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Márton Leó Zaccaria
University of Debrecen Faculty of Law, Debrecen, Hungary

Commentary on the principal judicial resolution EBH 2014. M.8. of the Curia of Hungary[1]

The recent decision of the Curia of Hungary – Hungarian Supreme Court before 1st January 2012 – deals with one of the most current questions of labour law which, is the most difficult to be judged, namely, the principle of equal treatment, inwardly the basic question of equality or inequality between employees regarding the obligation of equal wage. In the Hungarian law the question of remuneration without discrimination is not quite unified in spite of the fact that the legal regulation is available. The Hungarian legislation follows the consequently developed standards of both the International Labour Organization (ILO) and the European Union even if regarding the changing labour law rules we can find some controversial steps from the legislative side.[2]

According to it in the legal dispute two basic places of legal norms – the 142/A. § of the Mt., which was in force and partly the Ebktv.[3] – were disputed besides the fact that the Curia had to interpret the reference to the consequent legal practice of the Constitutional Court (in the following: AB)[4] as well as one of its own earlier decisions,[5] or to be correct, the Curia had to judge their relevances and applicability from the point of the basic case.

12. § paragraph (1) of the current Labour Code (in the following: Mt.) states on basic conceptual level that the principle of equal treatment in con-

[1] Official detailed number of the judgment: Kúria Mfv. I. 10.227/2013.

[2] B. Bitskey, T. Gyulavári, *Kell-e anti-diszkriminációs törvény?*, „Jogtudományi Közlöny" 2003, Vol. 58, No. 1, p. 1–8.

[3] Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (in the following: Ebktv.).

[4] Especially the 823/B/1991/3. AB resolution, which concerns the legal way of paying different wages to employees.

[5] Judicial resolution BH 2004.123. of the Curia of Hungary (in the following: BH 2004.123.).

nection with employment relationship must be kept and essentially, this concept complies with the most important regulations of the EU regarding that according to one of the anti-discrimination principles of the European labour law equality between the employees must be ensured in every phase and element of the employment relationship.[6] So the Mt. does not list them but states the rule in general, which correct interpretation should cover all important elements of the employment relationship.[7] At the same time regarding the present judgment it is of special importance that the Mt. – according to the reasoning of the bill[8] it is consistent with the case-law of the Court of Justice of the European Union (CJEU)[9] – at this point names remuneration separately emphasizing that the principle of equal treatment must be kept mainly in connection with remuneration. So the legislator declares that the principle of equal pay for equal work or work regarded as equal is really the most important field of the employees' equal rights and the legislator pays special attention to it. It is noteworthy that this rule is supposed to substitute the rule of the Mt. of 1992 – what is the casue of the legal dispute – according to which the employees must get equal pay for equal work, since this regulation in this form cannot be found in the present Mt., what is more, neither in the Basic Law of Hungary.[10]

Furthermore, the Mt. declares that if this principle is infringed it must be amended without other employees' violation or prejudice to her/his rights, namely it appears as the employer's fundsmental obligation even if the employees have several possibilities for legal remedy in case of discrimination.[11]

From the point of view of this study it must be added that Mt. 12. § (2) defines the concept of wage even if this definition cannot be regarded as an exhaustive general concept, since it only covers that in connection with the principle of equal pay for equal work what should be considered.[12] Though the definition is mainly consistent with remuneration in thg Treaty on the

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[6] C. Lehoczkyné Kollonay, *Az egyenlő bánásmód elve az Európai Unió elsődleges és másodlagos jogában*, [in:] *Egyenlő esélyek és jogharmonizáció*, ed. T. Gyulavári, Budapest 1997, p. 11–14 and 22–23.

[7] This way its establishment, termination, working time, working conditions etc.

[8] Detailed ministerial reasoning of Bill No. T/4786. on the Labour Code, p. 103.

[9] T. Gyulavári, G. Könczei, *Európai szociális jog*, Budapest 2000, p. 135–140.

[10] But it must be added that the Constitution of Hungary – which was in force befor 1st January 2012 – had this rule in 70/B. §. In my opinion this change will not have great effect on the legal practice because this is not the most important aspect in connection with the fundamental principle of equal pay. At the same time the former legal solution was very forward-thinking in Hungarian law.

[11] The employee can choose between the courts (the competent Administrative and Labour Court) and the administrative procedure (Equal Treatment Authority).

[12] This rule was the same in the previous Mt., which was in force at the time of this present case.

Functioining of the European Union (TFEU) and its concept in the European judical practice since it interprets the concept broadly and its most important conceptual criterion is that the employee should deserve certain remuneration from the employer in connection with employment relationship.

Last, from among these rules 12. § (3) should be mentioned, which lists the aspects of equal work not exhaustively. These aspects mainly appear in connection with wages, and are very important because they are the most typical from those on which basis it can be decided whether works done by two or more workers are of equal value or not.[13] It is important to add that since they are the most typical examples from the circle of criteria of comparision, it is not excluded that the courts also balance other aspects beyond them, but it is also true that in Hungarian legal practice the circle of these aspects have already been crystallized.[14]

At the time of the case by comparison regulatory environment in force it only must be added as a change that the circle of these typical attributes has broadened, since the aspects of the governing labour market should be examined as well. Otherwise, the aspects of defining the equality of work are of high importance because the fundamental principle of equal pay must be applied only for employess in comparable situation (e.g. equal position or equal task), namely, one of the most important concept of anti-discrimination law, the criterion of comparability appears factually in connection with remuneration. If the equal value of work cannot be stated in lack of comparable situations infringement of the principle of equal treatment is conceptually impossible.[15] Finally, it is clear that these aspects – the nature of the done work, its quantity, quality, working conditions, necessary qualification, physical or intellectual efforts, experience, responsibility, conditions of labour market – really are such elements by which adequate application in practice one can decide about the equality of certain work objectively and reasonably.

I would like to mention in short the main rules of the other important legal source, the Ebktv., which connects to the case, which is the object of this study. Ebktv.states in the 8. § the five types of discrimination: direct and indirect discrimination, harassment, segregation and victimization. Besides it provides the rules of burden of proof (19. §) and about exemptions from the main rule, in which cases the employee's disadvantage because of some

[13] We must also take into consideration that in most cases we can only talk about work of equal value and not equal or same work. According to the development of the case-law of the ECJ work of equal value can be regarded the most important aspect.

[14] As a consequence courts rarely exceed the catalog contained in 8. § of the Ebktv.

[15] See especially Article 2 paragraph (1) point a) of Directive 2006/54/EC of the Parliament and the Council, which states "comparable situation" as the base of direct discrimination.

personal attributes does not result discrimination, because the employer applied the means of differentiation legally. Special attention should be paid to the 2. § of the law because its rules must be applied together with the concept of the Mt. since the Mt. also declares general framework-type rules in connection with the principle of equal treatment, so regarding employment discrimination both of the legal regulations are governing though the norms of the Ebktv. are less important in this actal case.

In the following it is necessary to sum up the statement of facts of the judgment in short in order to evaluate the decision foundedly, and it is also important to regard the later consequences. First of all, it is important to remark that on the basis of the antecedents of the case the questions involved in the judgment have connection with stating the unfair termination of the legal relationship, but they will not be interpreted here, because these circumstances are irrelevant from the viewpoint of enforcing the principle of equal pay for equal work.

The plaintiff woman employee's position at the employer was swimming--master together with other employees who had the same tasks in this position (employee no. 1., employee no. 2. and employee no. 3.). The latter employees are men.The legal relationship of the employee and the employer started to be problematic from the 5th November 2005 because from this point to the 24th November 2008 the employer stated the plaintiff's base wage illegally infringing the principle of equal pay for equal work.[16] According to the court of first instance in the statement of facts the plaintiff's classified wage and her average income[17] calculated per hour was the same as her colleagues' till the 31st January 2005. But from now on the employer made differences openly and at great extent regarding the plaintiff's and the above mentioned colleagues' wages.

According to the employer's justification the employer paid less to the plaintiff because her colleagues in comparable situation received higher category qualification – higher education –and the employer says that itself it is enough reason to determine their classification in a different way according to other aspects. So on the 1st February 2005 employee no. 1.'s, employee no. 2.'s and employee no. 3.'s base wage was increased only and the plaintiff's salary remained unchanged.The difference between the plaintiff's and her colleagues salaries became higher from the 1st May 2005 – and this tendency was going on later – since the employer increased the three colleagues' and

[16] Base wage was considered as personal base wage according to the previous Mt., which was in force before 1st July 2012.

[17] This concept is replaced in the present Mt. in force by abscence wage.

the plaintiff's salary continuously but because of the differences in the intermediate period the raise was of different extent[18] in spite of the fact that – seemingly – the employer increased their salaries at the same extent expressed percentage. But the absolute value of the difference became continuously higher what led to the plaintiff employee's commencement of action.

First the Curia – since the plaintiff submitted a petition for review after the judgment of the second instane with legal force – had to decide whether the classified pay and the base wage belong to the scope of the principle of equal pay for equal work. Referring to the Mt. 12. § (2) the answer is definitely „yes", since the base wage is the most essential element of pay,[19] and the employee is entitled to it as consideration of working activity exclusively. And the so-called classification wage serves as its base, so the employee deserves the base wage mostly in a certain position. It is beyond dispute that these elements of pay – independently from their names – belong to the conceptual circle of remuneration.

The next important question connects to the comparability,since to decide whether the work done by the plaintiff and her colleagues is of equal value is the clue to judge whether the principle of equal pay for equal work regarding the plaintiff was infringed or not. During this examination the Curia relied on the concept of the Mt. 12. (3) mainly[20] and also on viewing working positions and the actually done work. The Curia stated that the employer has to justify that the employer fulfilled the requirements of equal treatment, if she/he made difference between his employees' base wage referring to their qulification, this is legal only if the other three colleagues' higher education is necessary for their work, namely, it had legal reason and reasonable cause that the employer decided lower base wage for the plaintiff employee. In this case even if the employer differentiated clearly between his employees, she/he could do it with keeping the principle of equal treatment, so it could have been legal differentiation and only seemingly discriminative.

It must be added that earlier the employee had to render in action that she was discriminated by her employer and she suffered disadvantage. However, the employer has possibility to justify himself and for this interest the employer stated the following causes.

The cause of the difference between the wages is only the obtained higher education and qualification for operating the water recycling equipment re-

[18] In the first period the the plaintiff's wage was only 94,3% of her colleagues' wage and later it decreased to 90%.

[19] T. Prugberger, G. Nádas, *Európai és magyar összehasonlító munka- és közszolgálati jog*, Budapest 2014, p. 253–254 and 259.

[20] It was paragraph (2) of 142/A. § of the previous Mt., which was in force that time.

ferring to the respondent's argument exempt from the principle of equal pay for equal work can be made if the compared employees' education, qualification is different. Furthermore, the employer noted that the mentioned difference between the wages is not so huge that it could not deduce reasonably from comparing higher and lower education. In the defence the employer also noted that the lower level courts applied Pp. 164. §[21] and Ebktv. 19. § paragraph (1) because the plaintiff would have had to justify that the employer did not fulfil the principle of equal pay for equal work. Furthermore she/he adds that employee no. 3. who was compared with the plaintiff, also had the tasks of the team leader, so his working activity is different from the plaintiff's work in merit, and on these basis higher pay can be given to him.To support all these the respondent employer said that the documents justifying the different educations are enough evidence that the plaintiff's wage was lower only because of her lower education – and did not increase at the expected measure – so it is justified that the employer fulfilled the requirements of the principle of equal treatment referring to the Ebktv. 19. §.

Further interesting element of the employer's argument is the reference to the 823/B1991/3. AB resolution, on which basis – according to the respondent – different remuneration can be paid legally to an employee whose classification is the same but whose qualification is different from the others.[22] The employer explained that different remuneration is possible even in case of equal work if such cicumstance can be justified, which diverses the measure of equality, namely, in the given circumstances the employees would be entitled equal pay only seemingly. Besides, the employer referred to the Curia's decision BH 123/2004., this way she/he intended to strengthen the legal possibility of differentiating between wages.

Summing up the respondent employer's justification arguments it is clear that the employer does not even try to deny that she/he paid less base wage for the plaintiff and the absolute value of her wage gradually decreased later in comparison with her colleagues in same positions. To his standpoint the base of differentation was not the plaintiff's protected attribute – her gender – but the examined other employees' higher, different education and qualification and this cannot be regarded wage discrimination.

But the Curia did not regard the employer's justification reasonable, because the employer cannot apply different remuneration if the nature, quantity, quality of the done work, working conditions, exerted efforts and responsibility practically is the same even if some further circumstance can

[21] Act III of 1952 on Civil Procedure (in the following: Pp.).

[22] So this kind of employer's act is not contrary to the principle pf equal pay.

be observed like the higher education or qualification, which was taken into consideration by the employer. Moreover, the name and type of the working positions were the same in this case. However, this argument must be completed that basically higher education can result higher classification but only if it is stated as compulsary regulation in connection with the given working position by legal regulation, collective agreement or the employer, or the employee's higher qualification may affect in merit the quality and quantity of the performance of work.[23]

In the present case taking into consideration these two aspects it is sure that it is not justified. On the one hand, higher education, qualification was not required to fill the position and on the other hand, the higher wage classification was not due to the fact whether the employees really had such qualification. It must be added that the employer did not even prescribe that in the interest of professional advancement she/he would involve the employees, namely, the employer could not have justified herself/himself that for establishing legal relationship education is not required, but it may be advantage later.[24]

What is more, the Curia emphasizes in the judgment that according to the respondent in the background of the wage classification there were the mentioned extra qualifications exclusively – which were not necessary for the work – but the plaintiff also had some extra qualification.[25] So if the employer intended to base the different wage classification whether the emploeyee had any extra qualification, the employer would have imfringed the principle of equal pay for equal work.

In my opinion this train of thought needs some ammendment because the extra qulification could be the condition of wage increasing if it is not bound necessarily close to the activity done. All this can be implemented in such a waging sytem where the employer binds the measure of the base wage to special levels of education or qualification. However, in this hypothetical case designing working positions sholud be matched to this.

The Curia – correctly on the basis of the regulations of Ebktv. and EU law[26] – shared the standpoints of the lower level courts in connection with

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[23] It must be added that in this case the emplyoer argued with these qualitative and quantitavive aspects but she/he did not give more details except the surplus tasks in connection with the team leader position.

[24] This kind of prescription could be legal, of course if the conditions were clarified in advance and in this case the employer should assure the terms for acquiring the actual qualification equally without discrimination for all employees (for example free time, pecuniary support).

[25] Chlorine-gas dispenser and conditioning masseur.

[26] See especially Article 19 of Directive 2006/54/EC as follows: "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that,

the burden of proof emphasizing that it was the employer's burden to justify that her/his procedure complianced the principle of equal pay. The function of this special – reversed – burden of proof is to ease the employees' situation in such cases regarding that the employer in her/his position is always in an easier situation during the evidentiary procedure since the employer has more information and facts than the employee.[27] Furthermore, it was legal that the courts examined not exclusively the plaintiff's comparable situation comparing with employee no. 1. in spite of the fact that in the claim that the plaitiff marked only him. According to the Curia if only by comparing more employees and works can be judged whether it is a comparable situation, it is justified to do this examination amplifying.

It is noteworthy that the Curia argues that defining equal value and equality of the remuneration cannot be bound to time limit, so the respondent cannot refer to that she/he fulfilled the requirement till the time in question and later there was no difference between the percentage of the raising. It should be noticed that the plaintiff suffered discrimination in the interim what is another proof that the difference between the wages were not based on objective aspects.[28] In my opinion it is of high importance that the Curia conducted the examination of comparability with the necessary care and did not make the mistake to judge the working activities on the basis of qualification. It is important to certify them different albeit with insisted on connecting the done work to the necessary qulification. Otherwise, it cannot be deduced either from it that only the higher qulification was the reason of different waging even if in this situation the employer could justify herself/himself.

Every employee working as swimming-master had the necessary qulification, their activities, working hours, responsibilities were the same. So their situations were comparable, namely, on the basis of the attributes stated in the Mt. 12. § (3) they made equal work for what they should have received the same pay naturally. Furthermore, since the employer did not raise more conditions, her/his argument that the plaintiff did not receive the designated qulifications by her own fault regarding that she had opportunity to it is unsubstantiated. Of course, this argument could have been correct if the ob-

when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

[27] N. Cunningham, *Discrimination Through the Looking-glass: Judicial Guidelines on the Burden of Proof*, „Industrial Law Journal" 2006, Vol. 35, No. 3, p. 272–278.

[28] It is irrelevant that they got the qualifications later because the unjustified differences had emerged earlier and these new qualifications did not make reasonable these differences either.

ligation of receiving higher qualification had been among the requirements and the plaintiff would not have fulfilled it intentionally. It is true that according to the principle of equal treatment the employer secures the same conditions and opportunities for her/his employees, but in this case „not using" this option as justification seems rather remote and hypothetic at the same time.

According to the 823/B/1991/3. AB resolution breaking the principle of equal pay for equal work is legitimate if further or higher qualification is important from the view of the working position and has effect on the activity done within its frames in merit. In other words: the designated employees did not become better, more useful workforce because of their higher qualification, which is in indirect connection with their work and it reasonably cannot be the base of wage differentiation. The Curia adds that the BH 123/2004. decision quoted by the respondent is irrelevant in this case.

I would like to add that in this decision the Curia declared that differentiation between the employees by the employer is justified during doing same type of work when the given employee has not got the same conditions. Consequently, in this case the employer can pay different remuneration to the given employees.[29]

As a whole we must agree with the decision, and in my opinion it is of high importance that the Curia raised this decision to principal decision level, since it is a new step to integrate the principle of equal pay for equal or work regarded as equal work to the Hungarian legal system since we have experienced its narrowing interpretation in the legal practice. Though the legal practice is not totally unified at present, but with its very important decision the Curia tries to declare that in connection with remuneration the prohibition of discrimination should be enforced broadening and consequently. Further importance of the decision is that all the important theoretical elements of the principle of equal pay are surveyed giving a more precise direction to the jurisdiction in the future.

[29] According to the decision of 2004 „conditions" mean the classification of the employee based on the law, which can of course orientate to qualification or education but these aspects are not exclusive. A parallel can be drawn with the judgment of 2014 as follows: in the 2004 case not the qualification was needed to adjust to the postion but the position to the qualification; and in the 2014 judgment not the qualification determined the working position and the base wage of this position but the fundamental prescriptions connected to the working position and the scope of duties.