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The principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

Case study

The principle of equal treatment and the principle of non-discrimination

- These principles are fundamental to the functioning of a democratic state ruled by law and are regulated by the Constitution of the Republic of Poland and by European Union and international law. The difference between the scope of their content is worth noting. Equality differs from non-discrimination primarily in terms of the nature of the obligations incumbent on public authorities. Thus, in the case of equality these obligations are positive in nature, and consist in taking specific actions to achieve equality (e.g. privileging a certain social group). With non-discrimination, however, the obligations are of a negative nature, and consist in refraining from certain actions which infringe the principle of equal treatment. The principle of equality encompasses the obligation of equal treatment, protection against discrimination, and also the prevention of inequality. It therefore requires that two entities in a similar situation should be treated in the same way – and differently in a different situation. If two persons having the same characteristics that are relevant in a given context are treated differently, then this constitutes discrimination – unless there is an objective and reasonable justification for such unequal treatment. At the same time, the equal treatment of persons significantly different from each other in terms of the relevant characteristics also constitutes discrimination.

The case

- The Legal Problem:

  In the cassation appeal filed with the Supreme Administrative Court against the judgment of the Wojewódzki Sąd Administracyjny (Provincial Administrative Court) in Warsaw case file SA/Wa 478/15, it was alleged that there had been an infringement of Article 145(1)(1)(a) of the Act of 30 August 2002 – the Law on Proceedings before Administrative Courts, due to the dismissal of the appeal at first instance in a situation where the contested decision was adopted in violation of, *inter alia*, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. However, the applicant in OSK 436/16 does not state the specific grounds for deducing that the decision to dismiss her from service infringed Directive 2006/54/EC.

EU law

- *The purpose of Directive 2006/54/EC is clearly to implement the principle of equal opportunities and equal treatment of men and women in matters of employment and work. Pursuant to General Provision 23 of Directive 2006/54/EC, which refers to the case law of the CJEU, unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. It follows from Article 2(2)(c) of the Directive that discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC. Within the meaning of that directive, 'pregnant worker' means a pregnant worker who informs her employer of her condition, in accordance with national law and/or practice (Article 2(a) of Directive 92/85/EEC).*
- *As stated in Article 14(1)(c) of Directive 2006/54/EC, any direct or indirect discrimination on grounds of sex in the private or public sectors, including public bodies, in relation to employment and working conditions, including dismissal, is prohibited.*

Judgments of the Court of Justice

- CJEU case law confirms that maternity is inextricably linked to sex, as a legally relevant and protected characteristic. Since the unfavourable nature of a woman's position in employment during pregnancy (including during or after maternity and parental leave or after returning from it) may primarily affect women, any discrimination on grounds of maternity will constitute discrimination on grounds of sex (CJEU judgments in the cases: C-179/88, Herz; C-394/96, Brown; C-191/03, McKenn, C-460-06, Paquay; C-232/09, Danos).

Polish law

- The applicant in case file I OSK 436/16 was dismissed from service pursuant to Article 41(2)(5), in connection with Article 43(3) and Article 45(1), of the Act of 6 April 1990 on the Police (Journal of Laws of the Republic of Poland 2011, No. 289, item 1687, as amended). In accordance with the content of this provision, a police officer may be dismissed from service if an important service interest thus requires. The case law of the administrative courts, including the Supreme Administrative Court (NSA), is uniform with regard to the understanding/interpretation of the premise “important service interest” in Article 41(2)(5), and leaves no doubt that the long-term absence of a police officer from service, and above all negative consequences of long-term and constantly repeated sick leave, may justify termination of the service relationship with a police officer on the basis of Article 41(2)(5) of the Police Act, due to an important service interest (see in particular the judgements of the NSA: of 27 October 2016, I OSK 1111/15; of 7 July 2016, I OSK 3445/15; of 23 February 2016, I OSK 1643/14; of 3 February 2016, I OSK 2920/14; of 8 January 2016, I OSK 2562/14). The existing national legislation does not differentiate between men and women on police duty in this respect.

- At the same time, Article 44(1) of the Police Act introduces an exception to the principle of the special protection of women during pregnancy and maternity against dismissal. It follows from this regulation that a police officer may be dismissed during pregnancy if the basis for dismissal is, *inter alia*, Article 41(2)(5) of the Police Act. In the context of the case pending before the Supreme Administrative Court (NSA), case file I OSK 436/16, it should be borne in mind that Article 44(1) of the Police Act must be interpreted strictly and applied exceptionally when non-dismissal could actually expose an important service interest to serious losses (cf. the NSA judgment of 19 December 2014, I OSK 1852/13).
- Due to the lack of specification in the cassation appeal of exactly which provisions of Directive 2006/54/EC were breached by the order for dismissal under Article 41(2)(5) of the Police Act, it is difficult to determine whether a breach of the Directive by the public authority's action, which consisted in dismissing a police officer because of an important service interest, actually occurred.
- In conclusion, the Supreme Administrative Court hearing the case in question should take into account the facts of the case. However, it is necessary for two situations to be distinguished.

Opinion on the basis of the cassation appeal alleging infringement of Directive 2006/54/EC

- If the dismissal was made on the basis of Article 41(2)(5) of the Police Act for reasons – as stated by the authority in the personnel decision/order No 4013 – other than pregnancy, and was justified by an “important service interest”, it cannot be said that a breach of the principle of non-discrimination had occurred, and thus of Directive 2006/54/EC. Such a decision is taken within the scope of administrative discretion, and in this case judicial review is limited, in that the court examines only the legality and not the advisability of such a decision.

Opinion

- If, on the other hand, the reason for the dismissal was the applicant's long-term absence and pregnancy, and the decision-making authority misused its powers by appealing to Article 41(2)(5) in conjunction with Article 44(1) of the Police Act and, to that end, by invoking the concept of an "important interest of the service", then there was a breach of the principle of non-discrimination and, consequently, of Directive 2006/54/EC. However, "the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice" (General Provision 30 of the Directive).

Opinion

- It seems that, insofar as the Supreme Administrative Court is bound by the limits of the cassation appeal (it is significant that the established facts are not disputed, inasmuch as the reason for the termination of the employment relationship was a prolonged absence not related to pregnancy), it can be concluded that in the present case there was no breach of the principle of non-discrimination and thus of Directive 2006/54/EC. At the same time, the problem of the correct implementation of Directive 2006/54/EC in the national legal order may be considered, taking into account the principle of equality between women and men, as set out in Articles 2 and 3(3) TEU, and the prohibition of any discrimination on grounds of sex contained in Articles 21 and 23 of the Charter of Fundamental Rights of the European Union. Therefore, if it is considered that Article 44(1) of the Police Act—(to the extent that it allows for dismissal from service of a pregnant police officer, but on the grounds that her long-term absence caused negative effects in terms of the proper performance of tasks and the efficient functioning of the police force (its organizational units) – and taking into account that it was pregnancy which constituted a decisive argument for termination of this relationship –, and thus exposed an important service interest to serious losses (a basis for dismissal under Article 41(2)(5) of the Police Act))—raises doubts as to its compliance with the EU principle of equal treatment of women and men, one may consider asking the CJEU for a preliminary ruling as to whether the provisions of Directive 2006/54/EC, or more broadly –the above mentioned provisions of the TEU and the Charter of Fundamental Rights – do not preclude such national regulations (cf. the judgment of the CJEU in Case C-555/07, Kücükdeveci).

The decision of the SAC

- **Article 41(2)(5) of the Police Act constituted a substantive legal basis for ending the service relationship with M. D. According to this provision, a police officer may be dismissed from service due to an important service interest. The phrase “may be dismissed” used in the aforementioned provision entails that decisions in this respect are taken within the scope of administrative discretion and are of an optional nature. It is generally accepted in the case law that the judicial review of discretionary decisions is limited. Ultimately, this necessitates examining whether the contested decision is not arbitrary and capricious, that is to say, whether the authority has chosen an acceptable way of resolving the matter, and whether it has made such a choice after having determined and considered the circumstances which are objectively relevant to the resolution of the case. Contrary to the suggestions made by the author of the cassation appeal, it is the substantive law applicable to the case that determines what circumstances are actually relevant to the resolution of the case, and not the subjective conviction of the party.**

The justification

- The expression “important service interest” referred to in the aforementioned provision may therefore cover various factual situations where the need to protect the service interest (social interest) – as an overriding interest – justifies dismissing a police officer from service, and it is not possible to terminate the service relationship with him/her on other statutory grounds. The concept in question may, in particular, be combined with the necessity for police structures to carry out the main tasks of the police referred to in the Act (cf. the judgment of the NSA of 16 March 1995, case file II SA 1802/94). The need to use the institution in question may consequently also arise in cases involving the continual and repeated absences of a police officer from service, as such situations undoubtedly have a negative impact on the organization and effectiveness of the police, and in particular the unit in which the given police officer should perform their official duties. The unforeseen, prolonged and frequent absences of every police officer from duty are always objectively detrimental to the smooth functioning of such a unit. This is due to the fact such absences require superiors to make sudden organizational changes, i.e., the constant organization of replacements, changes to staff rosters, burdening other officers with additional duties, etc. They may also involve increased expenses connected with the other police officers working overtime. Furthermore it is important that a police officer’s frequent absences, regardless of whether they were caused by his or her ill health or children (or other family members), as well as other cases of formally justified absence, entail that the officer is not available for service. They do not allow superiors to count on the presence of a police officer during the allocated time, or on the fact that the officer will be able to carry out official tasks in accordance with the current needs of the service and, moreover, that he or she will be able to replace another police officer if necessary. In such situations, the continued employment of the officer is undoubtedly neither in the interest of the police nor of society, i.e. the State and its citizens. Therefore, there are justified grounds for terminating the employment relationship with him/her under Article 41(2)(5) of the Police Act. The institution provided for in this provision may be applied to both functionaries and police officers. In this respect, the Police Act and other applicable provisions of national law do not distinguish between the situation of women and men serving in this organisation.

- The above position is already established in the case law of administrative courts. Therefore, the interpretation of Article 41(2)(5) of the Police Act by the authorities adjudicating in this case, and approved by the WSA in Warsaw in the appealed judgment, is correct. Moreover, it was not effectively challenged by the applicant in the cassation appeal, as no allegation of infringement of substantive law was formulated therein, since it covered neither the interpretation nor the manner of application of Article 41 (2) (5) of the Police Act.
- The legislator’s concern to ensure the efficient functioning of police structures and effective use of statutory tasks is additionally confirmed by the regulation contained in Article 44(1) of the Police Act. This provides that a police officer may not be dismissed from service during pregnancy, or during maternity leave, paternity leave, or parental leave, except in the situations specified in Article 41(1)(3) and (4), and Article 41(2)(2)(3)(5) and (6) of the Police Act.

- It follows from this provision that the guiding principle is to increase the stability of the service relationship of a specific group of police officers, including pregnant women. However, there are several exceptions to this general rule. It is permissible to dissolve the employment relationship even with a pregnant woman, if it is required by an important service interest. It is obvious that since Article 44(1) of the Police Act constitutes a derogation from the principle of special protection of pregnant women, it must be interpreted strictly and applied when the failure to dismiss a police officer from service could jeopardize an important service interest. Such a position, as expressed by the Supreme Administrative Court in its judgment of 15 November 1991, case file II SA 872/91 (Lex No. 10321), is essentially still valid (with the exception of the reference to Article 78 of the Constitution of 22 July 1952, which is no longer in force, and which I do not think the author of the cassation appeal has noted). This view was then reiterated by the Supreme Administrative Court in its judgment of 19 December 2014, case file I OSK 1852/13 (LEX No. 1565824). It is also shared by the Supreme Administrative Court panel reviewing this case. However, it is necessary to add that the fact that a broadening interpretation of Article 44(1) of the Police Act is inadmissible does not mean that there can be a narrow interpretation of the provision which would de facto entail the protection of a specific group of officers only. Firstly, this could mean that the norm in question would, in part, in fact become a dead provision. Secondly, it should be borne in mind that the solution in question was introduced because the legislator recognised that it is not always possible to prioritize, for example, the protection of pregnant women over the need for the police force to perform the public tasks entrusted to it efficiently.

The conclusion

In the present case, contrary to the applicant's different views expressed in cassation, the police authorities have sufficiently demonstrated that, in M. D.'s case, such a special situation existed and that it was therefore justified to terminate her employment with the applicant in the interests of the service. It is clear from the facts of the case that the immediate cause of M. D.'s dismissal was not her pregnancy but the consequences of her previous, notorious and prolonged absence from the service.