

# Equal pay for equal work

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**Charges of discrimination because of different pay for similar jobs may come as a surprise to employers. An employee may claim discrimination because he or she earns less than a colleague doing the same job. Once the employee shows that the position is the same but the pay is different, the burden of proof shifts to the employer to show that there is no unlawful discrimination. Does the employer have strong enough arguments to show that the employee is wrong? It is worth considering some legal safeguards at the early stages.**

## **Wage discrimination?**

Discrimination in earnings is one of the forms of employment discrimination. This has been directly governed by the Labour Code in its present form since 2004. Wage discrimination means violating the principle that employees have the right to equal pay for the same work or work of equal value.

Employers are in violation of this principle if they differentiate in wages without objective, reasonable cause, and thus when

they use an arbitrary criterion that does not further a justified purpose or is disproportionate to achieving the purpose.

This relates to a very broad understanding of pay, extending to all components of employee earnings, regardless of how they are labelled, including employment-related benefits in cash or in kind. An employee may claim discrimination as to all elements of their compensation package together, some specific elements, or even just a single element of the overall package.

## **What is identical?**

As a rule, identical work is work performed at the same job position. Work of equal value is work that requires employees to have comparable professional qualifications (as demonstrated by relevant certifications and by practice and professional experience) and also entails comparable responsibility and effort.

Equality should be assessed in terms of duties actually performed as well as the responsibility assigned to the

employees. Work by employees at the same position, and holding similar professional qualifications, is not considered to be identical work if the duties entrusted and actually performed indicate a different degree of complexity or a different scope and degree of responsibility.

In practice, a detailed comparison should be conducted to show that the work is not really the same, or of the same value. This means that litigating these kinds of cases is complicated and time-consuming, and the court has a considerable amount of discretion when deciding the case.

### **Equality for all?**

The principle of equal treatment in the area of wages does not mean that pay should be absolutely equal. Differences in pay are one of the many components that go to make up employee incentives. These are of course indispensable to the process of establishing the employee's overall compensation package. It is important to differentiate in salaries using legally permissible criteria and parameters, which are objectively justified, further a justified purpose and are proportionate to achieving the purpose.

The Labour Code directly states that pay for work should be set in a way that corresponds to the particular kind of work performed and the qualifications required to perform it, and also takes account of the quantity and quality of the work performed. An employer may thus differentiate in salary when describing an employee's work duties and assessing the quantity and quality of effort expected.

This will be particularly significant in cases where employees hold the same job titles, and thus where the work is basically identical. From this point of view, it is important to specify precisely the scope of duties and responsibilities of employees in particular job positions and to carry out periodic assessments of the employees' work. Then, if a discrimination case is filed, this will serve as evidence that any differentiation in earnings is justified by the quality and quantity of the work performed.

Other criteria for permissible differentiation arise from the definition of work of equal value. Professional qualifications, backed by relevant certifications, practice and experience, are one such criterion, so long as they are relevant and necessary to perform the work. One of the valid criteria for wage differentiation is that there are different levels of responsibility or effort associated with the work.

Another differentiation criterion that is also allowed, and indeed expressly recognised in the Labour Code, is length of service. Since length of service is closely associated with professional experience, the employer need not demonstrate the rationale for applying this criterion. However, if the employee questions this criterion (e.g. in a situation where the

employer cites length of service with previous employers), the employer must show that the criterion is being applied in a justified manner.

The main burden of proof in any court case will rest with the employer. The employee needs to make an initial showing of discrimination (for example by specifying the basis of the alleged discrimination and demonstrating that the work performed by the employees in question is comparable). The employer must then show that it does not discriminate against the employee, in other words, that it applied legally permissible criteria when setting the employees' pay at different levels.

### **Why is this a threat?**

If discrimination is proved, the employee has a right to compensation in an amount not less than the gross minimum wage (which in 2010 is PLN 1,317, or about USD 400, per month). The regulations do not provide a maximum level for compensation, but the predominant view, based on Polish Supreme Court case law and legal scholarship, is that compensation for wage discrimination is intended to made up for the difference in earnings that the employee received and what he or should have received were it not for the discrimination. The court may also establish non-discriminatory terms and conditions for continuing employment in the future.

It is important in discrimination cases to recognise that the employer's image is on the line, and the employer is also running the risk of further claims from other staff if it loses a case. For these reasons, settlements are difficult for an employer to accept in such court cases. Any concession that requires the employer to pay compensation creates the impression – not necessarily accurate – that the employer has admitted discriminating.

### **Summary**

The principle of equal pay for equal work gives staff a handy yardstick for checking whether their salary was set at the right level. A disgruntled employee may easily compare himself to other staff and try to claim wage discrimination. If a case comes to court, the employer must be prepared to present evidence to demonstrate in an objective way the differences in the quality or quantity of work performed by particular employees, and make a persuasive case that differences in pay are justified.

An employer will be all the more credible if it precisely specifies the scope of duties and responsibilities for every employee, introduces wage bands for particular positions, and, most importantly, a system for periodic appraisal based on uniform assessment criteria. It is worthwhile considering introducing job evaluation systems for more complex organisational structures.

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