

EQUAL

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From the publisher:

The legal analyses herein only point at the possibility that the principle of equal treatment was violated. They represent a subjective assessment of the cases and the authors' individual understanding of the anti-discrimination laws in force.

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EQUAL

REPORTAGES ABOUT
DISCRIMINATION
INCLUDING A LEGAL
PERSPECTIVE



POLSKIE TOWARZYSTWO
PRAWA ANTYDYSKRYMINACYJNEGO

Warsaw 2015

*In these matters, memory is often unclear,
because the mind is trying to push the unpleasant details
into a space to which there is no access, down to the bot-
tom, like in a closet.*

Małgorzata Borowska, *She was imprecise in saying where exactly he had touched her*
[from the reportage]

Introduction	7
She was imprecise in saying where exactly he had touched her, <i>Małgorzata Borowska</i>	11
Legal analysis, <i>Katarzyna Bogatko</i>	18
Labour and relaxation court, <i>Jakub Janiszewski</i>	23
Legal analysis, <i>Monika Wieczorek</i>	28
Welcome to our store, <i>Marta Mazuś</i>	33
Legal analysis, <i>Krzysztof Śmiszek</i>	38
Palestinian means suspicious, <i>Paweł Rzekanowski</i>	43
Komentarz prawny, <i>Krzysztof Śmiszek</i>	47
Tailor-made dismissals, <i>Paweł Rzekanowski</i>	53
Legal analysis, <i>Maciej Kułak</i>	57
Too able-bodied to feel hurt, <i>Michał Janczura</i>	61
Legal analysis, <i>Katarzyna Bogatko</i>	65
Because we are Gypsies, <i>Justyna Pobiedzińska</i>	69
Legal analysis, <i>Monika Wieczorek</i> and <i>Katarzyna Bogatko</i>	75
Fortune favours the reasonable, <i>Agnieszka Wójcińska</i>	79
Legal analysis, <i>Karolina Kędziora</i>	88
Podkowa, <i>Magdalena Kicińska</i>	93
Legal analysis, <i>Karolina Kędziora</i>	98
Revolutionary spirit, <i>Karolina Oponowicz-Żylik</i>	103
Legal analysis, <i>Monika Wieczorek</i>	109
About the authors	113

INTRODUCTION

Dear Reader,

We are excited to present to you *Equal*: ten reportages, each of which is appended with a legal analysis of the events presented therein. They are a result of cooperation between journalists with an interest in human rights on the one hand, and lawyers working with the Polish Society of Anti-Discrimination Law (PSAL) on the other. A large proportion of the stories feature past or current clients of PSAL who have approached us with request for (and received) legal assistance.

For a number of years, PSAL has been offering legal assistance in cases where the principle of equal treatment may have been violated on the grounds of sex, age, disability, religious or political beliefs, race, ethnic or national origin, sexual orientation, transsexuality, or trade union membership. As the name indicates, the Polish Society of Anti-Discrimination Law focuses on the legal aspects of discrimination. However, we know from experience that the social back-

ground of these problems cannot be discounted. This includes the sources of discrimination, among which the lack of social awareness certainly ranks high. Consequently, one of the key objectives of PSAL is to engage in anti-discrimination education. We provide training to various social groups: to those who may potentially fall victim to discrimination, as well as to the decision-makers who have impact on preventing discrimination, both in the private and in the public sector.

This publication is also intended as an educational resource. Its intended target audience is journalists. We believe that the media reporting on discrimination, along with the language used in this media coverage, has immense influence on the public debate and on whether and how the public is educated. While most of the journalists involved in this project had already had the experience of publishing on matters related to human rights issues, this was their first opportunity to study the specific problem of discrimination. We hope that the cooperation that has started with this project will result in greater sensitivity to the problem of discrimination in the future, both on the part of the re-

porters involved in this project and on the part of those who read the resulting stories.

When the issues of discrimination and equality are presented without the requisite knowledge or sensitivity, it may have the effect of actually perpetuating social indifference, stereotypes, and prejudice. Anti-discrimination education of journalists also appears increasingly necessary as media coverage of instances of discrimination and of its victims is on the rise. Tolerance, dignity, and respect for diversity must be promoted. Therefore, it is important for us to support the media community by providing knowledge and raising awareness to make this type of coverage most effective.

In offering this publication specifically to journalists and reporters, we would also like to bring their attention to certain types of language that have been in circulation for years, but that may result in perpetuating inequalities if we remain unaware of their effect. Language carries the stereotypes which in turn are the source of discrimination. Stereotypes are oversimplified beliefs about a social group or a member of a social group. They assign certain characteristics, behaviours, or social roles to all members of this group, erasing individual differences between them. Stereotypes are beliefs that are widely held by members of a group about members of other social or cultural groups. It is important to notice the language in which stereotypes are expressed. Typically, negative characteristics are associated with groups that are perceived as outsiders, as 'the other.' The language at any given point in time reflects the social attitudes of that time. A child that grows up in a specific social and cultural context learns this language, and consequently absorbs these stereotypes and prejudice.

In media programming with an educational purpose, discrimination features very rarely. Public awareness of this issue, including awareness inside the media community, is relatively low. The language itself may

also appear to be perpetuating exclusion of certain groups and domination of others. Certain word choices to refer to members of social groups may bring offence and further replicate hurtful, incorrect assumptions. The terms typically used in Poland, such as 'Gypsy' and 'Jew,' or the term 'Murzyn' to refer to a black person, are generally believed to simply denote ethnic, religious, and cultural groups, but are also used to insult and hurt.

The sexism of the Polish language, expressed in the avoidance of feminine forms of names for the more prestigious positions and profession, as well as the infantilization of women in the public space, have impact on how women function in various areas of life. The language of equality, also referred to as 'inclusive language,' proposes a shift in how language can be used in a community. Its objective is to stress the diversity and to include the perspectives of persons who are often marginalized. It serves to create fairer and more inclusive linguistic norms that would reflect the true diversity of the world (*Edukacja antydyskryminacyjna. Podręcznik trenerski*, eds. M. Branka, D. Cieślukowska, Villa Decius, Kraków 2010).

Using the language of gender equality, or a language that is ethnically neutral, may prove a great challenge for a journalist or a reporter, who may then be accused of being over-sensitive or incorrect in their use of language. People identify with language, are accustomed to how it is used, and have habits with regard to certain phrasing or word use. We would like to encourage you to take up this challenge nonetheless. We believe this is the best course of action in all perspectives, including the legal one.

If the media take an interest in the issue of discrimination and give coverage to stories of unequal treatment, and in doing so, they employ the language of equality, this will likely serve to raise public awareness of the problem. It may also result in a larger number of lawsuits being

brought. It would be naive to believe that the current, relatively low number of lawsuits is a reflection of how little discrimination takes place in Poland. Quite the opposite is true: research and available data suggest that the Polish society is both homogenous and reluctant to accept the diversity represented by minority groups. Moreover, those who fall victim to discrimination are often unfamiliar with the legal regulations, and even if they do know the law, they are afraid to take action for fear of losing their jobs or reputation. Often, they have also no trust in the effectiveness of legal action. A stronger presence of issues of equality in the public debate could trigger significant social change.

Publications with a strictly legal focus are of course necessary. They may be useful to those who take legal action e.g. against employers, service providers, or institutions of education, as well as to those who are just considering this option. This is why we have provided a specific legal analysis of each case that is described in the reportages. Most of the stories in this book refer to cases in which courts were involved. In some of them, rulings have already been entered, but other cases are still awaiting the court's final decision. This is the reason why we have changed some of the names and identifying details, and why the legal analyses pertain just to the facts of the case and not to the actual court documents.

While the legal regulations are certainly very important, we would like to draw your attention to the stories presented herein. Each of them focuses on specific real-life events, to which the legal perspective takes second place. We believe that the subjective view of a reporter gives the reader a way to see each case in the perspective of their own experiences, attitudes, and possibly prejudice. Dry legal analyses offer no space to do so, and thus may be less effective in effectively revealing the social mechanisms which are the source of discrimination.

This is why we are hoping that this publication will find readers not only among journalists and reporters, but also among all those who are not indifferent to the issue of discrimination. We are hoping that it will provide an insight into how the violations occur, in order to ensure that equality prevails wherever we work, study, or simply exist in the public space.

On behalf of the entire PSAL team and of the featured authors, I hope you enjoy reading this book!

*Karolina Kędziora, legal advisor
Vice-President of the Polish Society
of Anti-Discrimination Law*



SHE WAS IMPRECISE IN SAYING WHERE EXACTLY HE HAD TOUCHED HER

Małgorzata Borowska

Julia told the judges that Robert C. had touched her breasts and thighs, unbuttoned her clothes, and pressed her bodily to the wall. Witnesses testified to how upset she had been. The courts dismissed the case, citing absence of evidence.

HOW THE POLISH ARMED FORCES HANDLED HARASSMENT

In the court cases concerning Julia Kowalska, the evidence is either missing or scarce. The most important piece is the logbook kept by the commander of the military unit, Adam Baranowski. In the logbook, there is a note saying that Julia reported an issue. This should be followed by a brief report of the relevant meeting, but the remaining lines have been struck through with thick black marker. Only two sentences are left: 'Kowalska Julia – request to be moved to another room', and several lines later: 'Conversation with officer Robert C.' Three more lines follow, also redacted.

Actually, the case file only holds a copy of the logbook. The original went missing before the trial. The letter from the attorney said it was destroyed. Yet the note is important, because it is the commander of the unit that is responsible for the conditions of work. It is up to the commander of the unit to create an atmosphere in which nobody's hands go wandering under another person's clothes. Colonel Baranowski testified that Julia Kowalska had requested a transfer to another unit, because her



cooperation with officer C. was not going smoothly. Baranowski suggested that she should file an official note, which would officially launch the case. Julia didn't. He abided by her request to be discreet.

In his testimony, Baranowski often expresses his surprise: he did, after all, accept Julia's report; he did have a conversation with the officer involved a few hours later; the officer in question assured him that no harassment had taken place; he did meet with the intern – Julia – twice more, and she didn't seem intimidated; a psychologist on duty is available for everyone in the unit; the intern was issued a good reference, signed even by officer C., critical as he had been of her; so many interns move through the unit and nobody, really nobody at all, had ever had any problems, except for Julia.

This is why colonel Baranowski is convinced that Julia only wants revenge. If she had been offered an army job after her internship, the harassment case would have remained in the logbook, and would never have made its way into the courts.

Impulsive, pleasant, polite

Julia's first internship was 6 months long, from August 2008 to February 2009. It went very well. The commander of the unit himself gave Julia high praise in his opinion for the Labour Office. Julia was very eager to work for the army. She was used to the military culture. Her father retired as a colonel, and her mother had worked for years on the civilian staff. Julia was 23, she was motivated, she had a bachelor's degree in cultural studies, and she had a number of good references: from an animal shelter, the Auschwitz memorial museum, a history-oriented website. In addition to the standard-issue superlatives, the references noted that Julia has an amicable disposition and is not prone to conflict.

In the small press unit, Julia worked as an intern under the supervision of the spokesperson and the disciplinary officer. The brigade has been involved in many missions abroad, so people were coming and going, the soldiers did a pilgrimage, the bishop blessed the equipment, school kids came on trips to visit the small museum on site – the press team had its hands full. 'Impulsive, pleasant, polite,' said Piotr, who worked with Julia, in his testimony about her.

At the end of her internship, Julia threw a small party in the office. She brought coffee and cake. A few of the soldiers came, the secretaries, the human resources staff. Robert C., officer in charge of lower-ranking soldiers, came as well, all dressed up and bearing a rose and a Parker fountain pen. The gift was expensive and Julia was reluctant to accept it. She did, eventually, because the guests said it was not polite to be so picky. She was also reluctant to let C. give her hugs and kisses. It was so uncomfortable, with the guests looking on. A bit of a pickle, the party. Yet she thought also: the internship was over, and it had been so good. She took a deep breath.

I remember that she burst into tears

Robert C. became the supervisor of Julia's second internship in October 2009. He testified in court that it was at Julia's request; she testified it was at his. In C.'s office, taking deep breath was not helpful, and neither was scuttling along the walls, always making sure to be facing him, moving away. It helped neither to avoid him nor to be very polite. Also unhelpful: advice to the effect of 'just whack him if he comes on to you!' The advice was really how Julia's mom and sister were trying to make her laugh, because she was sad and subdued. Julia's mother says it was an aspect of the army she had never seen. She thought her daughter was maybe joking, and if not, surely exaggerating.

'I remember Julia saying: "I'm not going to go there", and me saying to her: "You should definitely go, because now they think highly of you, but if you don't go, they'll think you're a quitter", and so she went back. We thought it would all blow over.'

That day, Julia wanted to stay a bit longer, because a colleague in the human resources department had asked her for help. Robert C. did not allow it. 'Why is it not allowed to help a colleague?', the HR clerk asked C. before leaving the office for the day. C. answered, politely that he knew nothing about any helping.

'This is how the day ended', he testified. 'Before I left, I saw Ms Kowalska burst into tears and leave too.'

Julia on the other hand remembers how, after the question from the HR clerk, Robert C. was walking down the hallway and yelling: 'Kowalska is lying!' And then she did, in fact, burst into tears.

Robert C.: 'The next day before the briefing Ms Kowalska told me that she did not think it possible to continue working together. Maybe this was to some extent because I did not agree to her staying after hours. Maybe because I was critical of her work, and she was not receptive to my minor critical comments.'

Julia: 'This is when C. really got to me. It is one thing what he did in private, but it is another thing in public. It was such a scene that people came over from other floors. I didn't want them to think: she is just an intern and she is causing problems for a guy who actually works here.'

He denied it and I didn't drag it out

Julia didn't want Robert C. to have any problems because of her. All she wanted was not to work in his office any more. The most important think was to do it discreetly. Honourably, was her family's advice.

The chaplain was the first to find out. It was a normal chat over a coffee: about a trip to a place of religious importance, about work. It just slipped out. The chaplain told her to see the commander of the unit about it, and Julia felt encouraged.

It was a long way to the commander's office and Julia's courage ran out half way down, by the staircase. This is where support came, in the form of a colleague.

'What's going on?'

'I want to see the commander', said Julia, crying.

'Why are you crying?'

'Can't you figure out what happened?'

'Maybe we should see Małek, he is in charge of discipline.'

'No,' said Julia, shaking. 'I want to see the colonel.'

The colonel met with her immediately, but their conversation was very brief, something they both admit.

'The colonel was ill at ease, he didn't know what to do with me.'

'Ms Kowalska was not ill at ease.'

'He suggested a confrontation. That I was not able to face.'

'She was imprecise in saying where exactly he had touched her.'

'I requested a transfer.'

'I had no reasonable grounds to launch a complaint procedure against the officer,' said the colonel.

'I asked that no formal procedure should be launched,' said Julia.

'I talked to him that same afternoon. He denied everything. Consequently, I let the matter rest,' said the colonel.

'I had left my purse in C.'s office. Half of the conversation with the colonel, I was thinking about how I could get it out of there,' said Julia.

'I didn't find it necessary to make a formal note of the conversation, and Ms Kowalska was transferred as requested.'

In court it turned out that it didn't pay to be discreet. The witnesses somehow dematerialized. Yes, somebody had heard Julia crying, somebody had seen her upset. But who knew why? Hormones, maybe, or stress, or just a bad day? This is, after all, the army; things can get intense. The court found that there was not a single person to come out and say directly: 'I saw Ms Kowalska being harassed.' A witness to a bit of crying is not a good witness in court.

As for Julia's purse, eventually somebody grabbed it for her and so she got it back. Since then, she didn't have any contact with officer C. What she also didn't have was a desk or a computer. She worked at a bench where people normally sit to rest. The press spokesman wanted to offer Julia a spot at his desk, but – as luck would have it – he shared it with officer C.

Paweł Małek, in charge of discipline, took Julia on for the rest of her internship. The tasks she was assigned were somewhat erratic: cataloguing printers, dusting the storage shelves. Suspiciously often, she was also required to make the night trip to field training. For the

entire duration of the drive she would sit very still, her whole body rigid with tension: a young woman alone with twenty soldiers, all male. By December, two months later, she was clearly unwell. The muscles tensed enough to almost break her collarbones. Just looking at her mailbox made the tension spike. Usually, an email from C. appeared – he was still the supervisor of the internship, despite Julia’s transfer. He emailed to say that her press releases were ‘too feminine.’ Random soldiers fetched and carried the printouts between Julia and C. like dispatches between military headquarters.

The soldier suffered mentally

That might have been the end of story for Julia, if it hadn’t been for one thing. At the end of her internship, an opinion about her was issued – as it always is, at the end of an internship. In the opinion, Julia was described as ‘having completed her duties in a proper manner, with an engaged attitude and on time.’ The opinion was signed by Robert C. On seeing this signature, Julia burst out in tears again. She can’t remember now: was it helplessness or was it anger? She asked the commander of the unit in writing to have the signature removed. After all, she only worked with Robert C. for two weeks before her transfer. It was not an honourable thing to do, she thought, to have C. write an opinion about her, after he himself had acted dishonourably.

In April 2010, half a year later, Julia accused C. of assault and harassment. First, she gave an interview in a local daily. Robert C. was referred to only as ‘the soldier’ and ‘the officer,’ but the unit exploded. The head of military gendarmerie himself called Julia on the phone. If she was going to make accusation, he said, she should do so officially! She should make a decision, and right now!

And so Julia filed a report with the police, saying that Robert C. had touched her breasts and thighs, had unbuttoned her clothes, and had pressed her bodily to the wall; also, because she had resisted, he had pushed her against a wardrobe twice.

The military prosecutor initiated proceedings. He held several meetings to question Julia: with no witnesses present, no psychologist, and no attorney. He asked about the dates. When did C. come near her? On which day did he put a hand on her thigh? How many times? Was she certain it was twelve times? In these matters, memory is often unclear, because the mind is trying to push the unpleasant details into a space to which there is no access, down to the bottom, like in a closet. In December 2010, the prosecutor decided that Julia’s story was unlikely to be true. It came down to the dates. C. argued that on the dates indicated by Julia he had been away. He was familiar with Julia’s testimony and the documents he presented were partial copies of faxes in which the commander of the unit was sending him for trips out of the unit. The dates on the faxes were never checked, and the originals never requested.

Julia brought the first case, alleging defamation, not against C. himself, but against his wife. This was at the suggestion of her court-appointed attorney. C.’s wife had been quoted by the local daily as saying: ‘Kowalska wants to catch a guy and a job, but she has had no success with my husband.’ The journalist who had filed the text testified: ‘I cannot reveal my source, but this is a direct quotation.’ Yet the court found differently. It found that it is impossible to prove that C.’s wife had actually uttered these words. In September 2010, Julia lost the case.

While it was pending, Robert C. filed his own lawsuit too, also alleging defamation. He argued that since the press publications

about harassment that Julia had initiated, he suffered mentally, and he missed out on entering officer's training because he was not allowed to take entrance exams while he was under the prosecutor's investigation. Robert C. won the case in August 2013.

Today, Julia has official papers from a doctor certifying that she has clinical depression, and also official papers from the court sentencing her to four months of deprivation of liberty, with the option to choose community service instead. She is going to appeal.

The third court case was brought by Julia too, this time before the labour court, in November 2010. The essence of the case is failure to offer Julia employment. The labour court decided to split the case in two parts, with the first part referred to a civil court. Julia was trying to demonstrate that the general of the brigade had orally promised her she would get a job after the internship is over – but she didn't. In defence, the army unit offered written evidence, showing that Julia had been sent a letter with a denial of the job in November 2009. Julia lost the case in spring 2012.

Erotic email goes missing

The fourth and last case is still pending. Labour court of two instances – the lower, regional instance and the higher, appellate instance – both heard the case and dismissed the complaint.

This is how it went. Julia sued the army unit, seeking PLN 100 000 as compensation for being forced to work under the supervision of the same person from whose presence she was removed, despite there clearly needing to have been a reason for that removal. The procedural regulations for cases of this type require only that Julia should present some support for the argument that Robert C. had touched and assaulted her; there is no need for her to actually prove it.

Yet both two courts ruled that Julia failed to present such information. The dozen witnesses were found insufficient for the court to determine whether Julia had expressed any objections.

Julia's mother (who had asked Julia not to quit the internship): 'At first I ignored my daughter's reports, because I had never heard of a case this bad. I thought it was just a bit of horseplay, that it would not get out of the unit, would dishonour the army, because this is about us – we are a military family. And my daughter responded by telling me that he was grabbing her crotch and breasts unbuttoning her blouses. She said this was not permitted, and that it made it impossible to focus.'

A colonel (who worked two floors above C., but was assigned to a different unit and so was not under the same unit commander): 'I have known officer Robert C. since the 1990s. I know that he has big appetite and I have heard from friends that he and his wife had split up and he had a number of affairs. So I was not surprised when I heard about the accusations. Mr C. showed me several emails that he had written to Ms Kowalska. He actually printed one out for me, but it has gone missing. It was clearly very erotic in nature. It said that he would like to watch Julia change into a uniform.'

Human resources clerk (who worked on the same floor as Julia and saw her often): 'I asked Julia many times why she wasn't smiling, whether something had happened. I knew something had gone wrong during her first internship. When she first came to the unit, she was not this sad.'

Marek, one of the soldiers (who walked Julia to the unit commander on the day she made her report): 'I don't recall exactly the day or month. Ms Kowalska came running down from the second floor of building number eight. I asked her what was going on. She told me to figure it out myself. I didn't continue the conversation because I could see that she was in a state of shock.'

Julia: 'I saw both the psychologist and the psychiatrist in the military hospital. The psychologist referred me to two psychiatrists, a military one and a civilian one. The military psychiatrist found that during the internship and as a result of the court cases, I had suffered trauma like a soldier in Afghanistan. I now have neuralgia. I feel psychosomatic pain and I have anxiety regarding employment, and sometimes social anxiety and feelings of revulsion towards people.'

Julia's testimony was not taken into consideration by either of the two courts. The witnesses were no help either. The court dismissed the case, citing absence of information to support the likelihood of the alleged events.

Julia can now file a final appeal to the Supreme Court and complain to the European Court of Human Rights. She wants to use these options, because the labour court failed to shift the burden of evidence.

The army is supportive

The Ministry of National Defence says that any person experiencing harassment is eligible for support, available in the Polish Armed Forces by law: *In the entire army, and thus in the relevant brigade, all the provisions of Polish law remain in force. The rules of procedure mirror those generally applied too. The victim of harassment is to express their clear objection towards the conduct they find unacceptable, and if this is ineffective, file a written complaint with the supervisor or the employer. (...) If the perpetrator of harassment is a soldier, a commander (or a supervisor for disciplinary purposes) may initiate disciplinary proceedings against that soldier.* In the same letter, the Ministry states that the Armed Forces of the Republic of Poland work to prevent sexual harassment 'by monitoring social relations, by engaging in education, and by intervening.'

The unit where Julia used to work has had a psychologist on duty since 2004. The psychologist provides mandatory counselling to soldiers who return from their missions, due to the stress of their tour of duty. The psychologist believes that a soldier who volunteers for a mission requires special support upon return. With regard to harassment, the psychologist believes the person should make an appointment to see her on their own. It is not a very difficult mission and Julia should be able to handle it herself.

The brigade's psychologist: 'I personally conducted training sessions focusing on sexual harassment and bullying. In April a two-day training was held in the unit, with psychologists from the Ministry of National Defence, in which I also participated. I know that Ms Kowalska was also a participant.'

What to do with a victim of harassment

The brigade's psychologist: 'I don't know what a commander should do after finding out that a person that works there has been victim of harassment. Whether the victim should be separated from the perpetrator and to what extent is determined by the conditions of work, intensity of the problem, and the emotional state of the person who suffered from these practices.'

The human resources clerk: 'I don't know what the chain of decisions is with regard to a report of harassment, because this is a military issue. I don't know the responsibilities of the officer in charge of discipline. I didn't attend the training given by the consulting psychologist. How to react is described in our rules and regulations. Most people just come to the human resources office, we close the door, listen to what the person has to say, and then we go to report it to the commander. I think that if there was a problem, Ms Kowalska should have reported it herself. That's what I would have done.'

A general in charge of the unit (who agreed to Julia Kowalska doing a second internship in the unit because of the excellent opinion she had received, but was unaware of the harassment report and Julia's transfer): 'Any instance of harassment should be reported to the officer in charge of discipline, because it is a breach of discipline. The brigade commander should have made an official report. This is a violation of employee's rights, even if there are no legal provisions that specify it. Let me put it this way: an absence of regulation is never an excuse for the absence of a reaction.'

No response but a promotion

I emailed the spokesman of the unit where Julia used to work. I asked whether anything has changed in the unit after the case. How would a commander react to a harassment report today? I haven't received any response.

I know that, once the military prosecutor ended the investigation, officer Robert C. was promoted to a higher military rank, following which he changed the unit to which he was assigned, and also his telephone number. A year ago he told the local daily that he would not make any comments until all court cases were over. In the last case, the one for compensation, Julia Kowalska is now lodging a final appeal.

[Update for the 2015 edition: For a variety of reasons, the final appeal was eventually not lodged.]

Some names and identifying details have been changed.

Legal analysis

Katarzyna Bogatko

Julia Kowalska's story shows that sexual harassment at work remains a taboo topic. It is uncomfortable and embarrassing to discuss, and the blame is typically placed on the woman who is its victim.

Both employees and employers in Poland find it difficult to identify sexual harassment. As a result of poor knowledge and awareness about discrimination on the grounds of sex, conduct that certainly qualifies as sexual harassment may be perceived by co-workers and superiors as tasteless but harmless jokes. This in turn means that no disciplinary steps are taken towards the perpetrators (E. Zielińska, *Ochrona przed mobbingiem i molestowaniem oraz innymi przejawami dyskryminacji ze względu na płeć*, in: *Gender Index. Monitorowanie równości kobiet i mężczyzn w miejscu pracy*, ed. E. Lisowska, Warsaw 2007, p. 150).

Sexual harassment and the Labour Code

The Labour Code stipulates that sexual harassment in employment is a form of discrimination on the grounds of sex, and that it consists in any type of unwanted conduct of sexual nature or which refers to the sex of the employee, with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment; this conduct may consist in physical, verbal or non-verbal elements (Article 183a § 6 of the law of 26 June 1974 – the Labour Code; Journal of Laws of 1974, No 24, item 141).

Examples of conduct that may be classified as sexual harassment in employment include: insults and slurs; allegations and innuendo; inappropriate comments about clothing, hairstyle, age, or family situation; lustful looks; gestures such as stroking or hugging or gestures with a sexual undertone; sending obscene letters or emails; structuring relations in a way that infringes the dignity of the victim; telling jokes or stories that are erotic in content; using terms of address such as 'darling,' 'sweetheart,' or 'love.'

There is no doubt that the conduct of Julia's superior (touching her, sending e-mails with erotic content) could qualify as sexual harassment. Another factor supporting this conclusion is that Julia didn't accept these behaviours; in fact, she clearly expressed her objections by reporting the harassment to the commander of her unit.

For conduct of sexual nature to be considered sexual harassment, it is necessary that an objection to it must be expressed. The objection shows that the conduct is unwanted. It is a key characteristic of sexual harassment that the person who becomes its target doesn't accept it and feels it is unwanted. Any conduct which is sexual in nature or has sexual associations and which is unacceptable to the employee may qualify as sexual harassment (A.M. Świątkowski, *Komentarz do kodeksu pracy*, Warsaw 2006, p. 73).

Sexual harassment is unlawful even if the perpetrator violates no criminal laws. Even if criminal proceedings are discontinued due to the absence of evidence of criminal conduct, the case may be pursued under the regulations of labour law.

Damages for sexual harassment

Persons who have experienced sexual harassment at the workplace may seek damages under the regulations of labour law. Under

Article 183d of the Labour Code, 'a person with regard to whom the employer violated the principle of equal treatment in employment is eligible for compensation amounting to no less than the minimum compensation for work, determined under separate provisions of law.' This wording does not directly indicate the full amount of damages; it only indicates the minimal amount. The actual amount of damages will always depend on the specific facts of the case.

The compensation must be effective, proportionate, and dissuasive to fully compensate for the damage suffered by the employee. Importantly, the damages should cover not only the property damage but also (which is of particular significance in this case) the infringement of personal rights. In this sense, the damages serve as monetary compensation for the victim's suffering and for their loss of enjoyment of life, and are also intended to make it easier to overcome the negative psychological effects of the experience (judgment of the Polish Supreme Court of 7 January 2009, case no: III PK 43/08).

Protecting interns against discrimination

In the context of this specific case, it is important to note that the option to seek damages for discrimination under the provisions of the Labour Code pertains also to interns. Their conditions of work are regulated by the law of 20 April 2004 on the promotion of employment and institutions of the labour market (Journal of Laws of 2008 no 69, item 415, as amended) and by the regulation of the Minister of Labour and Social Policy of 20 August 2009 on specific conditions pertaining to internships for the unemployed (Journal of Laws of 2 September 2009).

Under § 8 of this regulation, an unemployed person in the course of an internship is to be treated equally under the principles

listed in chapter II a, first division, of the law of 26 June 1974 – the Labour Code (Journal of Laws of 1998, no 21, item 94, as amended). Julia Kowalska was therefore right to seek damages before a labour court.

Duty to prevent discrimination at the workplace

Another striking aspect of Julia's story is the reaction of the military unit in which these events took place, and in particular of the commander of the unit. He ignored Julia's report of sexual harassment. Yet the employer is obliged to prevent harassment, including sexual harassment, by the regulation of Article 94(2)(b) of the

Labour Code, which stipulates that the employer must endeavour to prevent discrimination in employment. This regulation places on the employer the entire burden of ensuring that the principle of equal treatment in employment is implemented throughout the workplace. The testimony of the psychologist cited in the reportage regarding the procedures connected with harassment suggests that at the time of the incidents, the unit had no internal procedures in place to prevent discrimination. It is unacceptable that the report of harassment filed by Julia was not officially recorded in any way. By not intervening after harassment was reported, the employer is exposed to the risk of liability for failure to prevent discrimination.



LABOUR AND RELAXATION COURT

Jakub Janiszewski

Did the labour court judge violate labour law when she asked Katarzyna during her job interview how she was going to reconcile her duties at work with her childcare obligations?

DISCRIMINATED BY THE JUSTICE SYSTEM



The whole thing would likely not have happened if Katarzyna were the kind of person who has a problem juggling multiple responsibilities. If she had this sort of attitude, she would probably think herself that working as a court clerk and being a mother to a young kid is not doable. As it happened, Katarzyna's entire life experience had demonstrated to her that it was not the case at all. While she was a student, she had a full course load, but managed to work full time too. It was doable, and she did a fine job fitting everything into her schedule. Once she graduated, her private life continued on, never coming onto a collision course with the public, or more precisely – with the professional, because Katarzyna had never held a job in the public administration. She had however worked in small, medium, and really huge private enterprises.

Now that an opportunity came up to work in the public administration (where the salaries may not be great, but job security is supposedly excellent), why wouldn't it be doable? She met all the

eligibility criteria. She had office work experience and good touch-typing skills. The latter, apparently, were particularly in demand.

'Well, there are nurseries, and kindergartens, and babysitters...?' She was somewhat surprised when, at her job interview in April 2012, she was asked how she was planning on reconciling her responsibilities as a mother with working in the justice administration system. Yet this very question later turned out to have been at the crux of it all.

Three secretive and suspicious ladies sat in opposite Katarzyna. Secretive, because they didn't tell her their names. Suspicious, because they were alarmed by Katarzyna's admission that, indeed, she has a young child, and she lost her job at the bank because her contract was not renewed when her child-rearing leave ended.

The mention of nurseries and babysitters was apparently not to their liking, because they offered no response. The whole interview was brought to a close soon after, thus closing the three-stage recruitment

process (where the first stage was a test in using MS Office, and the second – a test in touch typing). Katarzyna left, still with no information as to the names of the women on the interviewing panel. A few days later she was told that a different candidate was hired for the position for which she had applied. Incidentally, he was a man, and not married.

Too bad it didn't work out, thought Katarzyna, and with that she forgot about a career in the public administration and about the district court where she had wanted to pursue it.

Without looking

Yet the court didn't forget about Katarzyna.

Not even three months later, her phone rang. Another secretive woman invited her for another interview, to be held in room 1108. Secretive, because she did not offer her name; on the other hand, she did offer the information that the interview was for an office job again, but the conditions were different. It was not under a proper employment contract, but rather under a general civil law contract. The contract would be made with the courts division number 7, i.e. the labour and social insurance court.

Somewhat reluctantly, Katarzyna showed up at the appointed time and place. She was again greeted by two secretive ladies, different from those who had interviewed her before. Secretive, because they didn't introduce themselves. Katarzyna's guess was that the first lady was a judge and the other one a court clerk. The interview consisted mostly of the practical part: the secretive judge ordered a short dictation exercise to test Katarzyna's touch typing skills, always in demand in a court. Once she made it to the end, Katarzyna was told that she needed some more practice. And then she was asked the question about her children.

'Why would you ask?' said Katarzyna, because by now she was familiar with this line of inquiry.

'Because I'd like to know whether you will be able to make childcare arrangements for them while you work,' said the secretive judge.

'I don't think I should answer this question,' said Katarzyna with steel in her voice, because she found that her patience had suddenly run out.

'I see,' said the secretive judge. She made a sour face and disappeared in a room next door.

The equally secretive court clerk gave Katarzyna an anxious look, apparently astonished by the extraordinary defiance of her would-be co-worker. In the absence of any instruction, she got up and followed the judge.

She found the judge in the room next door, sitting with her back to the door, studying some papers over the desk.

'Is this all?' she asked.

'Yes, this is all,' said the judge, still with her back to the clerk, touch typing, which is a skill in much demand in every court.

What is the court allowed to ask?

When Katarzyna returned home, she told her husband about the interview. He found the story funny and said not to worry about it. But something kept bugging Katarzyna, and so she checked if the questions the court had asked were actually legal to ask. They are not; neither of them is legal to ask. During a job interview, it is forbidden to ask the candidate about their plans with regard to having children, as well as about the children they already have and childcare arrangements for them. It is the same law that forbids questions about religion, sexual orientation, and political views. Asking these questions is expressly forbidden by the Labour Code. The express purpose of the labour court is to ensure enforcement of the Labour Code. Yet it was the labour court itself that had just sent Katarzyna home with the unspoken message that mothers of young children make unreliable workers.

Katarzyna decided to write down her story. She published it on the feminist website Feminoteka. The comments section exploded.

The explosion put Katarzyna in touch with the Polish Society of Anti-Discrimination Law, and the organization's lawyers issued an official statement for Katarzyna. The court clearly violated the Labour Code when asking, during the first interview, about children and childcare arrangements. The case is a bit more complicated with regard to the second interview, since it concerned a potential civil law contract and not an employment contract. The waters are very murky when it comes to these types of contracts. Labour law does not apply to such interviews. Nonetheless, they do not take place in a legal vacuum. There is the law implementing several regulations of the European Union on equal treatment. While the law contains no provisions explicitly addressing parenthood, it does forbid discrimination on the grounds of sex. It definitely applies to negotiating civil law contracts.

The statement drafted by PSAL gave a very clear recommendation to file a complaint. Cite relevant laws, demand a response. If this fails, sue the court. Take the court to court.

In her letter of complaint, Katarzyna asked a number of questions. *Is having children of pre-elementary school age is a factor that determines that a candidate is rejected, and if so, on what grounds? Is this recruitment procedure in line with legal regulations and with the relevant case law? Is the question about having young children a standard question you ask to all candidates, or is it only asked to women of reproductive age? Please address these issues and propose a solution.* Katarzyna sent the letter to the presiding judge of the district court where the procedure took place.

To relax the candidate

The response came before two weeks were up.

In response to your letter, please be advised that I find no reasons

to agree with your complaint. I am also unclear as to your intentions in terms of 'proposing a solution, wrote the presiding judge. She continued to say that no factors were taken into account in the recruitment process beyond psychological and physical abilities, knowledge, and touch-typing skills. Judge Iwona J. admitted that during the interview, she asked you a question about having children, to which she received no answer. However, the context and reasons for the question were very different from what you are implying. The judge's intention was to diffuse a situation that was tense and stressful for you, in order to make it easier for you complete the tasks you were given. It was not an intention of the judge of discriminate against you on the basis of you having children. If you felt that these words constituted discrimination against you on the basis of you having children, on behalf of the court I would like to extend my heartfelt apology to you for this situation.

Further in the letter, the presiding judge offered a somewhat convoluted explanation: while it was inappropriate to ask about children, it was nonetheless without any bearing on the recruitment process, because judge Iwona J. (serving as vice-president of the division) would not be the person to actually sign the contract – that would be the job of the court's financial director. Thus the decision to give Katarzyna the job would be made by an entirely different person, and the role of judge Iwona J. was only to make the judgment – as befits a judge – of Katarzyna's touch-typing skills. The question was therefore without any impact on the final decision. Then again, who knows, it might have actually helped Katarzyna relax! A verbal spa, as it were.

The letter also revealed to Katarzyna the identity of the three secretive ladies who were so concerned about her childcare arrangements during her first interview at the court. One of them was a clerk in charge of administration, but the other two were judges. Actually, one of them was the president of the court herself! Yet she was unable to determine who had asked the unfortunate question on that day.

Due to the time that has lapsed since that recruitment process was held, and due to the number of ongoing recruitment processes, I am unable to determine whether a question was asked concerning you having children. If it was, this may have been in the context of your statement, noted in your letter, that “my contract not renewed due to taking child-rearing leave.”

Unaware and uneducated

A brief detour is called for here.

In the same year in which Katarzyna was trying to get a job in a court, PSAL conducted a study to investigate the attitudes of judges towards discrimination. A randomly selected sample of 54 judges of district courts, regional courts, and appellate courts filled out a questionnaire and gave an interview on the definitions and sources of discrimination, as well as legislation to address it. They didn't do very well, to put it mildly. While most of them were able to correctly define discrimination as unequal treatment, they generally forgot that inequality is discriminatory only when it is unreasonable and disproportionate. A staggering 11 judges said that the reason for discrimination is the conduct and attitude of those being discriminated against (this was particularly pronounced with regard to sexual orientation). Others couldn't distinguish between discrimination and intolerance. As many as 16 judges said that ethnicity and nationality are not a reason for discrimination in Poland, and the same number gave this response with regard to religion. In the opinion of 7 judges, disability is not a cause of discrimination in Poland, and 9 found this question difficult to answer. And so on, and so forth. In the final question, 12 judges said that discrimination is not an important problem in Poland, and 7 were unable to state their position. In the comments they explained that discrimination-related cases were rare in their courts, and a victory was as rare as hitting a lottery jackpot.

The study demonstrates that, unfortunately, there is too little awareness of anti-discrimination law. This is surprising, because most of the judges in the sample work in labour courts, which have the highest proportion of cases regarding equality in employment, wrote Joanna Kasicka, a judge in the regional court in Płock, in her commentary on these research results.

She added a handful of pretty striking statistics. The number of cases regarding discrimination in employment (under Article 11 of the Polish Labour Code) increased in district courts from 63 in 2007 to 105 in 2011. The number of unequal treatment lawsuits (under Article 183d of the Polish Labour Code) was 319 in 2007 and 842 in 2011, which in itself demonstrates that they are not that rare at all.

The definitions of discrimination offered by the judges demonstrate their faulty or incomplete understanding of this issue, judge Kasicka went on to say. She also noted that a majority of the judges in the study had had a decade or more of court practice. This should have translated into broad professional competence. Clearly, it didn't.

Is justice blind?

You've got your work cut out for you, Katarzyna could respond to the letter for the president of the district court, waiving around the results of the study, had they been out already at the time. Frankly, though, she had more important things to do. For one thing, she was still looking for work. She found a job, and a few months later another, better opportunity came up. Her employers did their best to persuade Katarzyna to stay, and when she persisted in her decision to move on, they gave her a most enthusiastic reference. It was completely silent on the topic of her being a mother.

As for the matter of the interviews, Katarzyna signed the necessary papers and had an attorney file two lawsuits on her behalf. One went

to a labour court, and the other to a civil law court that handles general contract disputes. In the box where the defendant is named, the attorney put down: 'State Treasury – President of the District Court.' Both lawsuits included application of the recusal of all the judges in the entire judicial district. It was necessary to ensure that justice would, indeed remain blind, and not just reluctant to look and see.

[Update for the 2015 edition: The case is still pending in the court of the first instance.]

Legal analysis

Monika Wieczorek

Legal protection against discrimination in employment extends throughout all the stages of the employment relationship: from recruitment, through the negotiations of conditions of work and pay, to the termination of the relationship by one of the parties. Starting from 1 January 2011, persons who work not under employment contracts but under various other contracts regulated by the Civil Code are also eligible for this protection.

Discrimination during recruitment on the grounds of being a parent

Two particularly sensitive issues are at play in this case. The first is discrimination in recruitment. Potential employers on occasion tell the candidates directly why they were not offered a job. It may happen that with regard to this reason, there are specific legal safeguards against discrimination. More typically, the candidates are not told why they were not offered the job for which they had applied, and they can

only speculate as to the reasons and their legality. Sometimes small details are symptomatic of the employer's decision-making criteria: facial expressions, tone of voice, reaction to the information about a certain characteristic of the candidate that is not related to the job in question, or the form and content of the questions asked in an interview.

The second sensitive issue here is the attitude of employers towards employees (including potential employees) who are raising children. Both women and men who approach PSAL with requests for assistance in this regard often admit that they have experienced unpleasant comments made by their superiors on the subject of employees making use of parenthood-related rights (such as maternity leave, child-rearing leave, or days off to look after a child). If a case is taken to court, testimony of the claimant and that of witnesses, confirming the negative attitude of the employer to the employees' roles as parents, may prove important.

Asking a candidate during a job interview questions about their maternity-related plans and the intended method of combining parenting and work is unlawful and is a violation of Article 221 § 1 of the Labour Code, which stipulates that it is forbidden to ask a candidate seeking employment about their private life, including being a parent. It regulation applies directly to anti-discrimination claims pertaining to recruitment for employment relationships under the Labour Code. However, the law of 3 December 2010 implementing selected European Union regulations on equal treatment (Journal of Laws no 254, item 1700) expands the ban on discrimination to also cover contracts under which work is performed but which are not employment contracts. This law has an open approach to discrimination (e.g. does not include a closed catalogue of situations to which it pertains). Therefore, its regulations may be applied also to work performed under various Civil Code contracts. Information on having children may only be required if it is necessary for the purpose of allowing the employee to make us of the specific rights and privileges afforded to the workers

who are parents. Moreover, questions about parenthood-related plans of the potential employee may suggest that the employee having children is a problem for the employer, and that persons without children at the moment, or not planning to have children, are preferred.

The employer is free to choose the person for each specific position. Yet this freedom is limited by the principle of equal treatment and the prohibition of discrimination. The determination whether the principle of equal treatment was violated in a given case during the process of recruitment consists in trying to find a cause-and-effect relationship between how the employer acted towards the candidate, and the outcome of the process. Importantly, discrimination in recruitment may also occur in how the eligibility criteria are formulated. A person who would have met the eligibility requirements if it were not for a characteristic unrelated to the formal requirements also may pursue anti-discrimination claims before the court. Examples of such situations include job advertisements with wording such as: 'seeking young employees,' 'men aged below 40,' or 'persons to join a young dynamic team.'

Protection against discrimination under the Labour Code

If the potential employer is using unlawful criteria in the recruitment process, protection can be sought in the regulations of either the Labour Code or of the law implementing selected European Union regulations on equal treatment. The former will apply if the recruitment was leading up to an employment contract; the Labour Code's ban on discrimination covers all stages of the employment relationship, including recruitment (judgment of the Polish Supreme Court dated 5 May 2011, case no: II PK 181/10, unpublished).

The obligation of equal treatment placed on the employer prohibits different treatment of employees based on a number of criteria. The cat-

alogue of these criteria is open, which means that the legislator lists only several of the criteria, but protection can be extended to persons with other characteristics, not specifically listed in the regulations. The application of unlawful discriminatory criteria in the process of recruitment qualifies as direct discrimination. This is defined, under Article 183a § 1 of the Labour Code, as treating an employee less favourably than other employees in a comparable situation, on certain grounds. This regulation also applies to candidates. In order to determine whether direct discrimination has occurred, a comparison must be made between the person potentially suffering discrimination and (an)other employee(s) in a comparable situation, to see how these persons were treated different from one another. This will reveal whether the characteristic that gives the person legal protection might have been the reason for discrimination.

It is a violation of the Labour Code's principle of equal treatment to even ask a candidate during a job interview about their plans related to parenthood. This violation is compounded by the following decision not to offer the job to the candidate because the employer is dissatisfied with the answer to this question. This accumulation of discriminatory practices should be reflected in the amount of compensation for the violation of the principle of equal treatment. The compensation, under Article 183d of the Labour Code, should amount to no less than the minimum compensation for work, determined under separate provisions of law. The regulation sets no maximum amount of the compensation. Its amount should take into account the principle that it must be effective, proportionate, and dissuasive (Article 17 of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016 - 0022; judgment of the Polish Supreme Court dated 7 January 2009, case no: III PK 43/09). The compensation should also take into account the suffering

of the victim. Importantly, in cases regarding discrimination in employment, the Labour Code (Article 183b § 1) shifts the burden of proof: the employee alleging discrimination only has to demonstrate that it is likely that the principle of equal treatment was violated, and it is the employer's duty to provide evidence that no discrimination occurred and that only objective criteria were applied.

Protection against discrimination under the 'antidiscrimination statute'

When work is to be performed under a contract regulated by the Civil Code (such as a contract of mandate, a contract to complete a specific task, or a managerial contract), rather than under the Labour Code, legal safeguards against discrimination are contained in the law of 3 December 2010 implementing selected European Union regulations on equal treatment, often referred to as the 'antidiscrimination statute.'

This is a relatively new law, and as such has not yet generated Supreme Court case law interpreting the legal norms it puts forward. However, it appears that its ratio legis is to establish legal protection for persons performing work under a contract regulated by the Civil Code on the same level as that enjoyed by other workers (employees), regardless of the specific legal relationship between the worker and the employer. Therefore, it may be concluded that – in line with the regulations of the Labour Code – the ban on discrimination contained in the 'antidiscrimination statute' also extends to all stages of the legal relationship, including recruitment.

The 'antidiscrimination statute,' again in line with the Labour Code, defines direct discrimination as a situation where a natural person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of sex, race, ethnic or national

origin, religion or belief, disability, age or sexual orientation. In contrast to the Labour Code, the 'antidiscrimination statute' contains a closed (exhaustive) catalogue of legally protected grounds of discrimination, and being a parent is not one of those grounds. However, parenthood is inseparably tied with sex, because it is associated with the stereotypical perception of women as being in charge of childcare, and this may, in the eyes of employers, be an obstacle to effective and correct performance of work. Unfavourable treatment of a woman associated with her pregnancy or with the fact that she is a mother must be classified as discrimination on grounds of sex (judgment of the Court of Justice dated 11 November 2010 in *Dita Danosa v LKB Lizings SIA*, C-232/09). Therefore, it is possible to seek the satisfaction of claims related to direct discrimination on grounds of being a mother, but formally, discrimination on grounds of sex must be specified.

When recruitment takes place in order to offer the worker a contract regulated by the Civil Code (rather than the Labour Code), claims may be made under Article 13 of the law implementing selected European Union regulations on equal treatment. It stipulates that anybody with regard to whom the principle of equal treatment has been breached may seek compensation following the provisions of the Civil Code. In contrast to cases brought under labour law, which are heard by labour courts, proceedings concerning violations of the 'antidiscrimination statute' will take place before a civil court. However, just like the Labour Code, the 'antidiscrimination statute' shifts the burden of proof in such cases, which means that the person alleging discrimination only has to demonstrate that it is likely that discrimination occurred, and it is the duty of the party who allegedly was guilty of discrimination to provide evidence that no discrimination took place.

Dyskryminacja oznacza nierówne traktowanie, spowodowane przez nieobiektywne przyczyny. Każde takie traktowanie stanowi pogwałcenie podstawowych praw i wolności człowieka.



WELCOME TO OUR STORE

Marta Mazuś

**A worker took on a national
supermarket chain.**

**It was a small guy against
a huge corporate giant,
but he won.**

**Actually, people call
him huge too:
a huge fat pig, a fatso.**



FIRED FOR BEING GAY

Ireneusz Muzalski is easily moved to tears, especially when he talks about meeting Jolanta Kwaśniewska, Poland's First Lady, in a TV waiting room. He is sitting there very nervous, because he is going live in just seconds. The next topic, 'Fired for being gay,' is just coming up. He is tearing up already, certain that this is too much, that he can't do it. Yet here she comes, Ms Kwaśniewska, and says: 'Ireneusz, don't worry, don't give up. Do you know what horrible things people have been saying about my husband and me?' She was a positively lovely person, so friendly and normal. They got a picture taken together.

It is important for Ireneusz to hear nice words. There have not been too many of them in his life. That is what the lawsuit has been all about. Words. His first lawsuit ever, and he actually won. On TV, once they went live, the presenter said he was like Don Quixote, bravely taking on an enemy many times his size. It was immense courage, said the presenter. It was very important for Ireneusz to hear. He felt appreciated. Because, ever since he was



a child... Oh, the tears. Ever since he was a child, he has been easily moved to tears.

We attract and retain the best

It started in Labour & Delivery. He was born healthy but unwanted. Nine years in an institutional children's home. Stasia, his main caretaker and almost a second mom, was very upset when he was moved to foster care, but she was unable to take care of him herself.

Ireneusz's first foster family. At school, the kids would call him names: reject, stray, 'your mom is too poor to buy stuff for sandwiches' (his lunch was plain buttered bread), fatso. At home, when he complained, he was whipped with a belt. The second foster family: he sat in his room, all alone, all the time. The third foster family... Between foster families, he slept in stairwells. He thought it was all because he had a bad nature. But really, it was probably because the

bio kids kept getting new clothes and he kept getting hand-me-downs. A total of seven foster families.

He was drawn to big cities, their buzz and energy. He was all too familiar with the town he grew up in. At 17, he put his belongings into a plastic bag and moved to Gorzów Wielkopolski. He met a woman and they started living together. They had an open relationship; it was all about honesty and trust. By that time he was aware that for him, a woman's body can be beautiful, but it is a man's body that is attractive. Ten years ago, as he was passing through the town of Ślubice, he went into a clothing store. The owner – tall, well-built – noticed him immediately. He had a weakness for bigger guys. A while later, he found Ireneusz on a dating site. Three months of trying it out and afterwards, they moved in together. Finally, he felt at home.

It was September 2009. Ireneusz was walking down the street. Demolition was going on at the old bus station, and there was an ad for a new supermarket that was going to open in its place: 'Cashiers wanted.' He went to the interview.

We train our employees and help them grow at all levels

They said: 'Mr Muzalski, welcome onboard. You can do it!' He knew he could. You have to stand up for yourself. His education had been as a construction worker, but ever since his trip with the plastic bag at 17, he didn't work a single day in construction. Instead, he worked at a tape manufacturing plant; also two years in a coal mine, including one year underground. After that, he was a manager in a bigger facility, managing a team of 50 workers: big responsibility, and it took serious organizational skills. And now he was going to be a cashier, starting with a three-month probationary period. Duties and responsibilities: working the cash register and the sales counter, and

stocking shelves. The stoking was potentially an issue, because by then Ireneusz's obesity became detrimental to his health. At 170 centimetres tall, he weighed 150 kilograms. He decided to clamp down on the weight issue, and hard. He had his stomach stapled. It had the intended effect of making his appetite vanish, but also the unintended side effect of limiting his mobility. He became legally an invalid. Medically prohibited from lifting more than ten kilograms. But the manager of the store said it was all right.

Things were going well. Ireneusz was learning new things. His probationary contract was changed to longer-term, though not permanent. Sometimes he was on the morning shift (6 a.m. – 2 p.m.) and sometimes on the afternoon one (2 p.m. – 10 p.m.). He was the friendly type, chit-chatting with the customers as he bagged their groceries. The store was not too big: the alcohol counter, the butcher's counter, the bakery, the fruit & vegetable section, and a small newsagent's. A few cash registers, shared locker rooms. Sometimes they all went out together after work. There were birthday parties, barbecues, trainings, conversations. The workers all got to know one another pretty well, but the managers kept changing. First there was Małgorzata, then Damian, and finally Jacek, the new one. It was March 2010. At the beginning, Jacek was not there much, because he travelled for training, mandatory for all employees. They learned all about the company's policy, including anti-bullying and anti-harassment procedures.

We foster integration and create a welcoming space

Ireneusz doesn't really know how they found out. He is not, he says, one to show it off, parade it around the town. He actually joked about how he never hit on anybody while at the cash register. But Ślubice is a small town. They went out for pizza or shopping with his

partner many times. They never even held hands in the street; their private life stayed private, at home. But maybe Joanna, the deputy manager, found out somehow – they were, after all, friendly. Or maybe Monika from the bakery section, because they used to work together in a different store. In any case, when Ireneusz brought a cake to work to celebrate his birthday, there were jokes about him getting ‘gay married.’ When he entered the locker rooms, conversations suddenly died down – and conversely, gossip flourished at the meat counter. Word got around, and then it was the summer.

We talk with our staff

Ireneusz and Jacek got to know each other rather slowly. Once, Ireneusz’s leg was hurting. He said it was because of varicose veins, but Jacek told him: ‘You’d be OK if you’d let him do you from behind.’ When Ireneusz was chatting with a customer, as he usually did, Jacek jumped in with: ‘You faggot, you’re not getting paid for being chatty!’ And another time, when a customer was standing right there: ‘You idiot, you moron, sit your fat ass at the register and get to it, and fast! I don’t know who gave a job to a pansy like you.’ And again, also with a customer there: ‘You poof, get off your ass and in five minute I want all these bottles shelved.’

Sometimes Ireneusz asked not to be spoken to like this. He said he’d prefer not to lift the crates of bottles, because of how heavy they are. He’d request the morning shift over the afternoon one, citing July’s hot temperatures as the reason. Frankly, it was also because the afternoon shift was when the manager and one cashier were the only staff members to work the store.

Ireneusz tried to ignore all these words, not take them personally. He thought the hate would just escalate if he reacted. He decided not to report the issue to the regional manager, because this would

be snitching. He preferred to be just a guy, not a snitch. He invited everybody to his birthday party; Jacek did not come. Then it was autumn. After two weeks of medical leave, Ireneusz came back to the cash register. Everything seemed normal. At the end of the day, the manager closed the door to the office. He was very brief: ‘I am sorry, but this is the end of us working together.’ It was 9.26 p.m. The afternoon shift was still on, but Ireneusz was no longer on it.

We are flexible and go beyond our duties

He made it only as far as the gas station. There, he ran into a friend. She said: ‘I’d take them to court.’ Ireneusz was hesitant. He didn’t know why he had been fired. There were hundreds of cameras in the store; maybe he’d done something wrong and the cameras had caught him. It is a huge national supermarket chain, and Ślubice is just a small town, where he would bump into people in the street all the time.

A regular customer once came over: ‘I can testify in court for you if you want,’ she said. He felt encouraged. Eventually, he did go to court. He learned a lot there.

Bożena from the meat counter testified that the claimant had to work just as much as everybody else. He often said he felt underappreciated, but don’t people always complain about something?

Agnieszka, also from the meat counter staff, said that there had been meetings. The leader of her team got them together and told them to keep an eye out for things, because the manager wanted to find some dirt on the claimant.

Piotr, who used to work at the alcohol counter, remembered an instance when the claimant was medically not allowed to lift anything heavy but the manager made him do it. And he heard the manager speak to the claimant in an unpleasant, offensive way. He seemed to recall the manager saying: ‘That’s because you’re gay.’ Although the

witness had also made fun of the claimant for this reason, that is his orientation, which the witness can't stand. And also, Piotr said, the manager was generally the kind of person that makes others do his work for him. Piotr had reported this to the regional manager, and was fired a month later.

The regional manager, Przemysław, had no recollection of the claimant reporting any issues to him, even though he visited the store several times a week for 2-3 hours. Emilia, from the cash register, remembered that in the locker room, the workers would say: 'Don't change now, the faggot is coming in,' or 'The poof shelved it all wrong.' All this, said the witness, despite the fact that the claimant had not, as far as the witness knew, made his sexual orientation known at his workplace. The information had come from the deputy manager, who had told this to everyone at the training.

Joanna, the deputy manager, made sure to stress in her testimony that she was feeling hurt. She had thought she and the claimant had been friends, good pals. They went to parties together; they had known each other from before, from where they had worked previously. Now, she said, the claimant was treating her as if she were his greatest enemy and as if she had fired him. And it's not like he had been working really well, she added. Elderly ladies had complained that they would give him their wallets and he would take out extra coins to keep, for example. And also, he came up with the gossip that her husband could not get her pregnant and so she was visiting a male friend about it. Jacek the manager corroborated that – this gossiping was the true cause of Ireneusz's firing. Well, and also the fact that he had an argument with another employee at the store about being called to the cash register to make change without a good reason. This incident, in Jacek's opinion, had a negative impact on the team and team members' trust towards one another.

The manager's wife Iwona added that the claimant was using the same hairdresser's as she was. Allegedly, he said at the salon that he had taken on a good attorney, and now her husband was going to be in trouble.

We are active, we plan, we set our priorities, and then we act

The court case brought by Ireneusz Muzalski lasted two years. The district labour court awarded him PLN 4500 as compensation for discrimination at his workplace. An appeal was lodged, and – after hearing the appeal – the regional court, i.e. the court of second instance, raised the amount of the compensation to PLN 18 000. Both the manager and the deputy manager were dismissed without notice, for cause. When the case was over, Ireneusz Muzalski started looking for another job, but in the town of Słubice nobody had a job for him. Together with his partner he decided to work from home. He goes shopping several times a week. He stops by 'his' store sometimes too. He has no problem with it; he did nothing wrong. Also, they have a good price on Fanta, and his partner likes Fanta, so there's that.

Section titles are taken from the website of the supermarket chain with which Ireneusz Muzalski won the workplace discrimination case. The section of the website is entitled: Our Values. Some names and identifying details have been changed.

Legal analysis

Krzysztof Śmiszek

The story of Ireneusz Muzalski is one of the very few cases of this type that actually ended in court. Poland remains quite homophobic and there are numerous labour-related issues rooted in this problem, but it is very rare for members of the LGBT community who experience them to fight for their rights in court.

Prohibition of discrimination

Prohibition of discrimination in employment is one of the key principles of Polish labour law. It is codified in Article 113 of the Labour Code (Journal of Laws of 1998, No 21, item 94), which stipulates that any discrimination in employment, be it direct or indirect, in particular on the grounds of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, denomination, sexual orientation, employment for a fixed time or for unlimited time, as well as full time or part time employment, is prohibited. The fact that the legislator decided to list the prohibition of discrimination among the key principles of labour law is crucial. It means that all the specific provisions that govern labour relations should be understood and interpreted in the context of the antidiscrimination standards.

Legal protection against discrimination on the grounds of sexual orientation in labour relations was incorporated into the Labour Code as part of the effort to harmonize Polish legislation with EU standards. The EU legal act which bans discrimination on the grounds of sexual orientation is Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The implementation of this directive into

the Polish legal order resulted in the new Chapter II a of the Labour code, entitled Equal Treatment in Employment. Under Article 183a § 1 of the Labour Code, employees must be treated equally in terms of commencement and of termination an employment relationship; conditions of employment, promotion and access to training to raise their qualifications; they must be treated equally irrespective of their sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, denomination, sexual orientation, employment for a fixed time or for unlimited time, as well as full time or part time employment. Some researchers have argued that the term 'sexual orientation' refers to homosexual persons. However, it appears that the legislator did not limit the legal protection to gays and lesbians; neither is this a legitimate interpretation of EU regulations (such as Council Directive 2000/78/EC). An employee's hetero- or bisexuality may also conceivably be the cause of unequal treatment (for more information see: E. Ellis, *EU Antidiscrimination Law*, Oxford 2005). Nonetheless, clearly the group whose protection was first and foremost in the legislator's mind is the persons who are homo- or bisexual. Chapter II a of the Labour Code provides definitions of the forms of discrimination it forbids: direct and indirect discrimination, harassment, sexual harassment, and promoting discrimination.

Direct discrimination and harassment on the grounds of sexual orientation

A review of the actions suffered by Ireneusz suggests that two types of safeguards apply:

- the prohibition of direct discrimination on the grounds of sexual orientation of the employee, Article 183a § 3 of the Labour Code;
- the prohibition of harassment on the grounds of sexual orientation of the employee, Article 183a § 5(2) of the Labour Code.

As specified in Article 183a § 3, direct discrimination occurs where, on one or more of the grounds (such as, for example, sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, denomination, sexual orientation, employment for a fixed time or for unlimited time, as well as full time or part time employment) one person is treated less favourably than another is, has been or would be treated in a comparable situation. Therefore, in order to determine whether direct discrimination occurred, the situation of the specific employee must be compared to that of other employees, taking into account not only the events in the present, but also those that occurred in the past and those that are likely to occur in foreseeable future (W. Cajselski, *Kodeks pracy – komentarz, Krótkie komentarze Becka*, Warsaw 2007). If there is a suspicion of direct discrimination of an employee, it is necessary to create a model for comparison. This consists in comparing the situation of the employee who is alleging discrimination with another employee in an overall similar situation, and in testing whether, in the absence of the alleged ground of discrimination, unequal treatment would have nonetheless occurred. In the story featured in the reportage, direct discrimination took place. Other employees did not fall victim to similar behaviours motivated by their sexual orientation. Clearly the sole 'reason' for Ireneusz Muzalski's situation was his sexual orientation.

Also applicable here is Article 183a § 5(2) of the Labour Code. It prohibits harassment, defined as unwanted behaviour, with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating, or offensive environment. In contrast to the typical understanding of this term, the legislator does not require that conduct must be long-term, unpleasant for the person it targets, and intended to have negative impact on his person, to classify it as harassment. On the contrary, harassment may

consist in a single action of a person acting with the intention of humiliating or degrading the victim, or violating the victim's dignity (A.M. Świątkowski, *Kodeks pracy – komentarz, Komentarze kodeksowe*, Warsaw 2007). The charge of harassment may be brought forward by a person in whose subjective assessment the conduct of a co-worker or a superior is unwanted. It is vital that the person who is feeling harassed should react to the unlawful behaviour and communicate clearly to the perpetrator that the behaviour is, in the victim's opinion, humiliating or degrading to the victim, or violating the victim's dignity, and that the victim is opposed to it.

This expression of opposition on the part of the victim is a prerequisite for legal protection. Since the employee's subjective experience is at the heart of the matter, the absence of a (verbal or non-verbal) communication of opposition precludes legal protection. Direct communication to the perpetrator means that from this moment on, the perpetrator is aware of how the victim feels about the behaviour. If no opposition is expressed, and the perpetrator is a co-worker and not the employer himself, the employer is unable to prevent and counteract such behaviour in the workplace, e.g. by disciplining the perpetrator. Consequently, it is difficult for the employer to foster a working environment that is friendly to all employees, regardless of their sex, sexual orientation, disability, religion etc. The story of Ireneusz Muzalski presents quite an extreme form of harassment; both the extent and the intensity of the comments and abuse he suffered was absolutely unacceptable and beyond anything that could be reasonable in an employment relationship.

In trying to determine whether harassment occurred, it is not necessary to use the model of comparison that is used to identify direct discrimination. There is also no need to demonstrate the intention of violating the victim's dignity. Harassment is defined as unwanted con-



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duct with the purpose or effect of violating the dignity of a person. The focus is on the purpose and/or effect of the unwanted behaviour. Whether this behaviour objectively qualifies as harassment is determined on a case-by-case basis by the court.

The dignity of the employee is protected not only the Article 183a § 5(2) of the Labour Code, but also by Article 111 of that Code, which stipulates that the employer must respect the dignity and other legally protected personal rights of the employee. Dignity means here: the respect owed to the employee due to the employee's personality, individuality, sex, civic attitude, and value system – and this are only examples. Dignity also means respect owed to the employee due to age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, denomination, sexual orientation, employment for a fixed time or for unlimited time, as well as full time or part time employment.

Multiple discrimination

In the story of Ireneusz Muzalski, the fact that he is gay was not the only ground on which he was mistreated as an employee. The offensive comments of his supervisor, making references to his appearance and body weight, suggest that Ireneusz Muzalski was also discriminated on account of these elements. It may therefore be argued that he experienced multiple discrimination at the workplace, i.e. treatment that violates the equality principle on multiple grounds.

Stereotypical views of homosexuality are still prevalent in Poland, and awareness of LGBT issues is very low. In view of this, and also of the experience of PSAL's lawyers, it appears that harassment and direct discrimination are the most widespread forms of discrimination in employment on grounds of sexual orientation. International Labour Organization in the Report of the Director-General *Equality at work:*

Tackling the challenges (Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 96th Session 2007, Report I B, Geneva) lists the following manifestations of discrimination based on sexual orientation at the workplace: refusal of employment, dismissal, denial of promotion, unwanted jokes, innuendo and loaded comments, verbal abuse, malicious gossip, name calling, bullying and victimization, false accusations of child abuse, abusive phone calls, blackmail, and threats. ILO also notes the problem of self-exclusion (e.g. when homosexual persons avoid certain jobs, careers or employers for fear of being discriminated against on the basis of their sexual orientation). To conclude: the defendant – that is, the employer – in the case of Ireneusz Muzalski was guilty of both harassment and direct discrimination, occurring against the general background of multiple discrimination on the grounds of sexual orientation, disability and looks. In light of the labour law regulations discussed above, this type of conduct on behalf of the employer is not legally protected. Therefore, the employee who suffers this conduct may make use of legal instruments to seek the satisfaction of their claims, primarily a claim for compensation from the employer. The amount of the compensation should reflect both the two forms of discrimination encountered by Ireneusz Muzalski (direct discrimination and harassment) and the multiple grounds on which he was treated unequally. Ireneusz Muzalski requested and obtained legal assistance from PSAL, and these arguments were presented to the court by PSAL lawyers.



PALESTINIAN MEANS SUSPICIOUS

Paweł Rzekanowski

Just because of where his father was originally from, Hasan, a Pole with an exotic-sounding name and surname, initially considered a perfect candidate for a Euro 2012 volunteer, was turned down for the job.

PREVENTIVE REJECTION FOR REASONS OF ETHNIC ORIGIN

He wears sophisticated glasses and neatly trimmed facial hair. When he speaks, he is deliberate and precise. An intellectual type. This first name and surname both sound exotic to a typical Polish ear, but in the Polish town of P. – not so much. This is where he was born 23 years ago, and where he lived up until four years ago, when he left to study in the UK, where he is now living. His mother was Polish, an office worker. His father was an office worker too. He came to Poland as a student in the 1980s from Syria and stayed. He started a family, had a job, never had a criminal record of any kind, and never returned to the Middle East. Originally, he is Palestinian.

This last fact was most likely what prevented his son from having the football adventure of his life. Most likely, because nobody never said expressly why a perfect volunteer candidate turned into a *persona non grata*, a potential terrorist, within just days.

For Hasan, football is much more than two teams struggling to score a goal. A football connoisseur notices the tactics, the cleverness,



the many possible options on the field. The global citizen rejoices in the coming together despite the differences: the merger of cultures, the cooperation between people of all nations in pursuit of a shared dream. This is why a person with a pretty non-standard background, a Pole of Palestinian origin now living and studying in the UK, was willing to volunteer his time and effort, to take a break from working for money, in exchange for the ability to participate in the big football celebration.

A perfect candidate

It is the summer the year before Euro 2012. Hasan finds an ad online looking for volunteers. He thought about it before, but now, seeing who's eligible, he knows for sure this is what he wants to do: knowledge of Polish or Ukrainian as well as English, age 18+, must be 'motivated, enthusiastic, and involved.' Hasan is nothing if not motivated, enthusiastic, and involved.

A company was set up before Euro 2012 to recruit volunteers for the event. In exchange for food, accommodation, and a bundle of promotional gadgets, they would become active participants in the football championship. The company is now in the process of winding up. It was set up in December 2009 with a single objective: to find and train several thousand volunteers to work with the tens of thousands of football fans. Dressed in green, the volunteers (mostly young) would maintain a presence in the streets of the cities where the games were to be held, in train stations, around the fan zones, and by the stadiums. Their main responsibility was to provide information. UEFA (Union of European Football Associations) and PZNP (Polish Football Association) also needed less-visible volunteers to work on documentation and logistics.

Recruitment started in the summer of 2011, yielding nearly 24 000 applications. The media covered the most outstanding stories. They wrote about a woman who grew to love volunteering when championship games were held in her home country of South Africa; about a guy from India who travelled the world volunteering at major events. More than half of the applications came from Poles. Hasan also applied: he filled out the questionnaire, listing all the reasons why he wanted to volunteer, and attached a detailed CV. On his application, he marked Warsaw as his preferred volunteering location.

According to UEFA's data, a total of 13 000 interviews with prospective volunteers were held, which took 7 000 hours to complete. Hasan's interview went well. Held in Warsaw in the autumn of 2011, it was mainly focused on verifying his English speaking skills. The interviewer asked Hasan several questions. He responded in the same way he did at his university in Derby, England, where he was a student of tourism and recreation. His English is fluent, his vocabulary is impressive, and his argumentation skills are great too. In fact, his English was better than the interviewer's. Hasan was fairly confi-

dent that he did well. Nonetheless, when the confirmation arrived that he was indeed accepted as a volunteer, he was very happy – almost as if he'd won a ticket to the championship's final game.

In January 2012, his volunteering contract came through. He was assigned to the accreditation team, and the location is Warsaw, just like he wanted. His specific responsibility was to assist journalists in getting access to the games in line with the relevant procedures. UEFA emailed him his roster, indicating his starting date: 1 May at 9 a.m.

We regret to inform you

The training process started: a month and a half of e-learning about UEFA, about the cities where games were to be held, and also marketing, first aid, and methods of conflict resolution.

In April 2012, nine days before the first volunteer meeting and just over a month before the start of Euro 2012, Hasan goes to Warsaw for the volunteer opening ceremony. There are speeches, plans, and promises. The nine hundred volunteers who made it through the process are excited for the games to begin.

Hasan is excited too. Only four days before he starts as a volunteer. When he opens his email inbox, an unexpected message is there: a brief, dry note from the UEFA. 'We regret to inform you,' 'unfortunately,' 'we wish you the best of luck in your future endeavours.' You are hereby removed from the list of Euro 2012 volunteers. There is no recourse and no way to appeal.

Hasan is confused. It must be a mistake. Someone pasted the wrong content into the message? His email address was mistakenly added to the list of the rejected candidates? He requests more information straight away. The UEFA's answer is evasive, but it confirms that the last-minute rejection is not a mistake. A negative opinion from the police (which verified the candidate list) is cited as the reason for the rejection.

Hasan's first reaction is indignation and anger. 'Initially, I thought it was some sort of an awful error. What do the police have against me?' He has no criminal record whatsoever. Actually, he had no time to come into conflict with the law in Poland. For three years, he has spent the great majority of his time in England, with only short visits here. Are the police maybe confused because he spends so much time in the UK? Or maybe it is about his background? 'But I have never even set a foot outside of Europe,' says Hasan.

Hasan's second reaction is to investigate. He begins analysing what has happened. He is trying to understand the police, to find the possible reason for this rejection. It appears that the opinion issued by the police was well-supported with arguments. Why are the police so completely certain that he cannot volunteer at Euro 2012? The media are silent on any similar stories. Is it just him?

His third reaction: emotional. He writes a letter, upset in tone, to alert several newspapers to the story.

His fourth reaction: he starts asking the people in his family whether anybody had ever done anything that could have influenced the police? Is father is shocked. 'My dad? He felt... I don't know, I don't have the words for it. My whole family felt like trash. Like somebody didn't want us here.'

Syria and Ukraine

On a hunch, he starts thinking about the situation in the perspective of wide global events. And he notices a connection.

It is April and Europe is feeling nervous. In Ukraine, the championship is no longer the top story, overshadowed by the three explosions in Dniepropietrowsk with more than ten casualties. An accident? A coup? A premeditated attack before the Euro 2012? The bombs go off on 27 April. Hasan's name is stricken off the list the following

day, 28 April. Did Poland find him to be a threat for the event due to his father's national origin?

On 27 April, just hours after the first explosion, Ukrainian head of state security Aleksandr Birsan announces that new security measures will be implemented to make sure the Euro 2012 is safe. He gives no details. The Polish Ministry of Internal Affairs issues a similar statement. The Polish Police Headquarters issues a statement to say that security of all fans is guaranteed, and to calm down the fans upset by the declaration of EU Commissioner Viviane Reding that she was going to skip the opening game.

'I analysed everything carefully and it was difficult not to see the two issues as being connected. It was the only solution that came to mind,' says Hasan. 'I felt discriminated because of my origin. I was treated as a potential terrorist just because my father is Palestinian, and we all know that most terrorist attacks are associated with Arabs.'

After Hasan's emotional letter, his story begins getting media coverage.

The journalists ask the spokesperson of the company in charge of the Euro 2012 about his assessment of Hasan's application. The spokesperson is not surprised. He admits that Hasan 'has successfully completed the recruitment process.' He confirms that Hasan has also completed the requisite training. Eventually, he also confirms that Hasan was dropped from the list for reasons of procedure. There is a legal requirement that the personnel working a large public event should be approved by the police. The spokesperson explains that in the last days of April, immediately following the explosions in Dniepropietrowsk, the police notified the organizers that Hasan was not approved to work at the event.

Hasan keeps asking questions. Why was his eligibility to volunteer questioned by the police? Was it because of his surname, or his fa-

ther's Palestinian roots? Hasan himself has never been to the Middle East. The police offer no response.

Hasan looks into the legal regulations. The police may, but do not have to, verify the persons seeking work at certain types of events in terms of risks to public safety and security. The verification is not limited to checking the criminal record, which in Hasan's case is completely clear. The police are authorized to rely on their own interpretation of potential risks and threats, and they have no obligation to provide detailed reasons for their assessment.

Hasan thus knows he is considered a potential risk, but he gets no opportunity to find out why. He formally asks about the reasons, but the Police Headquarters issues a letter that only says that the police are not authorized to share this information. This is a dead end. The journalists are investigating every aspect of the story. Was Hasan ever in trouble with the police? No, never. No reasons at all to find him suspicious. 'Later I also talked to the persons who were in charge of the whole volunteer group. They had no idea why I wasn't there. They'd had no information apart from the fact that I was dropped from the list,' says Hasan.

He asks everyone he can think of whether any other volunteer had been rejected. Nobody has heard of another case like this. Today he thinks he was the only one.

Theoretically, the UEFA could have disregarded the opinion of the police. But ignoring police suggestions means that the entire responsibility for ensuring that an event is safe and secure is shifted onto the organizer. One rejected volunteer is a small price for avoiding this option.

The ID badge is all that's left

The case ended with an out-of-court settlement after Hasan, assisted by the Polish Society of Anti-Discrimination Law, filed a suit for compensation for violation of the principle of equal treatment.

Hasan still has one item from the 2012: a branded ID badge with his name, surname, and the letters 'ACR,' indicating the accreditation team to which he had been assigned.

Some names and identifying details have been changed.

Legal analysis

Krzysztof Śmiszek

This case may be contemplated in a number of reference frameworks. Charges of unjustified unequal treatment may be made here not only under Polish anti-discrimination laws but also under international regulations. The potential ground on which unequal treatment may have occurred is Hasan's national origin. Also noteworthy here is the context of police profiling.

When considering discrimination, it is necessary to correctly identify the grounds on which Hasan may have been refused the opportunity to volunteer at Euro 2012. It appears that his national origin may have been the decisive ground, considering that Hasan's father is originally Palestinian. 'National origin' is defined in Poland by the Central Statistical Office for census purposes as a *declarative* (i.e. based on a subjective experience) individual characteristic of a person, expressing this person's emotional, cultural, or genealogical (due to parent's origins) connection with a specific nation (www.stat.gov.pl/warsz/69_175_PKL_HTML.htm, accessed on 30 September 2013). An analysis of the facts of the case and all other available data fails to generate other reasonable hypotheses as to why Hasan may have been denied the opportunity to volunteer. Potentially, religion or denomination (in this case, Islam) may have also been the ground; it may have been automatically attributed to Hasan because of his family connections.

Direct discrimination on the grounds of national origin

The legal basis of the discrimination charge is direct discrimination as per Article 8(1)(1) of law of 3 December 2010 implementing selected European Union regulations on equal treatment (Journal of Laws no 254, item 1700). It prohibits the unequal treatment of natural persons on the grounds of sex, race, ethnicity, nationality, religion, denomination, political beliefs, disability, age, and sexual orientation, in areas including vocational training, advanced vocational training and retraining, including practical work experience.

While volunteering is not explicitly listed, it nonetheless appears that this regulation is applicable to Hasan's case, because of the broader function this regulation serves with regard to the obligation to implement the relevant EU laws. Article 8 of the law of 3 December 2010 implementing selected European Union regulations on equal treatment, as well as the majority of other provisions of this law, implements into the national order the regulations of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Both of these directives prohibit discrimination with regard to conditions of access to employment, to self-employment and to occupation, as well as access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience. The latter part in particular can be understood to include volunteering. The principle of indirect effect requires the interpretation of national regulation in the light of EU laws and their objectives. Therefore, it is reasonable to believe that volunteering is also a context in which antidiscrimination safeguards are in force.

In line with the principle of indirect effect, national laws must be interpreted so as to ensure their compliance with (hierarchically higher-ranking) EU laws, in order to eliminate the discrepancy within the same area of regulation. Court of Justice case law contains also the broad interpretation of the principle of indirect effect, i.e. the suggestion that individual persons (such as Hasan) may directly invoke EU regulations before national courts if the directives are implemented improperly. In this case, it appears that the implementation of the prohibition of discrimination into the national legal order is incomplete. As a consequence, Hasan may be able to invoke the EU directives directly. Interpretation in line with the directives is reasonable considering that their objective is to support an open labour market.

In its judgment in *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, the Court of Justice noted that the aim of these directives is to foster conditions for a socially inclusive labour market that would be open to all regardless of their national, ethnic, or racial origin (case C-54/07). Promoting the conditions for a socially inclusive, open labour market mean that opportunities such as volunteering should be accessible to all interested parties, regardless of their national, ethnic, or racial origin as well as religion and denomination. Clearly, volunteering allows those involved to gain experience and obtain references, and consequently improve their chances of future employment. It can also be an opportunity for more advanced training. While volunteers are unpaid, they may receive training that will improve their qualifications. In this sense, volunteering is a method of continuing one's formal education. In effect, the position of the volunteer on the labour market improves. Moreover, volunteering meets the needs of young people who seek opportunities to gain experience while studying or immediately thereafter. As such, volunteering opportunities should be available to all, without discrimination.

Volunteering and the ban on discrimination

Another important element of Hasan's case is its civil law aspect. The volunteer and the organization for which this volunteer works (i.e. the beneficiary) enter into an agreement, in which the scope, manner and timeline of volunteering are specified (J. Blicharz, *Ustawa o działalności pożytku publicznego i wolontariacie. Ustawa o spółdzielniach socjalnych. Komentarz*, LEX 2012). Therefore, the legal relationship between the volunteer and the beneficiary is determined by the civil law. Article 42(1) of the law on public benefit activity and volunteering provides that under this agreement, the volunteer performs services for the beneficiary that correspond to the performance of work. Matters not regulated by the volunteering agreement and by the law on public benefit activity and volunteering are governed by the Civil Code (J. Blicharz, *Ustawa...*).

Taken together, these two facts – the applicability of the Civil Code and the correspondence of the services rendered by the volunteer to the performance of work – suggest that volunteers are also protected against discrimination under Article 8(2) of law of 3 December 2010 implementing selected European Union regulations on equal treatment, which prohibits discrimination of natural persons on the grounds of ethnic origin, nationality, and religion as far as the conditions of conducting economic or occupational activity are concerned, and including particular the employment relationships and relationships governed by Civil Code contracts.

If Hasan had decided to take legal action, he could have used Article 13(1) of law of 3 December 2010 implementing selected European Union regulations on equal treatment as a basis for filing a lawsuit for compensation for the discrimination he suffered. Just like in any civil law case where the court determines whether unjustified

unequal treatment occurred, the claimant (i.e. Hasan) would have had to present evidence that makes it likely that discrimination took place. In practice, this consists in presenting the court with circumstances that may suggest that the principle of equal treatment has been violated. If the court finds the claimant's version of events credible, and the suggestion of unlawfulness – reasonable, in the next stage of the proceedings, the burden of proof will be on the defendant to prove that the conduct was not discriminatory (the burden of proof is placed on the defendant and not the claimant).

Racial profiling by the police as a form of prohibited discrimination

Legally, Hasan's case also hinges on the issue of racial profiling by the public authorities. It was, after all, a negative opinion issued by the Police that caused Hasan to be denied the opportunity to volunteer. Racial profiling consists in less favourable treatment of a person (compared to others in a similar situation), for example because the police make a decision based solely or primarily on racial, ethnic or religious characteristics. Racial profiling is therefore inextricably tied to categorizing persons by their inalienable characteristics (such as sex, age, or national and ethnic origin). This inevitably leads to discrimination on the grounds of those characteristics, in particular when the police associate specific racial, ethnic, or religious minorities with criminal behaviour (*Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, European Union Agency for Fundamental Rights, 2010).

Racial profiling has long been on the radar of international bodies in charge of combating racial discrimination. European Commission against Racism and Intolerance (ECRI) recommends that a legal ban should be introduced to prevent profiling of individual on the grounds

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of race, skin colour, language, religion, nationality, as well as national and ethnic origin control, surveillance or investigation activities (European Commission against Racism and Intolerance General Policy Recommendation N°11 on combating racism and racial discrimination in policing). Nonetheless, the negative (and discriminatory) opinion about Hasan issued by the police in no way legitimizes or justifies the actions of the defendant in this case, particularly since the opinion was not legally binding on the defendant.

Disclaimer

This legal analysis is only a suggestion that the principle of equal treatment may have been violated. The author merely presents the legal instruments that could have been used in this case. However, the case ended with an out-of-court settlement, and thus no judgment was entered, which could have clearly identified and assessed the facts of the case. Consequently, the text only reflects the author's subjective opinion and is a presentation of generally available anti-discrimination laws.

TAILOR- -MADE DISMISSALS

Paweł Rzekanowski

**'You're going to regret it!',
said the store owner
to the sales
assistants who –
unhappy about
their working hours –
joined
a trade union.**

FIRED FOR BELONGING TO A TRADE UNION



The year was 2010. Economically, things were not going well. Sales of clothes were in a freefall, stores were cutting costs left and right, and workers were being let go. This affected even the popular shopping centres, usually pretty crisis-resistant. The sales assistants working in a small-scale clothing chain store in the Tricity got an offer they couldn't refuse. Well, they could – but they'd be risking dismissal. On the other hand, accepting would essentially mean their consent to what one of them called 'inhuman exploitation.'

'It's actually hard to tell what was the worst part: the fake roster, the abuse, the crazy scheduling, or how we were treated when anybody protested against this exploitation. Because that's what it was,' said one of the sales assistants.

Sunday, Monday, any day

It started with the fake roster, which continues to be one of the most common forms of labour law violations.

The store had one staff roster that was official but not actually followed. Its purpose was to just be there, available in case of an inspection by the National Labour Inspectorate. This was never explicitly said but always heavily implied. If an outsider tried to verify the working time, this is the roster they would be shown.

But there was also another roster. It was covert and unofficial, but very much in force. It was merciless for the workers and mercilessly enforced. The names were popped into the schedule without any limitations, with no guarantee of any time off. The store was located in a popular shopping centre that was open seven days a week. The sales assistants were expected to be always available to work.

In December 2010, the shop owner found out that several of her workers were planning to join a trade union in order to fight for better

working condition. A huge argument ensued. For the owner, this was unacceptable. She was unaccustomed to workers protesting. She is well-known in the Tricity and quite well-off: she owns a network of more than a dozen stores, built up over two decades. There has been no news about her being in this type of a conflict beforehand.

One of the sales assistants – let's call her Beata – worked in three of the owner's stores over a period of two years. First, she was employed under a contract for a probationary period. She was doing well at work and was soon rewarded with another contract, this time for a longer (but fixed) period. In the spring of 2007, Beata got another contract: this time, it was the open-ended, permanent employment contract that she had always wanted. In the typical Polish reality where proper employment contracts are becoming exceedingly rare, this was quite a feat. Compared to the stability and security of employment, the earnings were less important.

The store's owner was happy with Beata's work. According to what Beata testified in court later, the owner offered her a promotion twice, as a reward for her diligence. Yet when she handed Beata the letter of dismissal, the owner cited – to Beata's complete surprise – carelessness and many other shortcomings. She listed 'failure to demonstrate the requisite diligence, care and attention in performing her duties.' What had happened?

This was in January 2011, right after the protest erupted over the controversial overloaded roster. Beata was sick then, on medical leave. When she returned to work, she was told that she no longer had a job. Officially, the reason for termination of her contract was the liquidation of the store in which Beata was working. Yet Beata doesn't think it's true. Instead, she believes that she became an inconvenient problem for her boss, and she paid with her job for her insistence that the roster was wrong – and also other issues beyond that.

Unbuckle the clients' belts

There is another part to this story.

The sales assistants in these stores joined a trade union called Labour Confederation (the full Polish name is Ogólnopolski Pracowniczy Związek Zawodowy Konfederacja Pracy). They had reasons to do so that went beyond the fake roster and the unclear financial rules.

'If you don't know how to best serve the clients, unbuckle their belts and just blow them,' said the boss to the workers. She kept pushing them to sell more. Both the sales assistants' earnings and the stores' profits hinged on the sales. When the owner was unhappy with the results, she got insulting. The inappropriate suggestions, similar to the unbuckling comment, came up more and more often, and they further intensified when she heard about the trade union. That's when she said: 'You're going to regret it!' She started trying to find out which of her workers had joined the Labour Confederation. She failed to get the names but continued to make threats. 'I was afraid to admit that I was a member of the union, but the defendant kept saying that she was going to find out and then "we'll be screwed",' one of the witnesses testified in court.

The women all agreed: the boss tried to intimidate them and threatened them with dismissal for hiding trade union membership. She was the sole member of the managing board of the company, so there was nobody else to approach for help. After the suggestion to 'unbuckle the clients' belts,' the sales assistants brought forward the charge of harassment, on the grounds of both sex and trade union membership. Their ultimate argument is this: four months after their unit of Labour Confederation was founded, not a single person from among its founders was still employed by any of the owner's stores. They all had either been removed from management-level positions or their fixed-term contracts were left to expire and not renewed.

Tailor-made dismissals

The owner decided to close the store in which the trade union unit was formed. Was it not sufficiently profitable, or was there maybe a different reason? In any case, the jobs ended when the store was closed. Naturally, the workers were let go. Yet how the process was structured made Beata and several other sales associates indignant.

The store was not just simply closed. The process was tailor-made to suit the owner's broader needs. The store's goods, formally the property of her company, were transferred to another business – also held by the owner herself. The other business has a nearly-identical name and now operates a store in the same shopping centre in which the original store was located. In practice, the entire stock of the store was moved one floor up to a new location. From a customer's point of view, the changes were minimal, even more so because two of the four sales associates were also offered jobs in the new store. Why just the two and not the whole team?

Beata is completely confident: the owner only re-hired the women who were not trade union members.

Half a year without a day off

Beata felt this was scandalous. She took the case to court, where emotions escalated even further. The members of the Labour Confederation who'd been dismissed brought their own two cases to court, demanding compensation for discrimination as members of a trade union. They were represented by Grzegorz Ilnicki, a lawyer hired for them by the local branch of the Labour Confederation. He argued that the jobs were not eliminated but rather just moved to another store in the same shopping centre. In June 2011, the regional court found that Beata's dismissal was unlawful and awarded her almost PLN 5 000 in damages.

This amount is three times Beata's monthly wages, because she was employed at the minimum wage. She also proved that she worked for approximately half a year without a single day off. The lawyer was able to show the court some copies of the actual roster – the roster that had initially sparked the whole controversy – and clearly demonstrate that the store paid no heed to the mandatory rest periods for workers and time off at the weekends.

The owner of the stores appealed, but the appeal fell through in November 2011. The court of the second instance upheld the amount of damages. However, it didn't order what Beata had hoped it would: namely, her reinstatement at work. Eventually, Beata gave up on this idea herself, after she heard her former boss testify that she couldn't imagine working with her again.

Later, when talking with the media, the owner said that she finds the judgment unfair and that the testimony given by witnesses was untrue. As for the overloaded schedules and the fake rosters, she shrugged it off, saying that some mistakes may have been made due to a limited understanding of the intricacies of labour law and due to the chaos in the stores. Did she discriminate against trade union members? She denied this claim during the hearings, which were held with the participation of the Polish Society of Anti-Discrimination Law. She accused the workers of defamation.

An inspection on the horizon

She did however admit to trying to obtain the list in names of the trade union members. This gave rise to a number of considerations during the hearings. If she wasn't planning on taking any steps, why was she so determined to learn these names? The judge hearing the case thought this was wrong; as an employer, she had no right to put pressure on the trade union to disclose the names of its members.

Another issue under much investigation during the trial was whether indeed in several of the stores, the employees worked for months without a single day off. Both the owner and her attorney argued this was untrue, and that the former sales assistants lack credibility as witnesses. The court remained unconvinced.

In the end, the owner of the stores had to submit to a detailed inspection: the court decided that the scale of violations was so staggering that the assistance of the National Labour Inspectorate was requested.

Some names and identifying details have been changed.

Legal analysis

Maciej Kulak

Three types of discrimination may have occurred in this case: direct discrimination, harassment, and sexual harassment.

Under Article 183a §3 of the Labour Code (Journal of Laws of 1974, No 24, item 141, as amended) direct discrimination occurs where one employee is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of sex, age, religion, nationality, trade union membership, political views, etc. The list of potential grounds on which discrimination is prohibited is open-ended. This regulation of the Labour Code means that in order to determine whether direct discrimination has occurred, it is necessary to create a model for comparison. This consists in comparing the situation of the employee who is alleging discrimination (and who has one of the listed characteristics) with another employee in an overall similar situation (but who does not have this listed characteristic). In this case, the test would focus on trade

union membership. If the women described in the reportage had not been trade union members, would they have been dismissed and denied the opportunity to be re-hired?

Several aspects suggest that the employer differentiated the treatment of the employees unlawfully, i.e. on the grounds of trade union membership: the employer made attempts to find out who belongs to the trade union; she made threats against those who do belong to it; she terminated the employment relationship only with those persons who are trade union members. If it is determined that this was the only reason for the employer's actions, this qualifies as direct discrimination.

Trade unions represent employees and help them protect their rights. Therefore, trade union members are usually subject to special protection in labour law. The general principle of equal treatment in this scope is expressed in Article 3 of the law of 23 May 1991 on trade unions (Journal of Laws of 1991 No 55, item 234, as amended, hereinafter: the trade unions law). It stipulates that nobody can suffer negative consequences on the grounds of being a trade union member or holding an official position in a trade union. Discriminating an employee who meets these criteria triggers not only the liability under the Labour Code but also criminal liability under Article 35(1) of the trade unions law; it is punishable by a fine or a penalty of limitation of liberty (a non-custodial sentence). In the case presented in the reportage, the owner of the stores was thus at risk of criminal action.

In order to protect employees from discrimination, it is also important to consider the confidentiality of information on trade union membership. Firstly, the employer has no right to force the employee to reveal whether this employee belongs to a trade union. Secondly, the trade union is under no general obligation to provide the employer with any information on its members. This obligation only occurs in specific cases, e.g. when the trade union adopts

a resolution to prevent a named member from termination of employment or when the trade union participates in the process of consultation with regard to termination of employment. However, this information can never be revealed to the employer without the consent of the employee in question. Under Article 27(1) of the law of 29 August 1997 on personal data protection (Journal of Laws No 133, item 883, as amended) information on trade union membership is classified as sensitive information and is protected just as much as information about e.g. racial or ethnic origin, health status, or political beliefs. Consequently, the employer may not collect this information ‘just so,’ without an important specific reason related to the employment relationship. Actively trying to obtain information on an employee’s possible trade union membership may violate the employee’s right to privacy, which is protected under Article 111 of the Labour code as well as under the Civil Code (law of 23 April 1964, Journal of Laws of 1964 No 16, item 93, as amended).

Two other forms of discrimination have likely also appeared in this case: harassment, and sexual harassment. Harassment is defined as unwanted behaviour, with the purpose or effect of violating the dignity of an employee and of creating an intimidating, hostile, degrading, humiliating, or offensive environment (Article 183a § 5(2) of the Labour Code). Harassment on the grounds of trade union membership may be manifested in that the employer addresses the employees in an offensive manner in the context of trade union membership, or when the employer creates an intimidating atmosphere around this issue. Harassment may consist in a single act; continuing behaviour is not a requirement for legal protection. Moreover, it is not required that the behaviour be intentional. What matters is that the conduct must be subjectively perceived by the employee as un-

wanted, and that the employee must clearly communicate their objection (express that the perpetrator’s conduct is unacceptable). The objection may be verbal or non-verbal, and it may be explicit or clearly implied.

Sexual harassment is a form of discrimination that is inherently connected to the sex of the involved person. It consists in the same elements as harassment, but the unwanted conduct must be sexual in nature or be associated with the employee’s sex. Article 183a §6 of the Labour Code explicitly indicates that sexual harassment may consist in physical elements (any unwanted physical contact), verbal elements (e.g. inappropriate comments or jokes with sexual innuendo), and non-verbal elements (e.g. obscene gestures or looks). Saying to the employees: ‘If you don’t know how to best serve the clients, unbuckle their belts and just blow them,’ qualifies as sexual harassment. This statement is directly related to the sexuality of the persons to whom it was said, and the context indicates that it may have been intended as degrading. Even if it were intended as a joke, it may still qualify as sexual harassment, because the crucial element is the subjective perception of the employee (just like with ‘regular’ harassment). It is important to note that sexual harassment, despite the popular belief to the contrary, is not restricted to relations between persons of opposite sex. Furthermore, sexual contact is not necessary for certain conduct to qualify as sexual harassment; the definition is much broader in scope.

If discrimination takes place on the grounds of several characteristics at the same time (e.g. sex and trade union membership), this is referred to as multiple discrimination. Discrimination in such intensity and in such multiplicity of form can definitely have impact on the amount of compensation under Article 183d of the Labour Code, which is intended to compensate for the suffering of the victim of discrimination.

राष्ट्रिय



TOO ABLE-BODIED TO FEEL HURT

Michał Janczura

'The Association of Persons with Disabilities is inaccessible to person with disabilities.'
Sounds just as dumb as it looks, but it is true.
This was the title of a story I once wrote.
Later I learned that it actually gets worse: a Polish court can explicitly say it is OK to insult an athlete with disabilities and deprive him of his rights.

CAN AN ATHLETE WITH DISABILITIES FEEL OFFENDED IN POLAND?

The address is Aleje Jerozolimskie 30; the very heart of Warsaw. Until recently, all I knew about this building was that the infamous Polish MP Andrzej Lepper worked there and also committed suicide there. Now I discovered that the top floor of the building houses an institution that we are about to study in some detail.

Polish Association of Retirees, Pensioners, and Persons with Disabilities has a website. I found it by chance. The website is generally all right, but the pictogram with a crossed-out wheelchair is jarring. 'Building inaccessible for persons with disabilities,' the website also says to make it clear. I keep checking the name in disbelief. One of the stated objectives of the Association is to provide assistance to persons with disabilities. At first I thought this is surely a mistake. On second thoughts, I realized that over the years of my working in the media, I have seen even more unlikely cases, and that this needs to be checked out.

I asked Robert for help in investigating the issue. All I knew about Robert was that he is wheelchair-bound and is an activist advocating



for persons with disabilities. A mutual friend put us in touch. Robert drove himself to the agreed location, in a car with the necessary accommodations. Then, still all by himself, he unpacked his wheelchair and came over to where I was standing, along with a camera operator, by the entrance to the building. Just to clarify, let me add that this is not a mistake; for some time now, radio reporters often have cameras on hand. Robert was wearing a cap and a fleece jacket. He was accompanied by a beautiful chocolate labrador. I wanted to pet the dog and got immediately scolded. I know now that petting a guide dog is a grave offence. I am not exactly sure why that is, but I have accepted this for a fact: this is just not a done thing. The name of Robert's dog is Kankan. This is not the last time he will feature in this story.

After a brief conversation, Robert and I got down to business. The task at hand seemed very simple: a person with disabilities is to enter into the office of an institution which is supposedly there to assist persons with disabilities. (This is not just the name; the Asso-

ciation's founding and operating documents also reference this as the Association's objective.)

The first obstacle was the door, or more specifically, the entry phone. I helped Robert. I had to: the keyboard was placed at my eye level. A person in a wheelchair was unable to both see the keys properly and to reach up to touch them. We chose a random number and rang it. Nobody answered, but the door opened with a quiet 'ping.' We went through one door, then another. It turned out that there is an elevator in the building, but to get to it, we have to scale a flight of stairs, and after it, surprise! Another flight of stairs. Even with the best intentions, a person with disabilities will not be able to climb this many stairs. I didn't know whether to laugh or cry, and even more importantly: what do to?

We went back to the entry phone; now it seemed much less of a problem, relatively, than it had a few moments before. This time, somebody answered. 'Good morning, I have a disability and I'd like to visit your office,' said Robert. A nice elderly gentleman said he would be right here, and he was. He came down to where we were standing and offered to help in carrying Robert up the stairs. We all exchanged looks. I looked at Robert and then at the elderly gentleman, whose physique was far from that of a weightlifter. A sense of tragedy hung in the air. I asked the nice gentleman (and I'm stressing that he was nice, because he was, and it is not the norm in these institutions) if he was sure there was no ramp or an elevator. 'No, there isn't,' he said, and the look he gave me clearly showed that it was not necessary, because everybody was doing fine without it. Maciek, our camera operator, put the camera down, and we carried Robert up the stairs. When we got to the elevator, it turned out that the door opens in such a way that it would be impossible for Robert to open it himself. Yet this proved to be hardly an issue in view of what was about to happen.

We were greeted quite nicely in the office of the Polish Association of Retirees, Pensioners, and Persons with Disabilities. We asked to speak with the Association's President, and this is when problems began. The elderly lady, confronted with a camera and a person in a wheelchair (and I honestly cannot say which terrified her more) got a bit panicky. I said something along the lines of: 'Good morning. This is Robert, and my name is Michał Janczura from TOK FM radio. We would like to ask why your institution is inaccessible to persons with disabilities.' I am a bit embarrassed about this now, but that was the actual truth. We wanted some kind of an explanation. In any case, the reaction to my words was not one I had expected. The president of the Association told us to get the dog out of the building, and now! 'This is an institution and not a place where you bring dogs,' she said very firmly, and then remained deaf to our argument that this is a guide dog, which is allowed to accompany its owner everywhere – it's the law! Eventually, the lady calmed down somewhat, but up to this day we have not received an answer as to why the building offers no accommodations. 'Persons with disabilities don't come here, because this is the headquarters. They can visit other offices or contact us by phone,' said the president, making it very clear with every word that she had no clue about either the legal regulations or a humanitarian approach to potential clients.

When we were leaving, the nice elderly gentleman admitted (to save the situation, I think) that wheelchair-bound clients are served downstairs, in the hallway. We were speechless; and anyway, what can one possibly say to that? We carried Robert back downstairs, feeling ashamed. Once again he was shown that he can only count on himself. An institution that was designed to provide him with assistance not only offered none, but actually demonstrated that time has stopped there ages ago, and the organization's officers believe they themselves are much more important than the people they are supposed to serve.

I know it sounds awful, but as a reporter I was happy. I had a good story, I could show evidence of wrongdoing. We published the video online, all 17 minutes of it. We managed to get a conversation going on what I think is an important topic. We got tons of emails from outraged listeners, readers, and officials. Still, the voice I remember best is that of the woman on that fourth floor, of the president in charge of the weird Association: 'It has to stay the way it is.'

When we were saying good-bye, Robert asked if I could do a report on a case in which he was involved. He said: 'The court decided that because I am disabled, but also an athlete, I am immune to insults and so cannot feel offended.' Robert said it very calmly, and just a moment after he was nearly kicked out of a building. A court. Wisdom. Independence. The rule of law. How come? I am sure I must have made quite a face but the story is not that simple.

To begin with, let's have some facts. Robert has a disability, but he also has a great hunger for life and a liking for challenges. He plays wheelchair rugby and is active in many organizations. I could keep talking about what he likes and how he spends his time, but that is not the point. One day, Robert wanted to spend an evening out with his fiancée. 'It was an anniversary of our engagement and I wanted to have a nice dinner with her,' said Robert. The story got complicated as soon as they entered the restaurant. 'The dog stays outside,' said the staff. The dog, as you can imagine, was Kankan, the same guide dog that the president of the Polish Association of Retirees, Pensioners, and Persons with Disabilities wanted to kick out of her office. The whole issue could have been completely avoided if that woman, as well as the staff and the manager at the restaurant, had at least a passing familiarity with the law and understood that a guide dog may (and actually, must) enter any premises with the owner. These are not dogs that can be left outside, tied to a tree. Why, you ask? I asked that

too. After a small show performed by Kankan, I am to this day impressed with how this dog can make a person's life easier.

We agreed to meet Robert and shoot some film in front of the restaurant where the incident happened. It was in the centre of Warsaw's Ursynów district, on a beautiful sunny day. I asked Robert to demonstrate why he needs a guide dog and why the dog is so important for him. I hadn't noticed before, but Robert's legs are not the only part of his body that is not completely functional. He also has limited mobility in his hands, and cannot grasp objects very strongly. I only noticed when we shook hands. After a moment, Robert took out his wallet. He said sometimes he drops coins or cards. Kankan lifts them up one by one and places in Robert's open hand. He can also drag the wheelchair closer when it is too far for Robert to reach. It is difficult to imagine, isn't it? Training a guide dog takes immense effort and is very expensive. Then, the dog has to form an attachment to its owner and learn to perform the services necessary in a given situation. Robert said that leaving a guide dog tied to a post in front of a restaurant would be like leaving a car with open doors there.

A judge heard the story of the restaurant incident, because Robert filed a lawsuit in court. He wanted to draw attention to this situation and to the violation of the law; he wanted to make it clear that when one person does something unlawful, another person suffers. I'll add from myself, because Robert would probably never say so, that usually those who suffer in these cases are those who already have plenty of problems in their lives. The case ended up in a regional court. The claim was not for some exorbitant amount of compensation (in the United States, a lawsuit probably would have been filed for millions of dollars, and probably won, too). All that Robert wanted was an apology and compensation payable to the foundation that had trained and given him Kankan. A more suitable and reasonable demand is difficult to imagine.

Yet after a few months of waiting, a hearing took place and Robert lost the case; consequently, he also had to pay for the costs of proceedings.

I'll freely admit: I was sceptical until I read the court file and the statement of grounds accompanying the judgment. It's not that I didn't believe Robert; I certainly did. However, I just assumed that the court is obliged to assess the facts of the case in view of the legal regulations. Yet in the statement of grounds, the judge wrote that Robert is an activist and an athlete, which provides a form of therapy for him. As a result, he is psychologically resilient and self-confident. In short: it is OK to offend him, because he plays rugby, so the insults just don't get to him. Whenever I showed this to experts, they made a shocked face when they read these words. Monika Zima from PSAL said that Robert was hurt twice: at the restaurant where he was mistreated, and then again when the court forbade him to feel upset about that mistreatment. Also, every lawyer had a 'facepalm' moment over another part of the statement of grounds of the judgment. The judge wrote there that the staff at the restaurant might have been unfamiliar with the legal regulations on the issue of guide dogs. Wait a minute... If I steal an apple from a fruit stand and a police officer catches me, can I say that I just didn't know the laws about stealing? A smart Roman guy said some centuries ago that *ignorantia iuris nocet*, and I don't think anything has changed since this in this regard!

I spent a few days trying to set up a meeting with the judge who entered the judgment in Robert's case – to no effect. First, she was unavailable. Then, I was told that judges don't comment on their judgments. Eventually, it was decided that a spokesperson would meet with me. He read the statement of grounds, but even off the record he would not give a genuine comment. All he said was: 'Yes, these statements are indeed included here, but I would like to stress that

the judgment is not yet final and binding. The court of appeal is going to address the accuracy of these statements.'

Robert didn't give up. He won the case. The court of appeal agreed with his claims and I think the great majority of the people gathered in the courtroom had a strong sense of victory of the law and the common sense. This is where my role in this story ended. What I find terrifying is that there are many, many Roberts among us. Most of them have no friends who are reporters with big media outlets, or who are litigation specialists. Maybe they don't know that they can pursue their rights in court or in the media. I hope the case that we publicized is going to encourage them and show them they are not alone.

Some names and identifying details have been changed.

Legal analysis

Katarzyna Bogatko

Robert's story demonstrates that persons with disabilities continue to encounter many barriers and obstacles in Poland. Some of them are architectural in nature, while others are evident in social relations. Their likely source is the stereotypes about persons with disabilities. These stereotypes in turn are rooted in poor social awareness and knowledge about the needs of such persons. Very often these barriers mean that persons with disabilities find it difficult to fully participate in social life and to exercise all their rights. This leads to widespread violations of the principle of equal treatment and to discrimination on the grounds of disability.

Discrimination in access to goods and services on the grounds of disability

The legal analysis of the case involving Robert must begin with the fact that the principle of equal treatment is one of the key constitutional principles in Poland. It is explicitly expressed in Article 32 of the Polish Constitution (Journal of Laws of 1997, No 78, item 483), which reads: 'All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. No one shall be discriminated against in political, social or economic life for any reason whatsoever.' The ban on discrimination extends, of course, to discrimination on the grounds of disability.

Discrimination may take one of the two main forms: direct or indirect. Direct discrimination occurs when two persons in the same or comparable situation are treated differently without a good reason. Indirect discrimination occurs where an apparently neutral provision, criterion or practice is applied universally to all persons, but has particular impact on a certain social group, selected on grounds of having a certain characteristic which causes unequal treatment.

In strict legal terms, indirect discrimination occurs where an apparently neutral provision, criterion or practice, which is not objectively justified by a legitimate aim, puts persons of a particular sex, race, ethnic origin, religion or belief, political view, disability, age, sexual orientation, or civil status at a particular disadvantage compared with other persons, and where the means of achieving the aim are not appropriate and/or necessary.

Therefore, the restaurant staff and manager, in denying entry to the restaurant to a service dog, and consequently, to the dog's owner, violated the principle of equal treatment. It was a manifestation of direct discrimination in access to goods and services on the grounds of disability.

Since January 2011, the provision of the law of 3 December 2010 implementing selected European Union regulations on equal treatment (Journal of Laws no 254, item 1700) have been in force in Poland. They explicitly prohibit conduct that prevents a person, on the grounds of the fact that this person belongs to a group defined by having a certain characteristic, from accessing a publicly offered service or from purchasing goods offered for sale to the general public. Unfortunately, protection against discrimination under this law is only granted to certain groups, and persons with disabilities are not listed as one of those groups. Consequently, persons with disabilities who experience discrimination (either direct or indirect) in accessing goods or services may not invoke the law implementing selected European Union regulations on equal treatment to claim compensation. However, they can pursue their rights under the provisions of the Civil Code on legally protected personal rights.

Discrimination as a violation of legally protected personal rights

Unequal, discriminatory treatment is inherently connected with a violation of legally protected personal rights (judgement of the Polish Supreme Court dated 11 April 2006, case no: I PK 169/05, OSNP 2007/7-8/93). Therefore, Robert correctly decided to bring legal action using the Civil Code instruments of protection of legally protected personal rights. This option was upheld by the above-cited judgment of the Supreme Court, which reads: 'Discrimination is inherently connected with a violation of another person's dignity, and respect for this dignity is not only a legal obligation, but a moral one too.'

Dignity is a legally protected personal right. It reflects a person's sense of self-worth and of importance as an individual human being (judgement of the Polish Supreme Court dated 30 October 2003,



case no: IV CK 149/02). It is also characterized as a person's internal belief on their moral and ethical good standing and honour (judgement of the Polish Supreme Court dated 21 March 2007, case no: I CSK 292/06). Moreover, the Polish Supreme Court also noted that dignity, as a value inherent in each person, is the ultimate and highest legally protected personal rights (judgement of the Polish Supreme Court dated 29 October 1971, case no: II CR 455/71).

Under the Polish Constitution, dignity is granted special legal protection as an inherent characteristic of every human being, regardless of their nationality, sex, citizenship, or any other qualities. Article 30 of the Constitution stipulates that every person's dignity is inherent and inalienable. It is the fundamental value that underpins the entire constitutional order. Consequently, respect for a person's dignity must be connected to the principle of equal treatment and the ban on discrimination on any grounds (Article 32 of the Constitution). This in turn means that conduct that is discriminatory in nature may constitute a violation of the dignity of the person towards whom it is addressed. The conduct of the restaurant's staff and manager clearly violated Robert's dignity.

Furthermore, their conduct and the manner in which access to the restaurant's services was limited for Robert also violated Robert's personal liberty, defined under Article 23 of the Civil Code as the ability to choose freely, without unlawful pressures and restrictions. A violation of personal liberty may occur when a person is forced to behave in a particular manner not only by means of physical force, but also in another unlawful way; this is what happened to Robert.

Preventing Robert from entering the restaurant with his service dog, as well as the attempt to unlawfully force him to leave the dog outside, was a form of psychological coercion and as such a clear violation of Robert's legally protected personal liberty.

Unlawfulness as a prerequisite for violation

In analyzing Robert's situation in the light of the provisions on violation of legally protected personal rights, it is necessary to investigate whether preventing Robert from entering the restaurant with his service dog was unlawful. This is because the unlawfulness is required in order to consider that certain conduct was indeed a violation of these rights. The question of lawfulness here is determined under the law of 27 August 1997 on social and occupational rehabilitation and employment of persons with disabilities (Journal of Laws of 2011, No 127, item 721, as amended).

This law explicitly states that a person who has a disability may enter together with a service dog any facilities for the general public, including in particular (but not limited to) buildings and their surroundings, if their purpose is: public administration; justice administration; culture; education; healthcare; social welfare; provision of banking services; commerce; food services; general services; tourism; sport; customer service for passengers in rail, road, air, sea and inland water transport; provision of postal and telecommunications services; other buildings generally accessible to the public and serving similar functions; including office buildings and buildings offering various social and public services. These legal regulations also extend to entrance to national parks, nature reserves, beaches, and swimming facilities.

Restaurants obliged to ensure access for persons with disabilities accompanied by a service dog. Since the restaurant staff violated the regulations of the law on social and occupational rehabilitation and employment of persons with disabilities, preventing Robert from entering with his service dog the restaurant was unlawful. Consequently, the incident can be classified as indirect discrimination in access to goods and services on the grounds of disability, and as a violation of legally protected personal rights such as dignity and personal liberty.



BECAUSE WE ARE GYPSIES

Justyna Pobiedzińska

Reverend Opocki once had a visit from three of his parishioners, girls who had completed hairdressing school. They were looking for salons where they could do an internship. The reverend called each and every salon in the parish. As soon as it turned out that the girls were Roma, all potential internships vanished.

DISCRIMINATION OF THE ROMA ON THE LABOUR MARKET

I want no Gypsy managers

Anna (23), Chorzów

Anna has been working since she was 16; she sold ice cream, toys, and souvenirs in the zoo. Today, she is 23 and has quite an experience in the hospitality industry. She has tended and then managed a bar, and she worked in hotels as a kitchen assistant, a maid, and a conference support assistant.

Anna: 'As long as I was working for hourly wages, nobody cared about the colour of my skin. When you are making the minimum wage, it doesn't matter to the employer if you are Chinese or Romani. All that matters is that you do the job.'

When Anna came to inquire about a manager's position in a bar, the owner didn't even look at her. He didn't give her CV and documents a glance. If he had, he'd have learned that Anna has practical experience, bartending certificates at levels I and II, the European Computer Driving Licence, and has completed training in business ne-



gotiations, basic programming, and micro-business management. And she speaks English, too.

Anna: 'And the guy just asked me: "Are you a Gypsy?" Now, I'm not going to lie. And so he told me, upfront, that he wanted no Gypsy managers.'

Then there was another interview, also in a bar. When he saw Anna's dark hair, the director immediately said that he wasn't going to hire a woman, and especially such a young one (even though there was nothing in the add about the job being for men only). Anna sometimes still wonders today if her ethnicity was once again the reason she wasn't hired without even a brief look at her papers. Or was she, maybe, discriminated against on three grounds: because of her ethnicity, her age, and her sex?

Anna: 'One thing's certain. If you have a different skin colour, things are always an uphill struggle for you.'

For the Roma, the uphill struggle begins early on. Even when she was in primary school, Anna kept hearing that she was 'a dirty gypsy'

and many, many other ugly words she would prefer not to remember. Her classmates would sometimes add a beating to the insults, or some bullying in the school corridors. All the way until the end of junior high. In senior high, she was finally strong enough to argue back, stand up to them, protect herself. The teachers in all the schools turned a blind eye.

Anna: 'Maybe they didn't know what to do?'

Today Anna is a second-year psychology student, and she is in law school too. Psychology is her passion, and the law is a necessity.

Anna: 'You have to know the law. This will give me a better chance on the labour market. I went to law school also hoping that one day I will be able to help my mother and other family members. I also want to be a good example for my sister, who is graduating junior high school soon and then she will have to choose between education and marriage. I know she likes to study, but I want to give her good guidance, so that she doesn't end up in trade school.'

I don't regret my choices and decisions, because studying and learning helps me understand life in different categories. I listen to the elders in my family, because this is best for learning about life experiences, but academic learning is important too. People have a tendency to dump everybody into one big category, and so sometimes my family suffers because of other Roma, who steal. A Gypsy is a Gypsy, people say.'

At the university people know what discrimination is. They prefer to keep their distance. They ask no questions. Anna is focusing on her studies. She supports herself thanks to a bursary, but she is hoping to get the academic merit scholarship soon.

I would very much like to clean here

Maria Łój, Wrocław, support teacher for Roma students, Roma assistant

Maria (aka Maja aka Majka) Łój is a teacher. She has the trust of the Roma population in Wrocław. Thanks to her efforts, Roma children for years have attended mainstream schools rather than special needs schools. She helps the Roma fill out applications to the social welfare services, to the schools, to the building administration, the courts. For many of the Roma who have little education, the language used by the officials is difficult to understand. They need an explanation of what the official was trying to say, what the expectations are.

Maria Łój: More and more Roma complete expensive, difficult courses, and for example get certified as forklift operators, beauty technicians, or welders. They have tens of hours of training with employment advisors. They know how to write CVs and how to interview for a job. They apply to companies, send out CVs. They need work more than anything else.

Romani women are more likely to sign up for the 1-year internships. Maria Łój thinks that they are more open-minded and more determined than men. Romani women today have self-confidence and their own money. In the older times, the men made money, traded in horses, and worked in the tin trade, while the women stayed at home, and occasionally worked as fortune-tellers. Today, it is the women that get jobs and support their families. Why them? Because they are more likely to ask for work, to insist on getting work. But the men are following in their footsteps now. They want to work.

Maria Łój: 'I know Romani women who have lost jobs and I know how they despaired about it. They say they don't want to return to being nobody, to the humiliation of always asking for help at the social welfare centre. Work is valuable, and this is what the

Roma are telling their children, so today the kids are no longer saying: my mom couldn't read and write, but she's doing fine. Most of the Roma in Wrocław realize that the future hinges on education. The parents are modelling this for their children.'

Maria Łój often accompanies her clients to job interviews. Recently, she went to one of the universities in Wrocław with the mother of one of her students. The university had an opening for a cleaner's position. The ad specified that the work would have to be done in the afternoons. Janka, the client, was impressed by the modern, glossy interior. On the way to the interview, she kept saying over and over: 'I would very much like to clean here, I would very much like to clean here.'

When she saw a Romani woman, the recruiter only asked her how many children she has. When she heard the answer – which was 10 – she immediately said the work is to be done in the mornings, 6 a.m. to 10 a.m. Janka started crying: 'Who is going to send my kids off to school?' She felt that she didn't get the job because she is Romani.

Maria Łój: 'And then they made a note on Janka's papers that she refused to take the job. There was nothing I could do.'

Often, the Roma are offered work, but without any paperwork. After several weeks, when they start demanding a contract or a payment for their work, they are let go without any notice. Typically, they are accused of stealing or failing to do their job.

Maria Łój: 'This has recently happened to a woman who was working as a caretaker. After three weeks with no contract, she was accused of stealing some potatoes and fired, even though she swore she hadn't stolen anything. Or somewhere else three young Romani men were working on the electric installation in a house, and when they finished the work, they were forbidden to come to work there again, and of course nobody paid them. People complain that the Roma are aggressive. But who could take and accept this? I know

that there are no jobs for Polish people either, but under these circumstances, the Romani people have no chances on the job market at all. And of course we, the potential employers, even if we have never met a Romani person in our lives, we just know what "they" are like.'

Too many things that could go missing

Weronika (33), Limanowa

Weronika is very worried about the future of the four sons. How could she not? The oldest has always had a passion for car mechanics. When he finished junior high school, Weronika searched for a long time for a place where he could learn the trade, get some practical education, become an apprentice. In every car garage she visited, she was told that there were no spots open, or that apprenticeships generate no profit. Eventually she had to ask: were they saying 'no' because her son is Romani?

Weronika: 'One man told me upfront that in the garage there are too many things that could go missing. And even though I was ready to explode on the inside, I just left calmly. My son went to school to learn construction. The head teacher in the junior high he attended had to give him an official opinion that he was not demoralized, because they wouldn't have accepted him otherwise. He had to change his plans for his future. Everybody is saying that the Roma have to get an education, but how can we do that when nobody wants us?'

Weronika's work experience isn't positive either. For some years, she and her husband have been travelling merchants, selling window curtains, bed sheets, and table cloths. She remembers the unpleasantness of when they started off. They would go to the market places in the neighbouring towns, and she would find on her stand a handbag, dropped off there by other sellers at the market. They wanted

to see what she would do; they thought: 'She's a Gypsy, so surely she steals.' Time after time, she called the police to say that she has found a handbag. The police officers never had any trouble finding the handbag's owner.

Weronika: 'It's been 17 years now, they know us, so they don't do it any more. But I can see how the young people, non-Romani, treat us. They openly despise us. What difference does it make if I am Romani, or Black, or maybe from Peru: I am a person just like themselves. At school, they get sex education, but they get no education on how to treat ethnic minorities. That's really too bad.'

Neighbours leave them the keys

Aleksandra Malinowska, head of the social welfare centre, Limanowa

Aleksandra Malinowska: 'In our town, the Roma constitute about 1 percent of the population. We include them in various training courses just like other residents of the town. I think the problems that the Roma are facing on the labour market have several reasons. The first reason is their low education. Many of them have not finished primary school, and some cannot read and write. The second reason is the cultural differences. For example, girls become mothers as young as fifteen, so how can they study while taking care of their babies? Thirdly, some of the Romani people with their conduct damage the image of the entire group and cause animosity. Of course some members of the Roma community are well educated, have jobs, take care of their houses, and invest in their children's education. I know some Romani people with whom their neighbours leave their keys when they go on vacation.'

The Roma, a lower class of people

Teofil Kalinowski (57), Gliwice

Teofil Kalinowski is the first (and only) Roma tax advisor in Poland. Until 2003, he ran his own accounting office, but he closed it when the large supermarkets pushed the smaller shopkeepers, his clients, off the market. Today, he operates a trading business.

He remembers discrimination from the times when Edward Gierek was the First Secretary of the Communist Party (1970–1980). At that time, Kalinowski worked at a meat processing plant in Pabianice as transport manager.

Teofil Kalinowski: 'When somebody couldn't come to work, somebody got sick, I was called in immediately. The head of the factory said that the reason why he had a Gypsy on staff was for the Gypsy to take care of things. I was treated like a boy Friday. Before then, when I worked construction, other workers were always telling me I was dirty, even though I washed much more often than they did. Cleanliness is very important for the Roma.'

Kalinowski didn't go around telling people he was Romani. But, he says, his skin colour and comportment were a giveaway. When, as a tax advisor, he argued in favour of his client at the tax office, he was told by the official that he could pay himself for his clients, since he was clearly a rich Romani guy. Even today, if he has a stall on the market, every official inspection begins with him.

Teofil Kalinowski: 'People typically think: "If you are Romani and you have something, that means you stole it. And if you don't have anything, that's because you are lazy and can't manage your stuff." We are treated like a lower class of people. But there are exceptions, I must admit that much. In 2003, when I was taking the exam at the Ministry of Finance, the members of the examina-

tions board were very friendly. They were happy that a Romani man was taking the exam.'

They should get a job, but there are no jobs

The Reverend Stanisław Opocki, national Roma ministry, Rudka

The Reverend Stanisław Opocki keeps asking himself the question if the Roma are discriminated on the labour market. People say: they should get jobs. But there are no jobs for the Roma.

He once had a visit from three of his parishioners, girls who had completed hairdressing school. They were looking for salons where they could do an internship. The reverend called each and every salon in the parish. Some of the salon owners invited the girls to come for an interview. But as soon as they got there, it became clear there would be no internships.

The Reverend Stanisław Opocki: 'The same thing happened at the bakery. And at the sawmill. Every time it turned out that the people on whose behalf I was calling were Romani, there was no job.'

At the sawmill, the Romani men were turned down because, the owner explained, there no longer were any open positions. But a few days later the same ad ran again in the local paper. A reporter from Kraków responded and got the job. The reverend sometimes asks the employer upfront: is hiring the Roma a problem? The answer is always affirmative. People are afraid to hire the Roma because here are many hurtful stereotypes about them.

The Reverend Stanisław Opocki: 'I know a few examples where somebody hired a Romani person and was very happy with the work they were doing. Some of them are still employed up to this day. But these are very rare cases. We are ourselves contributing to the mar-

ginalization of the Roma. It is unchristian, and as a priest, I can't stand it. I try to protect their dignity, because they are wonderful people: hospitable, respectful of their elders, attached to their families, attentive towards the infirm, respectful of their ancestors, uncommonly clean. The Roma are different, and this is what the Poles find annoying. There is a long way ahead of us before we are going to treat the Roma normally, but I see that things are changing for the better. In 2005, I had a call from Pope John Paul II. He wanted to ask me what the correct term was: Roma or Gypsy, to make sure not to offend anybody. The Roma issue weighted on is heart. I'm always calling for brotherhood with our travelling brothers. We are a Christian nation and it is our duty to give every person respect. Those of you who are helping the Romani people are praiseworthy.'

A Gypsy to do the hard work

Małgorzata (45), Wrocław

Małgorzata works as a cleaner at two doctor's offices. In one of them she feels she is discriminated, mainly by her co-workers.

Małgorzata: 'It is just general knowledge that if there is some extra cleaning to do, or some particularly hard work to do, that I will do it. Everybody thinks I should do it, because I am a Gypsy. And I should be happy to have a job at all. My boss is OK with that. Probably he thinks so too.'

Romani businesses for the Roma

Władysław Bieda, mayor of Limanowa

The Romani people in Limanowa have a lot of respect for their mayor. Władysław Bieda with two of his co-workers created a programme called 'Romani businesses for the Roma.'

Władysław Bieda: 'It is important for us that everybody should have the same opportunities from the outset, be able to start working, to support themselves.'

From the description of the programme 'Romani businesses for the Roma': *The Roma should be encouraged to embrace their traditional occupations such as metalsmiths. In the past, this was a niche occupation, but recently the demand for such services has been on the rise, in particular with regard to artist blacksmith craftsmanship. The Romani people are famous for their unique aesthetic. If they were able to re-gain the mastery of this craft for which their ancestors were famous, they would likely be successful on the market. Unfortunately, given the current financial situation, they have no chance of doing so.*

Because we are Gypsies

Agnieszka (30), Wrocław

Agnieszka worked as an assistant in a kindergarden for two years. The kindergarden just closed down and she is now wondering how she is going to support her family. In the labour agency she keeps hearing: there are no jobs. And she thinks: there are no jobs for us, because we are Gypsies. The majority of Agnieszka's friends want to work.

Agnieszka: 'To live on welfare all life long? We don't want anybody's charity, we don't want to live at somebody's expense.'

Recently she went to a job interview that was advertised at a newspaper. The man told her there were no more open positions the moment he saw her. She asked him directly if that was because she was Romani.

Agnieszka: 'He just laughed, he didn't say anything. The number of times I've gone to the other end of the city because of a potential job! And every time they saw me, they told me there was no job. And some of them actually told me, to my face: "I'm not going to hire you, because you are a Gypsy." How do you live like that?'

Legal analysis

Katarzyna Bogatko, Monika Wieczorek

The Roma population in Europe is approx. 10 million, with approx. 60% of that number holding European Union citizenship. Sadly, statistics demonstrate that the Roma, despite being the largest ethnic minority in Europe, experience unequal treatment and discrimination in nearly all areas of life: in access to the labour market, employment, education, healthcare, and housing. The stories presented in the reportage show that in Poland, the negative stereotypes of the Roma are still strong, and their unequal treatment continues to be a serious problem.

Discrimination in employment

Discrimination in employment on the grounds of Roma ethnic origin occurs quite often. However, under the Labour Code (Journal of Laws of 1998, No 21, item 94, uniform text), unequal treatment for which there is no justification and which is motivated by a person's ethnic origin constitutes discrimination. The Labour Code protects against discrimination with regard to commencement and termination of an employment relationship; conditions of employment; promotion; and access to training to raise one's qualifications. This protection also applies to persons who have experienced discrimination, including discrimination on the grounds of ethnic origin, during the recruitment process (judgement of the Polish Supreme Court dated 5 May 2011, II PK 181/10, unpublished).

Forms of discrimination expressly prohibited by the law in an employment relationship include: direct discrimination, indirect discrimination, harassment, sexual harassment, enticement to discrimination, and

so-called retaliation. Under Article 183a § 3 of the Labour Code, direct discrimination occurs where, on one or more of the grounds one person is treated less favourably than another is, has been or would be treated in a comparable situation. To determine whether in a given case direct discrimination may reasonably have occurred, the following question must be answered: would discrimination have occurred if the employee didn't have the legally protected characteristic?

Indirect discrimination occurs where an apparently neutral provision, criterion or practice is applied universally to all persons, but – with regard to employment – has particular impact on a certain social group, selected on grounds of having a certain characteristic which causes unequal treatment.

Also included in the general notion of discrimination is harassment, prohibited under Article 183a § 5(2) of the Labour Code. Harassment is defined as unwanted behaviour, with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating, or offensive environment. When claiming harassment in court, the claimant must also indicate which legally protected characteristic caused the unequal treatment to occur. A similar form of discrimination is sexual harassment. In employment, it is a form of discrimination on the grounds of sex, and it consists in any type of unwanted conduct of sexual nature or which refers to the sex of the employee, with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment; this conduct may consist in physical, verbal or non-verbal elements.

Moreover, under Article 183a § 5 of the Labour Code, discrimination also exists where someone entices (encourages) another person to violate the principle of equal treatment in employment, or orders another person to violate it.

Yet another regulation of the Labour Code protects the employees who pursue anti-discrimination claims while in an employment relationship: exercising their legal rights may not be a reason for their unfavourable treatment or cause any negative consequences for them. Prohibition of so-called retaliation is expressed in Article 183e of the Labour Code, which primarily protects the employee against termination of employment effected by the employer in response to the exercise of these rights by the employee. This protection also extends to employees who have in any manner assisted the employee exercising their rights resulting from the violation of the principle of equal treatment in employment.

Persons who have experienced any of the forms of discrimination in the workplace have the right to compensation, which should not be lower than minimum remuneration for work. In court proceedings, the claimant must offer evidence to suggest that discrimination may reasonably have occurred, and in particular must indicate on which grounds the employer acted in violating the principle of equal treatment. Under Article 183b § 1 of the Labour Code, the burden of proof in these cases is on the employer, which means that the person alleging discrimination only has to demonstrate that it is likely that discrimination occurred, and it is the employer who allegedly was guilty of discrimination to provide evidence that no discrimination took place (judgment of the Polish Supreme Court SN dated 9 June 2006, III PK 30/06, OSNP 2007/11-12/160; judgment of the Polish Supreme Court dated 3 September 2010, I PK 72/10, LEX no 653657).

Prohibition of discrimination in education and in work-related legal relationships other than employment

The stories in the reportage show that another important issue that affects members of the Roma community is unequal treatment with re-

UĞAŞMY
NADPÁLONE MUSTY

gard to access to education. It is clearly discriminatory to require, in the process of school recruitment, that Roma children should submit special documents, e.g. certifying that they are not demoralized.

Under Article 70 of the Constitution of the Republic of Poland (Journal of Laws of 1997, No 78, item 483), everyone has the right to education, and education until the age of 18 is compulsory. This regulations should be read in conjunction with Article 32 of the Constitution, which stipulates that all persons are equal before the law, all persons have the right to equal treatment by public authorities, and no one shall be discriminated against in political, social or economic life for any reason whatsoever.

The above-cited provisions of the Polish Constitution on equality and the prohibition of discrimination apply to all persons over whom Poland has jurisdiction. This means that both Polish citizens and foreigners in the territory of Poland have the right to equal treatment in their access to education. Therefore, the protection extends not only to Polish citizens with Roma roots, but also to citizens of other countries who are ethnically Roma.

In terms of legal regulations regarding school education of children who are not Polish citizens or who belong to national, ethnic, or racial minorities, the key legal act is the law dated 7 September 1991 on the education system (Journal of Laws no 95, item 425), along with the regulation of the Minister of National Education dated

14 November 2007 on the conditions and manner of fulfilment by kindergartens, schools and public establishments of responsibilities that foster the national, ethnic and linguistic identity of students who belong to national and ethnic minorities and communities which use a regional language.

Another relevant regulation, in force since January 2011, is the law of 3 December 2010 implementing selected European Union regulations on equal treatment (Journal of Laws no 254, item 1700). It prohibits unequal treatment of natural persons on the grounds of race, ethnic origin, and nationality in the scope of education (Article 7), and it provides the right to compensation to persons with regard to whom the principle of equal treatment has been violated (Article 13).

This law also prohibits unequal treatment on the grounds of ethnic origin in access to social security, services (including housing), health-care, and occupational as well as trade-related education. Discrimination on the grounds of ethnic origin is also banned with regard to the conditions of undertaking and pursuing a trade or a profession, including on the basis of Civil Code contracts.


Therefore, the persons featured in the reportage who have experienced unequal treatment on the grounds of their ethnic origin in access to employment (under a Civil Code contract) or to education may pursue their rights in court and seek compensation.



FORTUNE FAVOURS THE REASONABLE

Agnieszka Wójcicka

Wojciech T. (on the recording):
So purely theoretically, out of curiosity. If I hadn't taken take the leave, I'd still have the job? CEO Jerzy Z.: Probably yes. (...) But we got just royally pissed and things went south. But it's your fault, because this is not how it's done.



FIRED FOR TAKING PATERNITY LEAVE

7 January 2012 just after 12 p.m., Wojciech T., employed at a company called Scan, applies for his two weeks of paternity leave. Wojciech is 28, he has been with Scan for nearly a year, and his daughter Dominika is 3.5 months old. Wojciech waited until the beginning of 2012 to apply for the leave, because on 1 January 2012 the law came into effect that extended its duration from one week to two weeks. At 3.30 p.m., the company's CEO calls Wojciech into his office. He hands Wojciech the approved application for his leave, as well as his dismissal.

Three days later, on 20 January 2012, Wojciech T. receives references from his employer. They are typed on Scan's letterhead and signed by Agata M., director of the sales department, Wojciech's immediate supervisor. The references read: *Wojciech T. is energetic and communicative. He adapts easily to a new environment and comfortably makes connections with others. He is a good team member but also works well on his own. He is reliable and involved, and he*



is thorough and systematic with regard to his responsibilities. He is ambitious, eager to learn, and open to new challenges.

People don't know

I meet with Wojciech T. and his wife Monika in a park in Warsaw. They were both born in 1984, and are both fit and slender. They have played volleyball for years; they met at their sports school. In the baby stroller, baby Dominika is sleeping. She is 21 months old now.

Wojciech: 'We've known each other since fourth grade, we've been a couple for 12 years, and we got married 3 years ago. I went on paternity leave to spend this time with my child. It's the most important thing in life, when a new person is born.'

Monika: 'People don't know about this option. I only learned about it because a colleague at work went on paternity leave. When Wojciech was fired, I was mad that somebody could try to take away

from a father the time to be with his baby, take away something that this person has the right to have, and that is a good thing too.'

Pride

Wojciech T.: 'At first, things at work were good. I like the fact that Scan is a small company, you can have direct access to the CEO, it is easier to make decisions. I was proud to be working for a Polish business and I admired the boss for having made it, for being so successful. I thought he was happy with me. I was often in his office, he shared his ideas with me, gave me advice on how to handle the clients. He was a bit weird, but I had an overall positive perception of him.'

Must close the deals

CEO Jerzy Z., an older gray-haired man, meets with me in a modern conference room at the company's headquarters. A large table, a huge screen, beige walls with posters showing various office equipment: copiers, scanners. On the shelves in the corner, a display of awards from RICOH, a producer of printers and scanners, for effectiveness in sales and promotion.

He tells me a bit about the company. It started out as an American business, a subsidiary of a larger, publicly listed company located in the USA. Several years ago, it was bought by Poles. Scan now employs a team of 15, including 3 sales representatives.

CEO Jerzy Z.: 'For us, the sales representatives are crucial personnel. They are given company cars to drive; Wojciech had a Vectra. They get mobile phones, which they can also use for their own private calls. They make good money. But a sales representative must close the deals. When I hire somebody to be a sales representative, I invest in this person, I give them training, and I know that the sales won't come

immediately. But I expect to see some results in 3-6 months. If this doesn't happen, the person won't make a good sales representative.'

ELO

Wojciech T.: 'I was hired in March 2011 to sell multifunction printers and scanners. First, I was given software to learn about the products and to take on-line tests. It took four months until me and Paweł, who was hired at the same time as me, went to a training when we were given information about the products and how to make the presentations. I started making calls to clients, set up meetings, and then give presentations. Then Robert was fired. He was a sales representative in charge of ELO, a digital office document management system. I was given his responsibilities instead.'

Sweets

CEO Jerzy Z.: 'When we first met, Wojciech made a very good impression on me. He was tall and handsome, and he spoke in a clear, precise manner, which is important in a sales representative. In his CV he said he had great results, but later it turned out that he had lied to us a bit. The CV said he had worked in a number of firms, including Wedel, the chocolate manufacturer. For me this was important.'

'Was he a sales representative there?'

'I don't know who he was. I didn't ask. What mattered to us was that he was familiar with computer technologies. He was. But he hadn't actually worked there. He didn't bring us an employment record certificate, even though we asked many times. He had some type of other contract with them, I don't know how it worked exactly.'

He did bring us references from the R&D department. He was an intern there and did laboratory testing of their products and sensory research. So, in other words, they were eating sweets.’ The CEO smiles. ‘He only showed us one employment record certificate, and it said that he worked for one month, part time.’

Wojciech T.: ‘I studied food technology at the Warsaw University of Life Sciences. I worked for Wedel for 4 months, doing technological testing of new products. Before that, for 3 or 4 years I worked at the call center of an assistance company. I brought references from those two companies. I had several other jobs before Scan. All of them apart from one were not on a proper employment contract but on a simple Civil Code contract, and that mean that I couldn’t get an employment record certificate.’

Numbers

Salary: PLN 53 000 gross, business trips: PLN 3 000, external training: PLN 2 700, internal training: PLN: 8 0000, company car: PLN 8 900, other expenses (mobile phone, coffee etc.): approx. PLN 1 000. Altogether, almost PLN 77 000. Jerzy Z. glances at his laptop and tells me how much Wojciech had cost the company while in its employment. In this time, says the CEO, Wojciech generated for the company a profit of less than PLN 7 000.

CEO: ‘So you can see what kind of employee he was. A weak one. No sales acumen at all. A sales representative should at least be able to make enough money to cover their own salary. Otherwise the company is spending money at the expense of other employees. His supervisor had wanted to fire him much earlier. After he’d been with us for half a year, we asked a headhunting business to start looking for his replacement for us. I kept him on because I wanted some continuity with regard to ELO sales. Today I can see that was a mistake.’

What Jerzy Z. is not saying is that he started looking for new hires when Wojciech had just started working with ELO, so there was no way to tell how well he would accomplish that task.

Makeshift solutions

Wojciech T.: ‘I went to one client meeting with Robert, who had been in charge of ELO, at which he made a presentation. A moment later he was fired. When he was in his notice period, he was supposed to do a training at the client’s office for the people who were already working with the system. But he was sick, had a doctor’s certificate, and the boss said I should go there instead, together with the head of customer services. I got the manual to study, some 600-800 pages, and I was told by the boss to learn it all. I had a day or two do to that. We split the manual between us, but it was a makeshift solution at best. They asked us a lot of questions and that’s what saved us, because otherwise I don’t know how we would have managed the four hours of training. This shows that the company wanted to sell, at a minimal expense to itself, a product that actually requires knowledge and experiences. I only went to an actual ELO training later.’

Surprise

‘Come into my office,’ says in the conference room Agata M., the director of sales. She is tiny and energetic, her hair in a ponytail, a white blouse, a pair of jeans. She is 37 and has been with Scan for 10 years. ‘I have a surprise of you.’

In her office, two girls – aged 11 or maybe 12 – are sitting at a desk and drawing. ‘This is my daughter and her friend,’ explains Agata M. ‘So you can see that this is not a company with any prej-

udice towards employees who have kids. My daughters are always welcome here. When I started working here, the younger one was 6 months old and the older one almost 6. When they got sick, I stayed at home. Sometimes I had to take time off for myself too, sometimes as long as several months, because I have quite a serious illness. And nobody fired me.'

Diapers

Wojciech T.: 'Once, the CEO's daughter came to visit him from abroad, with her son. He was very happy to have his grandson there. It was the first time that I saw this aspect of him. He was very friendly, very kind.'

CEO Jerzy Z.: 'I am a big fan of kids. I think well-raised children are the best pension insurance. I try to persuade all of my employees to have kids, because they give a person a purpose in life. I come from a family that had many kids, and myself I have four, two daughters and two sons. And three grandkids now. When the kids were young, I washed their diapers, because this was the time before the disposables, it was all cloth. Parent-teacher meetings were my thing. There was a point in time when I was practically on taxi duty: to school, to after-school classes, at least three rides a day. Now I babysit for the grandkids. You don't have to tell me how to take care of children. But I think that nobody can take the place of a woman, no father can do that. Especially with a baby, when the mother is still breastfeeding.'

Childcare is the wives' job

Marcin P. worked for Scan for 13 years, including 7 under CEO Jerzy Z. He was a technician, then was promoted to customer service manager for 5 years, and then demoted. Marcin P. quit in 2011.

He'd had enough. He says Jerzy Z. disregarded him as a manager and gave orders directly to his subordinates. But mostly, the problem was time off to take care of his daughter.

Marcin P.: 'When she was a baby, she was sick all the time. Every two weeks, she had a high fever and a blocked nose. A few times I wanted to take time off, but the boss told me that caring for a sick child is the wife's job.'

The luck has turned

Wojciech T.: 'At the end of the year, the luck had turned. I had an impression that he was angry when I was talking to him. There was a situation where we were doing a document flow audit for a large business. We'd hired an outside consultant to do it, and I was only supposed to be helping him. At some point that man vanished, he stopped answering his phone. I started doing the work myself, but it was difficult, because there were big discrepancies between the departments. I'd had the impression that the boss wanted quick results. Eventually I completed the audit and suggested particular solutions. Then, the boss transferred the whole case to Agata. She didn't know anything about the project, so she would just repeat his questions to me, and then repeat my answers to him. I had the feeling that I had done the work and now Agata was going to get the commission. But I didn't say anything, because the atmosphere was already getting unpleasant. Also, my relationship with Agata, which used to be good, started to sour.'

This won't end well

From a recording that Wojciech made on his phone.

CEO Jerzy Z.: 'There was already the first incident, and that made us really upset. You pulled a similar thing. The circumstances

were a bit different and of course nobody questioned that, but this is not how it's done. These things have to be agreed on, because for everybody, for you, work is an important topic in life.'

Because, when his wife's due date was approaching, Wojciech asked Agata for a leave.

Agata M.: 'I said, no problem, but I asked him to finish his project first. He didn't finish the project. Instead, he told me that he had asked a doctor for a medical leave certificate, and the doctor gave him one. I asked if there was any problem with his wife's health, and he said no, but since had the option of the medical leave, he took it. Because his wife was going to have a c-section. Myself, I've had two c-sections and my husband didn't take any time off, because everything was fine. I got upset then. He did it in an arrogant way. He knew I wouldn't give him leave.'

Wojciech T.: 'I finished the project 2-3 days before Dominika was born. But Agata didn't quite like it. There may have been issues with things like formatting or something like that, but in terms of content, it was all done. Because I had the medical leave certificate, I could feel that she was accusing me of fraud. I said that if she wanted to challenge the certificate, she should talk to the doctor who had issued it. And then for the second time she got mad at me when at the end of the year, I took one vacation day without earlier notice. She said: 'This won't end well for you,' but I thought it was just an empty threat. I had taken no vacation time before, because I didn't want to do it too soon, and also I wanted to use my vacation time to be with Dominika.'

A strong grip

Marcin P., former employee: 'Jerzy Z. wants chalk to be cheese, and things don't materialize out of thin air just because. Some of his ideas terrified me, like the printing business, for example. He bought

expensive machines, we spent time working on them, he hired a manager, but they were producing duds, the items were falling apart, came unglue, and so it all died a natural death.'

Wojciech T.: 'The boss is the type of person who makes a plan and then follows through. Even with an employee who is not necessarily a good fit for this particular plan. He often had ideas that were unrealistic, but we had to try to make them happen. For example, he wanted us to sell our software in the cloud in the future, so that a person could log onto our site and use the software. But we had neither the servers for it nor a good Internet connection. I spent a month on it, but it was unrealistic. He also had thousands of other ideas that he wanted us to work on, but then he never spoke of them again. He has a strong grip on the company. Together with the other executive, they treated us a bit like their property. The CEO for example like to tell us stories, supposedly as a joke, like this: "Recently I have read that somewhere in Japan, a man spent 15 hours at his desk at work straight, had a heart attack, and died right there," or: "When I was in China, I asked a woman where she was going for her vacation, and she was surprised that such a thing existed at all." My understanding was that this was his way of telling us what he thought was the right attitude to work.'

He didn't call me names

Wojciech T.: 'Once, I came to the office early, but I forgot to put my name on the list to clock in. At 8.30 a.m., the boss called me to his room and says: "Wojciech, you were late," and he shows me the list. I said I just forgot to put my name on the list and that my colleagues and my supervisor could confirm that I had come on time. But he just said: "If you'd come on time, you'd have put your name on the list." It was difficult to convince him of something if he got

a different idea stuck in his head. Robert, who was responsible for ELO before me, sometimes was called into the boss's office, where the boss would close the door and give him a huge lecture, yell at him. We could hear it through the wall. Robert actually stood up for himself, and Agata sort of implied that when the boss says something, we should all just agree. He never called me any names. My strategy was to agree to whatever he said. At worst, he used vulgar language in front of me.'

The car

CEO Jerzy Z.: 'He was chronically late. We start at 8 a.m. and he would show up at 8.15 a.m. Eventually I said I would take away his company car, and then he improved a bit.'

Wojciech T.: 'It's a completely made-up situation, with the company car. Nobody ever said to me they would take away my company car for being late. I was sometimes late, but not very often, and just 2-3 minutes. I was only once late 15 or 20 minutes. Agata once told me that the boss pays great attention to tardiness, and it doesn't matter if you come in at 8.01 a.m. or 8.15 a.m. I only learned about all this from the court file, because a document was filed with the court: an official record of a conversation between the boss and my supervisor, about the car being taken away from me.'

Distinctive

CEO Jerzy Z.: 'Wojciech was not well-liked in the company. He was a cold person, with no emotions. Weird. This is why he made no sales. He couldn't make this human connection.'

Agata M.: 'A good word to describe Wojciech without being insulting is "distinctive." Nice, polite, but with a "spit in your face"

attitude. No emotions at all, no empathy. Dour, very stern. I've never seen him smile.'

You don't have to worry

Wojciech T.: 'Was I afraid I'd be fired? Yes and no. In the autumn, when they fired two colleagues – Paweł, who was hired at the same time as me, and Robert, who was in charge of ELO – Agata told me not to worry, and implied that they were satisfied with me.'

Was I ever told that they were unhappy with my work? Agata never told me so. The boss, towards the end, told me a few times that I have a good start with people, I get clients interested, but I cannot close a deal. I interpreted it as a signal: "Think about what you could do to improve this." With the printers and scanners, I didn't do very well, I sold just a few second-hand ones to a printing business. But I was hoping it would get better, looking at Agata's results. She generated large sales, but she had been with the company for a long time and had a big contact network. Building up a network of clients takes time. When I switched to the software, I was glad, even though I knew that over the last few years the company had only sold a handful of licences. The cost of ELO is hundreds of thousands of zlotys, or for a smaller business tens of thousands, so nobody buys this just because it looks good. But once you're successful, the money is good, you generally need just two big sales a year.'

In his half year of work, Wojciech didn't manage to sell a single ELO licence. His successor, an IT specialist by education, didn't close any deals for the subsequent 8 months either. But by next June, he had closed four large transactions and two smaller ones. Of the latter, the groundwork for one had been laid way back, by the person who had been Wojciech's predecessor.

Dismissal

On the day he was fired, Wojciech T. filed an application for paternity leave.

CEO Jerzy Z.: 'He likely did it because he found out that we were going to fire him on that day. Maybe he guessed, because the company's other executive from Poznań arrived. He is in charge of the sales and has to be present when a person from his department is getting a dismissal. Or maybe he just heard, because we have thin walls here, you can hear anything through them. We had hired two new people to replace him, and he was handing over his duties to them. He was fully aware that he was going to be fired, he just didn't know when. This is why he came up with the paternity leave. He'd had the baby four months before that!'

Wojciech T.: 'The information I was getting was that I was in charge of ELO, but I was getting help from a person with specialist IT skills. Generally an outside consultant was brought for this purpose, but when two new persons were hired at the beginning of the year, I thought one of them would be helping me, because it was an IT specialist, and the other person would work with Agata on the printers and scanners. After I took the vacation day without earlier notice, I thought the boss would give me a talking-to, because there was a lot of pressure not to take days off. But I didn't expect a dismissal.'

Jerzy Z.: 'Wojciech's letter of dismissal was ready and waiting on my desk. With the other executive, we went to see a client, and when we came back, the application for paternity leave had been filed with the HR person. It annoyed me. For me, this is a dodgy move. Because if the guy knows that he is the only person responsible for a product, and he is expected to hand over his responsibilities in the notice period, then this move means that the company is in trouble. But it was his right and we respected it. Particularly because financially, this is not on us, but on the social security. The second

thing is that he didn't pay any attention to what was going on in the company, that it is the time of the winter school vacation and others have already scheduled leave. Something like paternity leave can be planned! He should have told the employer in November or December that he is planning to take the leave in January, because then it would be legally longer. I would actually find it praiseworthy, to be looking after one's family. But this is now how it's done.'

Wojciech T.: About 12.00 p.m. I gave the application for paternity leave to the boss. He didn't react. Then I gave some training to the two new people in the conference room. The other executive, who had been in the office since the morning that day, came over to the conference room and asked me to join them in the room. It must have been about 3 p.m., because I remember that after we finished talking, the whole office was empty, so it must have been after 4.15 p.m. The two executives were there. Jerzy Z. asked me: "Wojciech, why do you not want to work with us?". He reproached me for taking time off again instead of working, and this at a time when there was a conference in which the company would be participating. And actually I had planned the leave on purpose so that I would have time afterwards to get ready for the conference. And also I just assumed that we would change the date of my leave if the boss had problems with it. The other executive mentioned they were not satisfied with me because I had made no ELO sales. This was the first time I heard they had any issues with my work.'

Part ways amicably

From a recording that Wojciech made on his phone:

CEO Jerzy Z.: 'I'm not saying cooperation is out of the question. But you have to change your mentality, you have to wake up, so to say.'

He got the recording from the court and he is playing it for me on his laptop.

'Were you planning on assigning him to work on the printers with Agata M.?'

'No, the man is completely useless. He had no chance to stay employed. It was actually Agata that didn't want him. I said he would probably have a different position because I didn't want to say it to his face that he was no good for anything. My idea is to say goodbye to employees without damaging the relationship with them. They end up in other companies and we want them to have good memories. It always works to our benefit and it actually happens a lot that a former employee gets us hired for jobs. I wanted to end things with him on a good interpersonal level.'

Maybe it's my mistake that I said: "Probably yes." On the other hand, I said what I was supposed to say; it's just that he was recording the conversation.'

The reference

Wojciech T.: 'The day before my last day at work, I asked Agata to give me a reference. She said: "OK, but I don't feel like writing it. You do it, and if it's all right, I'll sign it." She had no comments, she signed the reference. I always try to get a reference to make it easier to find another job. I also wanted to have evidence that the company was satisfied with me.'

Agata M.: 'I only gave him the reference because he'd just had the baby. To make it easier for him to find a job. He wrote the text himself. It's really a stretch, I don't agree with it at all, but I just shrugged and signed it.'

On 10 February 2012, Scan had a lawyer sent a letter to Wojciech, requesting that he should stop using the reference signed by Agata. The stated reason for the request is that only the company's management board is authorized to issue references.

The lawsuit

Wojciech T.: 'Initially I was in shock. I only started thinking clearly the next evening. I realized how unfairly I had been treated.'

The next day, he went to see Jerzy Z. He recorded the conversation with a mobile phone he kept in his pocket. On 24 January 2012, he filed a lawsuit, requesting that his employment contract be terminated with a proper notice period. He wrote the complaint himself, with the assistance of a friend who is a lawyer. He also requested compensation for termination of his employment contract in violation of the relevant laws. In the statement of grounds for his complaint, he wrote that until the very day of his dismissal, he was a well-appreciated employee and had never been criticized by his employer. He also noted that the employer acted inappropriately in terminating his contract, because this qualified as discrimination on the grounds of having a child. He attached the recording and asked that it should be admitted as evidence.

Bad luck for the dumb

One of the witnesses testifying at the hearing on 21 May 2013 in the case brought by Wojciech against Scan was Karolina P.

Karolina P.: 'Initially the atmosphere at work was very good, but unfortunately in January 2009 I had a skiing accident and I was off on medical leave for a month, while I was getting physical therapy. When I returned to work, I was moved to a newly created part of the company, a printing business. It was a whole separate division. I hadn't been asked if I agreed. In a conversation after the accident, the boss told me that fortune favours the reasonable and not the dumb, and that was the end of our conversation about the accident. The atmosphere took a turn for the worse. My main responsibility was to sell the services of the printing business, but I also had lots of

other duties connected with starting the printing business basically from scratch, and I couldn't focus on sales, even though I was paid on the basis of the sales. It was a very stressful work environment and it was really hard. (...) After these words from the boss, I felt bad, I felt humiliated. (...) I didn't see the change of my position as a promotion, I felt it was more of a punishment, I don't know for what, the accident, or for the long medical leave.'

Karolina P. worked for Scan for three and half years. He contract was terminated, with a period of notice, in October 2009. At the hearing she mentioned that a day before her dismissal, one of the executives called her to ask her if she was pregnant. She wasn't. She is shaking when she talks about these events. She doesn't agree to an interview to talk about it, because she doesn't want to have to think about it again.

At his colleagues' expense

CEO Jerzy Z.: 'Wojciech T. is claiming PLN 35 000 as compensation for the moral damage he suffered because of how we hurt him in this company, and his self-confidence suffered. If the court agrees with him, to me this is a scam. This will take a toll on the other employees, because they normally get a bonus depending on how much profit the company makes. If there is no profit, because it all goes to Wojciech T., the others will get no bonuses.'

Fairness

Wojciech T.: 'I decided to take the case to court because I wanted to be fair towards myself. If I win, I will have that satisfaction, and this will be fair. And also, maybe then the case can get some media attention to say that it is important to fight for your rights. Maybe the company will change a bit as a result of going to court.'

The next hearing in Wojciech's case against Scan is scheduled for December 2013.

[Update for the 2015 edition: Wojciech won the case. The court of the first instance awarded him a compensation of PLN 16 844, and the court of the second instance raised this amount to PLN 20 661,35. However, no compensation for the moral damage suffered by Wojciech was awarded.]

Some names and identifying details have been changed.

Legal analysis

Karolina Kędziora

In Wojciech's case, it is highly likely that the employer terminated the claimant's employment contract due to the fact that the claimant is a father and that he wanted to exercise his right to paternity leave. Under the Labour Code (Journal of Laws of 1998, No 21, item 94, uniform text), an employee who meets these criteria is afforded protection against discrimination.

Unequal treatment due to being a father and exercising the right to paternity leave

Under Article 183b §1 of the Labour Code, a violation of the principle of equal treatment in employment occurs when the employer differentiates between the situation of the employees on the grounds specified in Article 183a §1 of the Labour Code (including in particular, but not limited to, the reasons explicitly listed), and the result is the decision to terminate or not to commence an employment rela-

tionship, or to offer unfavourable pay for work or other conditions of work, or to pass somebody up for a promotion or other work-related benefits or training, unless the employer proves that there were objective reasons for doing so.

The employer explained the motives for termination of employment in the conversation that was recorded by the claimant. The claimant asked: 'So purely theoretically, out of curiosity. If I hadn't taken the leave, I'd still have the job?' The defendant's answer was: 'Probably yes. (...) But it's your fault, because this is not how it's done.' The employer's words confirm the hypothesis that Wojciech was dismissed because he wanted to exercise his rights as a father, and that this was the sole reason for the termination of employment. While the fact of being a parent and exercising the right to paternity leave is not specifically listed in Article 183a § 1 of the Labour Code, it can nonetheless be considered a protected characteristic, because the list in this article is open-ended, as evidenced by the wording 'including in particular, but not limited to.' This wording means that the *ratio legis* of the provision was to list examples of characteristics on the grounds of which unequal treatment is prohibited, but without restricting the scope of the regulation.

Direct discrimination as a prohibited form of unequal treatment

In order to find out if unequal treatment occurred, it is necessary to check what form of discrimination may have taken place. The Labour Code lists several form of discrimination: direct and indirect discrimination, harassment, sexual harassment, and enticement to violate the principle of equal treatment in employment. In this case, direct discrimination has most likely taken place. The facts of the case suggest that if Wojciech had not become a father and had not exercised his

right to paternity leave, the employer would not have terminated his employment. The difference between Wojciech and other employees consisted in being a father and exercising this specific right. Other employees who actually or potentially were parents, but didn't apply for paternity leave, were not punished for it by termination of their employment. If there were no other rational motives for the termination of Wojciech's employment contract, this indicates that the employer's motivation for the termination was rooted in unlawful criteria. Moreover, the fact that the employment contract was terminated just hours after the application for paternity leave was filed makes it likely that discrimination on the grounds of being a father and exercising the right to paternity leave did indeed occur. The brief period between the two events suggests that there might have been a cause-and-effect relationship between them.

Damage suffered by victim as a measure of compensation

The claim for compensation for violation of the principle of equal treatment in this case, and the amount of compensation sought, may be calculated in reference to the following aspects: Wojciech's financial problems supporting himself and his family; a sense of lower self-worth as a father of a young child on the labour market; a sense of humiliation at work. Case law of the Polish Supreme Court indicates that the compensation for violation of the principle of equal treatment covers both the damage to property and other, intangible losses suffered by the victim (judgment of the Polish Supreme Court dated 7 January 2009, case no: III PK 43/08, OSNP 2010/13-14/160). In the same judgment, the Supreme Court also noted that compensation must be effective, proportionate, and dissuasive, in line with the regulations of EU law. In assessing the amount of compensation, the court may take

into account the specific facts of the case, such as the financial situation of the discriminating entity, and raise the amount of compensation so as to make it sufficiently burdensome for that entity to serve its dissuasive function with regard to the entity's employment policies.

In calculating the amount of compensation, the equivalent of the lost salary should also be taken into account (i.e. the amount that Wojciech would have earned if he hadn't been dismissed, in the period in which he remained jobless). In general, if a claimant finds new employment, but with a lower salary, this claimant may also seek compensation to make up for the difference in income that would not have occurred without the unlawful dismissal. These types of claims are allowed only for a period not exceeding the statute of limitations on employee claims, which – under Article 291 §1 of the Labour Code – is 3 years from the day the claim becomes due and payable.

Compensation for termination in violation of the provisions on terminating employment contracts

Wojciech can also seek compensation for termination of his employment contract in violation of the provisions on terminating employment contracts. This claim is completely separate from the claim for compensation for violating the principle of equal treatment. If the court awards Wojciech compensation on one of these claims, this in no way makes it impossible to also award him compensation on the other, even if they share the factual basis. It is lawful and allowed to seek compensation for termination of an employment contract in violation of the provisions on terminating such contracts at the same time as seeking compensation for the violation of the principle of equal treatment in situations where the employer, in terminating the employment contract, actually violated both the provisions on termination and the anti-discrimination provisions.

Recording in support of the allegation of discrimination

Finally, it is important to address the issue of the recording Wojciech made of his conversation with his employer in terms of using it as evidence. Wojciech recorded the conversation without obtaining his employer's prior consent to do so. In general, Polish case law suggests that a motion to admit such a recording as evidence may be granted by the court, despite the absence of the interlocutor's prior consent, if the recording is made for a lawful purpose (e.g. to prove that contract termination was in violation of the law). Illegal wiretapping is a crime, but recording a conversation in which the person who records it is a participant is not. Usually, an employee is the weaker party in an employment relationship and thus has limited options in terms of securing evidence of discrimination, or even any documentation in support of such a claim. Wojciech, as a victim of discrimination, had no choice. In the absence of other evidence to support his claim (such as witnesses or documents), he recorded his conversation with his employer, without his prior consent, to protect the rights granted to him by the law.

The Polish Supreme Court held similarly in a judgment dated 25 April 2003 (case no: IV CKN 94/01, LEX no 80244). The Court noted that it is allowed to admit a recording as evidence, if the specific facts of the case are taken into consideration and if the context of the recorded conversation is examined. In the particular case to which the judgment pertained, the Supreme Court decided that the recordings of phone conversations admitted as evidence could only serve to indicate further (but also significant) reasons for the deterioration of the marriage between the parties. The Supreme Court upheld the finding of the court of appeal, i.e. that there were no grounds for a complete disqualification of the recordings as evidence, even if they were made without the prior consent of one of the interlocutors. Since the defendant had not effec-



tively challenged the authenticity of the recordings, the court was allowed to admit them as a basis for evaluation of the parties' conduct and for the conclusion that one of them had alcohol abuse issues. The position of the Supreme Court expressed in this judgment means that recordings obtained without the interlocutor's prior consent may be admitted at least as auxiliary evidence. If the circumstances of the case suggest that there were no other options of securing evidence, a recording may at least offer valuable insight into the situation. It is important to note that the Supreme Court did not dismiss outright the option of admitting such recordings. While the judgment cited here was made in a divorce case, it is pertinent to all types of civil law cases (i.e. cases examined under the Code of Civil Procedure), and thus may also be applied to employment cases. Another argument for interpreting the judgment in this manner is that Wojciech had no other option to find support for his claim that his employer, in terminating his employment contract, had used a prohibited discriminatory approach.

Under Article 183b §1 of the Labour Code, in discrimination-related court cases the employee is not required to prove that discrimination occurred. Instead, the burden of proof is on the employed to prove that it had not (or that there was a lawful reason for the apparently-discriminatory conduct). In view of this regulation, the recording may serve as a factor supporting the employee's claim.


To recapitulate: in Wojciech's case, direct discrimination is likely to have occurred on the grounds of him being a parent exercising his right to paternity leave. The discrimination was manifested in the termination of Wojciech's employment contract. The key issue here is whether the court will admit the recording that Wojciech made, and whether the employer will be able to demonstrate that that were other objective circumstances related to Wojciech's work performance and not related to his exercise of his rights as a parent.



PODKOWA

Magdalena Kicińska

**I'm selling my life,
piece by piece.
The motorcycles are gone,
the engines, my collections.
I no longer
believe
can find a job.
With this past?**



FIRED BECAUSE OF A SEX CHANGE?

The motorcycles went first: out of the twelve, ten are gone. The unique ones, such as the Royal Star, made in Lviv, the only one in existence. Out of three, only one Podkowa is left, and that's for sentimental reasons, because it was manufactured in this area, and it's the most beautiful one of them all. Also Sokół 600, a pre-war model, huge and heavy.

'I also still have a racing BMW, more than eighty years old. I'd heard the word that it was parked in the countryside, in an orchard, just rusting there. I spent five years working on it, replacing the rusty pieces, straightening them out with a tiny hammer. This one is still here. Sometimes I take it out for a ride.'

The motorcycles are gone, and so is the engine made in the legendary factory of Steinhagen and Stransky.

'Only three of them had been preserved in Poland, and one of them was mine. And another engine, from Stefan Malcherek, gone too. I had a Wanderer, a NSU Quick... two Wanderers, actually.



Sold now, too. In the spring, I had to pay the bills, so I sold the SHL.'

When Agnieszka is talking, her voice is shaking.

That old name doesn't matter

'Which beginning should I tell you about? Not many people know about the beginning, and I don't want to talk about it.

I was born as boy in 1956 and given a name I don't want to say. Because something was always wrong. At first, it's the little things, tiny things that don't fit: that there is something I want but I am not allowed to do, that it's not done, no matter how much I want it.

I went to a high school with a technical focus in Białowieża. Far, far away. I loved being there. There was a house in the woods called Dziedzinka. For more than thirty years a beautiful couple lived there: in one half of the house the man, Lech Wilczek, a photographer and

a biologist, and in other the woman, Simonka Kossak, a granddaughter and great-granddaughter of painters, and a biologist too. I would run off to them from the boarding house, after my lessons, and they sort of took me in. Because of my phobias and anxieties I avoided the people and the crowds. I ran into the woods or to Dziejzinka. I felt good there.

Something was always wrong, something I couldn't grasp, one tiny thing and then another: I was a sum total of these little incompatibilities. Eventually, they all came together to make a whole. I read an article somewhere, I think, where it was given a name: somebody was born in a body that was not their own. This is the worst, because that's when the panic kicks in: what I am going to do about it, there is nothing I can do.

When I was in the hospital after the operation, on TV the Great Orchestra of Christmas Charity was playing for the first time. Now I think they are in their 21st year.

At first, everybody shunned me. My family, friends, acquaintances. My brother broke off all contact with me, saying that I was bringing shame and embarrassment on the family. Then they saw it was no big deal: the television didn't show up to make a scandal out of it, the priest in the church didn't point an angry finger at me. They saw that I'm still the same person, just finally in my own body.

Eventually my parents accepted my decision, although they were surprised and anxious both. My mom was weeping in the corner. I think, when I told them, I was just as shocked as they were. I made the decision when I was an adult, I didn't foist myself on them with visits, I wanted them to take their time with it.

In 1996, I got a job at the university, where nobody knew my past. I started my life anew.'

Pre-war Polish motorcycles

The new life lasted just over ten years. In this time, Agnieszka got her university degree and started publishing. She taught classes: the computer lab. She enjoyed it. With her students, they took apart computers, dissected them to their component parts. Once, she got a standing ovation from her class. In 2007, encouraged by professor Marcin Drzewiecki, director of her institute, she got her doctoral degree at the Polish Academy of Sciences. The title of the dissertation was: *A cheap motorcycle for everyone. The boom in production of light motorcycles in pre-World War II Poland.*

'I was always interested in automotive history. One of my earliest memories is this: my godfather lets me sit on the fuel tank of his Junak motorcycle and drives me around. When I got a book about cars to read, or when a motorcycle passed by me, I immediately felt better. At the university, I started doing my own research, because I was curious to know why motorcycles looked different from one another, and where they were made, where the parts came from, why the serial numbers made no sense, how many copies were made, and so on. I started collecting data, comparing it. I started asking fan for help, took pictures at rallies, wrote down engine numbers, body numbers. For example, with SHL motorcycles, about two thousand of them were made before WWII, but the numbering started at 300. Only one of them is preserved, but it is market with the number 157. Why? I really wanted to know. Or the Podkowa factory located just around here: they started numbering their motorcycles at 1500, a pre-war marketing trick, because nobody would buy number 001 – it would mean it wasn't tried-and-tested yet. I studied the engine numbers. I wanted to know why there were screws in one model but rivets in another.'

Agnieszka wants to talk about all of this, show us the pictures.

At the same time, the thought makes her anxious. The SHL is gone now, and only one Podkowa is left.

'After all I had been through, professor Drzewiecki gave me a job and a chance to start everything anew. I started to believe I was worth something. I was successful in a small way. And then it all fell apart.'

I know everything about you

In 2007, the institute got a new director, Dariusz Kuźmina.

'He called me into his office. He said: "I've looked at your papers at the HR department and I know everything about you." Imagine somebody saying that to you. It makes you afraid, even if you have done nothing wrong: you didn't steal anything, didn't defraud anybody, didn't kill. What did he mean if not THAT? My HR file has the court judgment adjusting my birth certificate.'

Before she was fired, says Agnieszka, she also heard from the director that she was good for nothing, she didn't know anything, had no skills. In 2009, she was dismissed.

Two months later, she was named an official expert of the Polish Ministry of Culture, with a specialization in automotive history. It is an honorary title granted to specialists to celebrate their skills. Agnieszka's 3-year term as the official expert ended in 2012.

There was no discrimination

From the court case file, the university's statement: *No events occurred at work that were discriminatory to the claimant. The only possible reason for the differentiation of her position may have been the division of employees into academic teachers, whose work is governed by the law on higher education, and other personnel, whose situation is regulated by the Labour Code. (...) The claimant was not dis-*

criminated against at the university, and her allegations are founded only on her subjective impression with no basis in facts, events, and documents.

In one of the official letters to the court, the attorney of the University of Warsaw wrote: *Even though [Agnieszka] was not burdened with duties, she was not diligent in their performance, as evidenced by negative comments, reprimands, and risk to the University's reputation (...). Reprimands are removed from an employee's HR file after one year.*

There is however a letter, dated November 2004, when Agnieszka received an award from the chancellor of the University of Warsaw, celebrating her 25 years of career. Attached to the letter is a note thanking Agnieszka for her involvement. Director Drzewiecki, who gave Agnieszka the job, died in March 2012.

The notice of termination of Agnieszka's employment contract specifies the following reasons for her dismissal: chronic failure to diligently perform the employee's duties, consisting in failure to meet the requisite deadlines and to account for classes taught, and carelessness in scheduling classes for weekend students, leading to errors in room bookings. In the academic year 2007/2008, Agnieszka was no longer assigned classes to teach, and was removed from IT-related duties. Instead, she was assigned a variety of office and clerical tasks, without a prior arrangement to this effect in her contract. The University explains that this was caused by the drop in the number of students and diminishing interest in the courses.

From the letter of the attorney of the University: *The environment at the University and at the Institute was friendly for [Agnieszka], the atmosphere was pleasant. Nobody knew the claimant's secret and nobody took any interest. She was evaluated solely as an employee, and unfortunately she was not meeting the expectations in this regard.*

Agnieszka's attorney: 'I believe that discrimination began as soon as Agnieszka was assigned responsibilities outside of her agreed scope of duties. It is irrelevant whether these responsibilities were easy or difficult, whether or not she was able to handle them. I hope that the court will find that discrimination with regard to the conditions of employment took place.'

It was emotionally uncomfortable not to know

June 2013, the case in a regional court. Claimant: Agnieszka, defendant: the University, the claim: violation of the principle of equal treatment in employment. The adjudicating panel is composed of one professional judge and two ladies as lay judges. Agnieszka hides her head between her shoulders. Her long gray hair falls across her forehead.

The testifying witness is the director of the Institute of Information and Book Studies, Dariusz Kuźmina. He talks in great detail about the problems with Agnieszka's work performance, about how she didn't account for the classes she taught and how her scheduling was problematic. He said he didn't see a difference between how Agnieszka was treated, compared to other employees. 'The only reason for the dismissal was the failure to fulfil the responsibilities of the job.' He said that for him, as his capacity as the institute's director, it was also difficult to fire an employee. In the University's entire history there were just a few similar cases. He also mentioned that he had once bought a cat from Agnieszka; the cat later ran away, he added. The court reminded the witness to stick to the facts of the case.

The witness was asked if he was aware of Agnieszka's sex change. His answer: 'Yes, I found this out at the time of the first attempt to dismiss the employee. I was upset with director Drzewiecki for not telling me about it. I had thought we had been friendly, but nonetheless he didn't tell me.'

Agnieszka's attorney asked: 'Why should he have told you?'

Dariusz Kuźmina: 'I admit that I don't now. But I was uncomfortable about not having known. I actually felt a bit stupid for not figuring it out myself. But I want to emphasize that this had no bearing on the management of the institute. I was just emotionally uncomfortable with not knowing.'

Junkyard treasures

Agnieszka doesn't believe she can win. She thought the judgment might make a difference if she got the compensation; she requested more than PLN 250 000.

Agnieszka's attorney: 'The court cannot re-instate Agnieszka. Unfortunately, in the initial stages of the case, my predecessor – as I was told by Agnieszka – made a mistake and failed to submit the application for that on time. The judgment is now expected at the next hearing.'

Agnieszka says all that is keeping her alive is her mother. She is 80, has been an insulin-dependent diabetic for forty years, and has dementia.

'All those thoughts from before my change are coming back. What to do with myself if there is nowhere I fit. I'm not myself, so I am nobody. Today, I feel this way again. I don't have the energy to start everything once again. I made it then, I started and completed my treatment, found a job, a new environment... And now I am back to square one. I'm actually getting used to these thoughts.'

Every day looks the same, says Agnieszka. Look into the garage; make sure mom is eating; give her the medicine. Pick up a book from the recycling stacks.

'Recently, I got a copy of Pan Tadeusz with illustrations by Andriolli. I know it by heart, but the pictures are so pretty, it would be a waste to recycle it.'

Sometimes she goes to the junkyard and on occasion actually finds a small treasure there. She cleans it off, brings it to a great condition. She knows this stuff, she has the tools, she does her research. She drops these items off at the local museum. From time to time, she gets emails: 'I found a picture of my grandfather on a motorcycle in the family album. Can you please tell me what model this is?' 'For me, it's just a moment to find and answer,' she says. She gets vintage car rallies.

'A big one is coming up in Wrocław, I'm one of the three speakers beside Sobiesław Zasada and Jan Tarczyński. I'm going to go, because they have offered to pay for the trip. Otherwise I couldn't afford it. I used to go a lot. In the Alps, I actually got the first prize once for riding a vintage vehicle.'

Vanishing

'If I had a job, if somebody needed me for something, maybe things would turn around. But with my situation, with this past? In my file, there are employment record certificates made out to a different name. There is the court judgment on the sex change. I keep sending out CVs, asking, trying. Actually, I used to, because I have stopped now. Everybody is just chasing me away, nobody wants to give me a chance.'

She says the only thing she can do is write down her testament, give away all the rest that hasn't been sold yet, and just vanish. Although frankly, she adds, she is already vanishing slowly. Each motorcycle she loses is a loss of a part of herself.

'It's as if somebody drove you somewhere far away, with nothing at all, just a foggy memory of who you once were. Everything that was important to me is gone or will be gone soon.'

She comes alive when she is showing us pictures of an 80-year old BMW. She is smiling in the picture she has on her website. You

can also see her smile in a short video on an automotive website, where somebody gave it a caption: 'An elderly lady is driving it to the max.'

[Update for the 2015 edition: The case was heard by courts of the first and of the second instance, and the claims were dismissed in the their entirety in both instances.]

Some names and identifying details have been changed.

Legal analysis

Karolina Kędziora

It is likely that Agnieszka was subject to unequal (worse) treatment with regard to the conditions of employment, as well as the termination of employment, due to her status as a transsexual person. In view of the regulations of the Labour Code (Journal of Laws of 1998, No 21, item 94, uniform text), this may amount to direct discriminations.

Prohibited unequal treatment on the grounds of transsexuality

Under Article 183a § 1 of the Labour Code, employees must be treated equally in terms of commencing and termination an employment relationship; conditions of employment, promotion and access to training to raise their qualifications; they must be treated equally regardless of their sex, age, disability, sexual orientation, and a number of other criteria. Equal treatment in employment means that no discrimination should occur on any of those grounds (Article 183a § 2 of the Labour Code). Because the legislator used the wording 'in particular but not limited to' before the list of these characteristics,

the list is open-ended and only provides examples of prohibited grounds of discrimination. Consequently, a complaint may be made against violation of the principle of equal treatment in employment also on the grounds of e.g. transsexuality, even if it is not explicitly included in the list in Article 183a of the Labour Code.

It is important to note here that a person's sex is one of their most vital characteristics. It determines the person's role and position in the social and cultural sphere, including its crucial aspect – the labour market. A sex change certainly has a personal dimension, but also has profound legal consequences. Being a member of a certain sex is legally relevant in terms of work and occupation. Discrimination on the grounds of sex is prohibited. Moreover, the Constitution of the Republic of Poland (Journal of Laws of 1997, No 78, item 483) in Article 33 makes a direct reference to equal treatment irrespective of a person's sex, emphasising the significance of this principle and fostering the need to prevent discrimination on the grounds thereof.

Definition of direct discrimination in line with the objective of anti-discrimination directives

Chapter II a of the Labour Code lists several forms of prohibited discrimination, including the violation of the principle of equal treatment in the form of direct discrimination. Under Article 183a § 3 of the Labour Code, direct discrimination is defined as treating an employee less favourably than other employees in a comparable situation, on the grounds specified in § 1 of the same provision. Therefore, the situation of one employee must be compared with that of other employees, taking into account not only the present, but also the past and the foreseeable future (W. Cajsels, *Kodeks pracy – komentarz, Krótkie komentarze Becka*, Warsaw 2007, p. 46).

To determine whether direct discrimination has occurred, it is necessary to create a model for comparison. This consists in comparing the situation of the person alleging discrimination with another employee in a similar position but who does not have the characteristic in question (e.g. disability or transsexuality). These regulations were incorporated into the Polish Labour Code in the process of implementation of EU laws, and must be identical in terms of objective with the EU directives that create the anti-discrimination standards. The same standards must be met by each of the Member States, including Poland.

Unfortunately, the Polish legislator left out the element of the EU definition of direct discrimination that stipulates that it occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the specified grounds. Thus the Polish definition is defective in that it connects the aspect of the past or hypothetical conduct to the victim of discrimination, rather than to another employee in the same situation. The definition extends to hypothetical conduct, which disqualifies it (I. Boruta, "Zakaz dyskryminacji w zatrudnieniu – nowa regulacja prawna", *Praca i Zabezpieczenie Społeczne* 2004 No 2, p. 2-8). However, the principle of indirect effect of EU directives remain in force. It means that courts in the Member States must interpret national laws in line with community laws (the fundamental ruling with regard to this principles was issued in the judgment of the Court of 10 April 1984 in Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen). Consequently, in contemplating the definition of direct discrimination, the correct one must be taken into account, i.e. the one that reads: 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds (...)'

With this in mind, it is necessary first to compare Agnieszka's situation with that of another employee in a similar situation, i.e. an employee who is working towards their PhD, but who is not transsexual and who has not been deprived of the option of teaching classes. If no actual person exists that could be used for the comparison, the definition of direct discrimination means that a hypothetical model is allowed.

The hypothetical model essentially consists in putting forwards a hypothesis: if such a person existed (working towards a PhD, not transsexual), this person would certainly not have been treated the same way as Agnieszka, i.e. this person would not have been deprived of the option of teaching classes.

The circumstances of termination of the employment relationship must also be analyzed. None of the responsibilities that she allegedly neglected were actually agreed with her beforehand in writing. Therefore, it could be argued that the employer requiring Agnieszka to fulfil other duties than those actually specified in her contract of employment did so out of prejudice motivated by the awareness the sex change Agnieszka had undergone.

Assessment of damage suffered

Article 183d of the Labour Code provides for the minimum amount of compensation an employee may seek in a discrimination case, but specifies no maximum in this regard. It appears however that the amount of compensation should not be fixed in disregard of the damage actually suffered by the employee. According to the judgment of the Polish Supreme Court dated 7 January 2009, the compensation should make up for both property losses and intangible losses of the employee (case no: III PK43/2008). In Agnieszka's case, property loss includes the earnings lost as a result of the decision not to allow her to teach classes. Moreover, the amount of compensation

should take into account the fact that when her employment contact was terminated, Agnieszka lost her primary source of income and despite her attempts to find another job, she has been unsuccessful, likely due to her age. These circumstances may provide the basis for seeking adequate compensation for the loss of a source of income by means of unlawful termination of employment. This amount is the monthly salary of the claimant (as she received it at the time of termination of her employment) multiplied by the number of months from the date of termination, but not more than the statute of limitation on employee claims, which under Article 291 §1 of the Labour Code is 3 years of the day the claim became due and payable.

Burden of proof is on the employer

The general principle, expressed in Article 6 of the Civil Code (Journal of Laws of 1964, No 16, item 93, as amended), is that the burden of proving a fact remains with the person who is arguing that this fact has a legal consequence. However, the provisions of labour law related to the issue of discrimination make an exception to this rule. Under Article 183b § 1 of the Labour Code, it is not the employee that must prove that discrimination occurred. Instead, the employer must prove that it did not (or if unequal treatment did occur, it was motivated by lawful reasons). The employee who is alleging discrimination in employment is only required to list in the complaint (Article 187 § 1(2) of the Code of Civil Procedure, Journal of Laws of 1964, No 43, item 296, as amended) the circumstances that merely suggest discrimination on the grounds of e.g. transsexuality, and also the illegality of the unequal treatment. If the employee provides at least some support for these claims, it is the employer's obligation to demonstrate that the different treatment of the claimant and the other employees was motivated by rational and fair criteria.



As the Polish Supreme Court noted in its judgment of 9 June 2006 (case no: III PK 30/06, OSNP 2007, No 11-12, item 160), the employee is only obliged to present the facts which suggest unequal treatment in order to shift the burden of proof on the employer. Therefore, the court may find the allegation of discrimination unfounded (and thus dismiss the complaint) only if the employer proves that the unequal treatment suggested by the employee either did not take place or, if it did take place, was motivated by objective reasons. Thus the employee is de facto free of the obligation to prove that they fell victim to discrimination. Specifying the facts that suggest discrimination triggers a presumption that can only be challenged by the employer producing evidence to rebut it.

In the light of the shifted burden of proof in employment cases, Article 233 § 2 of the Code of Civil Procedure becomes particularly important. This stipulates that the court uses its own discretion, after carefully considering the collected material in its entirety, to assess the

significance of refusing to produce evidence or trying to prevent the production of evidence for the court. Thus if the employer, after an allegation of discrimination is supported in some manner by the employee, fails to prove that discrimination did not occur or the differentiation between employees was objectively justified, this employer can be held liable for discrimination even if it was not purposeful or intentional.


To recapitulate: it is necessary to provide some evidence to support the argument that unequal (worse) treatment occurred due to Agnieszka's transsexuality. This unequal treatment pertained to the conditions of work and the termination of employment. In this legal analysis, the focus has been on direct discrimination. However, the facts of the case also offer the possibility of claiming harassment on the grounds of transsexuality. Harassment consists in behaviour with the purpose or effect of violating the dignity of an employee, humiliating, or offending the employee (Article 183a §5(2) of the Labour Code).



REVOLUTION- ARY SPIRIT

Karolina Oponowicz-Żyłik

**I've been saying
over and over again:
the Polish Radio,
because of its mission,
must uphold the law,
fairness,
and decency.**



EQUAL PAY FOR EQUAL WORK?

'I'm at work, at my desk. Suddenly the phone rings: 'Paweł, Paweł, it's about you, go to the studio!' So I go to the studio and listen. A reporter, Roman Czajarek, is talking to a lawyer who specializes in labour law. And the lawyer says that a case like mine is discrimination! Says it live on the air at the Polish Radio! It is completely schizophrenic!' Paweł Wojewódka laughs nervously. He finds it hard to believe that the Polish Radio is telling its listeners that equal work should also mean equal pay. Several months before, he actually took the Polish Radio to court over this exact issue.

'I gave me best years to this radio, to *Jedynka*. I don't want any official titles, medals, or honours in exchange. I only want what is due: equal treatment.'



Uncommonly objective and fair

Paweł Wojewódka was a student of journalism when he came to the Polish Radio in 1978. For the next three years, he diligently studied the craft. In the summer of 1981, he got in trouble with his superiors.

'I was doing a program about the strike of bus drivers in Warsaw. The people were talking freely, some critical stuff about the political authorities was said. The producer was a bit drunk that day, and the censor a bit lazy apparently, and somehow it all ended on the air. There was a big row, I was told that I was fighting the system, and I was kicked out of the radio.'

Wojewódka, then a new husband and father, became a plumber to support his family. At the time of the martial law, he left for France. After the Round Table talks, he returned to Poland for a little while and got a phone call from Janina Jankowska, an icon of political opposition and free journalism: 'Paweł, come back to the radio, there is

so much to do here!’ As a reporter of Radio Solidarity, he worked on the campaign of the Citizens’ Committee. After the electoral victory he hardly left the building of the parliament; he reported for the Polish Radio’s popular program *Jedynka*. In August, he was the first reporter who managed to interview Tadeusz Mazowiecki just after he became Prime Minister. He walked up to him on the stairs in the parliamentary building: ‘Excuse me, editor, sir, oh I’m sorry, Mister Prime Minister!’ Mazowiecki responded: ‘Paweł, it’s prime minister just for now, but once an editor, forever an editor...’

On 28 November 1989, he was hired full time at the Polish Radio. Twenty years later, he is one of the most recognizable voices of *Jedynka*. He works in the public affairs reporting division. He is in charge of several shows: *In Poland and Abroad*, *Talk of the Day*, *Poland and the World*, debates in the Electoral Studio, Reporter’s Gazette, and even sometimes automotive shows, just for fun. He feels he is the right person at the right place. He enjoys talking to people. It makes him happy that the Polish Radio remains a talk radio, in contrast to the commercial stations where music is replacing the spoken word.

‘An uncompromising reporter who stands by his opinion, even if this opinion clashes with the official politics of his superiors,’ said (at court) Paweł Kwieciński, former division head and director of the First Programme of the Polish Radio, currently working of the Bureau of Programming of the Polish Radio. He added: ‘He has had the top qualities necessary in a reporter: skill in this craft, diligence, objectivity, and fairness, to an uncommon degree.’

‘Reliable, to-the-point, well-prepared, well-trained, an experienced reporter,’ added Andrzej Zak, head of the current events division of the First Programme of the Polish Radio.

Krzysztof Michalski, former director of *Jedynka* and former CEO of the Polish Radio, also noted: ‘I have high regard for his

shows. (...) He is very good at selecting people for interviews. (...) When he runs a show, there is always a point to it, a conclusion. (...) I find his voice very pleasant.’

Three times as much – for what?

In January 2010, two new faces appear in the public affairs division: a woman aged 44 and a man aged 34. Their job is to work on the same shows as Paweł Wojewódka, taking turns with him. Rumours start surfacing that the newcomers are earning more. Are they? Paweł Wojewódka uses some methods he doesn’t want to discuss to find out if the rumour is true. As it turns out, it is. While Wojewódka’s basic salary is PLN 1500 PLN, the new woman’s is PLN 5000 and the new man’s – PLN 4000.

Paweł Wojewódka: ‘5000 minus 1500 is PLN 3500 a month. Multiply by 12, that is almost PLN 40 000 a year! And the social security contributions on top of that. I have 11 years left before I retire. That’s a lot of money. A huge difference. No idea what the reason for it is.’

And the money is not all that there is. What bothers Wojewódka is the rank of the newcomers. In the Polish Radio, the official career path is: junior reporter, senior reporter, publicist, senior publicist, and eventually commentator. There are no formal criteria for advancement; there is just a general consensus that those with the greatest experience and portfolio make it to the next step.

Paweł Wojewódka: ‘People used to say at the Polish Radio that I had the Radio’s archive behind me, with hundreds of kilometres of tape I’d recorded that were played on the air, and hundreds of hours of the shows I produced.’

After 20 years on the job, his official position is senior publicist. The new colleague R., along with his PLN 4000 PLN, became

a senior publicist immediately. The new colleague C. was hired as a commentator.

Paweł Wojewódka: 'I'm not saying this was wrong. Maybe it wasn't, maybe it was right. But I would like to know why! C. was a print journalist before she came here, and so was R., who doesn't have a university degree on top of it. I have a degree in journalism, two specializations, for 9 years I was head of the journalism department at a private university. I feel like an idiot when a person who is doing the exact same job I do is making three times as much!'

'Tomasz Lis, Polish TV's star anchor, makes more than PLN 10 000 for a single show in TVP, and nobody holds it against him.'

'Right! But he makes this money because of the commercials before and after his show. He generates money for TVP, this can be easily verified. This is not the case here. Nobody checked how much money each reporter generates: me, C., or R.'

'Why should the management of the Polish Radio not have the freedom to use its own discretion in deciding how much the staff earn?'

'Just because. I would understand it in a private business, when the boss just likes somebody better. But not in a publicly-owned company, when our salaries are paid out of public money!'

CEO refuses to give a raise

Upset about the salary differences, Paweł Wojewódka went to the CEO of the Polish Radio, Andrzej Siezieniewski. He asked for a raise and was told that the Radio was having financial difficulties.

Paweł Wojewódka: 'I asked why the long-time employees are supposed to pay for that? Just because I was born earlier, I am supposed to be treated worse? It is the question of my retirement, of my future!'

The CEO made a gesture of helplessness. Wojewódka kept pushing the issue. On 26 January 2012, he wrote an official letter to

the director of the First Programme of the Polish Radio: he wants a raise. The director refused. Wojewódka hired an attorney.

The attorney, Karolina Bodnar, drafted another official letter to the Management Board, requesting that Wojewódka's salary be raised to the same level as his co-workers. Since there have been no complaints about the quality of his work performance, the differences in salary levels between him and his colleagues who have the same responsibilities are a violation of the principle of equal treatment (Article 11 § 2 and 3 of the Labour Code).

'Another employee may have a higher salary, but salary differentiation should be based in some facts. Yet the Polish Radio is unable to say why the newcomers make more than Paweł Wojewódka, who is doing the exact same work,' said Bodnar.

Paweł Wojewódka: 'On 21 March 2012 I handed my superiors the papers drafted by my attorney, showing that they were in violation of the law and of the principle of equal treatment in employment. I proposed a settlement: raise my salary to the level of the new female colleague, and promote me officially to commentator.'

The Polish Radio refused to settle.

Paweł Wojewódka: 'I don't understand why. I thought that a legally reasoned letter would be the right approach for rationally thinking people. But it turned out that's not the case. I think the legal realities here are not really the reason. There is a dozen, maybe even many more persons in the Polish radio who are in the same situation. If I made a deal with the management, they would speak up too.'

Karolina Bodnar: 'Most likely, the Polish Radio was afraid of an avalanche of similar requests and preferred to wait and see how the court would rule in this case.'

On 17 May 2012, Paweł Wojewódka filed a lawsuit against his employer. He sought a salary raise to the level of PLN 5 000,

a promotion of the position of a commentator, and a compensation for unequal treatment. The total amount of his claims was PLN 98 000 plus the costs of proceedings.

‘Weren’t you afraid that a case against the Polish Radio would have detrimental effects for you?’

‘Sure I was. CEO Andrzej Siezieniewski had told me that if I was going to court, I had to know that all of my weak points would be dragged to light. I do realize that my actions may have very ugly consequences in the future. The management were very upset: “How can a person go up in court against their own company?” But somebody has to clear the path.’

‘Were the others not brave enough?’

‘I can understand them. If somebody is 50, 55 years old, they start to get afraid: “If I get kicked out of here, where am I ever going to get a job?” I could have just gone on working quietly for the Polish Radio. But I have a revolutionary spirit.’

Karolina Bodnar says that when she thinks of her client, the term ‘whistleblower’ comes to mind: a person who publically speaks about problems in their workplace. This person must be brave, and also prepared to face the consequences, which potentially maybe nasty.

Money is power

Seven months after Paweł Wojewódka’s lawsuit was filed, on 5 December 2012, the Management Board of the Polish radio suddenly raised his base salary from PLN 1500 to PLN 2500. Wojewódka learned this news from an official letter from the Head of HR and Personnel. Due to ‘a small improvement in the financial situation of the Company (...) the Management Board made the decision to regulate base salaries in the company Polish radio S.A. in order to eliminate salary discrepancies.’ For Paweł Wojewódka, it is

very clear that this move is a reaction to his lawsuit. The salary increases get nicknamed ‘Wojewódka raises’; they boost the earnings of many long-time employees of the Radio.

This was not the first time when the management openly admitted that they were aware of the discrepancies. Exactly a year earlier, in December 2011, Kamil Dąbrowa, director of the First Programme of the Polish Radio, was interviewed by Tomasz Kwaśniewski, a reporter for *Duży Format* magazine (published together with *Gazeta Wyborcza*). The topic of the interview was the earnings in Poland; it was in connection with a story Poles’ secret salaries (*Duży Format* dated 29 December 2011). In the interview, Kamil Dąbrowa said: ‘For example, I have an older gentleman on staff. He has been with the Radio for many years. His base salary is PLN 1500. And I also have a young man, a recent hire, with a base salary of PLN 4000. How exactly am I going to make this information public?’ To which the interviewer asked: ‘Can’t you bring them to the same level?’ ‘How would I get the money to do that?’, responded Dąbrowa. He added: ‘Money is power. You can give it to somebody or not give it to them.’

In court, at a hearing in Paweł Wojewódka v. management of the Polish Radio, Dąbrowa explained: ‘In the Polish Radio, the salary policy has been shaped by many years of practice. I find it difficult to address the financial situation in the past, and take responsibility for it.’ But he also said it was his belief that ‘employees who have the same official position don’t necessarily have to have equal salaries.’ He added that, while Paweł Wojewódka’s formal responsibilities similar to those of his colleagues in the same division, ‘he is the publicist in the First Programme of the Polish Radio with the poorest assessment from his superiors.’ Examples: ‘he has shown no initiative, has offered no proposals or new ideas.’ The comparison of responsibilities and achievements of Wojewódka and his colleagues would be the running

thread in the court case. This is how his superiors attempted to justify the salary gap.

Sławomir Assendi, Dąbrowa's deputy, testified: 'I heard second- and third-hand comments about the work performance of Paweł Wojewódka, but I can't remember exactly what they were. When I listen to interviews done on the air, I like the ones conducted by C. and R. better. They have a faster flow, more content. But this is just my personal opinion.'

Artur Makara, head of the public affairs division and Wojewódka's immediate superior, agreed with Dąbrowa and Assendi: 'There are no two persons in any profession whose performance is exactly the same.' He didn't try to hide that he found it easier to work with the newly-hired reporters than with Wojewódka. They were, he said, 'active in pursuing exceptional, non-standard radio content.' When the court asked for examples, Makara said: 'Just coming up with these kinds of initiatives, building up the know-how in the workplace, the collective know-how, which is not always manifested in specific programming-related knowledge. (...) This is the foundation of the divisions' subsequent work.'

The court asked for details.

Makara: 'It would be difficult to overestimate the contribution of C. to preparing the anniversary edition of *Sygnaly Dnia*.'

The court: 'Please say exactly what it was that she was doing.'

'She helped with the organization, with deciding on how the anniversary celebration would go.'

'So specifically...'

'The celebration takes place on the air...'

'I don't understand, please explain this on the examples of specific actions.'

'OK, you have to come up with an idea for a celebration and them prepare it.'

'And specifically what idea did C. come up with?'

'Well, for instance, how to finance the celebrations of the anniversary. She developed many ideas that later were broadcast. (...) The preparations took weeks, and she was involved in them to an exceptional degree.'

Up against the system, not you

During the trial, Paweł Wojewódka spent several weeks using his vacation leave, and then a month and a half on medical leave.

Paweł Wojewódka: 'When I came back, I was working normally, more or less. I've felt a bit bullied. How? For example, I get no bonuses. And the better-paid jobs go to my colleagues. Theoretically, we get the same amount of air time, but they pay differently. They get a show at 12 p.m. for PLN 220 PLN, and I get an interview in that time slot, for PLN 100 PLN. After 30 years of work, I am not allowed to work on *Sygnaly Dnia*, the flagship show of Polish Radios. C. and R. are working on it. When I ask why, I'm told I'm not a good fit.'

'How do you get on with the people who testified against you in court? Like the head of the division, Artur Makara?'

'I have to get on with him. He decides how many shows I get and how much money I make.'

'What about your colleague, whose salaries were the reason for the lawsuit?'

'I told C. and R.: 'Please don't hold it against me, I am not doing this to get at you. I'm just not going to allow anybody to treat me like this.' I'm also not going up against Mr Dąbrowa, Mr Siezieniewski, the vice-presidents, or the head of the division. I am going up against the system. I've been saying over and over again: the Polish Radio, because of its mission, must uphold the law, fairness, and decency.'

Victory, probably

In April 2013, 11 months after the complaint was filed, the judgment was entered. Polskie Radio S.A. is to pay to Paweł Wojewódka compensation for unequal treatment. The amount of compensation: PLN 93 500. The court dismissed the other claims, and so it didn't order Wojewódka's promotion to commentator and didn't order that his salary be raised.

But it's not necessarily the end for Paweł Wojewódka. The trial might go on. As soon as the court enters a statement of reasons for the judgment (on which it has been working for six months now), the parties will decide whether or not to lodge an appeal.

'Didn't you think about quitting the radio?'

'Sometimes, when I have a bad moment, I regret not sticking to plumbing. My friends who are plumbers are doing great: vacations in the Dominican Republic, trips to South Africa. And me? Well. But it was my own decision to choose the radio.'

'But it wasn't always bad for you at the Polish Radio, was it?'

'No, the radio used to be one happy family, it really did. Common sense always used to win. But then the demons were released, and they still are floating down the hallways.'

'Demons?'

'Well, yes. Targalski and Czabański got here and that was it. People were taken off the air at a moment's notice, new staff came in with much higher salaries.'

Wojewódka is referencing the 'purges' during the time when the political party Law and Justice was in power. At the time, Krzysztof Czabański was the CEO of the Polish Radio, and Jerzy Targalski was the Vice-President. In 2006, 264 persons lost their jobs at the Polish Radio, including 64 reporters such as Tadeusz Sznuć, Roman Czejarek, Małgorzata Kolińska-Dąbrowska, and Maria Szabłowska. Jerzy Targalski

spoke of the dismissals using derogatory language, alleging connections between the reporters and Poland's communist past, and saying that the workers' 'average age is pretty much the same as at a cemetery.' Former employees brought approx. 30 lawsuits against the Radio. Some of them, like Małgorzata Kolińska-Dąbrowska, won their discrimination cases. Others, like Maria Szabłowska, settled out of court.

Paweł Wojewódka: 'After Targalski and Czabański left, many reporters came back to the radio. But the standards changed and never went back to what they once used to be. The atmosphere remained bad.'

Some names and identifying details have been changed.

Legal analysis

Monika Wieczorek

It is the employer's duty to offer equal pay to employees. The amount of salary or wages is determined by the qualifications, experience, and quality as well as quantity of work. However, characteristics of the employee not connected with the employment relationship may not have impact on the amount of salary paid to the employee.

Principle of equal pay

The differentiation of salaries in the case involving Paweł Wojewódka must be contemplated in view of the provisions of the Labour Code prohibiting unequal treatment (Journal of Laws of 1998, No 21, item 94, uniform text). When considering the circumstances of the case, the focus should be on the criteria the employer could have used in determining the amount of the salary. It is important to note that employees have equal rights resulting from equal performance of the same duties, which is stipulated in Article 112 of the Labour

Code. These equal rights include the right to equal pay for equal work and in general the right to equal compensation for fulfilling the same responsibilities (judgment of the Polish Supreme Court dated 17 February 2005, II PK 87/04 LEX no 603768).

The principle of equal pay is also expressed in Article 183c of the Labour Code, which provides that employees have the right to the same pay for the same work or for work of the same value. This pertains to the entire range of components that may make up an employee's compensation for work, including non-monetary components. In line with the case law of the Polish Supreme Court, 'the same work' is work that is identical in terms of type of work, qualifications necessary to do it, conditions in which it is done, and its quality and quantity (judgment of the Polish Supreme Court dated 29 November 2012, II PK 112/12, M.P.Pr. 2013/4/197-199). Furthermore, under Article 183c § 3 of the Labour Code, 'work of the same value' is work that requires comparable qualifications, comparable responsibility, and comparable effort.

In determining the salary, the employer must take into account the qualifications and experience, as well as the type, quality, and quantity of work (judgment of the Polish Supreme Court dated 7 March 2012, case no: II PK 161/11). The criteria used by the employer must also be relevant in the given situation (judgment of the Polish Supreme Court dated 22 February 2007, I PK 242/06, ONSP 2008 No 7-8, item 98). On the other hand, it has no bearing on the salary whether or not the employees doing the same work or the work of the same value are officially employed at the same position.

Age and seniority as grounds for discrimination

In the case of Paweł Wojewódka, he (as a claimant) is pursuing claims connected with discrimination with regard to pay and access

to promotion, on the grounds of age and organizational seniority (time spent working for the same organization). The Labour Code grants protection against discrimination in this scope. First of all, Article 183a § 3 applies; it stipulates that direct discrimination occurs when an employee has been or could be treated in a comparable situation less favourably than other employees, e.g. on the grounds of age. The list of characteristics on the grounds of which discrimination is prohibited (i.e. on the grounds of which no unequal treatment is allowed) in 183a § 3 of the Labour Code is not exhaustive. Therefore, the law also protects persons who are experiencing discrimination on the grounds of other characteristics, not explicitly listed in the Labour Code. Under Article 183b § 1(2), protection is granted to persons who are experiencing unequal treatment on the grounds of having a legally protected characteristic e.g. when they are treated unfavourably with regard to pay or other conditions of employment, with regard to promotion, or with regard to other work-related benefits. Using prohibited discriminatory criteria in determining the amount of salary or wage and in refusing promotion qualifies as direct discrimination, i.e. (under Article 183a § 1 of the Labour Code) treating an employee less favourably than other employees in a comparable situation, due to this employee having a legally protected characteristic. To determine whether direct discrimination has occurred, it is necessary to compare the situation of the discriminated person to other employees in a comparable situation to check how these employees are different and to establish whether a legally protected characteristic could have been the reason for the discrimination.

To see if Paweł Wojewódka fell victim to direct discrimination, it is necessary ask: If he had been hired later, in 2010 or so, would he have received a base salary of PLN 1500, and would he have been hired as a senior publicist? Qualifications and experience, as well as



the type, quality, and quantity of work should also be considered. Moreover, the work should be compared to the work performed by C. and R. In this case, the question is whether the pay gap and the denied promotion was a result of Wojewódka's age and seniority in the organization.

There is Supreme Court case law to confirm that organizational seniority may be used as a discriminatory factor (judgment of the Polish Supreme Court dated 16 May 2008, I PK 261/07). Consequently, organizational seniority may be considered a legally protected characteristic in terms of anti-discrimination law; whether or not this happens depends on the circumstances of the case.

There are very few court cases concerning discrimination on the grounds of age. Typically, they focus on the employee's reaching retirement age as the sole reason for termination of employment. As a result, there is very little relevant case law. Apparently, the profusion of the problem in real life does not translate into a similar abundance of lawsuits (M. T. Romer, *Dyskryminacja ze względu na wiek w prawie pracy i ubezpieczeń społecznych in: Stop dyskryminacji ze względu na wiek*. Raport, 2009).

In terms of anti-discrimination law, the employer shouldn't offer higher salaries to newly-hired employees, whose contracts are signed

much later than those of employees with greater seniority. Typically, seniority with an employer should result in a more favourable salary. One of the reasons for this is the organizational memory of long-term employees, i.e. their experience acquired working for this specific employer over a longer time. This should make a long-term employee, if their work is generally highly assessed, particularly valuable. Experience, qualifications, and positive assessment scores should also provide grounds for promotion. This is particularly true when other employees who are doing the same work or work of the same value actually hold other, higher positions.

Importantly, the situation of employees pursuing anti-discrimination claims is legally quite favourable. Under Article 183b § 1 of the Labour Code, the burden of proof in these cases is shifted onto the employer. In court, the employee is only required to offer some support for the argument that unequal treatment may have occurred. This triggers the obligation on the part of the employer to prove that there were objective reasons for the unequal treatment (judgment of the Polish Supreme Court dated 9 June 2006, III PK 30/06, OSNP 2007/11-12/160; judgment of the Polish Supreme Court dated 3 September 2010, I PK 72/10, LEX no 653657).



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About PSAL

Polish Society of Anti-Discrimination Law (PSAL) is a countrywide organization with a focus on equality and anti-discrimination monitoring. PSAL members are lawyers with an interest in human rights, anti-discrimination, and the promotion of equal treatment, in particular irrespective of sex, age, race and ethnic origin, sexual orientation, gender identity, religion, belief, and disability. PSAL is active in the following key areas:

- initiating and conducting scientific research, including legal-comparative studies;
- drafting expert opinions;
- generating public interest in debates about discrimination;
- supporting victims of discrimination, in particular by providing legal assistance and representation before domestic and international courts and public administration authorities;
- fostering tolerance and eradicating stereotypes regarding the social groups at risk of discrimination;
- promoting an understanding of human rights and the protection of these rights;
- promoting initiatives that foster an atmosphere of trust and respect regardless of religion, culture, and belief.

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