

Equal Treatment Authority Advisory Board

384/2008 Viewpoints on the Principle of Equal Pay for Equal Work

In the legal dispute on the principle of equal pay for equal work the directions of the Labour Code and Act CXXV of Equal Treatment and the Promotion of Equal Chances (“Equal Treatment Act”) Have to be focused on. The value of two sorts of work can be measured according to the points of view listed in Section 142/A of the Labour Code even if the job requirements are different. The pay of the employees can only be compared if they work at the same employer except for the case if the origin of the difference between the wages is a decree or the labour agreement. Each payment or contribution in kind for the employee’s work shall be taken into consideration. According to Section 22a) of the Equal Treatment Act each employer or chief can be exempt from liability unless the inequality comes from the employee’s gender, race, skin colour, nationality or ethnic belonging.

The Principle of Equal Pay for Equal Work

According to Section 141) of the Treaty “Each member state shall enforce the principal of giving equal pay for the same work to men and women.” Section 70/B of the Constitution of says “Everybody is entitled to get the same payment for the same work without any discrimination.” Everybody can resort to a remedy if another person is given higher pay for the same work.. This principle, however, does not solve all the legal questions in its application, this is why the regulation in the Labour Code and Equal treatment Act are more detailed.

According to Section 142/A (1) of Labour Code “Equal pay shall be paid for work that is recognized as equal and the principle of equal treatment shall be observed.” This statement is completed by Section 142/A (4):”The payment that is based on the position of salary scale and performance has to agree with the principles of equal treatment.” According to Section 2) of the Equal treatment Act the regulations of the Labour Code shall be concerted with the principles of equal treatment.

In the legal disputes of unequal pay the ban on the direct discrimination has to be directive as this is the most common form of discrimination in payment.

According to Section 8) of the Equal Treatment Act if a person or a group of people is treated less favourable than other people because of his/her/ their putative a) gender, b) race, c) skin colour, d) nationality, e) ethnic belonging, f) mother tongue, g) disability, h) state of health, religion o conviction, i) political conviction, k) marital status, l) motherhood, pregnancy, fatherhood, m) sexual orientation, sexual identity, o) age, p) social origin, q) financial position, r) half-time employment or contract for a definite time, s) union membership, t) other position, it is deemed as direct discrimination.

As it is direct discrimination the employer shall not pay the person or the group lower pay because of the listed characteristics than other employee. “Other position” involves individual cases that are not always clear categories like citizenship, or differentiation set by the geographic position of the sites of the same employer. It has to be individually decided if the different pay is fairly based on different geographic positions. The causes for exemptions have to be investigated individually.

The legal relations that require equal pay

Section 142/A) of the Labour Code shall be applied in the following legal relations: Civil servants, employees of courts, employees of justice, employees of the state attorney's office, soldiers, ace athletes, members of cooperatives. Besides the Labour Code the Equal Treatment Act has to be applied too for these legal relationships.

The Equal Treatment Act, however, shall be applied for all the legal relationships. According to Section) of the Equal Treatment Act the principle of equal treatment is particularly violated if the employer directly discriminates the employee in the wage and allocation of the employee or in the insurance. According to Section 5 d) of the Equal Treatment Act the employer shall observe the principle of equal treatment in the employment contract and contractual job requirements or in any contractual duties of employment.

Section 3a) of Equal Treatment Act involves contractual employment, civil service,, employment at courts, employment at the attorney's office, justice, foster-parenthood, suppliers' contractual employment, cooperative membership, employment at civil association.

The Idea of Equal Work

Section 141) of the Treaty use the principle of equal job or job of equal value. Section 1) of 75/117/EEC says that the principle of equal pay means that all sorts of discrimination between genders in payment shall be stopped. The community law requires the application of equal pay in every respect. According to Section 3) of EU principle direct or indirect racial or ethnic differentiation in payment is forbidden. According to Section 3) of EU principle 2000/78 direct or indirect discrimination based on religion, conviction, disability, age or sexual orientation is forbidden.

At variance with EU law Section 70/B of the Constitution of writes about "equal work". Section 142/A (1) of the Labour Code adopts EU law when it says in payment for equal work the principle of equal treatment shall be considered. According to Paragraph (2) when setting equal work the nature, quality, amount, circumstances, required training, physical or mental effort, experience and responsibility shall be taken into consideration. When comparing the work of two employees, they do not need to have the same job descriptions. Even if the job requirements are different but based on the viewpoints listed in Section 142/A of the Labour Code they can be regarded equal. Two sorts of work can be regarded equal if based on the viewpoints listed above the employees are in a comparable position. It does not exclude the difference between the jobs of the two employees in training or experience. To judge the complexity of the given job may need an expert opinion.

According to the the principle of equal pay has to be applied for efficiency wage as well. According to Section 75/117 of the Equal Treatment Act when the employee's wage is defined and the wages are classified, men and women shall be given equal pay excluding any sort of discrimination. The states that the criteria at classifying the wages the principle of equal pay for equal work has to be ruling independent of the gender of the employee. Hungarian Labour Code is coordinated with the European principles.

Whose wages are comparable?

To judge if different employees are given equal pay the employees have to be in a comparable position. According to the decision of the the principle of equal treatment is not violated if mothers on maternity leave after a childbirth are given a single allocation as compensation for the disadvantage of staying away from work. In this case the woman employee who cannot work because of her position after her baby was born is not in a comparable situation with male employees.

According to the decision of inequality can only occur if the comparable parties are in a comparable position, employees in totally different legal positions cannot be compared.

According to Section 8) of Equal Treatment Act the principle of equal pay is abused if a person or a group of people is treated less favourable than other people in a comparable situation because of their real or imagined protected characteristic. In this case employee A is paid less than employee B for equal work or comparably equal work. The same test shall be applied for groups of employees as well.

Direct discrimination does not mean that one of the comparable employees or a group of employees is discriminated in the same time. According to the decision of the the abuse of equal pay can be stated if employee B, who does not have a protected characteristic, was paid better in the past for the same amount of work as employee A of a protected characteristic..

The Equal Treatment Act or the Labour Code do not define what employees are qualified to belong to the same group. It comes from the Labour Code that employees of the same employer are in a comparable position independent of the site of the work.

According to the European Court decided that the principle of equal pay for the two genders is not limited to the situation when men and women work at the same employer. An employer's employees can be compared with the employees of another employer if the difference between the wages originates from a single source: a decree or a collective agreement. Employees of the same collective agreement are in a comparable position as long as its single source is the collective agreement.

The Idea of Payment

As the Treaty defines in Section 2) Paragraph 141 when the question of payment is investigated "the basic payment along with other allocation, earnings or fringe benefits" shall be regarded. Section 142/A) of the Labour Code is fully coordinated with Section 141) of the treaty and the case law of the . According to Section 3) Paragraph 142/A of the Labour Code " all the directly or indirectly paid earnings or fringe benefits give by the employer shall qualify as payment."

Special Rules of Labour Lending

Since 1 January 2006 the principle of equal pay for equal work has been applied for borrowed employees as well with the departures listed in Section (9)-(10) Paragraph 193/H of the Labour Code. The borrowed employee does not need to get equal pay if the governing payment of the lender is higher than the employees' of the borrower.

Section 9) Paragraph 193/H of the Labour Code limits the application of the principle of equal pay for equal work as for the idea of payment and the period of work. On the one hand, the idea of payment in Paragraph 142/A of the Labour Code is less strict, on the other one, it does not limit the principle of equal pay on the basis of the period of work. According to Section 9) Paragraph 193/H of the Labour Code during the period of the borrowed work the directives of Paragraph 142 /A shall be governing with the borrowed employee who is employed by the lender. The same paragraph shall be applied to the basic payment, shift bonus, overtime and duty if

- a) the borrowed employee's work is over 183 days or
- b) the borrowed employee worked for the borrower at least 183 days for two years before this period. The borrowed employee working time have reached 183 days during this period, the above rule shall be applied from the 184th day.

Section 13) Paragraph 93/H of the Labour Code took effect on 1 April 2007, it says that the lender

of the labour force can oblige the employee to declare how long he/she had worked at each employer the past two years. The principle of the limited equal pay is enforceable if he/she has worked longer than 183 days even if he/she had been mediated by several lenders. It is significant because it also bases the borrowed employee's right to get limited equal pay if he/she has worked at the borrower at least 183 days the past two years (Section b) Para 9 Labour Code 142. The principle of limited equal pay is also enforceable even if the employee has been lent to the same employer by several mediators.

Section 10) Para 193/H of the Labour Code only limits the application of the principle of equal pay on the basis of the term of work, the idea of pay equals the concept of Section 3) Para 142/A of the Labour Code. The employee employed by the borrower shall be paid on the principle of equal pay as it is set forth in Section (10) Para 193/H of the Labour Code, as for the allocations Section 3) Para 142/A of the Labour Code shall be governing if the term of the labour at the borrower is over

- a) two years for a definite time
- b) one year for indefinite time.

According to Section 12) Para 193/H of the Labour Code that entered into force on 1 April 2007 when Sections 9-10) are employed, the exemption from labour according to 107 of the Labour Code does not interrupt the continuity of the labour. At variance with it, unpaid holiday, with the exception of Section 5) 138 and 139, does not effect the continuity of the labour if it does not exceed 30 days. The labour can only be regarded continuous if the employee continues the work at the same borrower.

Until the 183rd day of the borrowed labour the principle of equal pay does not have to be observed. In 2006 the average term of borrowed labour was 68 days for women and 64 days for men, for women with a contract for indefinite time it was 147 days for women and 185 days for men. The principle of equal pay is not to be applied for most of the cases.

For applying the principle of equal pay the three parties have to cooperate and inform each other. It is important because the employee is paid by the lender, however, for equal pay he has to know the size of the wages the borrower pays for his own employees. The employee too has to be informed how the duration of his work is influenced if his work is interrupted or reaches a certain time.

According to Section 3) 193/D of the Labour Code the lender, the borrower and the employee shall cooperate in practicing the rights and duties of the period of work. In order to be able to apply Sections 9-10) 193/H with the approval of the employee the lender shall inform the borrower about the qualification and experience of the borrower. Since the modification of Section 4) 193/G of the Labour Code on 1 April 2007 the borrower has had to inform the lender about the size of his payment along with the allotments and how the allotments can be available. The obligation of information shall be met within two weeks of starting the work.

The particular rules of lending labour shall be applied concerted with the Equal Treatment Act (ban on direct discrimination, exculpation, production of evidence) but the concepts of Para 142/A can only be applied with the limitations mentioned above.

Rules of Exculpation

In the relations of employment and labour not the general rules of exculpation (Section 7) of Equal Treatment Act) but the special rules (22) shall be employed. According to Para 22 any employer can be exempt from responsibility if the borrowed employee's pay can be less than a comparable employee's " if it is reasoned by the nature of the work and the difference is based on the character

of the work.” The excuse cannot be affirmative of any independent circumstances like the position of regional labour market or costs of living.

Direct discrimination based on gender, race, colour, nationality or ethnic minority belonging violates the principle of equal treatment in any case and the rules of exculpation shall not be valid for them.

The Rules of Evidence Production

Based on 19 of the Equal Treatment Act the employee shall give probable cause that

- a) the group or person has been discriminated, his/her pay is lower than the comparable employees' of equal labour
- b) the discriminated person or group possessed characteristics listed in Section 8).

The employee may only suppose that his/her wage is lower than the other employees' the exact information is only known by the employer. The existence of discrimination is only supposed, it is based on the information of the employee.

During the production of evidence the employee has to possess a protected characteristic and he/she speaks about the difference of pay between his and the rest of the employees. He/she does not have to prove the interrelation between his wage and protected characteristic.

Based on the above mentioned facts the employer or the executive manager shall prove that

- a) he observed the principle of equal treatment:
 - the applicant's (A) pay is higher or equal to the rest of the employees who are in a comparable position, whose work is of equal value (employee B),
 - employee B is not employed by the employer,
 - the reason for different pay does not come from one single source (statute, collective agreement).
- b) within the given legal relation he did not have to observe the principle of equal treatment because the differentiation is based on legal circumstances.

Resorting to a Remedy

According to Section 2) 5 of the Labour Code “ The violation of the principle of equal treatment shall be properly remedied which shall not be accompanied with the violation of rights of other employees.” According to Section 1) 199 of the Labour Code “ The employee can initiate a legal dispute to enforce the rights of his/her employment if the principle of equal pay is not abided by at work.”

Besides the legal dispute the employee can initiate the procedure of the Authority that shall proceed according to the relevant orders of Equal Treatment Act and Labour Code. The legal relationships that are not dealt with by 142/A of the Labour Code but entered in the force of the Act of Equal Treatment shall only be proceeded by the Equal Treatment Authority.

31st January 2008

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