

## ADMISSIBILITY OF REGIONALIZATION OF WAGES "IN LIGHT OF" CJEU JUDGMENT C-624/19

The judgment of the Court of Justice of the European Union ("CJEU") in the case of Tesco Stores Ltd (case C-624/19) (the "Judgment"), concerning equal pay in various employment establishments, caused quite a stir among employers, trade unions and lawyers. There have been many articles and statements in the Polish press indicating that the Judgment allegedly prohibits an employer from differentiating the level of remuneration of employees in different towns/cities solely on the basis of objective economic criteria. A similar view also results from the position of 20 September 2021 of the Chief Labour Inspectorate ("GIP"). Meanwhile, a reading of the Judgment itself and the opinions of European legal scholars leads to the conclusion that the Judgment does not relate to this issue and does not have the revolutionary nature that is attributed to it. However, it may have significant consequences in another matter – wage differentiation by formally separate employers that are controlled by the same entity.

### FACTS

Several thousand female employees at Tesco Stores in the UK sued the company for breaching the principle of equal pay for equal work or work of equal value on the grounds of gender. Tesco Stores was accused of infringing national legislation and Article 157 of the Treaty on the Functioning of the European Union ("TFEU"). In fact, Tesco Stores employees, who work in hundreds of different Tesco Stores, in various locations, claimed that they should receive the same salary as Tesco Store employees (mainly male) employed in the Tesco Stores warehouses. Although those employees held other positions, they performed work of the same value in the claimants' opinion.

Tesco Stores argued that Article 157 TFEU was not directly applicable and that female employees of shops could not be compared to employees of the

### Key issues

- Facts
- Legal issues resolved by the CJEU
- Direct effect of Article 157 TFEU
- The sole source
- Practical dimension of the Judgment

warehouses because those employment establishments of the employer are separate. The issue of regionalization of wages was not the subject of the dispute. Tesco Stores did not, therefore, try to defend the differences in wages by citing economic factors related to the location of the establishments in question, but challenged the possibility of comparing employees employed in its different establishments.

## **LEGAL ISSUES RESOLVED BY THE CJEU**

### **Direct effect of Article 157 TFEU**

The main issue addressed by the CJEU in the Judgment was the direct effect of Article 157 TFEU. This article states that each Member State must ensure that the principle of equal pay is applied to male and female employees for equal work or work of equal value. The principle of direct effect, on the other hand, is that an EU legal entity may invoke a Treaty provision directly before a national court or an EU court in order to assert his/her rights.

With regard to Article 157 TFEU, the CJEU has previously ruled that it has (in fact its counterpart in the older version of the Treaty has) direct effect (*Defrenne v Sabena*). However, that judgment related to the direct effect of that provision in relation to employees performing **the same work**. On the basis of that judgment, it was not clear whether Article 157 TFEU (at present) has a direct effect also in relation to workers performing **work of equal value** (and therefore not the same, but of equal value to the employer). It is this issue that the CJEU resolved in the Judgment, stating that Article 157 TFEU has direct effect **also in matters concerning work of equal value**.

### **The sole source**

An even more legally important finding in the Judgment is that Article 157 TFEU may apply to situations where the conditions of pay which give rise to unequal pay of employees relate to employees who work in different establishments, provided that those conditions relates to the 'sole source'.

The CJEU pointed out that the sole source is the entity that is responsible for the inequality and that, taking into account its managerial competences, has the power to eliminate the pay inequalities identified. The concept of a sole source is intended to enable employees to make comparisons in terms of work and pay with employees of different employment establishments and even different employers, as long as it is possible to identify the entity that is the sole source in relation to them.

### **Practical dimension of the Judgment**

The natural conclusion resulting from the Judgment is that employees performing work in different establishments may, provided that the working conditions in these establishments originate from the sole source, compare their conditions of pay. It seems, therefore, that it is possible for comparisons of conditions of work and pay to be made, for example by employees of different local branches of a company which are formally separate so-called internal employers, or potentially also different companies operating within one capital group in which there is strict corporate centralization of competences with regard to wage policy (i.e. these powers are actually exercised, for example, by a holding company, not the management boards of individual companies). It is worth pointing out that Polish courts have in the past already

allowed the possibility of assessing a violation of the principle of equal treatment in employment by comparing the situation of an employee of a subsidiary with the situation of employees of the parent company (judgment of the Supreme Court of 18 September 2014, III PK 136/13). We expect that the most important effect of the Judgment may be the consolidation of the above line of judgments of the Supreme Court in subsequent similar cases.

GIP expressed the opinion that the employer's differentiating of the remuneration of persons with the same scope of employee duties solely on the basis of where they perform their work is, in principle, unacceptable. Recently, numerous similar statements have appeared in the press, indicating that, in light of the Judgment, such a geographical difference in pay is tantamount to wage discrimination. However, the Judgment does not mean that the employer is absolutely obliged to pay the same remuneration to all employees performing the same work or work of the same value regardless of the location of the establishment in which they perform their work. The mere finding that the remuneration of such workers may, in principle, be compared does not mean that any difference in those wages constitutes wage discrimination, that is to say, that the difference results from the employer's applying a discriminatory criterion (i.e., a specific personal characteristic of the employee). The Judgment referred specifically to Article 157 TFEU, i.e., to discrimination based on the employee's gender. Meanwhile, the difference in wages for equal work or work of equal value in different employment establishments may result from a number of objective economic factors, such as the value of the purchasing power of money in a given location or the situation on the local labour market. As is clear from both the Labour Codes (Article 183b § 1) and the case law of the Supreme Court, even a difference in remuneration based on a criterion that could potentially be discriminatory in itself does not constitute wage discrimination if the employer proves that it was guided by objective reasons (including justified economic reasons). The CJEU itself in the Judgment expressly states that a difference in wages of employees in a comparable situation is permissible if it has been objectively justified. In turn, the Constitutional Tribunal rightly emphasised that pushing for the application of provisions aimed at ensuring equal treatment to people in a different factual situation (in the case of regionalization of wages, bearing different costs of living depending on the town/city in which they work, for example), could lead to extreme inequality.

Forcing equal pay for employees within the EU regardless of where they work would have serious legal, economic and social consequences. Such a rule would also have to apply cross-border (i.e. wage conditions derived from a 'sole source' would have to be the same for employees performing equal work or work of equal value in all Member States). In the side-line, it is worth noting that the EU institutions themselves differentiate the salaries of their employees according to the cost of living in different places of employment, which would mean that this practice should also be considered flawed.

## **CONCLUSION**

The Judgment will have the effect of making it easier for employees to pursue claims related to unequal treatment in situations where they wish to compare themselves to persons employed by formally separate employers, but whose conditions of pay have a sole source (e.g. the management board of a company with numerous regional branches). In our opinion, an examination of

whether there is potential discrimination will focus on an analysis of the actual situation, i.e. the location of the managerial powers in the corporate structure, rather than on the formal division of employers.

At the same time, it should be noted that the Judgment should in no way affect the issue of the admissibility of regionalization of wages based on economic criteria. In this context, we do not agree with the views expressed by some commentators and – as it seems – the Chief Labour Inspectorate. The Judgment did not address this issue.

On a side note, it is worth pointing out that the mere admissibility of regionalization of wages does not mean that all the practices of Polish employers in this area to date were correct. As our experience in litigation concerning regionalization claims in which we have successfully represented clients shows, the courts do not stop at a vague statement that life in large cities is more expensive than in smaller ones. They expect detailed evidence to be presented that a given level of salary differentials between individual locations is actually justified and proportionate to the economic differences that occur. Currently, issues related to labour market conditions (e.g. difficulties in recruiting an employee, local benchmark of wage levels) are often the only factor determining the geographical difference in pay, and the costs of living in a given location are disregarded, which may not be sufficient from the point of view of discrimination claims. Due to the increased interest (also on the part of trade unions) in the issue of regionalization of wages and the already emerging demands for wage equalization between different locations based on a misinterpretation of the Judgment, it is certainly recommended that employers thoroughly analyse current policy in this respect.

## CONTACTS

**Agnieszka Janicka**  
Partner

**T** + 48 22 627 11 77  
**E** Agnieszka.Janicka  
@cliffordchance.com

**Aleksandra Ulatowska**  
Associate

**T** + 48 22 627 11 77  
**E** Aleksandra.Ulatowska  
@cliffordchance.com

**Tomasz Derda**  
Counsel

**T** + 48 22 627 11 77  
**E** Tomasz.Derda  
@cliffordchance.com

**Grzegorz Nowaczek**  
Senior Associate

**T** + 48 22 627 11 77  
**E** Grzegorz.Nowaczek  
@cliffordchance.com

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Norway House, ul. Lwowska 19, 00-660  
Warsaw, Poland

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