

IS THE RIGHT TO EQUAL PAY FOR EQUAL WORK OR WORK OF EQUAL VALUE Distant Reality OR ONLY UTOPIA?

Denisa Nevická,* Eva Ladiverová**

Abstract: In the presented article we analyze the issue of equal pay for equal work or work of equal value. The principle of equal pay is regulated quite broadly in European legislation; however, its practical application does not correspond to the intention of the legislators and the pay gap in the European Union is still at the level of 14.1%. The authors deal with Slovak and European legislation, case law of the Court of Justice of the European Union as well as a new directive of the European Parliament and the Council, which strengthens the application of the principle of equal pay for men and women for equal work or work of equal value through transparency of remuneration and stronger enforcement mechanisms. Will this new legislative framework be without an impact on application practice, or can the new directive really help to eliminate the pay gap and thus prevent disputes? What is the role of so-called single source? The authors are of the opinion that the form of transposition of the Directive by the Member States will be a key variable in answering the presented question.

Keywords: pay gap, equal pay, labor relations, discrimination

1. INTRODUCTION

Equal pay for equal work or work of equal value is a long-term goal of the European Union as well as of individual Member States. Despite extensive legislation, anti-discrimination bodies as well as the reverse burden of proof in anti-discrimination disputes, which should be sufficient to eliminate pay inequality, application practices are quite different. A pay gap of around 14.1%¹ in the European Union confirms that current measures are insufficient and that steps need to be taken to ensure that men and women earn the same wage for the same work or work of equal value. Recently, the area of equal pay has seen two significant milestones. The first is the judgment of the European Court of Justice of 2021 in Case C-624/19 K and Others at Tesco Stores Ltd concerning equal pay for work of equal value in the United Kingdom. The second milestone is the Directive of the European Parliament and of the Council, which strengthens the application of the principle of equal pay for men and women for equal work or work of equal value through remuneration transparency and enforcement mechanisms. In this article, the authors deal with the mechanisms of ensuring equal pay for men and women as well as the impact of the decision and the directive on the possible achievement of full equality in pay, especially in the conditions of the Slovak Republic. Our aim is to answer the research question as well as bring our own considerations *de lege ferenda* through the analysis of legal regulations and professional literature as well as the court decision in order to eliminate contradictions in this area.

* Mgr. Denisa Nevická, Assistant Professor at The Comenius University in Bratislava, Faculty of Law, The Department of Labor Law and Social Security Law, Bratislava, Slovak Republic. ORCID: 0000-0002-0365-0776.

** JUDr. Eva Ladiverová, PhD. student at The Comenius University in Bratislava, Faculty of Law, The Department of Labor Law and Social Security Law, Bratislava, Slovak Republic. ORCID: 0000-0002-9026-1305.

¹ In: *The European Commission* [online]. [2021-07-15]. Available at: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en>.

2. EQUAL PAY AND GENDER PAY GAP IN EUROPEAN UNION AND SLOVAK REPUBLIC

Equal pay for equal work or work of equal value is one of the key principles of European Union. The minimum standards are set in the Treaty on the Functioning of the European Union, in particular Articles 141 and 153, which guarantee equality between men and women in employment relations.² Based on the Treaty on the Functioning of the European Union was adopted the 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 (hereinafter “the Gender Equality Directive”). The Gender Equality Directive defines remuneration as the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly from his employer in connection with his employment. Article 4 of the Equality Directive prohibits discrimination, including with regard to pay as follows “*For equal work or work of equal value, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of pay shall be eliminated. In particular, where a job classification system is used to determine remuneration, it is based on the same criteria for men and women and is designed to exclude any discrimination on grounds of sex.*” As we have stated several times, despite the high standards enshrined in by legal norms, the pay gap in the European Union is relatively high. Of the value of one euro earned by a man for his work, a woman in the same position or performing work of the same value earns on average 14.1% less.³

In the Slovak Republic, the situation for working women is significantly more unfavorable compared to the European average. At the end of 2020, the Institute for Research on Work and Family of the Slovak Republic published a study stating the pay gap is at the level of 20.2%.⁴ One euro earned by a man thus accounts for only € 0.8, which a woman earns for the same work or work of equal value. According to the study, during the COVID-19 pandemic, the financial situation worsened for 48.5% women and 44.5% men, while 11.5% of women and 7.8% of men completely lost their income.⁵ Statistical data in the Slovak Republic clearly speak to the detriment of working women. Despite alarming numbers in practice, the legislation in the Slovak Republic (similarly to the European Union) is set relatively strictly. The key legislation is Act no. 311/2001 Coll. the Labor Code as amended (hereinafter also referred to as the “Labor Code”) and Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on the Amendment of Certain Acts (hereinafter referred to as the “Anti-Discrimination Act”). The Anti-Discrimination Act guarantees equal pay in employment and similar relationships. The Labor Code stipulates in the Article §119a that “*Women and men have the right to equal pay for equal*

² BARANCOVÁ, H. a kol. *Zákoník práce. Komentár*. Bratislava: C. H. Beck, 2019, p. 1520.

³ KRIPPEL, M. *Aktuálne otázky v sociálnom poistení. Aktuálne výzvy pre sociálne zabezpečenie v 21. storočí*. Bratislava: SAP – Slovak Academic Press, 2018, pp. 34–47.

⁴ Poznáte hodnotu ženského eura? V roku 2020 je to 80,6 centa a pandémie COVID-19 situáciu žien na pracovnom trhu ešte zhoršuje. In: *Inštitút pre výskum práce a rodiny* [online]. [2021-07-19]. Available at:

<https://ivpr.gov.sk/wp-content/uploads/2020/10/TS_Den-rovnosti-v-odmenovani-2020_final.pdf>.

⁵ *Ibid.*

work or for work of equal value. The same work or work of equal value shall be deemed to be work of the same or comparable complexity, responsibility, and effort, carried out under the same or comparable working conditions and achieving the same or comparable performance and results of employment with the same employer. “The Slovak Republic, like the European Union, has a reversed reverse burden of proof in anti-discrimination disputes. Nevertheless, the number of disputes in matters of pay discrimination is relatively low. During 2020, Slovak labor inspections found violation of the principle of equal pay only in 20 cases in the whole territory of the Slovak Republic, which is at least an unlikely and non-reflective situation with a 20% pay gap.⁶ We therefore believe that the legislation does not reflect the real needs of practice and that the mechanisms of control and the sanction system are absolutely inadequate. As in the Slovak Republic, there is extensive legislation in the European Union, which, according to practical data, does not reflect the real needs of the labor market and has not eliminated the unjustified difference in the remuneration of men and women. The authors are of the opinion that despite the system of judicial and extrajudicial protection of victims of discrimination, the percentage of disputes over the difference in remuneration is so low, because victims of pay discrimination are afraid to file a complaint or lawsuit to court so that they do not become victimized and lose their jobs as a result.⁷ The authors are therefore of the opinion that control and sanction mechanisms need to be set as broadly as possible so that the full weight of control is not against the discriminated employee and her/his activity, but so that the state and its authorities can ensure protection for employees against pay discrimination before it occurs.

The latest ruling of the European Court of Justice in Case C-624/19 K and Others v Tesco Stores Ltd can be considered groundbreaking. It is a decision addressed to the United Kingdom but given the constant case law of the European Court of Justice, it will also have a major impact on the states of the European Union. Tesco Stores Ltd employs around 250,000 people in various positions, from sales to logistics to management. Approximately 6,000 current and former employees of Tesco Stores Ltd, both men and women, have filed a lawsuit in the national court against Tesco Stores Ltd. for infringement of Article 157 of the Treaty on the Functioning of the European Union and of national legislation on equal pay for equal work or work of equal value. The female applicants further claimed that they had been discriminated against in comparison to their male counterparts. Although they performed work at a different workplace and of a different nature, the employer was the same company Tesco Stores Ltd. which should have consider their work in stores as work of the same value as work of men in the distribution network, given the wage was paid by the same company.⁸ Tesco Stores Ltd objected to the impossibility of the direct application of Article 157 of the Treaty on the Functioning of the European Union in the United Kingdom, and the national court therefore referred a question to the European Court of Justice for a preliminary ruling.⁹ The European Court of Justice has ruled that Article 157 of the Treaty on the Functioning of the European Union has direct effect on disputes concerning

⁶ In: *Národný inšpektorát práce* [online]. [2021-07-04]. Available at: <<https://ip.gov.sk/>>.

⁷ LADIVEROVÁ, E. *Efektívnosť vedenia individuálnych pracovnoprávných sporov*. Bratislavské právnické fórum. Bratislava: Právnická fakulta UK, 2020, pp. 75–81.

⁸ C-624/19 K and Others v Tesco Stores Ltd., par. 9–12.

⁹ C-624/19 K and Others v Tesco Stores Ltd., par. 13–16.

breaches of the principle of equal pay for equal work or work of equal value. The Court of Justice of the EU further stated that equal pay applies not only to the same work but also to work of equal value and is therefore a matter for the national court to assess whether the employees performed work of equal value. The same work and work of equal value is of a qualitative nature and relates to the work tasks that employees perform and the resulting value to the employer. At the same time, it is necessary to emphasize that if the conditions of remuneration are from one source, i.e. one employer, they can be compared even if the employees do not work in the same establishment or job position. Article 157 TFEU may be relied on before national courts in a dispute concerning work of equal value performed by workers of the opposite sex who have the same employer in different establishments of that employer, since that employer as such is a single source.¹⁰

By its ruling, the European Court of Justice has clearly extended the protection of employees against pay discrimination. In addition to the settled case-law on equal pay for equal work or work of equal value,¹¹ it has extended the principle of equal pay to one source of pay, to one employer, irrespective of its regional scope. At the same time, the court emphasized the direct applicability of Article 157 TFEU before the national courts, thus clearly strengthening the applicants' position. We consider the ruling of the European Court of Justice to be groundbreaking, as it extends the protection of victims of pay discrimination and emphasizes the importance of the principle of equal pay for equal work and work of equal value between men and women. At the same time, despite the Member States of the European Union, it gives victims of discrimination relatively strong arguments in the event of litigation, as well as an interpretation from which national courts will not be able to simply deviate. However, we believe that the elimination of pay discrimination between men and women must be stopped at the outset, thus minimizing litigation, which is costly and long. We consider it most expedient to draft legislation in such a way as to impose on employers the obligation of transparency in remuneration with sufficient power of control bodies to control and enforce this obligation.

2.1 The New Directive – The Road to Equality?

A new directive of the European Parliament and of the Council strengthening the application of the principle of equal pay for male and female workers for equal work or work of equal value through remuneration transparency and enforcement mechanisms (hereinafter “the Equal Pay Directive”) can respond to persistent illegal pay discrimination. At the time of writing of this article, the Equal Pay Directive is at the draft stage and a draft version is available. The European Union has identified a lack of pay transparency as one of the main obstacles to gender equality in the labor market. The gender pay gap in the EU remains at around 14.1% and has a long-term impact on women's quality of life, their increased risk of poverty and the persistent gender pension gap of 33% in the EU.¹² The

¹⁰ C-624/19 *K and Others v Tesco Stores Ltd.*, par. 18–39.

¹¹ See e. g. C-381/99 *Brunnhöfer*.

¹² COMMISSION STAFF WORKING DOCUMENT. EVALUATION of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on ‘equal pay for equal work or work of equal value.’ In: *The European Commission* [online]. 5. 3. 2020 [2021-07-21]. Available at: <https://ec.europa.eu/info/sites/default/files/swd-2020-50_en.pdf>.

main objectives of the present directive on equal pay are to introduce pay transparency within organizations, to facilitate the application of key concepts relating to equal pay, including pay and work of equal value, and to strengthen mechanisms to promote equal pay. The Equal Pay Directive is aimed at both the private and public sectors and aims to ensure minimum requirements for strengthening the application of the principle of equal pay for men and women for equal work or work of equal value, enshrined in Article 157 TFEU. An important element is the personal scope of the Directive for all workers with an employment contract or similar employment relationship under national law. Thus, personal scope also covers atypical and flexible forms of work, which are very widespread across the European Union and, due to their “non-standard” content, employees in these employment relationships are victims of various forms of discrimination. The Equality Pay Directive also defines two key concepts that are relatively problematic in application practice, namely remuneration and the pay gap. Remuneration is “*the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly (supplementary and variable components) from his employer in connection with his employment.*”¹³ The pay gap is “*the difference in the average levels of pay for male and female employees of the employer, expressed as a percentage of the average level of pay for male workers.*”¹⁴ Equal work and work of equal value cause equally considerable problems in application practice. According to the Equal Pay Directive, it is up to the Member States to secure that employers have mechanisms in place to ensure equal pay for equal work and work of equal value. Achieving this goal is possible through objective tools and methodologies that ensure an objective assessment of the value of work with regard to education, vocational and training requirements, skills, effort and responsibility, work performed, and the nature of the tasks involved, whether workers are in a comparable situation without any gender discrimination. The proposal for a directive on equal pay also reflects the ruling of the European Court of Justice in Case C-624/19 K and Others v Tesco Stores Ltd, which clearly regulates the issue of a single source, i.e., one remuneration payer and a remuneration criteria adjuster. If men and women are employed by an employer who, along with others, falls under one source, their pay conditions are compared with all former, current, and future employees under one source, regardless of workplace or region.¹⁵

Remuneration transparency must start in pre-contractual relations in labor law. Employers of EU Member States will be required to publish the margin of remuneration associated with the vacant job position. Employers will thus be obliged to publish not only the minimum but also the maximum remuneration for a given job position, which, in addition to the basic salary, also includes all other monetary or material benefits that the

¹³ Article 3 of the Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

¹⁴ Ibid.

¹⁵ Article 4 of the Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

employee receives directly or indirectly from his employer.¹⁶ These are the so-called supplementary and variable components, which have not yet been compulsorily disclosed by employers and have thus been able to modify the remuneration of employees without the possibility of control, even without objective criteria. In addition to transparency in pre-contractual relations, existing employer employees will also have the right to information, giving them access to a description of the criteria used to determine the level of remuneration and career development of workers without any gender discrimination.¹⁷ The right to information is a new right that is being introduced for all employees. Employers must, at the written request of the employee, make available within a reasonable time information on their individual level of remuneration and average levels of remuneration, broken down by sex, for categories of workers performing the same work as them or for work of equal value. They can also do so through their representatives or protection bodies so that they do not fall victim to secondary victimization.¹⁸

In addition to obligations towards employees, employers will also have stricter obligations towards the state. Employers with at least 250 employees will have to assess, together with employees' representatives, equal pay in their companies if a pay gap of more than 5% for men and women for equal work or work of equal value is present and the employer cannot objectively justify this difference. The employer will be obliged, in cooperation with the employees' representatives, to prepare an analysis of remuneration as well as a proposal for a solution to the elimination of discrimination in remuneration and make it available not only to employees but also to designated state administration bodies. However, if there is unlawful discrimination against employees in remuneration, they will be entitled to full compensation, including interest on arrears, costs, independent litigation with the burden of proof, disclosure of confidential information on remuneration to employers by court order or representation through representatives, employees or anti-discrimination organizations. In addition to the above-mentioned claims of employees, the employer will be obliged to bear sanctions from the state in the form of fines. Fines for breaches of the principle of equal pay should be imposed with a genuine deterrent effect and should consider the length, gravity, intent and other circumstances of the breach of employees' rights. In the event of a repeated breach of the principle of equal pay, employers will be in danger of withdrawing contributions from public funds or being banned from participating in public procurement.¹⁹

The proposal for a directive on equal pay provides many instruments which are still absent from legal systems. The authors consider the positive definitions of the terms re-

¹⁶ Article 5 of the Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

¹⁷ Article 6 of the Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

¹⁸ Article 7 and 22 of the Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

¹⁹ Article 8–20 of the Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

muneration, one source or difference in remuneration to be positive, which will contribute to easier applicability as well as enforceability of the right to equal remuneration for the same work or work of equal value. The obligation of the employer to publish in the job offer, in addition to the basic minimum wage, also other components of the wage, which are variable or free, the authors also consider as a benefit. Disclosure of the exclusive basic minimum wage distorts transparency in remuneration and information of jobseekers about the employer's wage policy, as the employer can increase the offered wage with discretion to the selected jobseeker at will according to non-transparent criteria. When publishing the minimum and maximum amount of remuneration, job seekers will be able to negotiate the terms of remuneration and request a justification of the proposed wage as well as a plan to increase the agreed wage directly in the employment contract before concluding the employment contract with the employer. The authors consider the employer's obligation to pay the outstanding salary with interest on arrears in the event of the employee's success in an anti-discrimination dispute to be another positive. The reversed burden of proof or the direct inquisitorial jurisdiction of the court in the taking of evidence will also make a significant contribution to balancing the imbalance between the employee and the employer in litigation.

We consider it problematic that, according to the draft directive on equal pay directive, employers will not be obliged to automatically publish an overview²⁰ of the remuneration of individual employees according to position and seniority but will do so only at the written request of a specific employee. The authors fear that there will be victimization of employees who request such information, especially in countries such as the Slovak Republic, where the pay gap is still large and discrimination against women in pre-contractual relations as well as employment relations is relatively fundamental. Sending a request for access to information through employee representatives or law enforcement organizations is a partial solution to the problem raised, but it still does not lead to absolute anonymization of the employee concerned. In order to achieve the goal of equal pay, the authors are of the opinion that employers should publish the remuneration policy with all components of wages for individual positions in the company without the need to request it. This is also closely related to the intervention of employee' representatives or state representatives, who will not be able to find out whether the pay gap with the employer is more than 5% without some of the employees requesting information about the company's salaries. In addition, this obligation to intervene only applies to employers with at least 250 employees who consider themselves to be large employers and completely circumvent smaller employers. We do not consider this to be the right one, as large employers more often have employee representatives who, through collective agreements, are already able to significantly influence remuneration in the company. In most cases, in the author's opinion, smaller employers do not have sufficiently set control mechanisms in the Slovak Republic, both internally and by the state, and therefore the risk of discrimination against employees in remuneration is higher.

²⁰ MESARČÍK, M. The great escape? Liability of public authorities in the data protection area. *The Lawyer Quarterly*. Vol. 1, No. 11, 2021, pp. 158–177.

In the Slovak Republic, following the publication of the draft directive on equal pay, a discussion began on the (im)possibility of motivating skilled employees with higher wages. We consider this to be unjustified, as employers will still be able to remunerate employees who carry out more professional work or work of a different value or other work with higher remuneration than other employees in the same department, even after the adoption of the Equal Remuneration Directive. However, it will continue to be necessary to assess the justification for the pay gap on the basis of objective criteria and not on the basis of a subjective preferences or even gender. According to the authors, a transparent remuneration policy regulated in an internal directive, or a collective agreement is the best choice for compliance with existing standards as well as the Equal Pay Directive without employers facing possible anti-discrimination lawsuits and ensuring fair remuneration. At the same time, gender-transparent and fair remuneration is another tool which, in addition to eliminating the pay gap, will, in the author's opinion, also contribute to greater employment of women and earlier return to work after their maternity leave²¹ or parental leave.

CONCLUSION

Equal pay for equal work or work of equal value is a legitimate aim to which all Member States of the European Union should pursue effective legislation as well as the enforceability of individual regulations in practice. Achieving this goal is possible with maximum transparency of employers in both the public and private spheres. Not only the basic minimum wage but also other wage components such as bonuses, variable wages, monetary or non-monetary benefits must be allocated and verifiable by employers in such a way that there is no unjustified difference in remuneration between men and women. The authors are of the opinion that the new directive as well as the development of the case law of the European Court of Justice will significantly contribute to the achievement of equal pay if it is correctly applied by individual Member States. Transparency in the area of remuneration for all employers, the publication of wages in job offers, the introduction of internal regulations in the field of remuneration or the establishment of state bodies with sufficient control mechanisms can be described as effective tools for achieving this goal. Existing differences in remuneration need to be eliminated to motivate women with parental or caring responsibilities to participate fully in the work process and to ensure their monetary independence.

²¹ PORUBAN, A. *Právo na návrat do práce po rodičovskej dovolenke a diskriminácia. Sine amicitia vitam est nullam: pro memoria prof. Zdeňky Gregorovej*. Praha: Leges, 2019, pp. 212–221.