgments of SC. For example, in the judgment of 10 April 1997, SC found that reaching retirement age may be the only reason necessary for termination. Similarly, in the judgment of 21 April 1999, SC decided that the termination of an employment contract due to the reaching of retirement age by a woman (60 years) and the entitlement to receive a retirement pension is legitimate and may not be recognized as discrimination on the grounds of sex or age (Article 11³ of LC). SC adopted a similar standpoint in its decision of 18 July 2003, I PK 210/03. However, it should be underlined that at the same time contrasting interpretations were also formulated. For example, in its judgment of 15 October 1999 (I PKN 111/99), SC ruled that the possibility to receive an earlier miner's pension may not singularly justify the termination of the employment contract.

The standpoint of the Supreme Court, inspired by the judgments of the European Court of Justice, changed radically, starting from the judgment of 19 March 2008 (I PK 219/07), which stated that termination of an employment contract justified only by a woman's rights to receive a rail employee's pension at the age of 55 violates the prohibition of discrimination on the grounds of sex, provided by Article 11³ of LC. A similar opinion was expressed in the resolution of SC, adopted by seven judges on 19 November 2008 (I PZP 4/08). But the real breakthrough in interpretation occurred as a result of the resolution adopted by SC (represented by 7 judges) on 21 January 2009 (II PZP 13/08). The substantial part of the basis for that statement were European law regulations as well as ECJ judgements. The Supreme Court decided that retirement age and the following entitlement to receive a pension may not be the sole reason for employment termination with notice. Therefore, in such cases, it is necessary to indicate other objective reasons, dependant on the employee's or the employer's situation (Hajn, 1993).

However, the retirement age, when selecting an individual employee for dismissal, could be treated differently. In the case of collective redundancies, among the reasons that legally do not pertain to employees, the retirement age can become a criterion for selecting an employee. Then the right to receive a retirement pension may be a convincing argument for continuing the employment of an employee who is without such a source of income (Hajn, 1993).

As reports show, discrimination on the basis of age is the latest phenomenon in the Polish context. Court rulings prove that the concept of 'age discrimination' has become established and that awareness among older people is growing, slowly but surely. In 2013, the Minister of Labour appointed a Council for Senior Policy that prepared

the guidelines for a long-term policy for 2014-2020, adopted by the Council of Ministers, which include references to age discrimination (Bojarski, 2013).

4. The Possible (justified) Differentiation on the Basis of Old Age

Non discrimination principles on the grounds of age do not prohibit, possibly justified, differentiation of older workers. Poland, similarly to many other countries, has certain minimum and maximum age requirements in relation to access to employment, especially for particular professions. This occurs mostly in public services. Statutory regulations permit differential treatment based on age in respect to the specified types of activity or when it is necessary to protect the health and safety of older workers or achieve other legitimate objectives. According to the Labour Code, discrimination occurs when employees are treated differently on the grounds of prohibited criteria unless provision, criterion or practice are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 18 3a § 4 of LC *in fine*). A similar regulation, article 18 3b § 1 of LC, states that different treatment could be justified by a legitimate aim demonstrated by the employer. However, some of these objectives may raise serious concerns.

Among this number, some refer to mandatory retirement, a specific age at which the employee must retire and the employment relationship come to an end. The termination of an employment contract, resulting in receiving a retirement pension is often named as “automatic termination of an employment contract” or “compulsory retirement”. The changes in legal provisions that were recently made in this field should certainly be recognized as positive (Wrocławska, 2015). They were partially determined by the introduction of regulations against discrimination on the grounds of age and the rising retirement age, but were also connected with the exclusion of the obligation to retire. However, there are provisions still in force that lay down the expiry of the employment contract in cases of specified categories of employees. In this regard, it is possible to speak about workforce replacement.

Generational replacement in employment could be interpreted as controversial because of the danger of the permanent withdrawal of older people from the labour market (Orłowski, 2011). Despite this, the enforced regulations have been justified by the need to protect “rare goods (resources)”, such as workplaces (Mikołajczyk, 2012). In that light, the retirement of older employees (who have reached retirement age) has become socially justified, displacing the moral arguments expressed by non-discrimination principles on the grounds of age. This, however, pertains only to special categories of employees.

Prohibition of discrimination on the grounds of age is laid down by Council Directive no. 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation. According to the provisions of Article 6(1), member states may state that differences in treatment on the grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including a legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. The European Court emphasizes the freedom of member states to choose appropriate measures of differentiation (Tomaszewska, 2009).

Article 2(5) of the Directive should also be considered here. It states that age may justify different treatment in employment, if the measures laid down by national law, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Recognition of the retirement age as a reason leading to automatic expiry (termination) of an employment contract has given rise to serious concerns. The relationship with the biological aging of a human body is certainly present here. However, in certain circumstances this may not justify the termination of an employment contract. The assessment of whether it constitutes discrimination or justifies different treatment on the grounds of age depends on the cumulative meeting of conditions referred to in Article 6(1)(a). In the opinion of ECJ, the supporting of employment is an unquestionably justified aim of social or employment policy of member states (the judgment of ECJ in the case of *Palacios de la Villa*, 65). Here, we should also take into consideration a number of other ECJ judgments (Wrocławska, 2014). In some of them ECJ ruled that a measure intended to promote the access of young people to a profession may be regarded as an employment policy measure that may be an example of a justified regulation (judgment of ECJ in the case of *Petersen*, 68). Similarly, in a further case the provisions of the compulsory retirement of prosecutors (at the age of 65) were also found compatible with the directive, if the law has the aim of establishing a balanced age structure in order to encourage the recruitment of young people, and if that aim may be achieved by appropriate and necessary means (the judgment of ECJ in the case of *Hesja*).

In conclusion, it should be added that if the compulsory retirement of employees who attain the right to a retirement pension will increase the opportunities for the young to enter the labour market, the aim may be deemed legitimate.

In that connection, due to the developments in employment relationships, it does not seem unreasonable for the authorities of the member states to reconsider whether the application of an age limit, leading to the withdrawal from the labour market of older workers, may make it possible to promote the employment of younger employees and whether retirement age is sufficiently high to lead to cessation of employment (the judgment of the ECJ in the case of *W. I. Georgiew*, 51).

The European Court of Justice also emphasizes that automatic termination of an employment contract does not result in automatic withdrawal from the labour market. But does the right to work for certain people become, in some cases, only illusory due to the character of their job, education, and qualifications? In many cases, the closed access to their professions may *de facto* mean exclusion from work in general, regardless of the abilities, experience, and specific usefulness to work of the persons concerned. Therefore, it should be underlined that this is not only about the need to apply the narrow interpretation of exceptions but also about the legitimacy of using such exceptions when reconsidering changes in employment policy and in separate segments of the labour market, as well as the present situation of actors on the labour market to whom these specific measures are applied. Thus, the standpoint of ECJ, which obliges the national court to determine whether the national regulations are compatible with the directive (taking into account the transparency and adequacy of the measures to their aims), should be recognized as justified (the judgment of the ECJ in the case of *Petersen*, 81).

It is also clear that the principle of the generational replacement may not be applied absolutely, especially when social or economic changes could justify the need to reconsider the possibility to continue work for employees that reach retirement age. In that context, the Polish legislation and jurisprudence should also follow suit. The right to work emphasizes the exceptional character of the dismissal policy. In the light of that factor, the determination of the age limit for older employees who attain the right to a retirement pension and could be replaced by younger employees should be interpreted in a narrower way. Despite this happening, there is still much to do (for more see *Wrocławska*, 2015).

The cases in which ECJ issues statements shows a large and ever growing discord between national regulations and the needs of modern employees. Therefore, the demands for a flexible and modern understanding of the retirement age by the legislator, doctrine and jurisprudence, which must take into account the increased active participation in the employment relations among those of retirement age, as well as the growing trend of the increase in retirement age, related to the average lifespan, should be recognized as justified (*Mikołajczyk*, 2012).

5. Concluding remarks

The recent changes in Polish legislation have been accompanied by evolution in the doctrines and jurisprudence. These revisions were brought about by the need to adapt the applicable legal solutions to the ever changing conditions and social policies. Moreover, these changes reflect the European Union policies and regulations which are part of our legal system.

The increasing average life expectancy of the population, on the one hand, and the demographic low on the other hand, entail applying special solutions at various employment levels, adequately diversified to suit the older age bracket. However, it is doubtless that legal regulations intended to protect sustainable employment, even if they are compatible with the interests of older employees, may collide with the interests of employers and the unemployed, in particular young people.

The principle of generational replacement cannot be approached without consideration. Certain social or economic changes will justify the need to reconsider the option of continuing the employment of persons reaching retirement age. This is also the direction to be followed by Polish legislation and judicature. The right to work should emphasize the exceptional nature of dismissal policies, including those which determine the age limit for the employment of older employees eligible for retirement, to encourage retirement for the sake of younger employees.

To finalize these conclusions, I would like to stress certain core points that should be taken into account when reconsidering the regulations that provide the non-discrimination principle on the grounds of age:

1. there is a strong need to exclude discrimination on the base of age from the general provisions and enforce it by enacting new directives and new legal regulations at a national level (see arguments provided by *Mikołajczyk*, 2012),
2. further efforts should be taken in order that the right to work is also addressed to older employees,
3. the reasons for termination of the employment contract with employees at pre-retirement age as well as with those who are entitled to a retirement pension should be analyzed with the criteria of justified reason; the provisions of equal treatment make employment protection during the pre-retirement age useless and inadequate,

4. it is also important to reconcile the interests of different groups: older employees, younger ones and employers by giving more power to social partners, who, through dialogue, may adopt appropriate solutions.

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