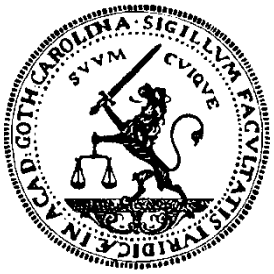

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Gender and age discrimination on the labour market in Poland: the compliance of Polish law and practice with International instruments

JAMM07 Master Thesis

International Human Rights Law
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Contents

Abstract

The principle of equality and non-discrimination in employment existed only in a very basic form in the Polish law until the fall of Communism in 1989, even though Poland had already ratified some major international instruments in this area, such as the ICCPR, ICESCR and the ILO Fundamental Conventions. The first positive development in Polish law concerning the principle of equality and non-discrimination in employment took place with the drafting of a new Constitution of the Republic of Poland in 1997. Its provisions on equality and non-discrimination are basic, but they cover all spheres of life and can be interpreted very broadly. However, it was during the period of transformation to a free-market economy and the accession to the EU that the real and far-reaching legal changes were made.

This thesis aims to examine the level of compliance of the Polish law and practice with the international instruments, with the focus on gender and age discrimination as well as their cumulative impact on older women on the Polish labour market.

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Abbreviations

C87 - Freedom of Association and Protection of the Right to Organise
C100 - Equal Remuneration Convention
C111 - Discrimination (Employment and Occupation) Convention
C156 - Workers with Family Responsibilities Convention
C158 - Termination of Employment Convention
C168 - Employment Promotion and Protection against Unemployment Convention
C175 - Part-Time Work Convention
C183 - Maternity Protection Convention
CEACR - Committee of Experts on the Application of Convention and Recommendations
CEDAW - Convention on the Elimination of All Forms of Discrimination against Women
CESCR - Committee on Economic, Social and Cultural Rights
Dz. U. - Dziennik Ustaw (Journal of Laws)
ECHR - European Convention on Human Rights
ECtHR - European Court of Human Rights
ECJ - European Court of Justice
ETA - Equal Treatment Act
EU - European Union
ICCPR - International Covenant on Civil and Political Rights
ICESCR - International Covenant on Economic, Social and Cultural Rights
ILO - International Labour Organisation
R090 - Equal Renumeration Recommendation
R111 - Discrimination (Employment and Occupation) Recommendation
R162 - Older Workers Recommendation
R166 - Termination of Employment Recommendation
Ombudsman - Commissioner for Human Rights
SN - Sąd Najwyższy (Supreme Court)
UN - United Nations
UDHR - Universal Declaration of Human Rights

Chapter 1: Introduction

1.1. Background

The laws concerning equality and non-discrimination in employment have undergone extensive development and significant improvement in the recent years. Poland had ratified many crucial international instruments concerning equality and non-discrimination. In addition, the accession to the European Union in 2004 had forced Poland to introduce many new legal provisions in the Labour Code and by virtue of being a member of the EU, Poland is obliged to automatically transpose EU Directives into the national law. The Polish Constitution and especially the Labour Code now constitute the main sources of protection against discrimination in employment.

It must be stressed that the Polish law on equality and non-discrimination in employment is better now than it has ever been, but that does not mean it is flawless. Two broad issues can be identified that hinder the effective implementation of the equality and non-discrimination provisions. First, since these provisions are relatively new, the courts do not have much experience with regard to their implementation. Although, the Supreme Court and the Constitutional Court have provided much guidance, they too sometimes face difficulties in practice and take time to establish legal precedents. As will be shown, there are still issues in the lower courts and among the general population which demonstrate lack of understanding and awareness of the problem of discrimination in employment. This leads to few cases being brought to the courts and even fewer successful outcomes.

Second, the Labour Code provides detailed regulations in the area of equality and non-discrimination in employment. In theory, women are protected from unjustified dismissals, denial of employment, promotion and vocational training. These rights are protected especially in regard to pregnancy and parenthood. However, in practice, even when women are aware of their rights, they are reluctant to use them. Their traditional role in the family, which is reflected in the highly uneven distribution of parental leave rights, puts women in a position where they are seen as ‘problematic’ and costly by employers and often decide to come back to work as soon as possible to avoid losing employment. This situation is getting worse as women age, since they are not afforded equal opportunities in employment due to the differential retirement ages for men and women. In sum, though there are many legal protections, there are still issues with their fulfilment in practice.

1.2. Purpose of the thesis

The purpose of this thesis is to assess the compliance of Polish law with the international instruments in regard to gender and age discrimination on the labour market. Both general and more specific issues preventing the full realisation of the principle of equality and non-discrimination in employment will be discussed to show that the traditional division of gender roles in the Polish

society still affects both young and older women on the labour market. They are burdened with household and childcare responsibilities, which hinder the effective realisation of equality between men and women on the labour market. Women face discriminatory treatment in access to and termination of employment as well as promotion and vocational training. This position of disadvantage has a cumulative effect in older age as women are pushed out of the labour market in order to perform their traditional roles as carers for family members. Multiple discrimination is a relatively new concept in international law and although it has technically been recognised in the Polish law, it is neither defined nor practiced by the courts. However, as I will argue, multiple discrimination on the basis of gender and age in Poland prevents women from competing on equal terms with men on the labour market, in particular due to the differential retirement ages.

1.3. Research Questions

Poland had ratified many international instruments relating to the discrimination in employment. Does Polish law and practice provide sufficient protection in the light of various international and regional instruments? Is Polish law in compliance with the international law set out in UN, ILO and EU instruments, and to what extent? Where do the problems still lie, which prevent the full realisation of the principle of equality and non-discrimination with regard to gender and age at work in Poland?

1.4. Methodology and structure

This thesis aims at critically evaluating the compliance of Polish law on equality and non-discrimination in employment with the international law and also analysing the application of these laws in practice. Although some historical background is discussed, the main focus is on the current state of the law and its implementation, therefore traditional legal dogmatic method is used for the major part of the thesis. As such, Polish provisions and case law on equality and non-discrimination will be reviewed to determine the effectiveness of the current law. In addition, since gender equality touches upon other disciplines as well, various sociological and gender studies will be featured throughout the thesis in order to ensure a better understanding of not only legal, but also social situation in Poland.

As discussed above, this thesis aims to analyse the compliance of Polish law with the international instruments concerning gender and age discrimination in employment. Chapter 1 will introduce the general purpose of the thesis. In Chapter 2, I shall discuss the International instruments as well as caselaw, what is their scope of protection and how the provisions on gender and age discrimination are interpreted by the supervisory bodies. In Chapter 3, I will analyse in depth the Polish regulations and caselaw, including the Constitution of Poland, however my main focus will be on the Labour Code and all its provisions regarding women and older persons. In addition, the attitude and decisions of the Polish courts will also be examined. In both these chapters, I will analyse the non-

discrimination law in relation to access to and termination of employment, and to a lesser extent, access to promotion and vocational training. Chapter 4 will be dedicated to the implementation aspect of the non-discrimination law. Gender and age equality policies and issues will be discussed in order to indicate that there is indeed some commitment to the equality based on gender and age, but there are still several lingering problems that prevent the full realisation of the principle of equality and non-discrimination on the Polish labour market. Special attention will be paid to the issues relating to parenthood and the differential retirement ages for men and women. Chapter 5 will provide an analysis of the compliance of Polish law with the international instruments concerning gender and age discrimination on the labour market. Finally, the last Chapter will offer final remarks and recommendations with regard to the more effective implementation of the principle of equality and non-discrimination in the sphere of employment.

1.5. Delimitations

This thesis focuses on the compliance of Polish law with the international instruments. As a result, a major part of the thesis will be dedicated to the analysis of the laws on equality and non-discrimination in employment. Although, there are many other issues which could be discussed in this regard, the focus here will be on gender and age discrimination in access to and termination of employment as well as the promotion at work and vocational training. In addition, as the law itself is not the only problem here, various reports will be discussed with the aim of showing that the implementation of the legal provisions is much more troublesome in practice. It must be indicated here that Poland does not carry out extensive research onto the actual impact of the non-discrimination law, and so the sources in this regard are somewhat limited. Still, the reports and documents presented in this thesis do show the general trends in the practical implementation of non-discrimination provisions.

Problems such as unequal pay, harassment and sexual harassment also have negative impact on women's position on the labour market. While they are very important issues that have impact on women's employment opportunities, they are beyond the scope of this thesis due to time and page limitations, and as such, are not dealt with here.

Chapter 2: International and European Instruments on Equality and Non-Discrimination

2.1. International Instruments

The principle of equality and non-discrimination is necessary for the protection and fulfilment of human rights. It has even been said to belong to the 'jus cogens'[1] norms, "because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws"[2]. This principle encompasses many topics, but the focus here will be on the work-related rights of women and older people. The principle of equality stipulates that everyone should receive equal treatment and opportunities. Equality may be formal or substantive. Formal equality simply means that everyone should be treated in the same way at all times. Substantive equality aims at bringing about true equality in that it considers various social or cultural factors that lead to a differential treatment of particular persons/groups. Such examination ensures better understanding of notions such as workplace privilege and instead of treating everyone in the same way, it recognises the need for temporary positive action in order to eliminate those factors that lead to discriminatory treatment. In order to achieve this goal, the principle of non-discrimination should be respected as it expressly prohibits unequal treatment based on specific grounds.

2.1.1. The UN Charter and Universal Declaration of Human Rights

The principle equality and non-discrimination is included in all major international instruments. One of the purposes of the Charter of the United Nations (UN Charter) is to promote and encourage respect "for fundamental freedoms for all without distinction as to race, sex, language and religion"[3]. The Universal Declaration of Human Rights (UDHR) already mentions in the Preamble the equal rights of all humans and even singles out the equality between men and women[4]. This principle is then included in Article 1 which states that "all human beings are born free and equal in dignity and rights", and in Article 2 which states that all rights and freedoms contained in the Declaration are to be realised "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", however, the formal recognition of principle of equality is found in Article 7 which proclaims that "all are equal before the law and are entitled without any discrimination to equal protection of the law"[5]. These are the first international human rights instruments and all other instruments were, to some extent, based on them.

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[1] Jus cogens (peremptory norm) is a fundamental international norm/principle from which no derogation is permitted.

[2] Inter-American Court of Human Rights Advisory Opinion OC-18/03, September 17, 2003 on the Juridicial Condition and Rights of Undocumented Migrants, para 101

[3] UN Charter, Article 1(3): http://www.un.org/en/sections/un-charter/chapter-i/index.html

[4] UDHR, Preamble: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

[5] Ibidem, Articles 1, 2 & 7

2.1.2. The ICCPR and ICESCR

The International Covenant on Civil and Political Rights (ICCPR)[6] obliges the Member States to observe the principle of non-discrimination in Article 2, while Article 3 concerns equality between men and women. Its' Article 26 for the most part mirrors the provision contained in the UDHR Article 7 as a standalone provision on equality and non-discrimination. However, more important here is the International Covenant on Economic, Social and Cultural Rights (ICESCR)[7] which, to a large extent, concerns the world of work. Again, Article 2 concerns non-discrimination and Article 3 provides for the equality between men and women. The ICESCR goes on to secure the right to work[8] as well as the enjoyment of just and favourable conditions of work in connection with equal remuneration and "equal opportunity for everyone to be promoted in his employment"[9]. The freedom of association and trade union rights are found in Article 8 ICESCR, but with no express prohibition of discrimination. However, it may be implied from the CESCR's General Comment 20. It states that equality and non-discrimination are necessary for the enjoyment of the Covenant rights and that: "the principles of equality and non-discrimination are recognised throughout the Covenant" and so everyone should enjoy, among others, "trade union freedoms"[10].

The General Comments of the Committee on Economic, Social and Cultural Rights (CESCR) have proven to be very helpful in understanding the scope of equality and non-discrimination provisions under ICESCR. General Comment 20 deals specifically with non-discrimination and states that discrimination may take many forms, not only that of a direct and indirect discrimination, but also discrimination by association (parent of a disabled child) or discrimination by perception (an individual is not a member of a group, but is perceived as such by others)[11]. Multiple discrimination was also recognised as having a unique impact on discriminated persons (e.g., women from an ethnic minority)[12]. Additionally, States are required to implement laws, policies and remedies that will ensure effective elimination of discriminatory practices[13]. Furthermore, General Comment 16 concerning equal rights of men and women had explained that Article 3 ICESCR "is a cross-cutting obligation and applies to all the rights contained in articles 6 to 15 of the Covenant"[14].

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[6] ICCPR: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[7] ICESCR: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

[8] Ibidem, Article 6

[9] Ibidem, Article 7(a)(i) & 7(c)

[10] General Comment 20, Committee on Economic, Social and Cultural Rights, Non-discrimination in economic, social and cultural rights (art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights), Forty-second Session, Geneva, 4-22 May 2009, para 2 & 3

[11] Ibidem, General Comment 20, para 16

[12] Ibidem, para 17

[13] Ibidem, para 36-41

[14] General Comment 16, Committee on Economic, Social and Cultural Rights, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), Thirty-fourth Session, Geneva, 25 April-13 May 2005, para 22

It is therefore clear that passing laws alone is not enough to eliminate gender and age discrimination as those laws require positive action to be effective in practice. It is also worth mentioning that, although there are specific grounds stated in the Covenant, the list is by no means exhaustive and can be developed in the future[15]. Therefore, work-related rights cannot be fulfilled without observing the principle of equality and non-discrimination. Although 'sex' was widely recognised as a ground for discrimination in international law, the same cannot be said of 'age'. However, in General Comment 20, 'age' was put forward as a possible ground of discrimination[16]. In addition, General Comment 6[17] had dealt with the rights of older persons. For the first time, the CESCR had recognised that the person's age may contribute to discrimination. More specifically, as a result of Article 3 of the Covenant, States should pay more attention to older women as they are often in a more precarious situation than men[18]. In addition, the need to fulfil the rights relating to work was stressed in regard to older persons[19].

2.1.3. The Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[20] is of great importance for gender equality. Article 1 defines 'discrimination against women' as *"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"*. Article 11 CEDAW deals with the field of employment and specifies various labour rights, the enjoyment of which should be equal between men and women, such as the right to work, equality in the process of recruitment, job promotion, vocational training and remuneration. It also prohibits discrimination on grounds of marriage or maternity in that it explicitly states that dismissal on grounds of pregnancy, maternity leave or marital status is prohibited. The only limitation in the employment rights of pregnant women may relate to the kind of work that is harmful to their health. In addition, Member States are encouraged to provide services and support of a kind that will allow parents to combine work and family responsibilities, stressing in particular the need for the availability of child-care services. Although Article 5 of the CEDAW does not refer to employment, it is bound to have positive impact on women. It requires the State Parties to take measures which will eliminate stereotypes and prejudices against women as well as to educate the society on the role of both parents in the

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[15] General Comment 20 …, op. cit., para 15

[16] Ibidem, para 29

[17] General Comment 6, Committee on Economic, Social and Cultural Rights, The Economic, Social and Cultural Rights of Older Persons, Thirteenth Session, 8 December 1995

[18] Ibidem, para 20

[19] Ibidem, para 21

[20] CEDAW: http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf

upbringing of their children. Employers value productivity, so women who are burdened with childcare and household responsibilities are seen as less capable, less available and more costly and this affects women's access to the labour market as well as the security of employment. The current predominant idea of women as being responsible for the care of children limits their employment opportunities so such measures will improve their position on the labour market.

Several General Recommendations also provide clarification as to the scope of obligations under CEDAW. To start with, the acceleration of equality between men and women through the use of temporary special measures was discussed in General Recommendation 25[21]. It had pointed out that identical treatment of men and women is not always sufficient and that special measures, the so-called positive discrimination might be necessary to ensure true equality of men and women[22].

The possibility of multiple discrimination based on gender and age was also recognised and States were advised to take that into account when introducing special measures[23]. More attention to this issue was finally paid in the General Recommendation 27[24] on older women and protection of their human rights. The Committee voiced a concern about the situation of older women as they are likely to face multiple discrimination. In the field of employment, older women are often regarded "as a non profitable investment for education and vocational training"[25]. Furthermore, "gender-based discrimination in employment throughout their life has a cumulative impact in old age, compelling older women to face disproportionately lower income and lower or no access to pensions compared with older men"[26]. Different retirement age may be a problem even if it is not mandatory, as pressure from employers or society may cause older women to stop working as soon as they are entitled to pensions. Therefore, "State parties have an obligation to ensure that retirement ages in both the public and private sectors do not discriminate against women"[27].

2.2. Standards of the International Labour Organisation

Since the International Labour Organisation (ILO) deals specifically with labour rights, it affords a broader scope of protection against discrimination than the above mentioned international instruments. It is best to start by pointing out that already in the Preamble to the ILO Constitution, a basic equality provision can be found as "the principle of equal remuneration for work of equal value"[28] is recognised there. The Declaration of Philadelphia, which concerned the aims and

[21] General Recommendation 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary measures, CEDAW, 2004

[22] Ibidem, para 18

[23] Ibidem, para 12

[24] General Recommendation 27 on older women and protection of their human rights, CEDAW, Forty-seventh Session, 4-22 October 2010

[25] Ibidem, para 19

[26] Ibidem, para 20

[27] Ibidem, para 42

[28] ILO Constitution: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO

purposes of the ILO adds to that a prohibition of discrimination on grounds of race, creed or sex[29]. However, it was only in 1998 with the signing of the ILO Declaration on Fundamental Principles and Rights at Work, that: 'the elimination of discrimination in respect of employment and occupation' was recognised as an obligation of every State simply by the virtue of their membership in the ILO[30]. In this Declaration, the ILO standards were set. Apart from the elimination of discrimination in employment, other standards include the freedom of association and the right to collective bargaining, elimination of all forms of forced labour and the effective abolition of child labour. In addition, State Parties are obliged to report on a progress they have made regarding the implementation of these ILO standards to the Committee of Experts on the Application of ILO Conventions and Recommendations.

2.2.1. The Fundamental Conventions

The principle of equality and non-discrimination lays at the heart of the ILO. To begin with, two out of eight fundamental ILO Conventions relate to this principle. The Equal Remuneration Convention (C100) is dedicated in full to the prohibition of gender discrimination in the payment of wages/ salaries and all other forms of pay. The Equal Remuneration Recommendation advises that in order to fulfil the requirement of equal remuneration for men and women for work of equal value, States should take action to ensure equal access to vocational guidance and training as well as equal access to employment in general[31]. The concept of work of equal value is important as it requires objective classification of jobs without regard to gender. This can be done through job analysis or other procedures, but the aim is to prevent the setting of unequal pay for work of equal value.

The Discrimination (Employment and Occupation) Convention (C111), Article 1(1) defines 'discrimination' as: "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" or "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned"[32]. The second part of the definition leaves open the possibility of adding other grounds of discrimination. The Discrimination (Employment and Occupation) Recommendation further explains that prohibition of discrimination applies in all aspects of employment, such as access to vocational training, access to employment, promotion, employment security, remuneration and

[29] Declaration of Philadelphia, Part III: http://www.ilo.org/asia/decentwork/dwcp/WCMS_142941/lang--en/index.htm

[30] ILO Declaration on Fundamental Principles and Rights at Work: http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm

[31] R090 - Equal Remuneration Recommendation, Article 6: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312428:NO

[32] C111, Article 1(1): http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C111

general conditions of work[33]. Although, not indicated in the Convention itself, the General Survey on the fundamental ILO Conventions[34] makes it clear that: "any discrimination - in law or in practice, direct or indirect - falls within the scope of the Convention"[35].

These are the provisions of two fundamental equality conventions, but the principle of equality and non-discrimination can be found in another fundamental ILO convention, namely the Freedom of Association and Protection of the Right to Organise Convention (C87). In Article 2, it is stated that: "workers and employees, without distinction whatsoever, shall have the right to establish and … to join organisations of their own choosing"[36]. The whole convention revolves around the idea that individuals should be able to fight for their labour rights, which clearly includes the prohibition of discrimination. C87 and C98 (Right to Organise and Collective Bargaining Convention) were deemed so important that a separate supervisory body, the Committee on Freedom of Association, was set up to ensure the State Parties' compliance with their provisions.

2.2.2. Other Conventions

Additional provisions regarding the principle of equality and non-discrimination are found in the Workers with Family Responsibilities Convention (C156)[37]. Even though, the C111 provides for a general prohibition of discrimination, it was felt that it does not sufficiently cover the issues of workers with family responsibilities. Therefore, C156 expressly requires the equality between men and women workers who have family responsibilities to enable them to work, as far as possible, without conflict between work and private life (Article 3). They should also be able to freely choose their employment, which takes into account their situation (Article 4) and cannot be dismissed solely as a result of their family responsibilities (Article 8). However, C156 has been in force for over three decades and was ratified by only 44 countries[38] so it affords little protection in practice.

Extensive protection against discrimination is also found in the Termination of Employment Convention (C158)[39]. It provides specifically that a worker may be terminated only for "a valid reason … connected with the capacity or conduct of the worker or based on the operational

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[33] R111 - Discrimination (Employment and Occupation) Recommendation, Part II, Article 2: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312449:NO

[34] Giving globalisation a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008, International Labour Conference, 101st Session, 2012: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf

[35] Ibidem, p. 312

[36] C87, Article 2: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232

[37] C156: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312301:NO

[38] Ratifications of C156: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312301

[39] C158: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312303:NO

requirements of the undertaking, establishment or service"[40]. It then goes on to enumerate specific reasons on basis of which termination is precluded: "trade union membership and participation; commencement of complaint procedures against the employer; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and maternity leave"[41]. Additionally, prior to termination the worker must be given a chance to defend himself, and if he is dismissed, he must have a right to an appeal to an appropriate body[42]. Although the protection against termination is wide in scope, one notable absence is that of *age* as a possible ground for discrimination. This shortcoming was corrected by the Recommendation to this Convention, which added *age*[43] to the already existing grounds under the C158. Still, it must be stressed that the addition of 'age' as a ground is merely recommended and the Member States may choose to disregard it, thereby halting any potential progress in this area. Regarding the access to employment, the Employment Promotion and Protection against Unemployment Convention (C168)[44], provides that the Member States should seek to ensure "the promotion of full, productive and freely chosen employment"[45] while respecting the principle of equality and the prohibition of discrimination (with both sex and age being recognised as grounds of discrimination)[46]. Again, due to low number of ratifications for both of these conventions (especially C168)[47] they provide very limited protection in reality.

There are also specific conventions which aim to protect women, such as the Maternity Protection Convention (C183)[48]. In accordance with C183 Article 8, the termination of employment is prohibited during a woman's pregnancy, absence on leave and the period following her return to work. Moreover, she must be able to return either to the same post, or to the post 'equivalent' to that which she occupied before the maternity leave. Article 9 stipulates that Member States should ensure that: "maternity does not constitute a source of discrimination in employment, including … access to employment"[49]. Pregnancy tests or certificates are prohibited when applying for employment, unless the post could cause harm to the child. C183 therefore constitutes a firm source of protection regarding the access to and termination of employment, but it is ratified by only 34

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[40] Ibidem, Article 4

[41] Ibidem, Article 5

[42] Ibidem, Articles 7 & 8

[43] R166 - Termination of Employment Recommendation, Part II, Article 5(a): http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312504:NO

[44] C168: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312313:NO

[45] Ibidem, Article 2

[46] Ibidem, Article 6

[47] Ratifications of C158: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303 & of C168: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312313

[48] C183: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312328:NO

[49] Ibidem, Article 9

(mainly European) countries[50]. The Part-Time Work Convention (C175)[51] merits consideration in so far as this type of work disproportionately affects women. Article 4 prohibits discrimination of part-time workers and states they ought to "receive the same protection as that accorded to comparable full time workers"[52].

Regardless of the ratification status of the above conventions, the issue of gender discrimination is well-covered in the ILO, as fundamental conventions - C100, C111 and C87 - provide extensive protection for women in employment, along with many conventions which concern specific areas, such as maternity, work-life balance, termination of employment and part-time work. The same cannot be said of discrimination of older persons as there is not a single convention dealing with this problem. Even the C111 on discrimination in employment and occupation does not mention it. Age is only mentioned briefly in Recommendation to C111 together with some other grounds.

The only ILO instrument on this topic is the Older Workers Recommendation (R162)[53]. It recognises that workers might encounter more difficulties as they age and encourages the Member States to promote equality of treatment with regard to older workers and to prevent discrimination based on age in access to employment and vocational guidance as well as the termination of employment[54]. However, it is only a recommendation and bears no binding obligations upon the Member States to implement it. In addition, the Declaration on Fundamental Principles and Rights at Work and its' Follow-up[55] is very important to mention. Its' purpose is to review each year the efforts made by the Member States and obtain information about any changes to their law and practice regarding the Eight Fundamental Conventions. This overall picture of State practice may prove useful in accelerating the ILO's development with regard to the ground of age. If Member States voice concern over it in their reports, they may encourage action on the part of the ILO in order to finally recognise age discrimination as a serious problem.

In addition to general conventions and recommendations declaring the ILO's commitment to labour rights (mentioned above), there are also other instruments that focus specifically on female workers. First such document was the Declaration on Equality of Opportunity and Treatment for Women Workers (1975)[56], but the most recent one is the Resolution concerning gender equality at the heart

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[50] Ratifications of C183: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328

[51] C175: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312320:NO

[52] Ibidem, Article 4

[53] R162: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312500:NO

[54] Ibidem, R162, Part II

[55] Available at: http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm

[56] ILO Declarations: http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm

of decent work (2009)[57]. Although progress has been made, some challenges remain, such as pregnancy or maternity related discrimination[58] and the problem of reconciling work and family responsibilities[59]. In some cases, this problem has been alleviated by measures aimed at male workers, such as paternity leave[60]. There is also a recognition of a possible multiple discrimination of women, especially in case of young migrant women[61], but this combination of sex and age discrimination again fails to recognise older women's issues. The resolution also stresses that the governments need not only to ratify conventions and write new laws, but also develop policies and take action to fulfil the principle gender equality in practice[62].

2.3. European Instruments

The rights of every individual in the EU are found in the Charter of Fundamental Rights of the European Union (EU Charter)[63]. Article 20 of the EU Charter contains equality before the law provision, while Article 21 prohibits discrimination on grounds of sex and age (among others). Equality between men and women, especially in the field of employment is stressed in Article 23. Other labour rights are also included: right to join trade unions (Article 12), right to work (Article 15), protection against unjustified dismissal (Article 30), and fair and just working conditions (Article 31). Although, the EU Charter is binding on State Parties, it only applies when they are implementing EU law[64].

2.3.1. The EU Directives

The EU Directives constitute another source of non-discrimination law. They are a part of the EU's secondary law and once they are adopted at the EU level, the State Parties have an obligation to implement them at the national level[65]. The main directive in the field of employment is the Employment Equality Directive[66]. Its' purpose is to combat discrimination based on religion or belief, disability, age and sexual orientation at work[67]. It is wide in scope as it covers access to employment, promotion, vocational training, working conditions, including dismissals and pay as

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[57] Resolution concerning gender equality at the heart of decent work, International Labour Conference, 98th session, Geneva, June 2009: http://www.ilo.org/public/libdoc/ilo/P/09734/09734%282009-98%29.pdf#page=8

[58] Ibidem, Conclusions, para 2-3

[59] Ibidem, para 11

[60] Ibidem, para 6

[61] Ibidem, para 4 & 31

[62] Ibidem, para 38-47

[63] EU Charter: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN

[64] Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, European Commission, 2010, p. 3 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF

[65] European Union Directives:
http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l14527&from=EN

[66] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0078&from=en

[67] Ibidem, Article 1

well as the membership of trade unions[68]. Article 6 allows for differential treatment based on age, but it is very limited, as it is only acceptable when "objectively and reasonably justified by a legitimate aim … and … the means of achieving that aim are appropriate and necessary"[69]. That could include 'positive action' in favour of older people[70]. The inclusion of age as a ground of discrimination is very important as there is still little recognition internationally of this issue.

Gender-based discrimination was most recently addressed in the Gender Equality Directive (Recast)[71]. This Directive had consolidated several existing EU directives and ECJ caselaw into a single text. Before that, there were separate directives on the following topics: equal treatment of men and women in access to employment, vocational training and working conditions; equal treatment in occupational security schemes; approximation of the laws of Member Staes in the area of equal pay; and burden of proof in discrimination cases based on sex. Since all of these Directives covered the issue of gender equality, it was felt that they should be brought together in a single directive. The Gender Equality Directive (Recast) also took into account the developments in the caselaw of the European Court of Justice and included them in the final text. Therefore, the new Gender Equality Directive covers equal treatment and non-discrimination principle in relation to access to employment, promotion, vocational training and working conditions, including pay[72], but the prohibition of discrimination also extends to trade union rights and the issue of dismissals[73]. 'Positive action' is also recommended[74]. It is important to mention that this Directive considers the fixing of different retirement ages to be contrary to the principle of equality[75]. It is also interesting to note that Article 26 of this Directive introduces the idea of employers having to take effective measures to prevent discrimination in the workplace. Both Directives set the burden of proof on the respondent[76]. As the States are obliged to transpose those directives into the national law, they become an important source of protection against both gender and age discrimination.

As gender discrimination is often caused by pregnancy or the upbringing of children, two other EU directives shall be considered, namely the Pregnant Workers Directive and the Parental Leave Directive. The Pregnant Workers Directive[77], though it mainly focuses on safety and health of pregnant women and women who have recently given birth, contains some equality and non-

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[68] Ibidem, Article 3

[69] Ibidem, Article 6(1)

[70] Ibidem, Article 7

[71] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

[72] Ibidem, Article 1 & 14

[73] Ibidem Article 14(1)(c) & (d)

[74] Ibidem, Article 3

[75] Ibidem, Article 9(1)(f)

[76] Employment Equality Directive, Article 10 & Gender Equality Directive (Recast), Article 19

[77] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0085

discrimination provisions as well. Article 10 provides for the non-discrimination of pregnant workers in that they are protected from dismissal "during the period from the beginning of their pregnancy to the end of the maternity leave … save in exceptional circumstances not connected with their condition". In case of dismissal during this time, the employer must provide extensive reasoning for such action in writing. Also, in accordance with Articles 6 and 7, certain work is prohibited during pregnancy and for breastfeeding women, but since it is meant to protect the health of such workers, this limitation will not constitute discrimination.

The Parental Leave Directive[78] is important in achieving gender equality as it facilitates the reconciliation of work and family responsibilities. Both parents have an individual right to parental leave, which shall be granted for at least 4 months "and to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis". To facilitate equality between men and women, at least 1 out of 4 months should be non-transferable (Clause 2). When the parental leave ends, worker should be returned to the same job, or to an equivalent post within the company. Also, Member States are to take necessary measures to prevent discriminatory treatment of workers due to them taking a parental leave (Clause 5). After the return to work, in order to better reconcile work and family responsibilities, there should be a more flexible working timetable available upon the worker's request (Clause 6). Therefore, this Directive promotes greater equality between men and women in family life and provides for a better reconciliation of work and family life with the aim of preventing discrimination of young parents, especially mothers, on the labour market.

2.3.2. Protection against discrimination - The European Court of Justice

The European Court of Justice (ECJ) delivered some important judgements with regard to both gender and age discrimination. In the Marshall case[79], the ECJ decided that special measures, such as giving priority to equally qualified female applicants in male dominated posts, was desirable as long as those measures were not automatic and unconditional[80]. The Mahlburg case[81] concerned access to employment of a pregnant woman. Her application for a permanent post as a nurse was turned down, because harm could be done to the child. However, this issue would only be temporary so it couldn't justify a complete bar from a permanent position[82]. Regarding age

[78] Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0018&from=EN

[79] C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, Judgement of the Court of 11 November 1997: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0409&from=EN

[80] Ibidem, para 35

[81] C-207/98, *Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern*, ECJ, Judgement of the Court (Sixth Chamber) of 3 February 2000: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-207/98

[82] Ibidem, para 29-30

discrimination, in the case of Mangold[83], the Court stated that: "the principle of non-discrimination on grounds of age must … be regarded as a general principle"[84] of the European law. This general statement is important as the issue of age discrimination was generally overlooked by the EU institutions, but it seems that, at least the ECJ, had started to pay more attention to it. It has also contributed to the better understanding of the non-discrimination law and its' scope.

2.3.3. Protection against discrimination - The European Court of Human Rights

Slightly different form of protection is accorded by the European Convention on Human Rights (ECHR) and its' Protocol 12. The ECHR may sometimes be more effective as it applies to everyone within the jurisdiction of a Member State[85]. The prohibition of discrimination under the ECHR is found in Article 14, but it can only be invoked in connection with another Convention right. The Court always deals with the main Convention right first, and if the violation is found, it sees no reason to deal with Article 14 as well[86]. As a result, the prohibition of discrimination under the ECHR is rarely useful in practice. However, there had been instances when Article 14 ECHR had been successfully invoked. In the case of Garcia Mateos[87], the employers refused to reduce their employee's (a mother) working hours and the Spanish Constitutional Court did not ensure sufficient protection against gender discrimination. The ECtHR found a violation of Article 6 (right to a fair trial) in conjunction with Article 14[88]. Another case in which Article 14 was invoked was Emel Boyraz[89]. The applicant was a security officer and was dismissed solely on the ground of gender. The Court found a violation of Article 8 (right to private and family life) as there was no objective justification for the applicant's dismissal[90] and Article 6 as the national courts failed to ensure a fair and speedy hearing[91]. The cases of Garcia Mateos v Spain and Emel Boyraz v Turkey both concerned gender discrimination in the workplace. Although, those cases invoked the right to a fair trial and right to private and family life in conjunction with prohibition on discrimination, labour rights were also indirectly affected. Under Protocol 12 to the ECHR, the prohibition on discrimination becomes free-standing (Article 1), but only 10 countries have ratified it so far[92].

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[83] C-144/04, *Wereer Mangold v Rudiger Helm*, ECJ, Judgement of the Court (Grand Chamber) of 22 November 2005: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-144/04

[84] Ibidem, para 75

[85] ECHR, Article 1: https://www.echr.coe.int/Documents/Convention_ENG.pdf

[86] Gerards J., The Discrimination Grounds of Article 14 of the European Convention on Human Rights, *Human Rights Review,* No. 13(1), 2013, Oxford University Press, p. 100: http://www.corteidh.or.cr/tablas/r30700.pdf

[87] Garcia Mateos v Spain, ECtHR, Application No. 38285/09, 19 May 2013

[88] Ibidem, para 42-9

[89] Emel Boyraz v Turkey, ECtHR, Application No. 61960/08, 2 March 2015

[90] Ibidem, para 52-6

[91] Ibidem, para 66-75

[92] Chart of signatures and ratifications of Protocol 12 to the ECHR: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=49uOGBte

2.3.4. The European Social Charter

Although the ECHR could in some cases have an impact on work-related rights, its' provisions are aimed at political and civil rights. Therefore, the European Social Charter was created to complement safeguards contained in the ECHR[93]. The European Social Charter[94] provides for extensive set of labour rights, some of which are binding on the State Parties[95]. Many of those rights pertain to equality and non-discrimination. Article 4 provides for a right to a fair remuneration which includes gender equality (equal pay for work of equal value) and the need to give appropriate notice of termination of employment. Under Article 8, pregnant women are to be afforded special protection, which includes prohibition of dismissal. Women's rights are additionally secured under Article 20 which concerns equality with regard to access to employment, vocational guidance and training, terms of employment and career development. Termination of employment is also covered separately under Article 24 and obliges the employer to give valid reasons for dismissal and in case of unjustified dismissal to provide adequate compensation. Article 7 secures a wide set of rights for young persons, but there is no corresponding provision for older people. Age is not even recognised as a possible ground for discrimination[96]. Provisions on gender equality in the workplace, on the other hand, are found in many Articles of the European Social Charter, but the State Parties are legally bound by only Article 20 while other rights may, or may not be selected as constituting a binding obligation on a state. In addition, just like Article 14 ECHR, non-discrimination provision in the European Social Charter can only be invoked in connection with another Charter right. Age discrimination is again ignored, but may be recognised and included in the future as the list of possible grounds is open. In the end though, the European Social Charter provides extensive protection against discrimination in the workplace and the State Parties should aim to follow its' provisions even if they are not legally bound to do so.

2.4. Conclusions

In conclusion, many international instruments deal with the principle of equality and non-discrimination. While, at least in theory, the issue of gender discrimination at work is well-covered, age discrimination is formally included only in CEDAW and discussed at length in a General Recommendation on older women. Other international conventions do not mention age as a ground of discrimination and such possibility is only briefly mentioned in General Comments. However, CESCR's General Comment 20 leaves the list of grounds of discrimination open and expressly puts forward age as potential ground of discrimination, so technically both the issue of gender and age discrimination is covered under the ICESCR.

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[93] Council of Europe website, The European Social Charter: https://www.coe.int/en/web/turin-european-social-charter

[94] European Social Charter (Revised): http://www.refworld.org/pdfid/3ae6b3678.pdf

[95] Ibidem, Part III, Article A - Undertakings

[96] Ibidem, Part V, Article E - Non-Discrimination

There are also many European instruments that contain provisions on equality and non-discrimination in the workplace. Some of those need separate ratification in order to become part of the national law, but in case of EU legislation (EU Charter and Directives), it needs to be transposed by all Member States into the national legislation. It is clear that gender discrimination is a single most often covered topic and, at least in theory, women are well protected against discrimination. The exact opposite could be said of older people. Although, the EU Charter and Directives do expressly mention 'age' as a ground of discrimination, they do not pay much attention to it. The ECJ discussed in the case Mangold the importance of age discrimination, but it was more of an exception, rather than a rule. There are no separate provisions for older workers and age is seldom mentioned as a ground of discrimination either in the conventions or by the courts.

As shown, gender equality and non-discrimination are one of the ILO's core principles and are found in the fundamental conventions as well as many specific conventions. Although areas that require most protection are well-covered, only the fundamental conventions are widely ratified while the ratification status of other conventions leaves a lot to be desired. There is some recognition that women are at risk of multiple discrimination, but even there older women are widely ignored. Even the Recommendation to C111 only mentions 'age' briefly and not separately, but along with other grounds. Age discrimination in general is rarely noticed and only one ILO Recommendation deals specifically with this problem.

Therefore, it seems that the international community at large had recognised the need to fight gender discrimination long ago, as many major international and regional conventions and other instruments were devoted to this problem. A great number of different documents (e.g. General Surveys, Reports, Declarations and Resolutions) also stress the importance of gender equality in the workplace. However, age discrimination is rarely mentioned and when it happens to be mentioned, it is certainly not dealt with at length. Not even the ILO, an expert organisation on labour rights recognises it as a serious issue and even its fundamental convention on discrimination (C111) fails to enumerate *age* as a possible ground of discrimination.

Chapter 3: Polish Law on Non-Discrimination in the workplace

3.1. Polish Instruments concerning the prohibition of discrimination

The main instruments in the Polish Law that contain the prohibition of discrimination at work provisions are: the Constitution, the Labour Code and, to a lesser extent, The Equal Treatment Act (ETA). The broadest scope of protection is provided by the Labour Code and it will be the main point of discussion in this chapter. The 2010 Equal Treatment Act will be mentioned briefly as it is mainly concerned with the discrimination outside of the employment sphere and has been used sparingly so far. The Civil Code is used mainly when the Labour Code provisions are not sufficient. Each one of the sources[97] will be covered in this chapter and their interpretation by the academic scholars and courts will be discussed. As this thesis focuses on gender and age discrimination in employment, provisions specific to those areas will be discussed in depth here.

It must also be stressed that Poland has not ratified all of the international instruments on non-discrimination that were mentioned above in Chapter 2. Major instruments such as ICCPR, ICESCR, CEDAW and the ILO Fundamental Conventions were ratified. However, none of the specific ILO Conventions, such as Maternity Convention or Workers with Family Responsibilities Convention, were ratified. This suggests a lack of commitment on the part of Poland to the labour market issues around discrimination in general. In addition, by a virtue of membership of the EU, Poland had to amend its laws to meet the requirements set by the European Union and now must also automatically transpose all of the EU Directives into the national law. However, it was because of the requirements set by the EU that the more detailed discrimination provisions were finally added to the Labour Code. It was suggested that it would not have taken place otherwise, or at least, it would have taken much longer[98]. There is one example that supports this idea. The Equal Treatment Act (ETA) that came into force in 2011 was introduced due to the threat of sanctions by the EU if Poland did not adapt its' non-discrimination law (outside of the employment context) to the European standard. Therefore, the introduction of the non-discrimination provisions was and to a large extent still is, more a result of international obligations, rather than a good will and desire to achieve equality between men and women.

3.1.1. The Constitution of the Republic of Poland

The basic provisions on equality and non-discrimination in Poland are included in the most important legal act, the Constitution of the Republic of Poland (1997). Article 32 stipulates that: "All persons shall be equal before the law. All persons shall have the right to equal treatment by

[97] The Civil Code will not be discussed separately, but will be sometimes included for the purposes of the other sources.

[98] Santera W., The Labour Code and Law of European Union (Santera W., Kodeks pracy a prawo Unii Europejskiej, *Studia Iuridica Lublinensia,* Vol. XXIV, No. 3, 2015), p. 83

public authorities"[99]. It goes on to state that: "No one shall be discriminated against in political, social or economic life for any reason"[100]. It means not only that there should be legal provisions in place, but also that the protection they offer should be implemented in practice. It is clear that the constitutional provisions on non-discrimination are very broad, surpassing the protection offered by the European Directives[101]. From this, one can conclude that this provision was meant to cover all possible types of discrimination and in that sense it could be called a universal provision on non-discrimination.

The Constitution also specifically singles out gender in Article 33, where it states that: "Men and women shall have equal rights in … economic life … in particular, regarding … employment and promotion, and shall have the right to equal compensation for work of equal value"[102]. This direct provision shows the recognition of and commitment to gender equality and non-discrimination in the most fundamental legal document.

It is also useful to consider some procedural rules that affect the above provisions. Firstly, Article 8(2) of the Constitution states that its' provisions are directly applicable, unless explicitly stated otherwise in the Constitution. Furthermore, according to the Article 188, the Constitutional Tribunal can adjudicate on the conformity of statutes with the Constitution and various international agreements. Any other court may also refer a question of the law regarding the conformity of statutes to the Constitutional Tribunal (Article 193). The same right is also accorded to any individual who believes that his rights have been infringed (Article 79). Although the Constitution stipulates general prohibition on discrimination of any kind, its' provisions are quite simple, so people tend to turn to the Labour Code for guidance in cases concerning discrimination at work.

3.1.2. The Labour Code Provisions on Non-Discrimination

3.1.2.1. Article 11^2 of the Labour Code

First and foremost, it should be pointed out that the Labour Code Act refers directly to the European Law by stating which Directives it transposed into the national law[103]. The first provisions on non-discrimination can be found in Article 11^2 of the Labour Code. It states that: "employees have equal rights in respect of the same performance of the same duties; this applies in particular to the equal treatment of men and women in employment"[104]. "Any discrimination in employment, direct or

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[99] The Constitution of the Republic of Poland, Article 32: http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/

[100] Ibidem

[101] The European Directives were discussed in Chapter 2

[102] Ibidem, The Constitution of the Republic of Poland, Article 33

[103] Labour Code 1974 (Dz. U. 1974 Nr 24 pod. 141, Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy), http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19740240141/U/D19740141Lj.pdf English translation available at :http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=45181

[104] Ibidem, Labour Code … Article 11^2

indirect, in particular in respect of gender, age … are prohibited"[105]. This wording suggests that the list of possible grounds of discrimination is open, which means it may be developed over time to adapt to new circumstances.

3.1.2.2. Prohibition against discrimination in employment

More detailed provisions are found in Chapter II of the Labour Code titled: Equal treatment in employment. Article 18^{3a} (Prohibition against discrimination in employment), paragraph 1 states that: "Employees should be treated equally in relation to establishing and terminating an employment relationship, employment conditions, promotion conditions, as well as access to training in order to improve professional qualification, in particular regardless of sex, age …". Paragraph 2 prohibits direct and indirect discrimination on any ground referred to in paragraph 1. "Direct discrimination is taken to occur where one employee, on one or more grounds referred to in paragraph 1, has been, is or would be treated in a comparable situation less favourably than other employees" (Paragraph 3). "Indirect discrimination is taken to occur where an apparently neutral provision, criterion, or practice places or would place all or a considerable number of employees belonging to a particular group on the grounds of one or more reasons referred to in paragraph 1 at a disproportionate disadvantage, or at a particular disadvantage in relation to the establishment or termination of an employment relationship, employment conditions, promotion conditions, as well as training in order to improve professional qualifications, unless that provision, criterion or practice is objectively justified by a legitimate aim to be achieved, and the means of achieving that aim are appropriate and necessary" (Paragraph 4). The remaining provisions of this article stipulate that 'encouraging or ordering' to discriminate as well as harassment and sexual harassment are also prohibited[106].

The Polish Supreme Court had made a differentiation between the notions of 'unequal treatment' and 'discrimination'. In a case from 2009[107], the Supreme Court had stated that: "discrimination **(**Article 11^3), unlike a 'normal' unequal treatment **(**Article 11^2), means less favourable treatment of an employee in relation to his characteristic or attribute described in KP (Labour Code) as a ground … of discrimination, in particular in respect of gender, age …"[108]. The Court stressed that this differentiation serves to point out the special nature of discrimination as it is considered a more serious form of unequal treatment. As a result the Court indicated that the "provisions of KP (Labour Code) relating to discrimination do not apply in cases of unequal treatment not caused by a

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[105] Ibidem, Article 11^3

[106] Harassment and sexual harassment are mentioned briefly because they are not a topic of this thesis.

[107] Supreme Court Judgement, I PK 28/09, 18 August 2009 (Wyrok Sądu Najwyższego - Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych z dnia 18 sierpnia 2009 r. I PK 28/09)

[108] Original quote: […] dyskryminacja (art. 11^3 KP) w odróżnieniu od "zwykłego" nierównego traktowania (art. 11^2 KP), oznacza gorsze traktowanie pracownika ze względu na jego cechę lub właściwość określaną w KP jako przyczyna […] dyskryminacji, w szczególności ze względu na płeć, wiek […]

discriminatory ground"[109]. The Court therefore requires that a person provides a ground for discrimination when applying for compensation for discriminatory treatment. There are two issues with that requirement which appear to limit the correct use of this provision in courts. First, it seems that often neither the claimants, nor their lawyers are aware that the non-inclusion of the discriminatory ground in their claim will cause the entire case to fail in court. However, it seems from the court's reasoning that not putting the ground of discrimination in the claim may result in a case being dismissed due to 'incorrect' formulation of the claim. Second, such 'incorrect' formulation seems very likely as the provisions on unequal treatment and discrimination are found in the same Articles (both in 11 & 18).

Therefore, only experts in non-discrimination law will be aware of such state of affairs. Even in the discussed case, the claimant (who herself was a legal advisor) did not seem to realise that such formal requirement existed and did not include it in her claim. This issue was also raised by Monika Tomaszewska in a Commentary to the Labour Code[110]. She indicated that although the prohibition of unequal treatment and discrimination are found in the same Chapter titled 'Equal treatment in employment' these two rules and their impact differ in that only discrimination based on a specific ground will enable an individual to receive compensation. Also Grzegorz Jędrejek stressed in his book[111] that such formulation of non-discrimination provisions might cause confusion. He also provided other examples of cases where the Court required a formal indication of a discriminatory ground[112], so this requirement should be regarded as having a general application in non-discrimination claims. This requirement, in my opinion, is reasonable on its own, but its' scope of application should be clearer, as it has proven to constitute a problem in compensation claims resulting from Article 18^{3d} of the Labour Code.

In order to prove that a person has been discriminated, there is a need for a 'comparator' which means that an employee must compare himself to someone else who is in a sufficiently similar situation. However, the Supreme Court has put a limitation on who a 'comparator' can be. It seems that one can only compare persons working for the same employer. In a case from 2013[113], the Court stated that: "since based on one contract of employment, you can be employed only by one employer, who is the recipient of the obligation to respect the rule of the equality of treatment of employees performing similar duties - the comparison of a legal situation of employees within

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[109] Original quote: […] przepisy KP odnoszące się do dyskryminacji nie ma mają zastosowania w przypadkach nierównego traktowania niespowodowanego przyczyną uznaną za podstawę dyskryminacji.

[110] Tomaszewska M., *Commentary to the Labour Code*, 2016, Art. 18(3(a)) section 8 (Tomaszewska M., (w:) *Kodeks pracy. Komentarz*, red. K. W. Baran, Warszawa 2016, Art. 18(3(a)) sekcja 8)

[111] Jędrejek, G., *Claims in relation to harassment, discrimination and sexual harassment*, Wolters Kluwer, Warsaw, 2017 (Jędrejek, G., *Dochodzenie roszczeń związanych z mobbingiem, dyskryminacją i molestowaniem*, Wolters Kluwer, Warszawa, 2017)

[112] Ibidem, p. 129-130

[113] Supreme Court Judgement, III PK 20/13, 15 November 2013 (Wyrok SN, III PK 20/13, z dnia 15 listopada 2013 r.): https://www.saos.org.pl/judgments/103548

Article 11^2 of the Labour Code can only take place within the same employer"[114]. Since Article 18 has been developed from Article 11, it seems that it applies in general to situations of discrimination. This requirement seems a bit odd. Although, a person who feels discriminated would usually compare themselves to some other employee within the company, there may not always be another person who performs the same duties and so can be regarded as being in a similar situation. This is especially true in smaller companies, where, for example, only one person may perform duties of a manager. If there is only one manager within the firm then he would have no chance to prove discrimination, even if another manager in the same kind of firm, performing the same duties has been given much better conditions of work. This issue was also raised by Magdalena Kuba in her book on the prohibition of discrimination in the workplace[115]. She too stressed that such situation could empower the employer to treat his employees in a less favourable manner compared to other persons performing the same duties, but for another employer[116]. Although this would mostly work for in cases of unequal pay, it may apply to cases regarding promotion, vocational training or termination of employment.

3.1.2.3. Behaviour that violates the principle of equal treatment

Article 18^{3b} defines the kind of behaviour that violates the principle of equal treatment. Technically, it does envisage the possibility of discrimination on multiple grounds, but it does not define it or treat it differently from discrimination on a single ground. According to paragraph 1, discrimination "means an employer treating an employee differently on one or more grounds referred to in Article 18^{3a} with the effect of, in particular: 1) terminating or rejecting the establishment of an employment relationship; 2) … not being selected for promotion or not being granted other work-related benefits; 3) not being chosen to participate in training …". The employer should then provide 'objective reasons' that justify such treatment. Paragraph 2 of this Article adds various exceptions which preclude discrimination. "The principle of equal treatment in employment is not violated by conduct aimed at legitimately differentiating the situation of an employee that includes" refusal of employment where a certain characteristic or characteristics "constitute a genuine and determining occupational requirement for the employee"; … "applying means that differentiate the legal position of an employee in respect of the protection of parenthood or disability; applying the criterion of the employment period in establishing employment and dismissal conditions, remuneration and promotion principles, as well as access conditions to training to improve professional qualifications which justifies a different treatment of employees in respect of age". Paragraph 3 states that positive action aimed at improving the opportunities of disadvantaged groups is not discriminatory. Also, organisations founded on the basis of certain ethics (e.g., churches) are allowed to restrict employment where a person's religion or world-view "are a real

[114] Ibidem

[115] Kuba M., *The Prohibition of discrimination in the workplace*, Wolters Kluwer, Warsaw 2017 (Kuba M., *Zakaz dyskryminacji w zatrudnieniu pracowniczym*, Wolters Kluwer, Warszawa 2017)

[116] Ibidem, p. 67-8

and decisive occupational requirement for an employee proportional to reaching a lawful aim of the differentiation of the situation of such a person" (Paragraph 4).

Article 18^{3b} provides for a burden of proof in discrimination claims. Normally, the burden of proof is found in the Civil Code[117] in Article 6 which states that the burden of proof rests on a person who brings the claim to court. However, this regulation is altered in cases relating to discrimination. The burden of proof may be shifted from an employee to an employer, but the claimant must first indicate facts from which it can be presumed that discrimination had occurred. Once more the requirement of providing a ground of discrimination is stressed[118]. It is sometimes called a 'reverse burden of proof' as it requires both sides to provide facts supporting their case. If the claimant is able to put forward enough facts to make discrimination likely, then the burden of proof shifts to the employer who must, in turn, provide 'objective reasons' for the differentiation that had occurred[119]. However, the Supreme Court doesn't always follow the same definition of burden of proof in discrimination cases. In a case from 2006[120] the Court stated that Article 18^{3b} should be interpreted in accordance with the EU Directive 2000/78 Article 10. The Court explained that: "the employee must substantiate the discriminatory treatment by indicating facts, from which the discrimination can be presumed" and only then "the employer can refute this claim by showing that he had objective reasons for doing so"[121]. However, in a judgement from 2007[122], the court added that, in order to shift the burden of proof, the person must also provide a 'cause' for discrimination, which probably means a ground, such as gender, for example. This seems to be more appropriate since the Supreme Court has often required not only facts, but also the ground for discrimination (discussed above). Still, it was indicated that this requirement is not expressly included in Article 18^{3b} of the Labour Code[123]. Although the burden of proof seems to be correctly interpreted by the Supreme Court, not all requirements for the shifting of the burden of proof are included in the Labour Code.

In accordance with Article 18^{3b}, there are certain situations where differentiation will not constitute discrimination based on gender. This is especially true in the event of a woman becoming a parent as there are certain jobs that such women cannot perform. In Article 176 of the Labour Code, women who are pregnant or breastfeeding are prohibited from performing work "that is especially

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[117] Civil Code 1964 (Dz.U. 1964 nr 16 poz. 93, Ustawa z dnia 23 kwietnia 1964 r. - Kodeks Cywilny): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640160093

[118] Tomaszewska M., … op. cit., Art. 18(3(b)) section 2

[119] Jaśkowski K., Maniewska E., *Commentary to the Labour Code*, Wolters Kluwer, Warsaw, 2018, Art. 18(3), section 3.2. (Jaśkowski K., Maniewska E., *Komentarz aktualizowany do Kodeksu Pracy*, Wolters Kluwer, Warszawa, 2018, Art. 18(3), sekcja 3.2.)

[120] Supreme Court Judgement, III PK 30/06, 9 June 2006 (Wyrok SN, III PK 30/06 z dnia 9 czerwca 2006 r.): https://prawo.money.pl/orzecznictwo/sad-najwyzszy/wyrok;sn;,ia,iii,pk,30,06,7439,orzeczenie.html

[121] Ibidem, Original quote: "Pracownik musi uprawdopodobnić jego dyskryminację wskazując fakty, z których ma ona wynikać" […], "pracodawca może obalić twierdzenie pracownika wskazując, iż w swoim postępowaniu kierował się obiektywnymi powodami".

[122] Supreme Court Judgement, II PK 180/06, 9 January 2007 (Wyrok SN, II PK 180/06 z dnia 9 stycznia 2007 r.): https://prawo.money.pl/orzecznictwo/sad-najwyzszy/wyrok;sn;izba;pracy;ubezpieczen;spolecznych;i;spraw;publicznych,ia,ii,pk,180,06,8164,orzeczenie.html

[123] Jaśkowski K., op. cit., section 3.2. (Jaśkowski K., op. cit., sekcja 3.2.)

strenuous or harmful to health"[124]. The Council of Ministers had provided a list of such prohibited works[125]. In this Council of Ministers Ordinance, pregnant women and women who breastfeed are prohibited from performing various kinds of hard physical work, work in hot, cold and changing micro-climate, work which exposes women to high level of noise, vibrations, electromagnetic field, work in elevated/lowered pressure, work with dangerous biological or chemical components, and finally work which may cause serious physical and psychological injury[126]. Therefore, it is clear that these reasons are objective and justified. There is little chance that the employers will misuse these provisions in order to not to employ women as their scope is specified and does not leave much room for interpretation. However, pregnancy and breastfeeding are temporary situations so pregnant women should not be barred from a permanent position due to this temporary situation. It seems there is a danger that women may be sometimes barred completely from a certain job that they would otherwise have access to only due to pregnancy or breastfeeding as there is no express obligation to consider their situation as temporary in terms of access to employment.

There are also many provisions protecting pregnant women. Article 177 para 1 of the Labour Code stipulates extensive protection against termination of employment of pregnant women and women on maternity leave. However, this protection is not absolute as there may be "reasons justifying termination without notice through her fault"[127] but in such a case the trade unions must agree to it. This provision is also quite vague, as the phrase "through her fault" is open to wide interpretation and not many employed persons in Poland are members of trade unions[128], so it is uncertain what protection the pregnant woman who is not a member of trade unions should be afforded. Also, regarding the maternity leave, a woman employee should return to the position she held before maternity leave, or to an equivalent position[129]. The same rule applies for childcare leave[130]. In accordance with the above articles, the termination of employment of pregnant worker or worker on maternity leave may only occur in the event of bankruptcy or liquidation of the employer[131]. Therefore, it seems that the protection against the termination of employment is quite strong, although there is no mention of any protection immediately after the maternity leave ends. An employee who has just ended maternity leave needs a steady employment, so there should be some provision, which for a specific period of time, protects such employee against termination.

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[124] Labour Code …, op. cit., Article 176 - Work prohibited for women

[125] Ordinance of the Council of Ministers (Rozporządzenie Rady Ministrów z dnia 3 kwietnia 2017 r. W sprawie wykazu prac uciążliwych, niebezpiecznych lub szkodliwych dla zdrowia kobiet w ciąży oraz kobiet karmiących piersią, Dz.U. 2017 poz. 796): http://dziennikustaw.gov.pl/DU/2017/0796

[126] Ibidem, Chapters I-VIII

[127] Labour Code …, op.cit., Article 177(1)

[128] Percentage of Polish workers who are members of the trade unions is estimated at a mere 11% - Centre for Social Opinion Research (Centrum Badania Opinii Społecznej, *Działalność związków zawodowych w Polsce,* Komunikat z Badań, nr 87, 2017, str.1): http://www.cbos.pl/SPISKOM.POL/2017/K_087_17.PDF

[129] Labour Code …, op. cit., Article 183^2

[130] Ibidem, Article 186^4

[131] Ibidem, Article 177 para 4

Is it also important to consider the maternity leave and its impact on women's access to employment. Maternity leave is at least 20 weeks in length (depending on the number of children), and women may be entitled to additional leave, but paternity leave is just 2 weeks and any extension is only possible if a woman decides to waive part of her maternity leave (after 14 weeks) in favour of the father. The parental leave is only equal between men and women when they raise a child[132]. Technically, such protection of women is desirable, but it may have unintended negative consequences, especially since paternity leave is so short. Employing women means that an employer will need to provide many concessions in case of pregnancy, while paternity leave is so short that it will not even be considered. This may discourage the employer from employing women. This has been called an institutional discrimination of women. The idea behind this is that women are entitled to so many different rights resulting from pregnancy that employers will tend to favour male candidates as they will be seen as 'available', more productive and less costly[133]. It is important to realise that this may be an issue and perhaps consider extending paternity leave.

As far as the age is concerned, there are also some provisions requiring positive action on the part of an employer. Article 39 of the Labour Code stipulates that: "an employer must not serve notice of termination on an employee who will reach the retirement age in not more then 4 years, if his employment period would enable him to receive a retirement pension upon reaching this age". The only exceptions from this rule are total incapacity to work[134] and bankruptcy or liquidation of the employer[135]. When such person reaches a retirement age, the protection of Article 39 ceases. However, it is stressed that the reaching of the retirement age cannot in and of itself be a reason for the termination of employment. Reaching the retirement age does not automatically mean that a person can be dismissed, because this event alone is not in any way connected to the productivity of such person, which could be an objective reason for dismissal[136]. "Gaining the right to pension can be, however, with the inclusion of all circumstances of the case, regarded as a justified criterion for choosing the employee for dismissal legitimised by the economical situation of an employer or other objective reasons"[137]. It must be stressed that it is still only a criterion and the termination of employment solely on the account of reaching the retirement age and gaining the right to pension will be considered a discriminatory treatment[138].

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[132] Ibidem, 180 & 182

[133] Sielska A., Institutional Discrimination of women on the polish labour market, *Wroclaw Economic Review* No 21(2), 2015, p. 52-3 (Sielska A., Instytucjonalna dyskryminacja kobiet na polskim rynku pracy, *Wroclaw Economic Review,* 21(2), 2015, s. 52-3)

[134] Labour Code …, op. cit., Article 40

[135] Ibidem, Article 41[1]

[136] Gaining the right to pension as a discriminatory ground based on the employee's age, *Monitor of the Labour Law Magazine*, No 9, 2016 (Uzyskanie prawa do emerytury jako przesłanka dyskryminacji z uwagi na wiek pracownika, *Monitor Prawa Pracy*, nr 9, 2016): http://czasopisma.beck.pl/monitor-prawa-pracy/aktualnosc/uzyskanie-prawa-do-emerytury-jako-przeslanka-dyskryminacji-z-uwagi-na-wiek-pracownika/

[137] Ibidem, Original quote: "Uzyskanie prawa do emerytury może być natomiast, z uwzględnieniem wszystkich okoliczności sprawy, uznane za usprawiedliwione kryterium wyboru pracownika do zwolnienia uzasadnionego sytuacją ekonomiczną pracodawcy lub innymi obiektywnymi względami."

[138] Resolution of the Supreme Court, II PZP 13/08, 21/01/2009 (Uchwała Składu Siedmiu Sędziów Sądu Najwyższego z dnia 21 stycznia 2009 r., II PZP 13/08): http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/II%20PZP%2013-08.pdf

3.1.2.4. Provisions on equal pay, right to compensation and the prohibition of retaliatory actions by an employer

Article 18^{3c} concerns equality in remuneration and it is important to point out that it has been singled out as needing separate provision indicating the seriousness of this problem. Article 18^{3d} states that in case of the violation of principle of equal treatment in employment, a person "has the right to compensation of at least the amount of the minimum remuneration for work, determined in separate provisions". It must be stressed that there is no upper limit for the amount of compensation that may be awarded, which indicates the importance of the equality and non-discrimination provisions. Finally, Article 18^{3e} serves to ensure that an employee who had exercised his rights, or a person who had helped such employee will not face negative consequences as a result of these actions by prohibiting any form of retaliation by an employer.

3.1.3. The scope of protection against discrimination

This section concerns the general scope of protection and the interpretation of the non-discrimination provisions in Article 18^3 of the Labour Code. The focus will be on the access and termination of employment, as well as the promotion in employment and, to a lesser extent, the interlinked issue of vocational training. In addition, the obligation of the employer to counteract discrimination will be introduced and explained.

3.1.3.1. The scope of protection against discrimination with regard to access to employment

The process of recruitment focuses on choosing the best candidate for a given position within the company. In accordance with the Polish Constitution, the labour market is based on the freedom of economic activity[139], which means that employers are free to regulate who they employ in order to achieve their economic aims. However, certain limitations can be imposed upon this freedom[140]. One such limitation is found in the provisions on non-discrimination relating to the access to employment[141], so that an employer cannot choose a less qualified man over a more qualified woman just because he does not want to employ women. Such situation would constitute discrimination based on gender in access to employment. It is therefore important that the employer is aware of the equality and non-discrimination provisions before he begins the recruitment process.

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[139] The Constitution of the Republic of Poland …, op. cit., Article 20

[140] Ibidem, Article 22

[141] Labour Code …, op. cit., Article 18^{3a} (para 1)

Discrimination in the recruitment process may either be direct or indirect. Gender and age are among the most frequent grounds of discrimination in the recruitment advertisements[142]. As an example, direct discrimination based on gender occurs where the job description contains an explicit requirement that only male candidates will be considered. The indirect discrimination can be harder to see as it usually occurs in subtle ways. Sometimes, there may be no mention of any gender requirement, but other requirements may make it possible for only a male candidate to succeed in gaining a certain position. In so far as age is concerned, discrimination usually occurs by putting minimum or maximum age as a requirement. However, not all such requirements will breach the non-discrimination provisions, as some age requirements are set by law. Candidates for judges must be at least 29 years old[143] and candidates for prosecutors at least 26 years old[144]. These requirements seem reasonable as it is doubtful that younger persons could have enough knowledge and expertise for such positions. Still, in order to avoid age discrimination it is better to require a number of years of experience, rather than a certain age. There is also a "criterion of the employment period in establishing employment … which justifies a different treatment of employees in respect of age"[145]. It means that for certain senior positions within a company, longer period of employment (and the knowledge and expertise that comes with it) may be necessary in order to fulfil the requirements for such positions. It will therefore exclude younger persons from consideration, but it is justified and therefore does not violate the prohibition on discrimination.

Furthermore, an employer will not violate the non-discrimination provisions if "the type of work or the conditions of its performance … constitute a genuine and determining occupational requirement for the employee"[146]. It is clear that, for example, a secretary may be either a man or a woman and so it is unreasonable to insist on employing women only for such a position. However, hard physical or dangerous work may not be available to older persons as they will not be able to perform their duties well. In case of women, this issue is more complex. Although, few women might perform such work in practice, that does not mean that women in general should be regarded as being unable to do so. Another example might be an all male or an all female prison, where it might be more advisable to employ a person of the same gender as the inmates.

It is also important to consider the limitation on access to employment in case of organisations with certain ethics based on world-view, creed, religion. Where a type of activity that such organisations

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[142] Ciupa S. W. The violation of prohibition of discrimination in the workplace in the practice of using recruitment advertisements, Part I, *Monitor of the Labour Law Magazine*, No 11, 2006 (Ciupa S.W., Naruszenie zakazu dyskryminacji w zatrudnieniu w praktyce korzystania z ogłoszeń rekrutacyjnych, Cz. 1. Dyskryminacja ze względu na płeć, wiek, niepełnosprawność, wymóg spełnienia określonych obowiązków lub innych rygorów, *Monitor Prawa Pracy*, nr 11, 2006)

[143] The law on the system of the courts, Act from 27 July 2001, Article 61(1(5)), (Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych, Dz.U. 2001 nr 98 pod 1070, Artykuł 61(1) punkt 5): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20010981070

[144] The law on prosecutors, Act from 28 January 2016, Article 75(1(5)), (Ustawa z dnia 28 stycznia 2016 r., Prawo o prokuraturze, Dz.U. 2016 pod. 177, Artykuł 75(1) punkt 5): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000177

[145] Labour Code …, op. cit., Article 18^{3b} para 2(4)

[146] Ibidem, Article 18^{3b} para 2(1)

conduct is focused around a certain world-view, creed or religion, then sharing the same beliefs or views will be a "real and decisive occupational requirement for the employee, proportional to reaching a lawful aim of the differentiation of the situation of such a person"[147]. In such a case, it might not be discriminatory for an anti-war organisation to reject an application from a retired female soldier. It would be really hard to argue that discrimination based on gender and/or age had occurred. Even if the discrimination on those grounds takes place quite often, the determining factor in rejecting the candidate for employment would in this case be the world-view (which could be inferred from a long-term employment as a soldier).

There are also two other criteria of selection in the recruitment process that have negative effects on a person's access to employment (especially for women and older people). First criterion is 'disposition and mobility', which could mean that such job requires frequent business trips. If it is a genuine requirement resulting from the type of work, then it may be justified. However, it can potentially be discriminatory on the basis of gender. It would exclude pregnant women and women with small children as the scope of protection afforded to them under the Labour Code provisions might be an excuse not to employ them. Since women cannot work at night during pregnancy or need to take care of children, such requirement might exclude them from employment. Second criterion, though it does not occur too often, is a 'regulated family situation'[148]. It is not exactly clear what that means, but it probably again excludes pregnant women or women with small children as they have a lot of family responsibilities and so the employer might need to be flexible if he decides to employ them and it seems that this is exactly what he wants to avoid.

It is useful to also consider two cases that did not expressly discuss the provisions on access to employment with regard to non-discrimination provisions, but nonetheless have impact on gender discrimination. In the Supreme Court Judgement (II PK 181/10, 05/05/2011)[149], it has been established that a person may claim compensation due to the discriminatory treatment in access to employment, but the court has now made it clear that this protection and the responsibility of the employer also extends the situation where the recruitment had been conducted by an 'outside agency' acting on the behalf of the employer. For women, it provides more protection in the recruitment process as they are more vulnerable than if they were already in employment.

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[147] Ibidem, Article 18^{3b} para 4

[148] Ciupa S. W., The violation of prohibition of discrimination in the workplace in the practice of using recruitment advertisements, Part II, *Monitor of the Labour Law Magazine*, No 12, 2006 (Ciupa S.W., Naruszenie zakazu dyskryminacji w zatrudnieniu w praktyce korzystania z ogłoszeń rekrutacyjnych, Cz. 2, Dyskryminacja ze względu na określoną sytuację kandydata, posiadanie określonych kwalifikacji lub statusu, posiadanie określonych cech osobowych, *Monitor Prawa Pracy*, nr 12, 2006): http://czasopisma.beck.pl/monitor-prawa-pracy/artykul/naruszenie-zakazu-dyskryminacji-w-zatrudnieniu-w-praktyce-korzystania-z-ogloszen-rekrutacyjnychbr-cz-2-dyskryminacja-ze-wzgledu-na-okreslona-sytuacje-kandydata-posiadanie-okreslonych-kwa/

[149] Wyrok Sądu Najwyższego z dnia 5 maja 2011 r., II PK 181/10: http://sn.pl/Sites/orzecznictwo/Orzeczenia1/II%20PK%20181-10-2.pdf

Another case of the Supreme Court (II UK 150/05, 14/02/2006)[150] should also be considered. This case did not directly invoke the prohibition of discrimination, but it is nonetheless important as it discussed the issue of pregnant women's access to employment. It concerned a pregnant woman who wished to gain employment in order to also gain the guaranteed maternity protection. The claimant was initially holding a 10% in the company run by her family member. When she became pregnant, she decided to enter into an employment relationship in order to receive the maternity protection resulting from an employment relationship. The Supreme Court said that such behaviour was not illegal and was in fact reasonable, both from the personal and social point of view. "Pregnant women are granted protection against the refusal to employ due to pregnancy, and the refusal to employ on this ground is treated as discrimination based on gender". It must also be stressed that in Poland, maternity protection resulting from an employment relationship is necessary if the father (even when he is employed) is to gain the right to a paternity leave longer than his individual right to two-weeks leave[151]. In such situation, it becomes all the more reasonable for a pregnant woman to seek employment only to gain maternity rights. This case not only discussed the illegality of discriminating women on account of pregnancy, but also allowed women to seek employment just to gain maternity rights. This is important in a sense it may encourage women to seek employment even when they are pregnant and also allow the fathers to share some of the responsibility in raising children as they will have a possibility to make use of some of the maternity leave.

3.1.3.2. The scope of protection against discrimination with regard to promotion and vocational training

In accordance with Article 18^{3a} "employees should be treated equally in relation to … promotion conditions, as well as access to training in order to improve professional qualifications, in particular regardless of sex, age …"[152]. These two issues are interconnected. Without access to vocational training which improves the employee's professional qualifications it is very hard to be promoted to a higher post, especially if other employees had been given this opportunity. Article 18^{3b} of the Labour Code also states that the violation of the principle of non-discrimination will occur where the employer treats an employee differently based on prohibited ground with the effect of denying her/him the access to promotion and vocational training[153]. It is important to bear in mind the provision of Article 17 of the Labour Code, which states that the "employers are obliged to enable employees to improve their professional qualifications"[154]. The formulation of this provision suggests that although, the employer does not have to provide vocational training, it is advisable that he should enable employees to participate in them. When choosing the employees who will

[150] Wyrok Sądu Najwyższego - Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych z dnia 14 lutego 2006 r., III UK 150/05

[151] This issue will be discussed in depth later on in this Chapter.

[152] Labour Code …, op. cit., Article 18^{3a} (para 1)

[153] Ibidem, Article 18^{3b} para 1(2 & 3)

[154] Ibidem, Article 17

receive vocational training, the employer should therefore respect the principle of non-discrimination.

The refusal of access to vocational training, which usually also results in refusal of promotion, can be very prevalent among older workers as employers might not think it is worth investing in them as they will leave employment soon. Therefore, when vocational training is offered and only one person out of two or more in a comparable situation is chosen, it may constitute a violation of non-discrimination provisions, unless the employer presents objective reasons for doing so. It was also pointed out that there are barriers in the promotion of older workers, not even due to the lack of vocational training, but due to financial costs of an employer. The longer the employment period, the more knowledge and experience is gained and that should lead to promotion. However, for an employer, the higher the position of an employee in the company, the more they need to be paid, which discourages the employer from promoting such employee[155]. As a result, employers may not want to enable older workers to access vocational training not only because they would rather invest their money in younger workers, but also because vocational training usually leads to the promotion of employees and so higher earnings.

3.1.3.3. The scope of protection against discrimination with regard to termination of employment

In accordance with Article 18^{3a} of the Labour Code "employees should be treated equally in relation to … terminating an employment relationship"[156]. This basically means that the employer, in choosing to dismiss an employee, must take into account only the objective reasons, such as an improper performance of duties. If an employer terminates an employment on a prohibited ground, this will constitute discrimination in the workplace. In the event that an employer plainly says that employment is terminated due to one of the grounds, direct discrimination occurs. It may happen often with older workers who have gained the right to pension. They are being dismissed simply because of their age. The employer might not even realise that such behaviour amounts to a direct discrimination in the workplace. The case of indirect discrimination in the termination of employment seems to be more complex. If only one person occupied a specific post within the company, then it is hard to see who could be a possible 'comparator' in such a case. According to the Supreme Court[157], an employee can only compare his/her situation to that of another employee within the company. In another case[158], the Supreme Court stated that the "criterion of choosing the employees for dismissal ought to be objective and just, and the employer … should indicate that he took all those employees into account, whom the reasons for termination of employment

[155] Kuba M., *The Prohibition of discrimination in the workplace* …, op. cit., p. 156

[156] Labour Code …, op. cit., Article 18^{3a} (para 1)

[157] Supreme Court Judgement, III PK 20/13, 15 November 2013 (Wyrok SN, III PK 20/13 z dnia 15 listopada 2013 r.): https://www.saos.org.pl/judgments/103548

[158] Supreme Court Judgement, I PK 243/12, 14 March 2013 (Wyrok SN, I PK 243/12 z dnia 14 marca 2013 r.)

concern."[159] Therefore, this 'group' should be treated in an equal manner. This might be helpful in some cases, but it is still problematic when only one person had worked at a specific post. Unless economic reasons justify the liquidation of such post, it is not clear who can a dismissed employee compare himself/herself to in order to provide some proof of discrimination.

It is also important to discuss the issue of 'objective reasons' as a cause of termination of employment. In the Supreme Court Judgement (I PKN 780/00, 10/01/2002)[160] the Court did not expressly refer to the non-discrimination provisions, but considered the type of reasoning on the part of the employer that could make the employee's dismissal unlawful. The Court stated that sometimes the dismissals may be driven by economical considerations. The Court's role in such a case is to analyse the criteria used by an employer in choosing a person for dismissal or the circumstances that led to a particular decision. In the present case, the claimant was absent from work due to illness, but otherwise had been a qualified professional and had performed his duties well. During his absence, the rest of the team continued to work without interruptions or delays. The managerial staff decided that there is a possibility of reducing staff and dismissed the claimant. Except for the general economic reasons in reducing the number of staff, no specific reason was put forward as to why the claimant was dismissed. The Court stated that additional circumstances need to be considered, such as which employee will suffer the most severe consequences as a result of the dismissal.

Although this case did not invoke discrimination, it is clear that it could be used in by employees who may have been dismissed due to 'objective reasons'. It limits the employers' ability to dismiss anyone due to economic considerations without taking into account their personal situation. This means that women who are earning less than men or who have children have more protection against dismissal. This reasoning of the court has a potential to positively impact women who are usually in a more vulnerable or disadvantaged position, and may prevent discrimination on the ground of gender. In yet another case[161], the Court also confirmed that although the availability of an employee for the performance of his duties during the normal hours of work may be a criterion for dismissal, the simple absence from work due to illness or the need to take care of children will not be accepted as fulfilling this criterion. Again, as women in Poland are still largely responsible for bringing up the children, their dismissal due to the family reasons will constitute gender discrimination. "In Poland in practice there are many known instances of dismissing women in the first place in case of the adoption of group dismissals by the employers"[162]. This fact makes these

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[159] Ibidem

[160] Wyrok Sądu Najwyższego - Izba Administracyjna, Pracy i Ubezpieczeń Społecznych z dnia 10 stycznia 2002 r. I PKN 780/00

[161] Supreme Court Judgement 23/01/2001, I PKN 191/00 (Wyrok Sądu Najwyższego - Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych z dnia 23 stycznia 2001 r. I PKN 191/00): https://prawo.money.pl/orzecznictwo/sad-najwyzszy/wyrok;sn;izba;pracy;ubezpieczen;spolecznych;i;spraw;publicznych,ia,i,pkn,191,00,4678,orzeczenie.html

[162] Szewczyk H., *Gender Equality in Employment*, Wolters Kluwer, Warsaw 2017, p. 385 (Szewczyk H., *Równość płci w zatrudnieniu*, Wolters Kluwer, Warszawa 2017)

two cases and their reasoning all the more important for women as they are able to fight against discriminatory treatment by the employers.

Furthermore, it was pointed out that the employer has a duty to provide reasons for the termination of employment for an indefinite period of time only. If the employment is for a definite period of time, no such explanation is needed[163], which means that unlawful dismissal might occur, but since an employer does not need to provide reasons for it, he is able to get away with it. Although the employer has every right not to extend an employment relationship, he ought to give reasons for doing so in all cases, otherwise a whole group a people only have recourse to non-discrimination provisions as the employer had technically ended an employment relationship in accordance with the law. Since no reasons need to be given for the termination, it might also be more difficult to provide facts on the basis of which the burden of proof will shift to the employer.

This issue was discussed in the Supreme Court Judgement (II PK 225/13, 27/05/2014)[164]. The Supreme Court discussed the permissibility of entering into multiple contracts of employment for a definite period of time. In Polish law, contracts for an indefinite period of time are protected in a way that an employer must give notice of dismissal much earlier than in case of contracts for a definite period of time, where such notice can be given just two weeks prior to the termination of employment. In addition, in case of indefinite contracts of employment, an employer must give reasons for the dismissal, while he has no such obligation in case of definite contracts of employment. Therefore, an employee on a definite contract of employment is not afforded the same protection against the termination of employment and is at a far greater risk of being discriminated against. For example, an employer might use this against women in that their contract for a definite period of time will be extended several times, but then an employer may simply dismiss them for whatever reason he sees fit, whether that would be an objective reason or discrimination based on gender (e.g., parenthood), it is hard to prove when no reasons for dismissal were given. The Supreme Court recognised that such differential treatment based on the type of contract of employment may violate the non-discrimination provisions contained in Articles 11^{3} and 18^{3a} of the Labour Code. It is important as the lack of employment security, which seems to be a deliberate action by the employer to gain flexibility in the process of dismissal, may in some circumstances constitute discrimination with regard to termination of employment. Still, the non-discrimination provisions offer a possibility of claiming compensation to anyone whose employment might have been terminated due to a discriminatory ground. Here, a positive development took place in 2016, when the Labour Code was amended to limit the possibility of entering into multiple contracts for a definite period of time. According to statistics, women are more often employed under such

[163] Kuba M., *The Prohibition of discrimination in the workplace* …, op. cit., p.159-160

[164] Wyrok Sądu Najwyższego z dnia 27 maja 2014 r. II PK 225/13: http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20PK%20225-13-1.pdf

contracts than men[165], so this amendment has a potential to improve women's situation on the labour market.

Article 18^{3d} states that in case of the violation of principle of equal treatment in employment, a person "has the right to compensation of at least the amount of the minimum remuneration for work, determined in separate provisions". The claim of compensation in the event of unlawful dismissal under Article 18^{3d} is usually accepted as long as it has been brought within a required period of time. Until 2017, this period used to be just 7 days[166]. However, it has changed and now Article 264 of the Labour Code extends this period to 21 days. This gives a discriminated person more time to bring a claim and so improves the effectiveness of non-discrimination provisions relating to the termination of employment.

The protection against the termination of employment in cases of discrimination may have been extended even further by the Supreme Court. In its' Resolution from 2016[167], the Court stated that: "The bringing of a claim by an employee in the event of termination of employment … is not a condition of receiving compensation envisaged in Article 18^{3d} of the Labour Code resulting from a discriminatory ground in the termination of employment or a discriminatory reason for choosing the employee for dismissal."[168] Non-discrimination provisions have therefore been afforded a special protection. It may stem from the fact that a dismissed employee might not realise at the time of the termination of employment that he/she was discriminated against. In any case, it shows a growing understanding of a complex and serious problem of discrimination in relation to the termination of employment.

3.1.3.4. Employer's duty to counteract discrimination

It is also important to stress that one of the duties of the employer is to "act against discrimination in employment, in particular in respect of sex, age …"[169]. It means that an employer must not only not discriminate himself, but also that he must counteract discrimination in the workplace, even if it comes from other employees. One of the ways in which this can be done is to inform his employees about their rights and how to act when discrimination occurs. Employer is in any case obliged to

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[165] *The Law Magazine*, Changes with regard to contracts of employment: The type of contract is influenced by age and gender, but it will change, 2016 (*Gazeta Prawna,* Zmiany w umowach o pracę: Na rodzaj kontraktu wpływ ma wiek i płeć, ale to się zmieni, 2016): http://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/924929,zmiany-w-umowach-o-prace-2016-wiek-plec.html

[166] *Lege Artis Magazine* (*Czasopismo Lege Artis*): http://czasopismo.legeartis.org/2017/01/21-dni-wniesienie-odwolania-sad-pracy.html

[167] Resolution of the Supreme Court, III PZP 3/16, 28 September 2016 (Uchwała składu siedmiu sędziów Sądu Najwyższego z dnia 28 września 2016 r., III PZP 3/16): http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20PZP%203-16.pdf

[168] Ibidem, p. 1-2, Original quote: "Wniesienie przez pracownika odwołania od wypowiedzenia […] nie jest warunkiem zasądzenia na jego rzecz odszkodowania z art. 18 k.p. z tytułu dyskryminującej przyczyny wypowiedzenia lub dyskryminującej przyczyny wyboru pracownika do zwolnienia z pracy".

[169] Labour Code …, op. cit., Article 94(2b)

provide such information to the employees[170]. It is also important to stress that the employer will be held responsible for not preventing discrimination. It has been noticed that the employer's duty to counteract discrimination is somewhat vague as it doesn't explain the scope of this obligation, or what exactly the employers should do to fulfil it. Its' scope was explained by H. Szewczyk and M. Fajkis[171]. They said that the employer must not only inform the employees about their rights in regard to the provisions on equal treatment and non-discrimination, but must also take specific actions to prevent and/or eliminate all forms of discrimination in the workplace. Although, the Labour Code does not provide any guidance here, one such action could be to devise anti-discrimination policies and implement them through, for example, managerial staff training. An employer must also help the victims and may punish the perpetrator, and that could mean changing the organisation of work, so as to separate both parties. Those responsible for discrimination might face negative consequences such as being degraded or simply dismissed. Another suggested way to counteract discrimination is to create anti-discrimination procedures based on two things, namely the complaint procedure and preventive action. In addition, once the discrimination has occurred, a mediation could be useful. The employer, in this regard, can employ a psychologist, cooperate with trade unions or organisations specialising in this problem[172]. This is certainly not an exhaustive list of actions that the employer can take, but due to the vagueness of the provisions in the Labour Code, it is certainly very helpful in eliminating discrimination in the workplace. It is also in the best interest of the employer as there is a tendency in the judiciary to hold the employer responsible for the result (an act of discrimination), even when various anti-discrimination tactics were in place[173].

3.1.3.5. Workers with family responsibilities

It is also important to mention the issues of the parents raising children. They are at risk of losing employment due to long absence on the labour market and this affects primarily women. For now, due to the State's failure in the provision of childcare institutions, the parents must largely cope with taking care of children on their own, especially at the early stages. There are several provisions in the Labour Code that facilitate the reconciliation of work and family life.

First, Article 67[174] on teleworking allows a person to work largely outside of the actual workplace. Such place may well be the employee's home, which means that the teleworker can conduct his work and take care of the child since he/she is at home. The parent is able to pursue professional

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[170] Ibidem, Article 94(1)

[171] Fajkis M., Szewczyk H., The duty of an employer to counteract discrimination of employees [in:] *Chosen duties of an employer towards employees and trade unions*, ed. Szewczyk H., Instytut Wydawniczy EuroPrawo, Warsaw, 2016, pp. 79-109 (Fajkis M., Szewczyk H., Obowiązek pracodawcy przeciwdziałania dyskryminacji pracowników, [w:] *Wybrane obowiązki pracodawcy wobec pracowników i związków zawodowych*, red. Szewczyk H., Instytut Wydawniczy EuroPrawo, Warszawa 2016, s. 79-107), http://www.iwep.pl/1134_wybrane-obowiazki-pracodawcy-wobec-pracownikow-i-zwiazkow-zawodowych-p-452.html

[172] Ibidem, p. 89-93

[173] Tomaszewska M., … op. cit., Art. 18(3(a)), section 5

[174] Articles 67^5 to 67^{17}

career while also being able to take care of the child without the need for any special arrangements. Second, Article 142 stipulates that upon the employee's written request, an employer may arrange an individual working timetable within the employee's working time system. It provides a lot of flexibility and ensures the employee's individual situation and needs will be considered. Third, Article 143 provides for a shortened working week. The employee may perform work for less than 5 days a week, but his daily working time will be extended (no more than 12 hours). Although, such schedule is limited to a 1 month period, it means more flexibility for an employee as he may work more on some days and be free on otherwise normal working days. It is perhaps even more important that such employee still works full time (so does not lose earnings), but may gain some free days in order to take care of the child. Fourth, Article 144 introduces yet another system, where the work is being conducted on Fridays, Saturdays, Sundays and during Holidays. Again, daily working time cannot exceed 12 hours and it is limited to a 1 month period, but should the parents combine Article 143 and 144, they may be able to take care of the child without any outside support. It is, of course, quite tiresome and harmful to the relationship between the parents, but without any other options, it may become necessary. Finally, Article 186^7 para 1 states that an employee who is entitled to a childcare leave may file a written request to the employer to reduce working time to not less than half of the full-time schedule in the period of the employee's entitlement to the childcare leave. Moreover, it is actually an obligation of the employer to accept such requests. Although, the employee does not work full-time, he still remains at work (does not lose skill or knowledge) while also being able to better take care of the child.

All these flexible forms of work are very important for women in particular, as they are normally at a greater risk of discrimination because of maternity. They are expected to take care of the children, but upon returning to work may be discriminated against by employers. Ability to continue working while raising a child decreases chances of gender discrimination.

3.1.3.6. Gender equality bodies

There are two bodies for the promotion of equal treatment in Poland, namely the Ombudsman (Commissioner for Human Rights Protection) and the Government Plenipotentiary for Equal Treatment. First, the Ombudsman's Office is an independent body that prepares reports annually on its activities. Since 2012, these reports include a special section dedicated to activities in relation to equality and non-discrimination[175]. However, it is responsible for human rights in general, so cannot dedicate full attention to the principle of equality and non-discrimination. The Polish Constitution, Article 80 states: "In accordance with principles specified by statute, everyone shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority". Therefore, its' power is limited to cases between a public authority and the individual. He can only provide informational support in cases between

[175] European Commission, Country Report, Non-discrimination, Poland, 2017, p. 120: https://publications.europa.eu/en/publication-detail/-/publication/86ec1f65-c501-11e7-9b01-01aa75ed71a1/language-en/format-PDF/source-68609528

individuals. Tasks of the Ombudsman include: safeguarding the observation of the equal treatment principle; provision of support to victims of discrimination; and preparing independent reports and recommendations regarding discrimination-related problems. The Ombudsman has no legislative power, but may "apply to competent authorities for undertaking a legislative initiative, issuing or amending acts"[176].

Second, the law concerning the Government Plenipotentiary for Equal Treatment was enacted by the Council of Ministers Ordinance in 2008, while the Equal Treatment Act (ETA) had provided for some new tasks for the Plenipotentiary. It must be stressed that the Plenipotentiary is operating within the Chancellery of the Prime Minister and as such is not independent[177]. The 2008 Council of Ministers Ordinance[178] stipulates that the Plenipotentiary's duties are: realisation of the government policy on equal treatment; providing opinions on the projects of legal acts in the area of equal treatment; conducting analysis of legal solutions concerning equal treatment; taking action aimed at the elimination or limitation of the consequences of the violation of the principle of equal treatment; analysis of the legal and social situation; monitoring the situation concerning equal treatment; and promotion of the principle of equal treatment. The ETA adds additional competences[179], such as: the cooperation with regard to issues of equal treatment with other countries, international organisations and institutions; cooperation in the preparation of reports on the compliance with international agreements; presenting opinions on the possible ratification of international agreements; introducing projects or programmes concerning equal treatment; initiating, realising, coordinating or overseeing programmes on equal treatment.

The ETA had named both the Ombudsman and the Plenipotentiary as bodies responsible for the realisation of the equal treatment principle[180]. This may constitute problems, as there should be one specialised agency within a single ministry with all the necessary competencies to better organise and coordinate actions towards the fulfilment of the principle of equal treatment, especially since the Plenipotentiary is not an independent body. The task of accelerating equality would be better performed by the Ombudsman who is independent of the Government. Moreover, both bodies face problems with regard to the fulfilment of their agendas. "The Ombudsman faces problems related to the budget of the office and political attacks … The role of the Plenipotentiary has been marginalised. The Office was combined with the newly created office of the Plenipotentiary for

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[176] Commissioner for Human Rights (Ombudsman): https://www.rpo.gov.pl/en/content/what-does-commissioner-human-rights-do

[177] European Commission, Country Report, Non-discrimination, Poland, 2017… op, cit., p. 123

[178] Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania, Dz.U. 2008 nr 75 poz. 450: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20080750450

[179] The Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment, Chapter 3, Articles 21(3-7) (Dz.U. 2010 Nr 254 poz. 1700, Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20102541700

[180] Ibidem, Chapter 3, Article 18

Civil Society"[181] causing the Plenipotentiary to have many new tasks unrelated to discrimination. Though not without issues, both these bodies should be seen as having positive impact as they contribute towards the realisation of the principle of equal treatment in Poland.

3.1.4. The Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (ETA)[182]

This Act concerns, for the large part, equality and non-discrimination outside of the employment context, but it does contain some labour provisions. Although many non-discrimination provisions were introduced in the Labour Code prior to and after the accession of Poland to the EU, discrimination in other spheres of life was left largely untouched. The ETA was created only as a result of a pressure by the European Commission to extend protection against discrimination beyond the field of employment[183]. ETA provisions are in some respects different in scope to those in the Labour Code. In Article 1, ETA stipulates that the protected grounds are sex, age and couple other grounds, but the formulation of this provision seems to suggest that, unlike in the Labour Code, the list of the grounds of discrimination is exhaustive. With relation to labour rights, it then states in Article 2 that Chapters 1 and 2 of the Act "do not apply to employees in the scope regulated with the provisions" of the Labour Code. It basically means that it is only useful when corresponding provisions do not already exist in the Labour Code.

There are a few labour provisions in the ETA. The first one is found in Article 4 where it is stated that ETA is applicable to the "access and use of … labour market instruments and labour market services … on the promotion of employment and labour market institutions". As such, it could potentially have some positive effects on the issue of access to employment (particularly in regard to access to occupation), especially for women and older people. Other provisions in regard to non-discrimination are found in Articles 12, 13 and 14, which are all interconnected. Article 12 states that violations of the principle of equal treatment in relation to pregnancy and all kinds of parental leaves are subject to compensation claims found in Article 13, which in turn says that compensation claims will be governed by the provisions of the Civil Code. The only (important) exception to this rule is Article 14 which seems to be referring to, though not explicitly, the rule of the shared burden of proof found in the Labour Code provisions. Article 14 states that Civil Code will govern the burden of proof, but it substantially alters the Civil Code's Article 6 provisions in relation to ETA, as the violation of the principle of equal treatment must first be made probable by the accusing party and then the accused must prove that no violation had occurred. In Article 6 of the Civil Code,

[181] European Commission, Country Report, Non-discrimination, Poland, 2017…, op. cit., p. 149

[182] The Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (Dz.U. 2010 Nr 254 poz. 1700, Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20102541700

[183] Tomaszewska M., … op. cit., Art. 18(3(a)), section 4

it is the person who claims that the violation had occurred who has to prove his/her case in court[184]. The sharing of the burden of proof is provided for in the Labour Code's Article 18^{3b} on discrimination in the workplace. As ETA deals with equal treatment and non-discrimination it is quite reasonable that it borrows this rule from the Labour Code provisions on non-discrimination.

Although the ETA had widened the scope of non-discrimination law in Poland beyond the field of employment, it seems to have little practical effect. It was stressed in the 2017 European Commission's Country Report on Poland[185] that few cases had been brought to the courts on the basis of ETA. It was suggested that this is due to its' limited protection as it covers only material damage, while non-material damage should, but was not included in it. The only other alternative then are the Civil Code provisions, but the burden of proof there rests entirely on the claimant[186], which is highly problematic in discrimination cases, which is why there is a shared burden of proof both in ETA and the Labour Code. Perhaps with this small change, ETA would be used more often.

3.2. The Courts - Law versus Practice

First, it is important to stress that there aren't that many cases coming to court that concern discrimination. "In 2014, about 1000 cases were brought to the labour courts, but the claimants (employees) were successful only in 44 compensation cases"[187]. Second, most of them are claims of gender discrimination due to sexual harassment, while the number of general discrimination cases brought by men and women is similar. "For example, in 2013, out of about 900 cases brought to the labour courts, 482 were brought by men"[188]. There are also about 2000 complaints a year of discrimination and harassment coming to the National Labour Inspectorate, most of which concern unequal pay, discrimination in access to and termination of employment and which most often put forward gender as a ground of discrimination[189]. It is therefore clear that the fact that there are few cases coming to the courts does not mean that discrimination doesn't occur. It simply means that people prefer to use other means of support. Although there isn't a glaring disproportion between male and female claimants in the courts, women were far more likely to complain to the National Labour Inspectorate. Also, as indicated, very few court cases are successful so it might actually be more practical to go elsewhere in the event of discriminatory treatment in the workplace. To sum up, discrimination in employment in Poland may not be as prevalent as it is in other countries, but it is nonetheless a serious problem, which affects women more often than men.

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[184] Civil Code 1964 (Dz.U. 1964 nr 16 poz. 93, Ustawa z dnia 23 kwietnia 1964 r. - Kodeks Cywilny): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640160093

[185] European Commission, Country Report, Non-discrimination, Poland, 2017: https://publications.europa.eu/en/publication-detail/-/publication/86ec1f65-c501-11e7-9b01-01aa75ed71a1/language-en/format-PDF/source-68609528

[186] Ibidem, p. 9

[187] Szewczyk H., *Gender Equality in Employment*, Wolters Kluwer, Warsaw 2017, p. 22 (Szewczyk H., *Równość płci w zatrudnieniu*, Wolters Kluwer, Warszawa 2017)

[188] Ibidem

[189] Ibidem

Therefore, having extensive provisions on non-discrimination is one thing, implementation is another. In this section, I intend to show the courts' approach to discrimination cases. Although many cases were already discussed, they were judgements of the Supreme Court. In order to better understand the judicial practice, it is also useful to consider how the lower courts deal with discrimination cases. This section will be based on a report of the Polish Anti-Discrimination Society, which examined court decisions and judges' attitudes towards discrimination[190]. It must be stressed that since only a limited number of court decisions were examined and only a limited number of judges interviewed (in a random selection process), what this report indicates is merely a tendency in the judicial application of the non-discrimination provisions. Still, it is an important issue to consider as legal rules without practical implementation are devoid of value.

3.2.1. Part I of the Report - Court Decisions[191]

This part of the report focuses on judgements in the chosen courts[192]. The first noticeable issue is the number of dismissed cases in the Courts of First Instance, which stands at 64,82%, while the successful claims stand at a mere 28,70%. The Courts of Second Instance are not much better with 47.61% dismissed cases and 33.33% successful ones. The rest of cases were either partially successful, or sent back for re-assessment[193]. It is not clear why so many cases have failed, but it does indicate some form of a difficulty either in the legal rules or their practical implementation.

Further analysis indicated that the courts (both I and II Instance) relied mostly on the Labour Code and the Supreme Court Judgments when deciding cases[194]. Using a quantitive method, the courts' use and interpretation of non-discrimination provisions was also examined. Firstly, as to the list of grounds of discrimination, the courts differed in their judgements. In the First Instance, a large majority (63) held that the list of grounds was open while some (11) seemed to suggest that it was closed. It is also worth pointing out that many courts (34) did not mention it at all. In the Second Instance, only one judgement indicated a closed list of grounds, but while many (28) held that the list was open, the majority (37) again did not mention it. Secondly, the application of the burden of proof was varied as well. In the First Instance, the courts applied the correct (shared) burden of proof (51) almost just as often as they failed to mention it (45). In some cases (12) the courts applied the wrong burden of proof seemingly based on the Civil Code, instead of the Labour Code provisions on non-discrimination. The situation in the Second Instance courts was no better with a

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[190] Polish Anti-Discrimination Society Report (*Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu*, red. M. Wieczorek, K. Bogatko, Polskie Towarzystwo Prawa Antydyskryminacyjnego, Warszawa, 2013)

[191] Ibidem, Part I, The application of anti-discrimination provisions in practice, p. 17-70 (Część I - Stosowanie przepisów antydyskryminacyjnych w praktyce polskich sądów powszechnych, str. 17-70)

[192] For the purposes of this thesis, only the labour law findings will be considered here.

[193] Polish Anti-Discrimination Society, Part I …, op. cit., p. 20

[194] Ibidem, p. 22

similar number of judgments correctly referring to a shared burden of proof (34) and those failing to consider it (25). Again, in a few judgments the burden of proof was applied incorrectly (7)[195].

The above situation may in some part be the fault of the claimants (or their legal advisors). As established by the Polish Supreme Court, in compensation cases resulting from discrimination, the claimant has to provide a ground of discrimination. The Report indicated that more often that not, the claims for compensation did not include any ground (56 cases, which constitutes 52% of all examined cases).[196] However, the courts too do not seem to possess sufficient knowledge of the application of non-discrimination provisions. In some judgements, there was no reference to the compensation for the violation of the principle of equal treatment. Also, sometimes the justification for the dismissal of the claim was scarce and with limited reference to the legal provisions and/or other judicial decisions. A final interesting issue that was noticed is that when the courts 'referred' to the decisions of the Supreme Court, they did not explain exactly which decision they talked about[197]. The Report then presents an extensive set of examples of the use and interpretation of the non-discrimination provisions by the courts. Here, it is sufficient to say that those examples include the correct, partially correct and incorrect interpretations, when compared to those of the Supreme Court, Constitutional Tribunal as well as some European sources (e.g., European Court of Justice)[198].

It can be deduced from the above that both the courts and the claimants have difficulties in understanding non-discrimination provisions. Whether it is the lack of knowledge or awareness on both sides of all the possible ways of proving and tackling non-discrimination claims, it is clear that there are some visible problems. Firstly, although the formulation of the Article 18^{3a} of the Labour Code clearly leaves the list of grounds open for further development when it states that discrimination is prohibited "in particular regardless of sex, age …", some courts have reached the opposite conclusion, while many others did not care to mention it. Secondly, the shared burden of proof in discrimination cases, even though its' exact use might constitute some difficulty, should be clearly differentiated from the provisions on the burden of proof found in the Civil Code. Nonetheless, some courts seemed to apply it incorrectly, even with Article 18^{3b} of the Labour Code clearly providing for an 'altered' version of the burden of proof in discrimination cases. Astonishingly, many courts failed to mention the burden of proof entirely. Thirdly, the claimants, or their legal advisors also seem unaware of the requirements for successfully proving that discrimination had occurred, as many of them fail to provide a ground for discrimination. Here, the reason might be the overall formulation of Article 18^{3}, which makes it easy to assume that compensation based on Article 18^{3d} can be claimed both in cases of unequal treatment and in cases of discrimination based on a specific ground, while the Supreme Court held that it can only be

[195] Ibidem, p. 22-24

[196] Ibidem, p. 25

[197] Ibidem, p. 26-7

[198] Ibidem, p. 27-60

claimed in the event of discrimination on a specific ground. To sum up, it can be inferred from this Report that there is a problem with the use and the interpretation of the non-discrimination provisions, both on the side of the claimants and the courts.

3.2.2. Part II of the Report - The attitudes of judges toward discrimination[199]

In this part, the Report, through interviews and/or questionnaires with the chosen judges focused on how those judges see discrimination and how they interpret legal provisions concerning discrimination. The judges in general defined discrimination in similar ways such as "unequal treatment", "differentiation" or "less favourable treatment"[200]. A lot of judges were also in agreement that there are certain groups that are at risk of discriminatory treatment. Many judges indicated gender and age (among others) as cause of discrimination, while discrimination in an employment sphere was indicated far more often than other spheres (e.g., social sphere).[201] Therefore, the judges' general idea about what constitutes discrimination is correct. Still, when asked whether discrimination is a serious problem in Poland, most judges concurred (35), but some disagreed (12). Some judges also indicated that it is "hard to answer … because there aren't many cases coming to courts, even fewer successful ones"[202]. However, it is important to indicate what is missing here. Firstly, none of the judges thought of discrimination by association, which occurs when a person is discriminated against on the basis of another person's characteristic (e.g., mother of a disabled child). Secondly, nobody indicated that sometimes objective reasons might justify differential treatment, for example, when a pregnant women is prohibited from performing hard physical work. Finally, no one mentioned the possibility of positive action, the aim of which is to ensure equality in practice through temporary favourable treatment of certain disadvantaged groups.[203] It seems that the judges are only aware of the basic meaning of discrimination and do not keep up with the new developments in this area.

3.3. Conclusions

Overall, the Polish Labour provisions on Non-Discrimination cover all the most important issues. The basic rules on equality and non-discrimination are present already in the Constitution of the Republic of Poland and their scope is very wide as any kind of discrimination against any person is prohibited. However, it is not often used in practice. The main provisions on non-discrimination in the workplace are found in the Labour Code Articles 11 and 18. They are much more detailed (especially Article 18) and as such are the principal source of non-discrimination law as far as employment is concerned. Article 18^{3a} provides for an open list of discriminatory grounds and

[199] Polish Anti-Discrimination Society Report … op. cit., Part II, The attitudes of judges toward discrimination, p. 105-78 (Część II - Postawy sędziów sądów powszechnych wobec zjawiska dyskryminacji, s. 105-78)

[200] Ibidem, p. 110-12

[201] Ibidem, p. 115-19

[202] Ibidem, p. 122

[203] Ibidem, p.123-4

defines both direct and indirect discrimination as well as the scope of application, which is access to and termination of employment, working conditions, promotion and vocational training. Article 18^{3b} defines what constitutes a violation of the principle of non-discrimination as well as a differential treatment that will not amount to discrimination. Article 18^{3d} stipulates a right to compensation for discriminatory treatment in the workplace. Lastly, Article 18^{3e} prohibits any kind of retaliation by an employer toward an employee who filed a complaint in court. There is also Equal Treatment Act (ETA), which concerns mainly discrimination in a non-employment sphere, but may still have some impact on the labour rights.

Although, the law is in theory well-developed, there are some issues with its' implementation. Both the courts and the claimants have troubles understanding what the provisions of the Labour Code mean and how to use them. Many cases are lost because the claimants are unaware of what to put in the complaint. This could be due to a formulation of the provisions which suggests that compensation can be claimed both in the event of unequal treatment and discrimination, but the court differentiates between them and allows compensation only in cases of discrimination based on a particular ground. Another problem seems to be the exact nature of the burden of proof and the 'comparator' requirement in discrimination cases. The scope of non-discrimination law in regard to access and termination of employment is also difficult to understand and implement in practice. The Polish Anti-Discrimination Society's Report shows a tendency in the judiciary of the incorrect usage of the non-discrimination provisions. Even though this Report has limitations, it is reasonable to state that non-discrimination provisions are difficult to implement in practice and more guidance should be provided as to the interpretation of these provisions.

Chapter 4: Gender and age discrimination and their cumulative impact on the employment status of older women in Poland

4.1. Historical background

In order to understand the current position of women in the labour market and the issues they face, it is necessary to consider Polish history, starting with the Communist period (1947-1989). After the Second World War, Poland came under a direct control of the Soviet Union. The idea of gender equality, though it existed under the Communist Regime, was very different to what we understand by it today. Nowadays, gender equality focuses on the promotion of women's rights in all spheres of life. In employment, women should be treated fairly and have access to various opportunities on equal terms with men. The empowerment of women and the need to improve their livelihoods is at the heart of gender equality.

However, the Communist definition of gender equality had nothing to do with the recognition of women as having equal rights with men. Gender equality was widely proclaimed as a desirable goal, but it was actually based on the needs of the struggling economy. "The official concept of gender equality was understood by the abolition of occupational segregation. It was directly tied to the significant lack of workers in traditional male professions"[204]. Women were 'invited' to the labour market simply because there were shortages of workforce. In addition to entering the workforce, women were expected to run a family. Although, a basic protection of pregnant workers and workers who have recently given birth existed, for example, the prohibition of night work or working with dangerous materials and the availability of maternity leave, the use of which was actually encouraged[205], it had a negative impact on their contribution to the labour market. Women were responsible for both work and family, which resulted in women obtaining jobs that were "less pressured, less-responsible, less time-consuming, in less-developed and lower-priority industries"[206]. These policies resulted in limited opportunities for women. Not only did they earn less, they also occupied lower positions and were seen as unreliable and less productive. In sum, women's entry into the labour market in Poland under the Communist regime was commanded by the need for additional workforce and not gender equality. The stereotype of women as being solely responsible for running the household, bringing up children and taking care of the elderly persons was prevalent, but it was hidden by the Communists under the guise of gender equality[207].

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[204] Zachorowska-Mazurkiewicz A., Impact of Ideology on Institutional Solutions Addressing Women's Role in the Labour Market in Poland, *Journal of Economic Issues*, Vol. XLI, No. 2, June 2007, p. 454

[205] Employment Discrimination and Sexual Harassment in Poland. A Publication of Minnesota Advocates for Human Rights, Women's Rights Centre and International Women's Human Rights Clinic, USA, July 2002, p. 9: https://www.theadvocatesforhumanrights.org/uploads/poland_discrimination_2002.PDF

[206] Łobodzińska B., Polish Women's Gender-segregated Education and Employment, *Women's Studies International Forum*, Vol. 23, No. 1, pp. 49-71, 2000, p. 52

[207] Zachorowska-Mazurkiewicz A., …, op. cit., p. 454

The fall of Communism and the transition to a free-market economy brought about many improvements in the social and economic situation in Poland, but gender equality still had a long way to go as "traditional stereotypes of women, such as the Polish Mother, have resurfaced"[208]. In addition, the changing of the labour market resulted in the elimination of jobs in which women consisted the majority of the workforce. Dismissals of women were justified by the "future need for maternity and childcare leave"[209]. Women were also openly discriminated against during the recruitment process[210]. Promotion of traditional family values and dismissals resulting from the changing economy had drastic impact on working women in Poland prior to the accession to the European Union. According to the statistics, 50,9% of registered unemployed persons in 1990 were women. This number rose to 60,4% at the end of 1997[211].

In addition, the law did not sufficiently protect gender equality and non-discrimination in employment. At the time of the transition, only very basic provisions on gender equality were found in the Polish Constitution and the Labour Code. The Constitution, in Article 32 and 33 contained equality of men and women provisions with no mention of discrimination. The Labour Code's sole provision on gender equality was found in Article 11^2, while Article 11^3 stipulated a general prohibition of discrimination. Also, the burden of proof in discrimination cases still rested on the claimant, which made it all the more difficult to win a case. Although, Poland was not yet a Member of the European Union, it had ratified ILO Conventions (C100 and C111) on equality and non-discrimination and should thus comply with their provisions, especially that the Constitution gave priority to the international regulations over Polish law[212]. It is also quite telling that the more specific ILO Conventions such as C156 on workers with family responsibilities and C183 on maternity protection were never ratified by Poland, which may suggest lack of awareness or will to take action towards equality between men and women. Even though, equality and non-discrimination provisions were present in the Polish Constitution and the Labour Code prior to the EU Accession, they were very basic and ineffective in practice due to the relatively short existence in the Polish legal system[213]. Although they were not extensive, some issues pertaining to gender discrimination were repeatedly voiced in the Comments adopted by the CEACR[214]. Most often, attention was paid to the discrimination of women due to maternity and family responsibilities, as

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[208] Employment Discrimination and Sexual Harassment in Poland …, op. cit., p.12

[209] Ibidem, p. 13

[210] Zachorowska-Mazurkiewicz …, op. cit., p. 455

[211] Centre for Women's Rights Report, p. 21 (Centrum Praw Kobiet, Wpływ Procesu Prywatyzacji na Położenie Kobiet: Kobiety Polskie w Gospodarce Okresu Transformacji, Raport z Badań, Warszawa 2000): https://rownosc.info/media/uploads/biblioteka/badania/wplyw_proc_prywatyzacji_tekst.pdf

[212] Ibidem, p. 7-9

[213] Ibidem, p. 19

[214] See Comments by the CEACR:
http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2115843
http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2141597
http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2153833
http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2153828
http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2173565

well as the fact that, although there was a noticeable improvement in that area, still substantially more women than men occupied posts with low pay and in industries that were subject to the restructuring during transition to a free-market economy resulting in elimination of jobs that were occupied mostly by women.

The accession to the European Union had forced Poland to alter and develop its' laws in all areas, including equality and non-discrimination provisions. It is worth mentioning that those changes were a result of the requirement to adjust Polish law to the EU law and did not appear to stem from the general realisation of the need for gender equality. Since the EU Directives are to be automatically transposed into the Polish legal system, this led to the introduction of the new chapter in the Labour Code, called 'Equal Treatment in Employment' as well as the better formulation of the already existing equality and non-discrimination provisions[215]. Since the introduction of the new laws, they have been updated several times, which caused difficulties in their practical implementation (as was mentioned in the previous Chapter). This was due to the changes in the EU Directives themselves and also their incorrect reading/interpretation[216]. Such frequent changes "led to the lower technical and legislative value, deterioration in the systematic method as well as the degree of formal coherence"[217]. For example, it has been noticed that the Labour Code made a reference to Directive 97/80 on the burden of proof in discrimination cases, but it didn't mention earlier directives on equal treatment of men and women or the now valid Gender Equality Directive **(**Recast)[218]. However, despite some practical difficulties in implementation, it is clear that substantive developments in the law on equality and non-discrimination had taken place and improved women's employment opportunities, as will be shown later on in this chapter.

Although the women's position on the Polish labour market has improved over the years since the accession to the EU, they still face obstacles in the access to employment and promotion opportunities as well as struggle to stay in employment. Even though, the Polish anti-discrimination law provides extensive protection against discriminatory treatment in employment, it works well only in theory. The Polish Central Statistics Office concluded that women are less active on the labour market than men. In 2015, out of the entire population, only 48,6% of women were active in employment compared to 65% of men. Even when the report limited the employment rate to working age population, women constituted 70,3% while for men it was 78.8%. The Central Statistics Office also indicated that in 2015, for 1000 active men on the labour market, 538 men were inactive, while for 1000 active women, 1056 were inactive[219]. According to the OECD Report on Poland, the "labour force participation and employment rates are still among the lowest in the

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[215] Santera W., The Labour Code and Law of European Union, p. 83 (Santera W., Kodeks pracy a prawo Unii Europejskiej, *Studia Iuridica Lublinensia*, Vol. XXIV, No. 3, 2015)

[216] Ibidem, p. 85-7

[217] Ibidem, p. 87

[218] Ibidem, p. 86

[219] Polish Central Statistics Office, Women and men on the labour market, Warsaw 2016 (Główny Urząd Statystyczny, Kobiety i mężczyźni na rynku pracy, Warszawa 2016): https://stat.gov.pl/obszary-tematyczne/rynek-pracy/opracowania/kobiety-i-mezczyzni-na-rynku-pracy-2016,1,6.html

OECD, especially for women and older workers"[220]. The Report also indicates the need for better opportunities to combine work and family responsibilities so that women, both young and old, can remain in employment. The child-care coverage remains low, forcing young women to take longer maternity leaves or older women to retire and take care of their grandchildren[221].

It is also important to point out that the extensive protection for women in case of pregnancy may be the cause of a less-discussed form of gender discrimination. In an article titled: "Institutional Discrimination of Women on the Polish Labour Market", Alicja Sielska[222] discussed in depth the rights of women on the labour market in relation to the costs incurred by the employers. "Labour … is the measure of productivity, the cost of which is dependent on the level of productivity. This means that on the free market, the more productive an element is, the more costly it will be"[223]. As an example was put forward a situation where a woman and a man with the same qualifications apply for a job, but a woman requests less money, so the employer, looking to maximise the profits, will choose a woman as a cheaper labour force. The point here is to explain that employers' primary concern is to minimise costs and maximise productivity, so women who need to take long maternity leaves will be seen as costly and less-productive than men, which increases risk of discrimination.

The effective implementation of equality and non-discrimination provisions is therefore important for two reasons. First, discrimination by employers has both cultural and institutional roots. There are various harmful stereotypes and prejudices against women in Poland which have negative impact on employment opportunities. Women are seen as weaker, less available, less productive and more costly than men. This is a result of a traditional views of women as stay-at-home mothers. For women who are in employment, although pregnancy-related rights are necessary, the highly unequal distribution of the parental leave rights between men and women mean that employers prefer to employ men. Second, victims of discrimination are unaware of their rights or unwilling to bring a case to the courts. Anti-discrimination laws are a relatively new addition to the Polish legal system and without substantial and wide-ranging support for awareness-raising policies from both the State and the employers, the protection afforded by the law will not be effective in practice. One other problem may stem from the Communist history where courts were largely used by the State as puppets of the regime and so couldn't be trusted. Although, the Communist regime ended many years ago, there still remains a deep-rooted distrust within the society towards the judicial system and its effectiveness in protecting the rights of citizens. To sum up, the effective implementation of anti-discrimination laws in Poland is a challenge. This chapter will cover gender equality issues in employment as well as the aspect of multiple discrimination of older women.

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[220] OECD Economic Surveys Poland, March 2016, p. 27

[221] Ibidem, p. 27-8

[222] Sielska A., Institutional Discrimination of women on the polish labour market, *Wroclaw Economic Review,* No 21(2), 2015, p. 52-3 (Sielska A., Instytucjonalna dyskryminacja kobiet na polskim rynku pracy, *Wroclaw Economic Review*, nr 21(2), 2015, s. 52-3)

[223] Ibidem, p. 44

4.2. Parenthood and gender discrimination

4.2.1. Pregnancy and maternity leave

As indicated briefly in Chapter 3, women are technically well protected under the Labour Code provisions. They cannot be dismissed during pregnancy or maternity leave (and other types of leaves) and the employers are obliged to return them to the same position that they occupied before going on maternity leave, or at least to an equivalent position. Employers also cannot refuse to employ pregnant women simply because of their condition, as that will constitute gender discrimination. In addition, women have access to various kinds of leaves in order to take care of their children, not only maternity leave, but also to additional maternity leave and child-care leave. This extensive protection for mothers and children also constitutes a problem in practice.

Until 2016, Article 176 para 1 of the Labour Code and the interconnected Ordinance of Ministers[224] simply stated a list of works prohibited for women. There was some differentiation in the document itself as in several places it referred expressly to pregnant or breastfeeding women, but all women were prohibited from performing hard physical work, or certain works under ground, such as mining. Although most women would not take up such jobs, this general limitation based solely on gender and not the individual assessment was clearly discriminatory as it further reinforced stereotypes about women and automatically excluded all women from certain jobs. In 2017, this situation has changed and now both the Labour Code and the Ordinance of Ministers have limited this prohibition to pregnant and breastfeeding women[225]. This is a positive development towards gender equality.

However, due to the extensive rights in relation to pregnancy or maternity leave, women may be out of work for a full year if they choose to do so (in any case for at least for 14 weeks). During that time, their knowledge might become outdated and they will need to improve it upon their return, perhaps through vocational training. For the employer, such long absence will require employing a new staff member for the period of the maternity leave. It will be perhaps difficult to find someone in time and some training may be necessary, thus increasing costs of an employer. After the conclusion of maternity leave, the employer must then return women to their previous posts or equivalent ones, which necessitates further reorganisation of work. Child-care leave is even longer, but both parents have a right to it so it may in theory be affecting both mothers and fathers in the same way. Also pregnant women who become ill keep 100% of their pay for 33 days (Article 92 para 1 of the Labour Code). As shown, the employer may incur considerable costs by employing a

[224] Ordinance of Ministers, 2016 (Obwieszczenie Prezesa Rady Ministrów z dnia 8 grudnia 2016 r. w sprawie ogłoszenia jednolitego tekstu rozporządzenia Rady Ministrów w sprawie wykazu prac szczególnie uciążliwych lub szkodliwych dla zdrowia kobiet, Dz.U. 2016 poz. 2057): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160002057

[225] Ordinance of the Council of Ministers, 2017 (Rozporządzenie Rady Ministrów z dnia 3 kwietnia 2017 r. W sprawie wykazu prac uciążliwych, niebezpiecznych lub szkodliwych dla zdrowia kobiet w ciąży oraz kobiet karmiących piersią, Dz.U. 2017 poz. 796): http://dziennikustaw.gov.pl/DU/2017/0796

woman over a man. The prohibition of dismissal during pregnancy and various types of leaves, necessity to employ a temporary staff member and the need to return women to their previous post all cost the employer not only money and time, but also to some extent the overall productivity at this specific post in the company (new, perhaps less experienced staff member, or outdated knowledge of women after they return to work). Alicja Sielska calls this situation 'institutional discrimination' and indicates that it is often overlooked, but from an economical point of view it might constitute a serious problem connected to the discrimination of women on the labour market[226]. This is not to say that women should have less rights in relation to motherhood, but as it may negatively affect their employment opportunities, other solutions must be considered.

Therefore, the rights of mothers and fathers are highly unequal in the Polish legal system. Clearly, after giving birth, a woman needs to take maternity leave, but she is given much more rights afterwards compared to the father. In the Polish society, women are still largely expected to take care of home and family and this is reflected in the law on parenthood. Article 180 para 1 of the Labour Code stipulates that a woman employee may, after at least 14 weeks of maternity leave, return to work if she transfers the rest of her leave to a father. In that case, a father has a right to a part of the women's maternity leave. However, a father's independent right to paternity leave constitutes a mere 2 weeks (Article 182^3 para 1). Such distribution of parental leaves puts women at a disadvantage and only reinforces the stereotype of a woman as a sole carer of children.

There is also one other serious problem with paternity leave. As an individual, a father's paternity leave right is only two weeks, and it is only dependent on a father being employed. The same goes for the child-care leaves that are equal for both parents. However, the rules for sharing of the maternity leave are different. A woman employee can share her maternity leave with the father whether he is employed or not. In case of the mother being unemployed, the father, whether he is employed or not, does not have a right to a share of maternity leave[227]. This means that an unemployed woman has to use all her maternity leave by herself, as the father will only be able to take two weeks of leave that are his individual entitlement. Such situation worsens the unemployed women's chance of finding employment. If she is lucky enough to find employment while on maternity leave, she gains maternity rights connected to an employment relationship, and in such case, the father also gains a right to a share of the maternity leave, but most employers would avoid choosing to employ a woman who has recently given birth. Therefore, the inequality in the rights of mothers and fathers reinforce harmful gender stereotypes and contribute to the discrimination of women on the labour market. A more equal share of parenthood rights would have a potential of improving women's opportunities on the labour market. This is a largely theoretical/legal analysis and the actual impact of maternity on women will be discussed in the following section.

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[226] Sielska A., op. cit., p. 52-3

[227] The Report of the Ombudsman, Reconciling the family and work responsibilities. Equal Treatment of parents on the labour market, Warsaw 2015, p. 11 (Biuletyn Rzecznika Praw Obywatelskich, Zasada równego traktowania - Prawo i praktyka, Nr. 18, Godzenie ról rodzinnych i zawodowych. Równe traktowanie rodziców na rynku pracy. Analiza i zalecenia, Warszawa 2015)

4.2.2. Workers with family responsibilities

First and foremost, it must be stressed that legal protection with regard to parenthood is extensive in Poland. There are many different types of leaves that the parents can take in order to share their responsibilities in bringing up children. Although maternity and paternity leaves are unequal for mothers and fathers, child-care leaves are available in equal manner for both parents. In addition to 20-37 week maternity leave and 2 week paternity leave, there is: additional maternity leave of 6 weeks, childcare leave of 32-4 weeks: and 'educational' leave of 20-37 weeks (all depending on the number of children)[228].

However, the use of all those opportunities will have negative effects on the opportunities of both parents on the labour market, especially women. Such long absence from the labour market will make it harder to further one's career or even to enter or stay in employment. "Access to childcare is among the key factors determining women's situation in the labour market. Availability of suitable childcare is an essential step towards preventing discrimination against women on the grounds of maternity and marriage and ensuring their right to work"[229]. Poland had failed in the provision of childcare as in 2014, only 4% of under 3 year olds were covered. However, there have been significant improvements (20%) for 3-5 year olds in the recent years with 71% attendance in 2012/13 compared to 32,6% in 2007[230]. Still, from the birth of a child until it reaches 3 years, there is practically no help for parents, so they need to depend on themselves or their family members.

Since there are by far not enough care institutions, parents need to work and take care of children at the same time, or stop working altogether. The childcare nowadays is still centred around the idea of women bringing up children. As such, they are often discriminated against in employment, as they are seen as more costly and less-available. The parents face the most difficult situation before children reach the age of 3 as childcare coverage significantly increases from there. Although the situation is dire, there have been steps by the government to improve the coverage of children under 3 years old. The Law on Care for Children Aged 0-3[231] was introduced in 2011 and provides for detailed legal rules as to the functioning of different forms of childcare, such as children's clubs, daytime carers and work of nannies. However, due to the ineffectiveness of the new law, an Act Amending the Law on care of children under 3 and certain other laws[232] came into force in 2013. Overall, this Act makes it easier to finance childcare institutions. Article 1(21) includes a possibility

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[228] Labour Code, Articles 180 para 1, 182[1a] para 1 and 183 para 1

[229] Alternative Report on the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Poland 2014, KARAT Coalition on behalf of CEDAW Coalition of Polish NGOs, p. 8-9: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/POL/INT_CEDAW_NGO_POL_16521_E.pdf

[230] Ibidem, p. 9

[231] Ustawa z dnia 4 lutego 2011 r. o opiece nad dziećmi w wieku do lat 3, Dz.U. 2011 nr 45 poz. 235: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20110450235

[232] Ustawa z dnia 10 maja 2013 r. o zmianie ustawy o opiece nad dziećmi w wieku do lat 3 oraz niektórych innych ustaw, Dz.U. 2013 poz. 747: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20130000747

of government funding of up to 80% of costs in each given case. Also, along with the 2011 Act, the Maluch (Kid) Programme was introduced with an aim to increase the overall attendance of children by creating new childcare institutions[233]. In 2018, the Ministry of Family, Work and Social Policy has devoted 450 million (zloty) to the creation of new childcare institutions[234]. Although, there is still a long way to go, the situation in this area is slowly improving.

As to the childcare of 3-5 year olds, the situation is much better as 71% of children attended pre-schools in 2012-13. However, there are still problems with its long-term realisation. CEDAW Report indicates that most successes were a result of 'short-term EU Funding'. Also, "there is a striking disproportion in access to public pre-school facilities between cities and rural areas"[235]. The Act on the Amendment of School Education System and certain other Acts[236] could bring some positive changes in this respect as the communes may receive some funding from the state budget[237]. However, whether this will work in practice seems to be largely dependent on each commune and its' ability to organise childcare.

The remainder of this section will be based on the Report of the Ombudsman (Reconciling family and work responsibilities. Equal treatment of parents on the labour market)[238] which analysed both law and practice in the area of the reconciliation of work and family responsibilities. One thing that needs to be pointed out is that in Poland, the subject of work-life balance usually does not appear in the context of gender equality, but it concerns the increasing of the fertility rate[239]. It is therefore visible that the Polish society is not as aware of problem gender inequality as the European Union. Also, the mere existence of laws or opportunities does not mean an automatic change in social practices. The Ombudsman's report had looked mainly at the employers' practices and attitudes, as well as the individual strategies of the employees aiming at the reconciliation of work-family life. The studied groups were composed of the representatives of various companies (big, medium and small), mothers and fathers up until the age of 40 and trade unions. The detailed research results will be presented below, but one overall trend can be seen. The employees often use flexible forms of working time, and work part-time to raise the child, but as far as different kinds of parental leaves are concerned, only maternity and 2 week paternity leaves are in general use, while the other leaves are used sparingly.

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233 Maluch Programme Website: http://emaluch.com.pl/maluch

234 Ibidem, News: http://emaluch.com.pl/aktualnosci

235 Alternative Report …, op, cit., p. 50

236 Ustawa z dnia 13 czerwca 2013 r. o zmianie ustawy o systemie oświaty oraz niektórych innych ustaw, Dz.U. 2013 poz. 827: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20130000827

237 Ibidem, Article 1(7)

238 The Report of the Ombudsman, Reconciling the family and work responsibilities. Equal Treatment of parents on the labour market, Warsaw 2015 (Biuletyn Rzecznika Praw Obywatelskich, Zasada równego traktowania - Prawo i praktyka, Nr. 18, Godzenie ról rodzinnych i zawodowych. Równe traktowanie rodziców na rynku pracy. Analiza i zalecenia, Warszawa 2015)

239 Ibidem, p. 5

The mothers were predominantly found to be taking the basic maternity and additional maternity leave, rarely the childcare leave, and even less the educational leave. The reasoning behind that was economical (educational leave is unpaid), and there was a fear that such long absence will negatively affect the career or even result in losing the job. Since the employer must find someone to fill the post during maternity leave, the prolonged absence may mean that the employer will decide it is better to keep the worker with up to date knowledge. It is true that the Labour Code protects from dismissal during maternity leave and the employer must return a mother to her previous post, but there is no protection after that. Many women are encouraged to return quickly for a part-time work in order to keep up with the changes on the labour market. Some women who took childcare and educational leave usually worked part-time. Also, the social security is paid even when the mother takes childcare or educational leave, so in case of low earnings, it might be better to take those leaves due to lack of childcare facilities, or the money for nannies[240]. In sum, women fear discrimination on the labour market caused by long absence. Also, the financial considerations and fear of halting one's career mean that women limit themselves to taking maternity leave and additional maternity leave, or they return fast and gradually come back to work using the flexible working time arrangements that are provided for in the Labour Code.

The fathers, on the other hand, often used the 2 week paternity leave, but only a handful used any other opportunities. The most important factors that cause hardships include: stereotypes on the role of the father as a breadwinner; lack of incentives or strategies for the promotion of paternity leave; lack of profitability as men usually earn more than women; fear of losing a job and halting one's career; lack of knowledge of the rights of fathers; and the dependence of using paternity leave on the employment status of the mother. Clearly, the traditional view of family in the Polish society means that there is no widespread practice of using parental leaves by fathers. The employers declared that they do not mind when the father takes more time-off, but neither do they actively encourage it. Both mothers and fathers have pointed out that some employers still have a stereotypical view of the role of fathers and mothers. Moreover, on rare occasions when the fathers do decide to take more paternity leave, they do so not because they actually want to share the family responsibilities, but because mothers fear losing their job or it is simply financially more profitable (mother earns more or father doesn't work). In addition, unequal treatment of mothers and fathers in taking parental leaves is a significant factor which limits the fathers' use of their rights. Even when the fathers are aware of their rights, the actual use of them is still 'unwelcome' in some private companies[241]. Therefore, the persistent stereotypes in the Polish society and their negative consequences on the fathers's professional careers are often the root cause of them taking no more than the basic 2 week paternity leave.

The formal and informal solutions for the reconciliation of work and family life after the employee's return to work constitute another problem. Although the employers do not usually

[240] Ibidem, p. 21-4

[241] Ibidem, p. 26-32

refuse such requests, the disapproval on the part of the employers is quite visible. In addition, even when the children had gotten a place at a children's clubs, it is still hard to organise care in the afternoons. Although, parents can get some days off, they do so at the expense of working more on other days which constitutes a problem whether the children have access to children's clubs or not. Since there is little access to children's clubs, a great majority of parents must organise care for their children all by themselves. Since the employers value productivity and profitability and not always understand the parents' needs, often the employees feel pressure to live up to those expectations and accept conditions of work that will make it more difficult to reconcile it with childcare. Many mothers have stressed the negative attitude of employers towards the use of flexible work arrangements[242]. To sum up, employers usually grant the employees' requests for flexible working arrangements not because they want to or are understanding of the specific needs of parents, but because the law requires them to do so. This attitude leaves the employees feeling insecure about their employment and forces them to use flexible work arrangements as seldom as possible.

The attitude of an employer proves to be a significant factor in the reconciliation of work and family life. Parents who feel pressured to work more often turn to more informal ways of providing childcare, such as help from family or friends, mainly grandparents. Here, the impact of culture and traditions is clear. It is mostly grandmothers that take care of children, sometimes even their help is expected and is thought of almost as an obligation, rather than voluntary help[243]. Even though, there are also some positive attitudes and practices towards formal and informal ways of reconciling work and family responsibilities visible in Polish companies, such as a gradual return to work, limiting business trips or the availability of 'mother with a child' room. Still these arrangements are usually aimed at mothers, not fathers. Although various childcare options are available to fathers, it is still met with little 'social acceptance'[244]. Therefore, though there are legal provisions in place for the reconciliation of work and family life, they often bear the burden of gender inequality. Also, the employers' attitudes and deeply rooted stereotypes about women to a large extent prevent their use beyond the basic maternity leave (often 20 weeks) and the short 2 week paternity leave.

4.3. Multiple discrimination based on gender and age

Multiple discrimination means that a person is treated less favourably on more than one ground. For example, older women may be discriminated against both on the ground of gender and age. Only recently has the international community start to realise that multiple discrimination should be treated separately as its' consequences may be more severe than in a case of discrimination on a single ground. The reasoning behind gender discrimination in Poland was already discussed above, so now it is important to explain what factors may lead to age discrimination. "From an employer's standpoint, one of the worker's key values is his or her productivity. Even if age does not directly

[242] Ibidem, p. 33-8

[243] Ibidem, p. 38-43

[244] Ibidem, p. 43-54

and straightforwardly influence job performance, older age is usually perceived as a phase of lower productivity"[245]. Whatever an individual's case may be, the stereotypes about older persons usually contribute to the difficulties in finding and keeping employment[246]. Employers would rather invest in younger workers and they see dismissal of older workers as a way to deal with economic issues[247]. In Poland, some of the present problems are the result of transition from Communism to a free-market economy. Due to a struggling economy, the Government tackled high unemployment rates by pushing older people out of the labour market and enabling early retirement[248].

Nowadays, both Poland and the EU in general, face the problem of an ageing society[249]. In Poland, the percentage of workers over the age of 45 years has grown from 17,2% in 1989 to 23,3% in 2014. It is becoming more and more crucial for the economy that the older persons stay in employment for as long as possible. Presently, the employment rates of older workers (55-64 years old) are increasing from 28,6% in 2003 to 42,5% in 2014, which is a very positive development. However, there are also significant disproportions between the activity of older men and older women in Poland and they are higher than the EU and OECD average. The root causes of this are the differential retirement age for men (65) and women (60) and traditional care responsibilities (for grandchildren or old parents) of older women[250]. These are the main factors that contribute to the multiple discrimination of older women.

4.3.1. Caselaw

First, it is important to indicate the general approach of Polish courts to the issue of multiple discrimination based on gender and age. Although, the Labour Code provisions prohibit discrimination on "one or more grounds"[251], there is no actual recognition of multiple discrimination. It is neither defined, nor expressly stated anywhere. Moreover, the courts, even when they seem to realise that a multiple discrimination had taken place, do not treat it differently and often find it sufficient to decide a case on the basis of a single ground. So, when older woman is

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[245] Turek K., Perek-Białas J., The role of employers opinion about skills and productivity of older workers: example of Poland, *Employee Relations*, Vol. 35, Issue 6, 2013, p. 648

[246] Staszewska E., Financial Support for employers hiring unemployed persons distinguished by the reason of age [in:] Wiktorowicz J., Warwas I., Kuba M., Staszewska E., Woszczyk P., Stankiewicz A., Kliombka-Jarzyna J., *Generations - what is changing? Compendium of multigenerational management*, Wolters Kluwer, Warsaw 2016, p. 277 (Staszewska E., Finansowe wspieranie pracodawców zatruniających osoby bezrobotne wyodrębnione ze względu na wiek [w:] Wiktorowicz J., Warwas I., Kuba M., Staszewska E., Woszczyk P., Stankiewicz A., Kliombka-Jarzyna J., *Pokolenia - co się zmienia? Kompendium zarządzania multigeneracyjnego*, Wolters Kluwer, Warszawa 2016)

[247] Turek K., Perek-Białas J., op, cit., p. 649

[248] Ibidem, p. 658

[249] Zawidzka-Łojek A., *The Prohibition of discrimination on the basis of age in European Union Law*, Instytut Wydawniczy EuroPrawo, Warsaw, 2013, p. 398-9 (Zawidzka-Łojek A., *Zakaz dyskryminacji ze względu na wiek w prawie Unii Europejskiej*, Instytut Wydawniczy EuroPrawo, Warszawa, 2013)

[250] Błaszczyk B., The situation of the elderly in the labour market in Poland, *Polish Gerontology*, No 24, 2016, p. 52-3 (Błaszczyk B., Sytuacja osób starszych na rynku pracy w Polsce, *Gerontologia Polska*, nr 24, 2016): http://www.akademiamedycyny.pl/wp-content/uploads/2016/05/201601_Gerontologia_007.pdf

[251] Labour Code, Article 18^{3b} para 1

discriminated against, in many instances this occurs in the form of dismissal due to her reaching the retirement age. The courts adjudicate the case as gender discrimination and do not devote time to consider it in conjunction with age discrimination[252]. In addition, it has been said that claims of discrimination on the basis of gender and age (along with disability) are brought more often to the Polish courts[253] than claims on any other grounds. Since instances of gender and age discrimination are more prevalent, then their multiple aspect should be considered by the courts.

4.3.1.1. Resolution of the Supreme Court on the issue of dismissal due to the reaching of the retirement age and gaining the right to pension[254]

For a long time, reaching the retirement age was regarded as a cause for dismissal of an employee. The Supreme Court stated on a number of occasions that the dismissal of an employee solely due to him/her reaching the retirement age was not discriminatory. As an example, in the judgement from 21 April 1999[255], the Supreme Court stated unequivocally that the "termination of the employment contract on the ground of the woman reaching the retirement age and gaining right to pension is justified and cannot be regarded as discrimination on the basis of gender or age"[256]. Such line of thought had long persisted within the Polish judiciary[257]. Even after the accession to the EU, there were instances when the Court claimed that gaining the right to pension is in and of itself a justified cause for a dismissal of an employee[258].

However, the Resolution of the Supreme Court from 2009 has officially put an end to the legality of that clearly discriminatory practice. The Court stated that the "reaching of the retirement age and gaining the right to pension cannot be a sole reason for dismissal by an employer"[259]. The Court discussed the difference between two situations. First, when a woman who has reached retirement age and gained a right to pension is dismissed due to economic reasons, such as when an employer is forced to reduce the number of staff. Second situation that the Court discussed was when a woman has been simply dismissed because she reached the retirement age and has a right to pension

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[252] European Commission, Country Report, Non-discrimination, Poland, 2017, op, cit., p. 40

[253] Gonera K., Equal Treatment in employment, Laws and reality, p. 47 (Gonera K., Analiza przepisów antydyskryminacyjnych i orzecznictwa sądów polskich w zakresie równego traktowania w zatrudnieniu, str. 45-65 [w:] *Równe traktowanie w zatrudnieniu, Przepisy a rzeczywistość, Raport z monitoringu ogłoszeń o pracę,* red. Kędziora K., Śmiszka K., Zima M., Polskie Towarzystwo Prawa Antydyskryminacyjnego, Warszawa, 2009): http://www.hfhr.org.pl/wielokulturowosc/documents/doc_70.pdf

[254] Resolution of the Supreme Court, II PZP 13/08, 21/01/2009 (Uchwała Składu Siedmiu Sędziów Sądu Najwyższego z dnia 21 stycznia 2009 r., II PZP 13/08: http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/II%20PZP%2013-08.pdf)

[255] Supreme Court Judgement, I PKN 31/99, 21 April 1999 (Wyrok Sądu Najwyższego - Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych z dnia 21 kwietnia 1999 r., I PKN 31/99): https://prawo.money.pl/orzecznictwo/sad-najwyzszy/wyrok;sn;izba;pracy;ubezpieczen;spolecznych;i;spraw;publicznych,ia,i,pkn,31,99,2865,orzeczenie.html

[256] Ibidem

[257] Also see: Supreme Court Judgment, I PK 616/02, 26 November 2003 (Wyrok Sądu Najwyższego z dnia 26 listopada 2003 r., I PK 616/02)

[258] For example: Supreme Court Judgement II PK 19/05, 29 September 2005 (Wyrok Sądu Najwyższego z dnia 29 września 2005 r. II PK 19/05)

[259] Uchwała Składu Siedmiu Sędziów Sądu Najwyższego …, op, cit.

and there are no other reasons for the dismissal. The Supreme Court therefore differentiated between a situation where retirement age and the right to pension are the sole reasons for the termination of employment and a situation where it is one of the criterions that the employer had considered in selecting a person for dismissal.

In addition, the Court had discussed the different retirement ages for men (65) and women (60). Since the criterion of age (in this case retirement age) leads in practice to the unfavourable treatment of women who will work shorter than men, the Court said that this constitutes indirect discrimination based on gender in accordance with Article 18^{3a} para 4. In this way, the Court made it clear that with the differential retirement age for men and women, the dismissal of women solely on the basis of reaching the retirement age (that is lower than that of men) constitutes gender discrimination. This is a positive development, but surely, the differential retirement age has a unique impact on women as their situation on the labour market is, in general, worse than that of men. As they age, their already disadvantaged position is made even more difficult due to the difference in retirement ages, as they will be forced out of the labour market sooner than men. It is a pity that the Court did not also discuss the other aspect of this problem, that is, multiple discrimination on the basis of both gender and age. It seems there is still little awareness, even in the Supreme Court, of the cumulative impact of gender and age discrimination on older women.

4.3.1.2. Caselaw on termination of employment on the ground of age

As far as dismissal of older persons is concerned, it is important to discuss two types of cases, namely those concerning old age in general and those relating to the pre-retirement protection under Article 39 of the Labour Code. Although workers face greater risk of discrimination as they age, some positive developments took place in the Polish courts which increased the protection against discrimination of this group of workers.

With regard to the general attitude of the courts to wards age discrimination, the Supreme Court Judgement I PK 238/10, 07/04/2011[260] is very useful. This case concerned a dismissed employee who wished to be returned to his post. The employer stated as a reason for the termination of employment with the claimant the need to reduce the number of staff due to the planned restructuring of the company resulting from economical hardships. The claimant was chosen for dismissal also because he had additional source of income and as the youngest of employees, had the best chance of finding new employment. The Court stated that: “older workers have more troubles with finding new employment, so the dismissal of the oldest worker could be regarded as a violation of the principle of equal treatment resulting from the application of a wrong criterion” and thus would likely constitute age discrimination. This case is important because it shows that there is at least some recognition of the older workers’ problems on the labour market and even though they

[260] Wyrok Sądu Najwyższego z dnia 7 kwietnia 2011 r. I PK 238/10: http://www.sn.pl/sites/orzecznictwo/orzeczenia1/i%20pk%20238-10-1.pdf

are not yet protected by Article 39 of the Labour Code, their difficult situation must be taken into account by the employer as far as selection process of employees for dismissal is concerned.

A more substantial form of protection seems to be afforded to persons who are covered by Article 39 of the Labour Code. The first case to consider here is the District Court Judgement (Gdańsk) VII PA 42/12, 11/05/2012[261]. In that case, the claimant was dismissed at the time when he was covered by the pre-retirement protection afforded by Article 39 of the Labour Code, which stipulates the prohibition of dismissal of an employee who has no more than 4 years left before reaching the statutory retirement age. The court stated that the "aim of Article 39 is to cover those employees, who - being of an advanced age - do not yet have the right to pension and in case of termination of employment would have difficulties finding a new job and gaining the right to pension (due to insufficient length of active employment). Although the statutory age of retirement for men is 65 years, there are many possibilities in the Polish system of gaining the right to a pension before that age. Therefore, the Court stated that a person may indeed only gain the right to pension once, so if (like in the present case) a person already receives pension before reaching the statutory age of retirement, the protection offered by Article 39 is not necessary as such person has a source of income. In sum, an employee who has a right to pension and actually receives it is not protected under Article 39 and can be dismissed when there are objective reasons for doing so, but an employee who would be left with no income is afforded the protection under Article 39.

Another useful case is the Supreme Court Judgement II PK 5/13, 18/09/2013[262] which concerned a woman who had been an employee in a pharmacy from 1978-2011 when she got a notice of dismissal. As a reason, the employer put forward the 'structural reorganisation necessitating the reduction in staff, including the elimination of the claimant's post'. However, after the claimant's dismissal, the respondent hired an additional employee whose professional qualifications meant much higher earnings and whose duties were largely the same as those of the claimant. Therefore, the Court held, the reasoning behind the dismissal was false as no actual reduction took place, but it was simply necessary to employ a more qualified professional in the claimant's place. The real reason, as it turned out, was that out of the two employees in the same posts, one was subject of the pre-retirement protection afforded by Article 39 of the Labour Code, and so could not be dismissed. This case shows, that especially in times of economic hardships and uncertainty in employment, the pre-retirement protection may be vital as it would be very hard for such employee to find a new job. Although, the claimant's notice of termination of employment was 'defective', Article 39 of the Labour Code took precedence and served to prevent discrimination based on age in this case. Both this case and the previous one show that the non-discrimination provisions in the Labour Code do in practice protect older workers and that (at least some) employers are aware of them.

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[261] Wyrok Sądu Okręgowego w Gdańsku z dnia 11 maja 2012 r., VII Pa 42/12

[262] Wyrok Sądu Najwyższego - Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych z dnia 18 września 2013 r. II PK 5/13: http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20PK%205-13.pdf

4.3.1.3. Differential retirement age for women and men in Poland: the case of privilege or multiple discrimination?

This section is based on the Constitutional Court's Judgement on the compatibility of differential retirement ages with the principle of equality of men and women and is discussed separately from the Resolution of the Supreme Court concerning the dismissal due to the reaching of the retirement age (discussed above). Although, the Supreme Court did indeed discuss the issue of differential retirement age for men and women, it did so only in connection to the issue of dismissal solely on the basis of reaching the retirement age. This resolution was aimed at age discrimination and concerned both men and women in equal manner. In this section, the judgement of the Constitutional Court will be discussed, which focuses on whether the lower retirement age for women is in accordance with the Constitutional provisions on equality and non-discrimination. Therefore, the present section deals with a different subject, namely, the general position of women on the labour market due to the existence of differential retirement age and its impact on the principle of equality between men and women. Although, these two judgements do overlap to some extent, they deal with two distinct issues.

Most of the EU countries apply the same retirement age for men and women. Poland is one of those few countries that have a differential retirement age for men and women. The statutory age of retirement for men is 65 years, while for women it is 60 years[263]. The Ombudsman brought a claim to the Constitutional Court asking to adjudicate on the compliance of Article 24 of the Act on retirement and pensions from the Social Fund[264] with Articles 32 and 33 of the Constitution. Article 24 of the Act on retirement and pensions states that (with some exceptions) the retirement age for women shall be 60 years and for men it shall be 65 years. Article 32 of the Constitution stipulates that everyone is equal before the law and that no one can be discriminated "in political, social and economic life for any reason whatsoever". Article 33 of the Constitution provides that men and women "shall have equal rights in family, political, social and economic life".

The Constitutional Court gave a judgement on the matter on 15 July 2010[265]. The Ombudsman claimed that the differential retirement age for women and men discriminates against women in the field of social security. In the present system, since women retire earlier, the time during which they contribute to their pensions is shorter while the time of receiving it is longer which means that women will receive lower pensions than men. In addition, the Ombudsman pointed out that there

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[263] It must be stressed that, depending on the occupation, the retirement ages may differ and some persons may have a right to an early retirement. Also, for some occupations, retirement at a particular age is mandatory. However, here the focus will be on the general statutory retirement age that applies to the majority of the population.

[264] The latest version of this Act, upholding differential retirement age for man and women is found at: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170001383 (Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 7 lipca 2017 r. w sprawie ogłoszenia jednolitego tekstu ustawy o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych, Dz.U. 2017 poz. 1383)

[265] The Judgement of the Constitutional Tribunal 15/07/2010, K 63/07 (Wyrok Trybunału Konstytucyjnego z dnia 15 lipca 2010 r., Sygn. akt K 63/07): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20101370925

are other important factors that need to be considered, such as the lower pay of women and frequent breaks in employment due to maternity and childcare. The Ombudsman also stated that there are no objective reasons for the differential retirement age. The biological and social differences between men and women are not interconnected in a direct way with the differential retirement age, which is why many countries have decided to introduce equal retirement ages for men and women. Although this case had concerned discrimination in the area of social security, it had impact on discrimination in employment as well. The Ombudsman stressed that, even though, retirement is not mandatory, in accordance with the established practice, the right to pension may be one of the criterions for dismissal of an employee and since women gain this right earlier than men, they may be pushed out of the labour market as soon as they reach the retirement age. Therefore, it robs women of the possibility of continuing employment on equal terms with men and not only prevents women from gaining equal opportunities for professional advancement, but also for equal pension status. It also limits access to vocational training and promotion as well as potentially causes reduction in pay close to retirement[266]. For these reasons, the Ombudsman claimed that the differential retirement age constitutes gender discrimination and therefore violates Articles 32 and 33 of the Constitution.

The Speaker of the Sejm (Lower House of Parliament), on the other hand argued that although the differential retirement age may limit the possibilities for the continuation of employment by women, raising the retirement age of women to 65 years may not necessarily be a desirable solution. The Speaker pointed out that in the present socio-economical and demographic situation in Poland, such decision might not be met with widespread acceptance, since a lot of older women would like to exit the labour market in order to take care of children or grandchildren. The Speaker also added that the biological differences between men and women are relevant in this case[267]. The Prosecutor also stressed that retirement is optional and that lower retirement age for women concerns "a right, and so is a privilege"[268] and not "a differentiation of responsibilities limiting the professional chances of women"[269]. The Prosecutor also regarded as important for the reasoning behind the differential retirement age the 'biological and social differences between men and women' and said that the lower retirement age for women "aims to reduce the real differences between men and women in social life"[270].

The Court gave extensive reasoning to support its' conclusion that the differential retirement age is in accordance with the Constitutional provisions on equality and non-discrimination. The general issue in this case was whether the differential retirement age for men and women constitutes gender discrimination, or whether it is a kind of positive action with the purpose of equalising the situation of men and women. The Court started by explaining that both international and European law does

[266] Ibidem, p. 2-4

[267] Ibidem, p. 4-5

[268] "Privilege" here means positive action in the form of temporary measures to accelerate equality between men and women.

[269] The Judgement of the Constitutional Tribunal 15/07/2010, K 63/07 …, op. cit., p. 5

[270] Ibidem, p. 5-6

not prohibit differential retirement ages for men and women, but merely requires that the Member States aim toward it. Therefore, the discussed legal rule does not violate international law. It went on to emphasise that Article 32 and 33 of the Constitution do not indicate the need to treat everyone in the same way, but that similar persons should be treated in the same way, while different persons should be treated differently. As a result, women may only be treated differently if such action has a legal aim and the measures taken to achieve that aim fulfil the criterion of proportionality.

The Court then applied the law to the present case. It discussed the "retirement risk" which was defined as "the right to a discontinuation of employment after the fulfilment of certain conditions and receiving of retirement instead of pay". In determining the 'retirement risk', biological, socio-economic and financial factors are taken into account in order to set the most appropriate retirement age in a given country[271]. The overall European trend to equalise the retirement ages of men and women was indicated. In addition, the Court explained that the then recent Resolution of the Supreme Court[272] prohibits dismissal solely due to an employee reaching the retirement age. Also, due to recent changes in the law, when a person reaches the retirement age, he/she does not have to terminate an employment relationship in order to receive pension. For these reasons, the Constitutional Tribunal held that claims of the Ombudsman in regard to the limitations in continuing employment after the reaching of the retirement age are not substantiated. The Court also did not agree with Ombudsman's claim that due to Article 24 of the Act on retirement and pensions, Article 39 of the Labour Code does not cover women who are 62 years old, while men are covered by it. It does so because women are protected by Article 39 when they are between 56-60 and men are protected when they are 61-65 due to different retirement ages. The Court therefore concluded that changes in the law alleviated potential negative consequences of lower retirement age for women. However, it seems that the Court disregarded the fact that the protection of Article 39 is afforded to women earlier because of differential retirement age and so when it ends women would have worked shorter than men and may be unable to continue thereby contributing to inequality of opportunities between men and women in employment.

The Court also discussed the financial implications of lower retirement age for women. The Court stated that, although the retirement age of women means that they will receive lower pensions, there is no obligation to retire when women reach the age of 60 years. They may continue to work and in that case their pensions will keep increasing. However, the Court did acknowledge that unequal pay leads to lower pensions and that would happen even if the retirement ages of both sexes were the same. But the Court decided that this is not an issue in this case.

Then, the Court indicated that the purpose of differential treatment may be to mitigate existing biological and social differences. It went back to the period of transformation in the 1990s to explain the cultural changes that took place concerning the roles of men and women in various

[271] Ibidem, p. 20

[272] Resolution of the Supreme Court, II PZP 13/08, 21/01/2009 - Discussed above.

spheres of life. Although there were some positive developments, women are still expected to run a household and take care of children, while also working at the same time. According to the Court, this situation may lead to hardships in managing work responsibilities earlier for women than for men. The differential retirement age is therefore regarded as a natural outcome of unequal division of parental responsibilities. Also, the Court said that the pension system works in such a way that it partly compensates for the shorter employment activity of women and decreases differences in the amount of pension between men and women. Therefore, there still exists a strong, traditional model of family where young women work and take care of family, while older women are expected to retire early in order to help their children. Such social situation, the Court said, partially helps in reaching a decision in this case. The Constitutional Court sadly concluded that, taking all the circumstances of the case into account, Article 24 of the Act on retirement and pensions is in compliance with Articles 32 and 33 of the Constitution. Still, the Court decided to signal to the Parliament the need commence action to slowly equalise the retirement ages of men and women.

However, it is also crucial to point out that there were 3 dissenting opinions in this case, all of which were written by female judges. First, in her dissenting opinion, Judge Teresa Liszcz, stated that biological and social are not relevant to the pension rights. She also did not agree with the statement that the lower retirement age for women is a privilege. Moreover, the present pension system only partially alleviates the differences in the amount of pension paid to women. She admitted that it is harder now to dismiss an employee who has reached a retirement age, but pointed out that does not mean that such employee has gained significantly more stability in employment. In practice, women will still be 'pushed out' of the labour market. She also suggested that, in fact, the main reason for the decision were the expectations of the majority of the society to keep the existing regulations. Second, the dissenting opinion of Ewa Łętowska is very interesting. She stated that the present system leads to lower pensions, but added that other factors, which are in no way compensated by the legislator violate the principle of equal treatment of men and women and actually contribute to the "impairment" of women. Her claim was based on the fact that the differential retirement age put women, at the outset, in a disadvantaged position. It is not the matter of simple differential retirement age or lower pensions, that constituted a problem for Judge Ewa Łętowska, but the women's disadvantaged position and no visible commencement of a process to equalise the situation of women. There is a need for affirmative action which takes into account the multitude of factors that led to the lower pensions for women, such as economic and cultural ones as well as the expectations that women will take care of the family which are born out of a failing care infrastructure in Poland. The last dissenting opinion was that of Judge Sławomira Wronkowska-Jaśkiewicz. She stated that, due to the present pension system, a woman who gains the right to retirement and pension at 60 is in worse situation from a man who retires at 65. Although retirement at 60 is not compulsory, women's situation at that time is less advantageous that the men's. Women are pressured to leave the labour market, and in the end, the possibility of the continuation of employment does not sufficiently compensate for the pension-related discrimination.

On a final note, it is important to point out that a retirement age reform, albeit short-lived, was indeed introduced in 2012. This reform increased the retirement age to 67 years and equalised it for men and women. This change was in line with the European trend as most EU countries have equal retirement ages for men and women or are in the process of such reforms. However, when the new Government took over, it abolished this reform and returned to the old system with differential retirement ages. This 'new' system is valid from October the 1st 2017. It is interesting that most of those persons who filed for pensions under the 'new' system were not in employment. There were not many persons in active employment that applied, and among them there were many whose earnings were low[273]. This suggests that many of those who are employed would prefer to stay longer in the labour market. The problem may therefore be the unemployment among older persons, which to some extent, is a result of discrimination of older persons, especially older women. It seems that the Government wishes to tackle unemployment by allowing for an earlier retirement, instead of focusing on the causes of unemployment, one of which is discrimination of older workers. Now, it is again easier to push women out of the labour market early and such avoidance by the Government of dealing with the root causes of the problem is not going to lead to equality between men and women in employment, but will simply 'get rid of this problem' sooner.

4.4. Equality policies and plans

As discussed above, although the Polish law on equality and non-discrimination in employment is well-developed, some issues remain, which prevent its full realisation in practice. Traditional views about women are still rooted deep within the Polish society and they have a negative impact on women's employment opportunities. Nonetheless, there is some commitment toward substantive equality between men and women as several policies and programmes were implemented with the aim of achieving gender equality.

4.4.1. National Action Plan

The National Action Plan (2013-2016)[274] on equal treatment prepared by the Plenipotentiary for Equal Treatment is particularly important for the attainment of equality between men and women. Its main goals included the raising of the standards of conducting anti-discrimination policies and the equality between men and women on the labour market. The proposed actions in this area included the promotion of sharing parental rights, equal treatment of both parents and development of childcare institutions. Another important policy is the Ordinance of Ministers on the National

[273] Business Insider Polska - Pensions: https://businessinsider.com.pl/twoje-pieniadze/emerytury/nizszy-wiek-emerytalny-od-1-pazdziernika-2017-r/e8q06rp

[274] Krajowy Program Działań na rzecz równego traktowania na lata 2013-2016, Pełnomocnik Rządu do Spraw Równego Traktowania, Warszawa 2013: https://www.spoleczenstwoobywatelskie.gov.pl/sites/default/files/krajowy_program_dzialan_na_rzecz_rownego_traktowania_przyjety_na_rm_10.12.13.pdf

Action Plan on Employment (2015-2017)[275]. The general aim is to raise the employment rate for 20-64 year olds. Out of many strategies to do it, those that have impact on the equality and non-discrimination in employment are: the support for mobility and employability of workers on the labour market and supporting disadvantaged groups such as women, parents or older persons who are most at risk of being discriminated against in employment.

Both these policies show the will on the part of the Government to improve the situation of women on the labour market. The National Action Plan focused solely on the sphere of employment and the work-life balance. Since the traditional views of women are still prevalent, it is of great importance to the women's professional careers to be able to share responsibilities with their partners or, at least, have access to childcare institutions. Also, the employers' views of women as more costly and less productive may change. Prompt return to work and greater involvement of fathers in childcare will likely decrease the possibility of gender discrimination due to maternity. Some of these ideas were also continued through the National Action Plan on Employment. Although it concerned unemployment in general, it also included strategies that focused on the access to employment of the disadvantaged groups, such as women and it recognised that preventing discrimination is important in tackling unemployment.

4.4.2. Other policies for the promotion of gender equality

There are also other polices with the aim of achieving gender equality[276]. First, the PROGRESS Programme (2007-2013) supported the development and coordination of the EU Policies in 5 fields: employment; social security; conditions of work; counteracting discrimination; and equality between men and women[277]. Its purpose was to effectively implement EU regulations concerning the protection and equal treatment of workers through, for example, the exchange of information and experience, the shaping of the EU policies and legislation or the inclusion of the issue of equality in all policy areas[278]. However, in 2010, the subject area of this programme had been changed to 'micro-financing'[279]. It is also difficult to ascertain its actual impact on Poland. There are only general reports on the various information sharing activities, but there are no country specific reports. That is not to say that this programme did not have a positive impact, but it is hard to ascertain what impact it had on a specific country. In addition, since the EU law and policies are being developed all the time, such programme should have been continued in order to ensure up to

[275] Uchwała Nr 28/2015 Rady Ministrów z dnia 10 marca 2015 r. w sprawie Krajowego Planu Działań na rzecz Zatrudnienia na lata 2015–2017: https://cofund.org.pl/upload/krajowy-plan-dzia%C5%82a%C5%84-na-rzecz-zatrudnienia-na-lata-2015-2017.pdf

[276] Only the most important recent policies concerning equal treatment in the labour market will be discussed.

[277] Program PROGRESS (2007-2013): http://ec.europa.eu/social/main.jsp?catId=327&langId=pl

[278] The aims of the PROGRESS Programme: http://ec.europa.eu/social/main.jsp?catId=657&langId=pl

[279] Decision No 284/2010/EU of the European Parliament and of the Council of 25 March 2010 amending Decision No 1672/2006/EC establishing a Community Programme for Employment and Social Solidarity - Progress: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0284&from=PL

date information in the area of equality in employment, but after just a couple of years it has been concluded and replaced by a new topic which does not concern equality between men and women.

Also the EQUAL Initiative (2004-2008) is worth mentioning. The main aim of this initiative was to discover new ways of eliminating all forms of discrimination on the labour market. It had been divided into 3 'Phases'. During Phase 1, Poland has focused its efforts in several key areas[280]. First topic concerned the facilitation of entry and re-entry to the labour market and promotion of open labour market. It focused on the provision of equal opportunities to groups experiencing inequality due to lack of qualifications and low level of education (mainly in rural areas). Second topic was about the strengthening of the national social economy, mostly by engaging local communities to support and activate groups at risk of exclusion. The third topic focused on the need to educate companies on how to better deal with structural changes in the economy and how to make use of new technologies. The aim was to ensure the development of companies and prevent reduction in staff, which is very important for older workers and women. Fourth topic concerned the reconciliation of work and family life and reintegration of parents who left the labour market. It included support for the development of institutions for childcare and dependants, improving professional qualifications and the promotion of flexible forms of employment[281]. Phase 2 concerned the testing of these new solutions, while Phase 3 focused on the spreading of good practices into the national and international politics. However, this initiative lasted only 4 years (2004-2008)[282] and was concluded in 2008.

Still, some of the projects based on the EQUAL Initiative and their results were discussed[283]. They were overall positive and as long as they were funded, they seemed to operate quite well. However, their long-term impact varied after the funding was withdrawn. As an example, the programme "Flexible worker - family based on partnership"[284] had a very positive and seemingly lasting impact in the region of Podlasie (North-East Poland). It focused on four areas. First, the flexible forms of employment have been tested and promoted and were found to be functioning well. Second, some of the childcare institutions had extended the working hours to 21 and at the time of the report, they were still open in the evenings. Third, action was taken to prevent the employees' knowledge from becoming outdated. To that end, various individual trainings were organised for persons on parental leaves. Fourth, a social campaign called the "Partnership Day" was organised to discuss the roles of each of the parents in taking care of the family with the aim of changing various negative attitudes. There were plans to repeat similar campaigns in the future. As shown, action was taken to reconcile work and family life and it may have long-lasting positive impact in this area.

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[280] There are 5 topics in the Polish EQUAL Initiative, but the last one concerns refugees so it will not be discussed here.

[281] Program Inicjatywy Wspólnotowej EQUAL: http://www.equal.org.pl/equal.php?lang=pl

[282] See: http://wiadomosci.ngo.pl/wiadomosc/117176.html

[283] Biuletyn EQUAL, nr 3, 2008, Fundacja "Fundusz Współpracy": http://www.equal.org.pl/kompendium.php?CID=1&lang=pl

[284] Ibidem, p. 10-11

Another example is the “Partnership - Family - Equality - Work”[285] programme which was directed at women with outdated professional knowledge, working women at risk of losing jobs due to maternity and women whose parental responsibilities hamper their professional advancement. One of the projects within this programme concerned teleworking. Special handbook for employers as well as a vocational training programme were prepared to ensure the effective operation of this type of work. The beneficiaries still worked within this scheme after the end of this project so it may also be functioning well in the future. Another programme was the so-called “Day Mum”. The idea was to set up small childcare 'institutions’ in private homes, but due to lack of funding after the project was concluded, they ceased to operate. However, nowadays this may change as the new law[286] was introduced which should make it easier for such forms of childcare to operate. One last project was called the “Work under a patronage” and concerned women returning to work after long-term unemployment. A special form of action was implemented whereas a motivational and psychological support was coupled with vocational training and internship. Also, a handbook for career counsellors was created and was met significant interest. To sum up, both of the discussed projects focused on ensuring greater equality of women, either by promoting the sharing of family responsibilities or by supporting stable employment of women with small children. Therefore, the EQUAL Initiative definitely had positive results in the areas where it was being implemented. The only downside is that the lack of funding after the end of the project may hamper the long-term positive impact of such projects. This proves that policies do have impact on discrimination in employment, but it is crucial that they are continued, even if the programme itself is concluded. To sum up, even though it was mostly due to the action by the EU, Poland had introduced quite a few policies and programmes that aim to improve the situation of women the labour market. It may take time, but these policies have a real potential of improving the women’s position on the labour market.

4.4.3. Policies toward older workers

Since the Polish society is ageing, it is becoming more and more important to encourage people to stay in employment. “Due to low employment rates among Poland’s senior age cohorts, and the shortfall between actual and statutory age of retirement, many of the country’s Active Ageing measures have focused on employment activation of workers over the age of 50”[287]. One of the first steps toward the increasing of the employment rates in Poland was the 1999 reform[288], which made early retirement less attractive. Although, the employment rates of older persons in Poland have grown in the recent years, they are still low. Moreover, according to the OECD Report, “while the

[285] Ibidem, p. 12-13

[286] Ustawa z dnia 10 maja 2013 r. o zmianie ustawy o opiece nad dziećmi w wieku do lat 3 oraz niektórych innych ustaw, Dz.U. 2013 poz. 747.

[287] Zbyszewska A., Active Ageing through Employment: A Critical Feminist Perspective on Polish Policy, *International Journal of Comparative Labour Law and Industrial Relations,* Vol. 32, No. 4, 2016, p. 449

[288] Act of 17 December 1998 on retirement pensions and other benefits from the Social Insurance Fund (Ustawa z dnia 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych, Dz.U. 1998 nr 162 poz. 1118): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19981621118)

gender gap has declined in the OECD area over the past decade, it has remained stable in Poland"[289]. Therefore, there clearly is a need to focus on the employment of older workers. The European Commission's programme 'Europe 2020: A strategy for start, sustainable and inclusive growth'[290] aims to raise the employment rate of the population aged 20-64 to 75% with the particular emphasis on the "greater involvement of women and older workers"[291].

As regards the Polish efforts in this area, the first important policy is the 'Solidarity Across Generations' programme[292] which was adopted in 2008. The main plan of action is divided into 3 topics. First, it is important to keep older workers in employment and support the development of age management policies as well as improving the professional qualifications of older persons. Second, activation programmes for the unemployed aged 45+/50+ are necessary. Finally, Poland's 'culture' of early exit from the labour market must be curtailed. The best way to do so is to limit the possibilities for receiving early pensions or other benefits[293]. All those actions are interrelated and necessary if the employment rates of older persons are going to rise. This programme correctly addresses all the main problems with the activation of older workers in Poland. Employers are still largely unaware or unengaged in the age management and that connected with the availability of early pensions makes it easy for older persons to leave the labour market. Employers' attitude also has an impact on the unemployment rate as older persons are not seen as a desirable workforce.

This programme also raises the issue of differential retirement ages for women and men. It recognises that the lower retirement age for women is harmful to them as it causes gender discrimination on the labour market, especially in access to vocational training and termination of employment. It also leads to lower pensions for women. Even though retirement is not mandatory, in practice, pressures from society and employers encourage workers to leave the labour market[294]. If correctly executed, this programme has a real potential for improving the situation of older workers, especially older women, on the labour market. However, it has been stressed in the OECD Report that there is little information available on the effectiveness of measures implemented through this programme[295]. An updated version of this programme was adopted in 2014[296]. It includes some information about the effectiveness of this programme, but it is quite general and brief. The aim for the year 2020 is to raise employment rate of workers aged 55-64 to 50%[297]. Some

[289] OECD (2015), Ageing and Employment Policies: Poland 2015, OECD Publishing, p. 13: https://www.oecd-ilibrary.org/employment/ageing-and-employment-policies-poland-2015_9789264227279-en

[290] Communication from the Commission, Europe 2020: A strategy for start, sustainable and inclusive growth, COM(2010) 2020 final: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF

[291] Ibidem, p. 10

[292] Program Solidarność Pokoleń, Działania dla zwiększenia aktywności zawodowej osób w wieku 50+, Program przyjęty przez Radę Ministrów w dniu 17 października 2008: http://analizy.mpips.gov.pl/images/stories/publ_i_raporty/Program50+.pdf

[293] Ibidem, p. 13

[294] Ibidem, p. 29

[295] OECD (2015), Ageing and Employment Policies: Poland 2015 …, op. cit., p. 14

[296] Available at: https://www.mpips.gov.pl/seniorzyaktywne-starzenie/program-solidarnosc-pokolen/

[297] Ibidem

new elements include “the improvement of professional skills as well as competences in staff management and the promotion of healthy and active lifestyle”[298].

Another important policy is the Long-term Senior Policy for the years 2014-2020[299]. The aim of this policy is to support and ensure healthy ageing and independent and satisfactory living standards for older persons. It covers topics such as: health and independence; security; housing; educational, cultural and social activity; and relations between generations. It also includes employment issues, albeit briefly. It is a general policy concerning older persons, but the action in the field of employment alone isn’t enough to combat prejudices and stereotypes and prevent age discrimination in the labour market. This policy, together with the Solidarity Across Generations Programme are closely related to each other, because such a widespread approach is necessary to accelerate equality between men and women in the labour market.

4.5. Conclusions

To conclude, the legal provisions for the non-discrimination both on the grounds of gender and age are quite extensive as they cover all the most important areas. As to gender discrimination, especially the provisions on pregnant workers and parental leaves are well-developed. However, some of these rights only work well in theory. Firstly, pregnant women are entitled to various kinds of leaves, such as maternity leave, additional leave or childcare leave, but even after the basic maternity leave women often come back to work because they fear dismissal. For the same reason, childcare leave is rarely used. Secondly, fathers are entitled to a mere two weeks of paternity leave as their individual right and although they can technically have a share of the maternity leave, in practice they again rarely use this opportunity. Thirdly, fathers are only entitled to a share of maternity leave if the mother is in employment. Such unequal division of parental leaves only reinforces the stereotype of a woman as solely responsible for raising children and deepens the already existing prejudices against female workers.

There are also several different flexible working ‘schemes’ to help both parents raise their child. There is no differentiation in law between men and women other than the short breaks from work to allow mothers to breastfeed. The employees may ask for an individual timetable, shortened working week or a gradual return to work, mostly through part-time work. Due to failure of the state in the provision of childcare institutions, those flexible work schemes are extremely important, especially for women who are expected to take care of children and so are at a greater risk of being discriminated against on the labour market. In theory, both parents have the same rights here, but in practice women are more likely to use them frequently due to their perceived role as child carers.

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[298] Błaszczyk B., The situation of the elderly in the labour market in Poland …, op. cit., p. 55

[299] Długofalowa Polityka Senioralna w Polsce na lata 2014-2020, Uchwała Rady Ministrów Nr 238 z dnia 24 grudnia 2013 r.: https://www.mpips.gov.pl/seniorzyaktywne-starzenie/zalozenia-dlugofalowej-polityki-senioralnej-w-polsce-na-lata-20142020/

With regard to age discrimination, older workers have troubles maintaining their employment as they age. Poland has a low percentage of older workers in employment mostly as a result of the availability of early retirement. During the transition period from Communism to a free-market economy, both women and older people were pushed out of the labour market as a way of tackling unemployment. Although, there have been undeniable improvements in this regard, the employment rate among older workers in Poland is still low. Older persons are also facing discrimination because they are seen as less productive by the employers and the possibility of earlier retirement only encourages this practice. Article 39 of the Labour Code protects workers who have less than 4 four years before they reach a retirement age, but after that the protection ceases. Although, there is the prohibition of dismissal of workers who have reached the retirement age and gained the right to pension solely on the basis of age, this may be used as one of the 'criterions' in choosing persons for dismissal. Especially in the times of economic hardships, it is very easy to do so.

Finally, multiple discrimination based on gender and age is still largely unrecognised in Poland, even though gender and age are among the most frequent grounds of discrimination. Women are in a more disadvantaged situation than men due to the differential retirement ages for men and women in Poland. The 'early exit' culture affect them even more as they are pushed out of the labour market sooner than men. Moreover, they are expected to retire in order to take care of dependants or grandchildren. This substantially limits their ability to compete on the labour market on equal terms with men. Moreover, the Constitutional Court ruled that differential retirement age for men and women is in compliance with the Constitutional provisions on equality and non-discrimination. In this ruling, the Court stressed the importance of social and biological factors thereby undermining the principle of equality between men and women and only reinforced harmful stereotypes that hamper women's professional development. Perhaps, what is even worse, the Constitutional Court framed this situation of older women as 'privilege', a kind of affirmative action towards the equality of men and women. Since then, the retirement ages were equalised in a law reform from 2012, but the new Government returned to the old differential retirement ages system. It is therefore clear that the older women's situation on the labour market is precarious, especially compared to that of men.

Chapter 5: Compliance of Polish Non-Discrimination Law and Practice with the International and Regional Instruments

5.1. Polish Law and International Instruments

First and foremost, it is important to indicate that Poland had ratified all of the most important international instruments concerning equality and non-discrimination with regard to gender and age, namely the ICCPR, ICESCR and CEDAW. Therefore, Poland has an obligation to implement all provisions of these instruments into its' legal system. It must be stressed that all these instruments were ratified at the time when they were adopted. Both the ICCPR and ICESCR were ratified by Poland already in 1977, while CEDAW was ratified in 1980[300]. However, the Optional Protocol to the ICESCR had not been ratified. State Parties to this Protocol recognise the competence of the Committee on Economic, Social and Cultural Rights to "receive and consider communications" from individual persons or groups who are claiming violation of the Covenant rights[301]. It has already been a couple of years since the Optional Protocol has been adopted, and since it gives individuals recourse to additional international protection of the Covenant rights, the Polish Government should consider ratifying it.

5.1.1. The compliance of the Polish Constitution with ICCPR, ICESCR and CEDAW

Even though, the Constitution provides for only very basic equality and non-discrimination provisions, it is the most fundamental legal document and so it should be discussed separately. Article 32 of the Constitution states that "all persons shall be equal before the law" and that "no one shall be discriminated against in political, social and economic life for any reason whatsoever". Article 33 stipulates equality between men and women in "family, political, social and economic life". It also specifies that both men and women shall have equal rights regarding "employment and promotion", among others. Therefore, the prohibition of discrimination is very wide and not limited to any specific grounds. Both ICCPR and ICESCR contain non-discrimination and equality between men and women provisions in their respective Articles 2 and 3. Although, in Article 2, they both list certain grounds of discrimination, the "other status" is added in the end, which means that some important and frequent grounds of discrimination were recognised, but the list remains open to future development. Articles 3 of the Covenants oblige the State Parties to ensure equal rights of men and women in the enjoyment of Covenant rights. With regard to employment, Article 7 of the ICESCR seems somewhat limited to just and favourable conditions of work, emphasising in particular equal pay. There is no mention of equality in access to and termination of employment, only equality regarding the promotion in employment. Although, the Polish Constitution and

[300] See ratification status by Poland at: http://indicators.ohchr.org/

[301] Optional Protocol to the ICESCR: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx

ICCPR and ICESCR are all not limited to specific grounds, but can cover every possible ground of discrimination, it seems that the Polish Constitution has a wider scope of application as its' provisions on equality and non-discrimination cover employment issues in general, while the ICESCR fails to mention equality in access to or termination of employment. However, the ICESCR's General Comments are quite helpful in defining the scope of principle of equality and non-discrimination. These General Comments are very useful in the interpretation of the Constitutional provisions, which are quite basic. As an example, General Comment 20 had dealt specifically with non-discrimination under the ICESCR and recognised that it may take form of discrimination by perception or by association as well as discrimination on multiple grounds. Also, positive action is often stressed as necessary to fulfil the rights recognised by the Covenant.

CEDAW focuses specifically on gender equality. Its' definition of the term 'discrimination against women' is very wide and Article 11 provides extensive protection in employment. Member States are also encouraged to introduce measures for the reconciliation of work and family responsibilities. The General Recommendation 25 also emphasised the need for temporary special measures. Both the Polish Constitution and CEDAW contain wide definitions of discrimination against women and so in this way, they are in compliance. However, while all of the international instruments and their scope have been defined well, it is indeed harder to define the exact scope of application of the principle of equality and non-discrimination under the Polish Constitution due to its' very general provisions. This is also why few cases concerning equality and non-discrimination come to the Constitutional Court. Even when a case comes to the Constitutional Court, the outcome depends largely on the individual judges' interpretation of the Constitution and the extent to which they consider the international instruments.

To illustrate this, it is useful to briefly discuss the judgement of the Constitutional Court on the compliance of differential retirement ages for men and women with Articles 32 and 33 of the Constitution[302]. In this case, the Constitutional Court considered international regulations at length. While it correctly stated that the use of differential retirement ages is not a violation of international and European law, the rest of the argument rested on the fact that in the Polish situation, the differential retirement ages constitute a 'privilege' for women and so are a form of temporary measures with the aim of bringing about the equality between men and women. However, as I argued in the previous chapter, this only worsens the position of women. They are put at a disadvantage from the beginning as they do not have equal opportunities of professional development and are pushed out of the labour market. In addition, this reinforces harmful stereotypes about women which lead to discrimination in employment. Yet, the Constitutional Court interpreted the regulation on differential retirement age as being a 'privilege', while it seems to be exactly the opposite. It can also be argued that the CEDAW Committee would probably disagree

[302] The Judgement of the Constitutional Tribunal 15/07/2010, K 63/07 (Wyrok Trybunału Konstytucyjnego z dnia 15 lipca 2010 r., Sygn. akt K 63/07): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20101370925

with the Constitutional Court's reasoning. In General Recommendation 27[303], the Committee discussed the issue of multiple discrimination based on gender and age and recognised that the work-related discrimination of women throughout their lives "has a cumulative impact in old age"[304] especially with regard to access to pensions and their amount. The Committee indicated that the State Parties are obliged to ensure that retirement ages do not discriminate against women. However, in the present situation, women on the Polish labour market are not afforded equal opportunities compared with men as the differential retirement ages limit their possibilities for professional advancement. Therefore, it is unlikely that the CEDAW Committee would agree with the Constitutional Court's reasoning that the differential retirement ages in Poland are necessary to bring about substantive equality. Nonetheless, it must be pointed out that, despite the potential difficulties in the implementation, the provisions of the Constitution are in compliance with the ICCPR, ICESCR and CEDAW and sometimes may be even interpreted to cover more issues in regard to discrimination in employment than the international instruments.

5.1.2. The compliance of the Labour Code with ICCPR, ICESCR and CEDAW

As discussed above, both the ICCPR and ICESCR stipulate the prohibition on non-discrimination in their Article 2 and equality between men and women in Article 3 in the same way. Since the focus here is on economic rights, only the ICESCR will be discussed in depth. Starting with Article 2 on non-discrimination, it states that the Covenant rights shall be exercised without discrimination and enumerates several grounds, but leaves the list open with the addition of 'other status' in the end. Article 18^{3a} of the Labour Code (Prohibition against discrimination in employment) also puts forward various grounds, even more than the ICESCR. Although there is no express mention of any 'other status', the formulation of this provision suggests that the list remains open, as it states that workers should be treated equally "in particular regardless of sex, age …". This had been interpreted by scholars as meaning that there is no closed list of grounds and that more grounds can be added in the future. Article 3 of the ICESCR stipulates equality between men and women with regard to Covenant rights. The Labour Code, though it does not have a separate provision on equality between men and women, does cover these rights in its' general Articles concerning equality and non-discrimination in employment.

Both the ICESCR and the Polish Labour Code cover the sphere of employment, but it seems that the Labour Code affords more rights. As an example, both instruments cover inequality in promotion, remuneration or conditions of work, but the Labour Code also covers access to and termination of employment. In addition, the Labour Code is much more detailed as it contains definitions of direct and indirect discrimination, examples of actions that will or will not constitute discrimination (e.g., special temporary measures) and a provision on prohibition of retaliation.

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[303] General Recommendation 27 on older women and protection of their human rights, CEDAW, Forty-seventh Session, 4-22 October 2010

[304] Ibidem, para 20

However, it must be pointed out that these issues were covered by the General Comments to the ICESCR. In addition, General Comment 20 to the ICSECR had discussed different forms of discrimination, such as discrimination by perception or association, which are not mentioned and therefore not prohibited anywhere in the Labour Code and still largely unrecognised by the Courts[305]. As discussed in the previous chapter, the issue of multiple discrimination in Polish law is neither defined, nor practised, but it technically exists as Article 18^{3b} of the Labour Code prohibits discrimination on "one or more grounds". Still, the Courts usually find it sufficient to decide a case on a single ground. In addition, the Labour Code enumerates certain exceptions from the general prohibition fo discrimination. For example, 'objective reasons' or seniority (length of work) provide justification for the differentiation between employees. The same is true when the type of work is such that certain characteristics of a person constitute a genuine occupational requirement for the job. There are no such limitations under the ICESCR. Therefore, the provisions of the Labour Code are largely in compliance with the ICESCR, sometimes even providing more protection. However, there is still little recognition of some distinct forms of discrimination such as discrimination by association or perception, which are currently not prohibited under the Labour Code. Also, the ICESCR states that limitations to its' rights must be determined by law and will only be accepted "in so far as this may be compatible with the nature of these rights" (Article 4). It is debatable whether Labour Code justifications for differential treatment in employment are compatible here.

The CEDAW focuses on gender discrimination and in that area is much more detailed that the ICESCR. The definitions of discrimination in CEDAW and in the Labour Code are quite similar, even if their scope differs. As far as employment relations are concerned, they both refer to discrimination as any kind of unfavourable treatment based on gender in the economic sphere. CEDAW in addition points out the need for equality between men and women and also includes 'marital status' as a possible ground of discrimination. Article 11 CEDAW on employment prohibits discrimination in access to employment, promotion, vocational training and remuneration, so it covers the same areas of employment relations as the Labour Code. CEDAW, like the Labour Code, does provide for a general rule of non-discrimination in termination of employment in Article 11, and more specifically prohibits dismissals on the basis of pregnancy, maternity leave or marital status. The Labour Code protects pregnant women and women on maternity leave in the general non-discrimination provisions and also in the provisions regarding pregnancy and parental leaves. Also, both CEDAW and the Labour Code refer to temporary special measures, the aim of which is to accelerate the de facto equality and state that such measures will not constitute discrimination. There is only one limitation on the employment of pregnant women in CEDAW and the Labour Code, namely when the type of work conducted could be harmful to the women's health. In addition, while CEDAW only encourages the States to provide services for the reconciliation of work and family life, the Labour Code provides for several schemes, such as individual timetable or shortened working week, which make it easier for parents, especially women, to go back to work.

[305] European Commission, Country Report, Non-discrimination, Poland, 2017, p. 41: https://publications.europa.eu/en/publication-detail/-/publication/86ec1f65-c501-11e7-9b01-01aa75ed71a1/language-en/format-PDF/source-68609528

Article 5 CEDAW focuses on State actions aimed at the elimination of harmful stereotypes and educating the society on the roles of both parents in childcare. This could come under the 'positive action' provisions of the Labour Code. There are also bodies with the same purpose, such as the Ombudsman and Plenipotentiary for Equal Treatment. In addition, various policies with the aim of accelerating gender equality were implemented, such as the EQUAL Initiative or the National Action Plan. The CEDAW General Recommendations (25 and 27) put emphasis on the multiple discrimination of older women and stressed their particularly disadvantaged position on the labour market. Poland had also paid attention to this problem, with both the judiciary and the government recognising the need for action. Policies such as the 'Solidarity Across Generations' or 'Long-term Senior Policy' focus on age discrimination and also recognise the less favourable treatment of older women. This reflects the CEDAW Committee's view that legal action alone is not sufficient and special measures are necessary to ensure substantive equality between men and women[306]. Therefore, the CEDAW and the Labour Code are in compliance, both regarding the legal provisions and programmes accelerating equality between men and women.

5.2. Polish Law and ILO Standards

5.2.1. The compliance of the Polish Constitution with the ILO Standards

Poland had ratified all fundamental ILO Conventions. The two fundamental ILO Conventions dealing with equality and non-discrimination are C100 and C111. C100 on equal remuneration stresses the need for equality between men and women in the payment of wages and all other forms of pay. In order to fulfil that aim, it also advises the States to take action to ensure equal access employment and vocational training. C111 concerns not only the prohibition of discrimination, but also measures to be taken by Member States to promote the equality of opportunity and treatment in employment. It defines discrimination in employment very widely in that any distinction, exclusion or preference on the basis of prohibited ground which violates the principle of equality will constitute a breach of the Convention. Its' Recommendation clarifies that this principle applies in various aspects of employment, such as access to and termination of employment, promotion and general conditions of work. C111 also specifies several prohibited grounds of discrimination, but then adds a provision which states that any other distinctions, as determined by the Member States, may also be applicable. In addition, C87 is yet another fundamental convention (on the freedom of association and right to organise) which also contains non-discrimination provisions. In accordance with Article 2, all workers without distinction, have a right to set up and join trade unions.

Therefore, all of the above fundamental conventions offer a wide scope of protection against discrimination and in that way, they are similar to the provisions in the Polish Constitution. Article 32 of the Constitution prohibits any kind of discrimination in the economic sphere and Article 33

306 General Recommendation 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary measures, CEDAW, 2004, para 8

stipulates equality between men and women in economic life, particularly with regard to employment and promotion. The provisions of the Constitution are therefore so wide that they may be interpreted to cover all of the issues discussed in the fundamental ILO Conventions. However, the lack of specificity may again constitute a problem in practice, and so the ILO Conventions are a great source of guidance in this regard.

Other ILO Conventions which concern the principle of equality and non-discrimination are: C156 on workers with family responsibilities, C158 on termination of employment, C183 on maternity protection and C175 on part-time work. It must be pointed out here again that none of these conventions were ratified by Poland. This suggests lack of commitment or awareness of these problems and although, the protection afforded by the Polish Constitution is extensive, without ratification the specific problems discussed in these ILO Conventions may not be given too much attention. Some of these Conventions require specific action, for example, C156 stresses the need for the sharing of responsibilities between both parents, while C183 states that mothers should return to the same post after maternity leave. The Polish Constitution could be easily interpreted to cover these issues, but due to the general wording and clear lack of commitment by Poland, the Constitution might not be useful here. This is why it is advisable that these conventions are ratified by Poland as they may contribute to the better understanding of the scope of the Constitutional provisions on equality and non-discrimination and expand their use in practice.

5.2.2. The compliance of the Labour Code with the ILO Standards

Starting with the Fundamental ILO Conventions linked to the principle of equality and non-discrimination. C100 on equal remuneration for work of equal value focuses on gender discrimination in the payment of wages and all other forms of pay, while its' Recommendation advises that in order to fulfil this goal, states should also ensure equal access to employment. The Labour Code does contain provisions on equal pay and equal access to employment, but it does so in general terms. Article 11^2 of the Labour Code provides for equality of men and women, but there are no specific provisions dealing specifically with equal pay for women. Perhaps, it was considered unnecessary as a general equal pay provision covers this issue. Article 18^{3c} of the Labour Code states that: "all workers have a right to an equal remuneration for the same work or work of equal value", but does not mention non-discrimination nor does it indicate any specific grounds. Still, since gender is one of the most common grounds of discrimination in Poland, a provision devoted solely to gender equality could be useful. The Committee of Experts does not seem to have an issue with the fact that there is no specific gender equality provision in this regard and only discusses the problem with its' implementation, especially in connection with the requirement of a 'comparator'[307], which does not exist under C100 and potentially limits its protection.

[307] Comment by the CEACR: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3188158:NO

As for C111 on discrimination in employment, its' definition of discrimination, like the one in the Labour Code, covers several grounds of discrimination, but leaves the list open for further development. C111 does this by adding 'other status' ground, thereby creating the possibility for the States to develop new grounds. The Labour Code states that discrimination in prohibited "in particular regardless of sex, age …". This formulation of prohibition of discrimination allows for the creation of new grounds. Also, the need for positive action is recognised both by C111 and the Labour Code. The Recommendation to C111 and the Labour Code both state that non-discrimination provisions extend to the access to and termination of employment, promotion at work, vocational training, remuneration and general conditions of work. Also, C111 recognises that certain "inherent requirements" of the job, security of the state and special measures of protection (provided for in other ILO Conventions) shall preclude the occurrence of discrimination. However, it not does envisage any other exceptions, while the Labour Code has several exceptions such as 'objective reasons' or seniority. Although, the provisions of the Labour Code are largely in compliance with C111, the inclusion of so many exceptions may limit the Labour Code's protection against discrimination. Unlike the Labour Code, C111 does not contain definitions of direct and indirect discrimination, but the ILO General Survey on the Fundamental Conventions (2012) explained that they come within the scope of C111. However, C111 only lists gender as a prohibited ground of discrimination and does not mention age at all, while the Labour Code lists both gender and age as grounds of discrimination.

In regard to C87 on freedom of association and right to organise, it is sufficient to say that the Labour Code expressly prohibits discrimination on the ground of trade union membership and therefore in this aspect is in compliance with this fundamental convention.

Even though, the other ILO conventions relating to non-discrimination based on gender were not ratified by Poland, they should still be discussed. Firstly, C183 on maternity protection prohibits dismissals of pregnant women and women on maternity leave, unless the cause of dismissal was unrelated to pregnancy or maternity leave (Article 8). The same provisions are found in the Labour Code's Article 177, which only allows dismissals of such women "through their own fault" or in the event of bankruptcy or liquidation of the employer. Both of these instruments also state that women need to be returned to the same post that they occupied before or at least to an equivalent one. However, the Labour Code's protection seems to end right after the return to work, while C183 also applies to a certain period of time after women's return to work. While both the Labour Code and C183 prohibit discrimination in access to employment, C183 is more specific in that it also prohibits use of pregnancy certificates or tests. Although, Polish law is largely in compliance with C183, its' ratification is recommended as its' provisions are more detailed and, unlike the Labour Code, C183 provides protection also after the women's return to work.

Secondly, C156 concerning workers with family responsibilities requires equality between men and women workers who have family responsibilities without conflict between work and family life as

well as the freedom to choose employment that considers their personal situation as well as obliges the states to take measures in connection with the development of family and childcare facilities (Article 5). Such workers also cannot be dismissed solely due to their family responsibilities (Article 8). C156 also requires states to develop policies in this regard. The Labour Code contains several provisions which concern workers with family responsibilities. Article 18^{3b} para 2(3) of the Labour Code states that differentiation of workers based on the protection of parenthood is not deemed discriminatory. Although, parenthood is not listed expressly as a ground of discrimination, it is clear that the only differentiation that is allowed under the Labour Code is when it serves to protect the rights of workers with family responsibilities, which means that any other differentiation will be deemed discriminatory. In this regard, Articles 67^{5} to 67^{17}, 142-4 and 186^{7} para 1 all provide for different types of flexible working arrangements, such as individual timetable, a shortened working week or part-time work. In addition, policies and programmes were implemented, such as the 'Maluch' (Kid) Programme, which aims to create new and well-equipped childcare institutions, while the Act Amending the Law on care of children under 3 and certain other laws[308] made it easier to finance such institutions. Also, the EQUAL Initiative set up projects concerning workers with family responsibilities, but it must be stressed that these projects were regional and not nationwide and that this programme was concluded couple of years ago. These projects are in line with the Labour Code's provision which allows for a differentiation of workers for the protection of the rights related to parenthood. The Labour Code is therefore compatible with C156, however, ratification of this convention is still advisable, especially in connection with the creation of national policies, as it provides very detailed rules for the States to abide by and therefore may be more straightforward on this topic, thereby helping with the effective implementation of the rights of workers with family responsibilities.

Thirdly, C158 on termination of employment states that workers may only be dismissed for a 'valid reason' connected to their work. It also specifically prohibits dismissals on various grounds, such as gender, pregnancy, maternity leave or family responsibilities. Dismissed workers must also have a right to appeal to an appropriate body. The Labour Code also prohibits unjustified dismissal on these grounds. However, it does not always do so in the Chapter on Equal Treatment in Employment, as the prohibition of dismissal on the grounds of pregnancy or maternity is found elsewhere in the Labour Code. The inclusion of these grounds in the provisions on non-discrimination may emphasise the importance of these issues and perhaps such addition should be considered. Dismissed workers also have a right to bring a discrimination claim to a court (Article 18^{3d}). As far as age discrimination is concerned, the Labour Code lists 'age' as one of the grounds of discrimination, while it is only included in the Recommendation to C158 and therefore the States are not obliged to add it as a ground. C158 is also formulated in such a way that it suggests that the list of grounds is closed. Here, the Labour Code actually provides more protection than the C158.

[308] Ustawa z dnia 10 maja 2013 r. o zmianie ustawy o opiece nad dziećmi w wieku do lat 3 oraz niektórych innych ustaw, Dz.U. 2013 poz. 747: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20130000747

Fourthly, C168 on employment promotion and protection against unemployment promotes “full, productive and freely chosen employment” (Article 2) and states that the principle of equality and the prohibition of discrimination should be ensured with regard to access to employment. Both sex and age are recognised as grounds of discrimination, along with several other grounds, but it again seems that it is a closed list. The Labour Code provides for non-discrimination in access to employment in Article 18^{3a} of the Labour Code, but does not limit this protection to specific grounds. The Labour Code therefore provides more protection with regard to non-discrimination in access to employment than C168, but since the practical implementation of this principle in connection to women, both younger and older, is an issue in Poland, the ratification of this Convention should be considered.

Finally, C175 on part-time work prohibits discrimination of part-time workers and states that they should "receive the same protection as that accorded to comparable full-time workers” (Article 4). The Labour Code also prohibits discrimination of part-time workers. It is listed in Article 18^{3a} of the Labour Code which concerns equal treatment in employment, along with other grounds of discrimination, such as gender or age. Such addition of part-time work as a discriminatory ground in itself is unusual, but it shows commitment to the protection of this group of workers.

To sum up on all of these specific ILO Conventions, although they have not been ratified by Poland, the Labour Code is largely in compliance with each of them. Still, they are all devoted to a certain topic and provide detailed set of rules and sometimes more extensive protection, so their ratification by Poland is advisable as it could prove to be very useful in the effective implementation of rights contained therein.

5.3. Polish Law and EU Instruments

5.3.1. The compliance of the Polish Constitution with the EU Instruments

Since Poland is a Member of the European Union, it must take into account the caselaw of the European Court of Justice (ECJ) as well as automatically transpose the EU Directives into the national law. Poland has ratified the European Convention of Human Rights (ECHR), so its’ caselaw must also be considered by the Polish courts, but it must be emphasised that ECHR does not deal directly with discrimination in employment, but may in some cases have impact on this sphere. When dealing with employment relations, the obligations arising out of the EU membership greatly contribute to the understanding of the scope of protection against discrimination in the Polish Constitution. As discussed above, the Polish Constitution contains two articles on equality and non-discrimination. Article 32 states that: “all persons shall be equal before the law” and that: “no one shall be discriminated against in … economic life for any reason whatsoever”. Article 33 stipulates equality between men and women in, among others, economic life with the special indication of employment and promotion at work. This is a very broad definition, which means it

could be interpreted in different ways, as there is not much guidance in the Constitution on the more specific employment issues, such as temporary special measures or maternity protection. This is why, although the Constitution is technically in compliance with various international instruments, for example ICESCR, without further guidance this protection may not be effective in practice. Much more specific obligations are found in the ILO Conventions, which were not ratified by Poland, so there is no obligation on the courts to consider rights contained therein to define the scope of the Constitutional provisions on equality and non-discrimination. That is what makes the EU Membership so important. By the virtue of being an EU Member, all EU law must be implemented and the ECJ caselaw must be considered. This makes it easier for the Constitutional Court to use and interpret the very broad constitutional provisions on equality and non-discrimination.

To illustrate this point, it is best to recall some EU caselaw that was discussed in Chapter 2. With regard to gender discrimination, in the Marshall case[309], the ECJ stated that the use of temporary special measures giving priority to female applicants was desirable as long as they were not unconditional (para 35). This case provides a lot of clarification on the scope of non-discrimination in employment. Not only should women be treated equally, but States should take certain measures to ensure that the situation of men and women is equalised. On age discrimination, the ECJ stated in Mangold that: "it must be regarded as a general principle" of the EU law[310]. The ECJ here shows the importance of age discrimination, which is often overlooked. The basic provisions of the Constitution may not be enough by themselves to ensure that such protection is afforded to the people. The European Social Charter also provides extensive protection with regard to employment, which helps with the interpretation of the Constitution. It states in express terms that discrimination in access to and termination of employment, as well as vocational training and working conditions is prohibited. It requires that pregnant women are not to be dismissed on that account. It also has a downside as the European Social Charter largely ignores age discrimination, so this may have a negative impact on the Constitutional Court's interpretation of the scope of protection as far as age is concerned. However, it still provides much more clarity and improves the effectiveness of the Constitutional provisions on equality and non-discrimination. In addition, the EU Directives which deal with a variety of issues in great depth, are also important. The Employment Equality Directive[311] deals with employment in general, but other Directives, such the Gender Equality

[309] C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, Judgement of the Court of 11 November 1997: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0409&from=EN

[310] C-144/04, *Wereer Mangold v Rudiger Helm*, ECJ, Judgement of the Court (Grand Chamber) of 22 November 2005, para 75: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-144/04

[311] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0078&from=en

Directive (Recast)[312], Pregnant Workers Directive[313] or Parental Leave Directive[314] provide detailed regulations on the extent of the rights and the use of special measures with regard to gender discrimination. The need to implement the rights contained therein into the national law means that the Constitutional Court has a great source of guidance on the interpretation of Constitutional provisions on equality and non-discrimination, which greatly improves their overall effectiveness.

5.3.2. The compliance of the Labour Code with the EU Instruments

As mentioned earlier, Poland's membership in the EU means that it must automatically transpose EU Directives into the national law and also consider the ECJ caselaw. Poland has also ratified both the ECHR and the European Social Charter. Although the EU law and the ECHR are separate sources of law, they are closely connected and the ECJ looks to ECtHR for guidance on the scope of protection of rights under the EU law. As a result, these sources of law are largely consistent with each other[315].

Starting with the Employment Equality Directive[316], prohibited grounds of discrimination include age (along with several other grounds), but this is a closed list, so unlike the Labour Code, it does not envisage a possibility of adding more grounds. Both the Labour Code and the Employment Directive contain definitions of direct and indirect discrimination. The definition of direct discrimination in the Employment Directive reads as follows: "direct discrimination is 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"[317]. The Labour Code's Article 18^{3a} para 3, on the other hand, states that: "direct discrimination takes place when an employee, for one or more reasons listed in para 1, was, is, or may be treated, in a comparable situation, less favourably than other employees". In the Employment Directive, the "hypothetical nature refers to the behaviour to which the discriminatory treatment is being compared … and not the discrimination itself"[318]. Although the Polish translation differs slightly, it proven to have no practical effect[319]. The definition of indirect discrimination in the Labour Code seems to be slightly erroneous as it refers to "all or a

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[312] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

[313] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0085

[314] Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0018&from=EN

[315] Handbook on European Non-discrimination law, European Union Agency for Fundamental Rights and Council of Europe, 2010, p. 17

[316] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0078&from=en

[317] Ibidem, Article 2(2(a))

[318] European Commission, Country Report, Non-discrimination, Poland, 2017 …, op. cit., p. 42

[319] Ibidem

considerable number of workers" who must face indirect discrimination, while the Employment Directive simply refers to the indirect discrimination of "persons" and does not require that the majority of persons must be at a disadvantage. Both the Employment Directive and the Labour Code provide that indirect discrimination may be objectively justified by a legitimate aim and the means of achieving that aim must be appropriate and necessary. However, in the Labour Code, both direct and indirect discrimination may be justified through "objective reasons", while in the EU law only indirect discrimination may be justified.

The Labour Code also adds other kinds of behaviour that will not amount to discrimination in Article 18[3b] para 2, such as 'special occupational requirements', 'changing working time if justified by reasons not relating to the employees', 'distinction of employees for the protection of parenthood or disability', and the 'criterion of seniority' (length of service/work). Such exceptions are not found in the Employment Directive or the Gender Equality Directive (Recast)[320] which defines gender discrimination (both direct and indirect) in the same way as the Employment Directive. On other accounts, the Labour Code and the Employment and Gender Equality Directives are in compliance with each other. All refer to non-discrimination in access to and termination of employment, promotion at work, vocational training, equal pay and conditions of work and also include 'positive action'. Both the Directives and the Labour Code put the burden of proof on the respondent, while the claimant must only introduce facts that make the occurrence of discrimination likely. Therefore, the Labour Code is largely in compliance with the Employment Directive and Gender Equality Directive. The two problems that arise are connected to the definition of indirect discrimination and a significantly higher number of possible exceptions to the prohibition of discrimination under the Labour Code. On a positive note, it must be pointed out that the Labour Code, unlike the EU Directives, provides for an open list of prohibited grounds and therefore allows for a future development of grounds of discrimination.

The non-discrimination provisions on the basis of gender should also be discussed in the light of the Pregnant Workers Directive[321] and the Parental Leave Directive[322]. The Pregnant Workers Directive largely concerns pregnant women's safety and health, but it does contain some non-discrimination provisions. Article 10 provides for the prohibition of dismissal during pregnancy or maternity leave, unless exceptional circumstances not connected to pregnancy had occurred that justified dismissal. Chapter 8 of the Labour Code contains rights related to parenthood. There, it is also stated that women cannot be dismissed during maternity leave, unless "through her own fault" (Article 177

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[320] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

[321] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0085

[322] Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0018&from=EN

para 1). Labour Code also adds that bankruptcy or liquidation will justify dismissal (Article 177 para 4). Therefore, here it seems that the Labour Code is in compliance with the Pregnant Workers Directive, but it must be pointed out that the Labour Code's formulation "through her own fault" is quite vague and could be interpreted to cover many things, which is why a change in wording of this provision is advisable. Articles 6 and 7 of the Pregnant Workers Directive prohibit exposure and night work, respectively. Similar provisions are found in the Labour Code, Chapter 8. Both instruments provide the same rules on the kind of work that is prohibited[323], but the Labour Code is more specific about the scope of prohibited work for pregnant and breastfeeding women.

The Parental Leave Directive facilitates reconciliation of work and family responsibilities. It stipulates the individual right of each parent to a leave. The entire period of leave should be 4 months and at least 1 out of these 4 months should be non-transferable in order to ensure greater equality between men and women (Clause 2). The Labour Code actually provides for 20 weeks maternity leave, so more than 4 months, but paternity leave, as an individual right of the father is only 2 weeks. As such, the Labour Code does not meet the requirements of the Parental Leave Directive, as far as the sharing of responsibilities between the parents is concerned. The Parental Leave Directive (Clause 5) and the Labour Code (Article 183^2) both provide that workers should be returned to their post after the end of parental leave. The Pregnant Workers Directive also refers to the reconciliation of work and family life for employees after the return to work, such as changes to the working time. Labour Code envisages several flexible forms of work, such as telework (Articles 67^5 to 67^{17}), part-time work (Article 186^7 para 1), individual working timetable **(**Article 142) or a shortened working week (Articles 143 and 144). Here, the Labour Code is in compliance with the Parental Leave Directive.

Since Poland is a Member of the EU, in general, provisions such as the definitions of direct and indirect discrimination, a 'comparator' or the shifted burden of proof are largely in compliance with the EU rules and caselaw. However, there are some issues that need to be stressed. As discussed above in Chapter 3, a 'comparator' in discrimination cases may sometimes become an issue. The Supreme Court[324] decided that comparison may take place only within the same employer, which constitutes problems in small companies where only one person may occupy a specific post. The ECJ delivered a judgement on this matter as well. It stated that in some circumstances, persons may compare themselves to employees from other companies, for example, by using statistical evidence[325]. Since the ECJ stated that a 'comparator' may include persons from outside the

[323] See Pregnant Workers Directive, Annexes I and II, and Labour Code, Article 176 and the interconnected Ordinance of the Council of Ministers (Rozporządzenie Rady Ministrów z dnia 3 kwietnia 2017 r. W sprawie wykazu prac uciążliwych, niebezpiecznych lub szkodliwych dla zdrowia kobiet w ciąży oraz kobiet karmiących piersią, Dz.U. 2017 poz. 796)

[324] Supreme Court Judgement, III PK 20/13, 15 November 2013 (Wyrok SN, III PK 20/13, z dnia 15 listopada 2013 r.): https://www.saos.org.pl/judgments/103548

[325] C-256/01, Debra Allonby v Accrington & Rossendale College, Judgement of the Court of 13 January 2004, paras 73-84: http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-256/01&td=ALL

company, Polish Courts, especially the Supreme Court should take this into account as it will increase chances of successful claim of discrimination.

As far as positive action to combat discrimination is concerned, Article 18^{3b} para 3 of the Labour Code allows it, but there is no significant caselaw in Poland on this issue[326]. The concept of positive action was used by the Constitutional Court, albeit not in a positive way, to justify differential retirement ages for men and women in a judgment that seems to have followed a rather outdated ideas about equality between men and women. In order to improve the situation of women through positive action, the Polish Courts can look for guidance in the ECJ's caselaw, for example, the Marshall case, where the ECJ stated that giving priority to equally qualified female applicants in male dominated posts was desirable as long as such measures were not automatic and unconditional[327]. However, Poland did put in place policies concerning gender and age that could be regarded as positive action, such as the EQUAL Initiative, National Action Plan, Solidarity Between Generations or Long-term Senior Policy. Therefore, some positive action does take place in Poland, although unfortunately, not in the courts.

In addition, the "objective reasons" may justify both direct and indirect discriminatory treatment in Poland. Usually, this concerns a situation when economic hardship is used to justify an otherwise discriminatory treatment. In the Supreme Court Judgement (I PKN 780/00, 10/01/2002,)[328], the Court confirmed that economical considerations may be a reason for dismissal, but the employer's choice should then be carefully examined. Although, the employer should consider the situation of his employees while making a selection, it seems very easy to justify dismissals in general. The ECJ does not seem as eager to excuse discrimination due to the financial or economic hardships of the employer. In the case of Hill and Stapleton, the Court stated that: "an employer cannot justify discrimination […] solely on the ground that avoidance of such discrimination would involve increased costs"[329]. Although this case concerned a job-sharing scheme, it is clear that the ECJ does not readily accept economic considerations as a justification of discrimination. It is a positive development in the Polish law that the employers should take into account the specific situation of each employee, but it would be even better to first consider whether the economic reasons are sufficiently serious as to preclude discrimination in regard to termination of employment.

There are also potential issues which concern discrimination due to parenthood. First, Article 176 of the Labour Code and the interconnected Ordinance of Ministers on works prohibited for pregnant and breastfeeding women effectively limit women's participation in the labour market, but are not

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[326] European Commission, Country Report, Non-discrimination, Poland, 2017 …, op. cit., p. 100

[327] C-409/95, *Hellmut Marschall* ...op, cit., para 35

[328] Wyrok Sądu Najwyższego - Izba Administracyjna, Pracy i Ubezpieczeń Społecznych z dnia 10 stycznia 2002 r. I PKN 780/00

[329] C-243/95, Kathleen Hill and Ann Stapleton v the Revenue Commissioners and the Department of Finance, Judgment of the Court (Sixth Chamber) of 17 June 1998, para 40: http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-243/95&td=ALL

discriminatory because they aim to protect women's health. Although, as discussed above, these regulations are compatible with the EU law, they may produce problems with regard to access to employment. In the Mahlburg case, the ECJ decided that pregnancy requires only temporary protection, and as such, does not justify the refusal to employ a pregnant women for a permanent position[330]. The Court therefore clarified that although, the protection of pregnant women is necessary, it cannot justify a complete denial of access to certain kinds of occupations on this ground. The Labour Code is clear on the need to protect pregnant women, but while it does prohibit dismissals, the access to employment during pregnancy is not considered. It might be advisable to either reformulate provisions of the Labour Code, or for the Supreme Court to clarify this issue.

Second, in a case of Konstantinos Maïstrellis, the ECJ considered Greek legislation and had emphasised that a parent cannot be denied parental leave simply because another parent had not gained that right. The Court stated that each parent should have an individual right to a parental leave, so States are not allowed to adopt provisions where a working father will not be entitled to parental leave, because a mother does not work. According to the Court, such provision is "far from ensuring full equality in practice between men and women in working life, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties"[331]. Such situation constitutes discrimination based on sex. Similar situation persists in Poland. The working father has a right to 2 weeks of parental leave as an individual right, but if he would like to exercise his right to a share of maternity leave, he can only do so when a mother is employed. Although the circumstances are slightly different, the result is the same. Women are regarded as sole carers for children, and just like in the Konstantinos Maïstrellis case, this provision is taking Poland further away from the equality between men and women in parenthood.

Finally, the differential retirement age has a negative impact on women in Poland. Not only does the 'early exit' culture and gender stereotypes still persist in the Polish society, but older women face further disadvantage in the labour market due to a differential retirement age for women (60) and men (65). Nonetheless, the Constitutional Court decided that the differential retirement age does not constitute gender discrimination, but rather is a 'privilege', a form of positive action with the aim of bringing about substantive equality between men and women[332]. Unfortunately, this is technically in line with the caselaw of the European Court of Human Rights (ECtHR). In the case of Stec and Others v UK, which concerned differential retirement ages, the Court stated that generally only "very weighty reasons" could justify gender discrimination. However, a "wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social

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330 C-207/98, *Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern*, ECJ, Judgement of the Court (Sixth Chamber) of 3 February 2000, para 29-30: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-207/98

331 C-222/14, Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton, Judgement of the Court (Fourth Chamber) of 16 July 2015, para 50: http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-222/14&td=ALL

332 The Judgement of the Constitutional Tribunal 15/07/2010, K 63/07 (Wyrok Trybunału Konstytucyjnego z dnia 15 lipca 2010 r., Sygn. akt K 63/07): http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20101370925

strategy" as the national authorities are better placed to know what is in the best interest of the public. The ECtHR will therefore usually accept national strategy "unless it is manifestly without reasonable foundation"[333]. Therefore, the differential retirement age is allowed under the European law, and states can continue to differentiate the situation of men and women in order to eliminate factual inequalities. However, it may be argued that in Poland the differential retirement age not only hampers women's professional careers, but may also no longer be necessary. In 2012, a law reform was introduced which equalised retirement ages for men and women (67) signalling that Poland was ready to make that step towards the equality of men and women. This reform was reversed by the new Government, and the year 2017 saw the return of the old system, which, in my opinion, only perpetuates the existing gender roles in the Polish society and it is unlikely that it will have positive impact on gender equality.

5.4. Conclusions

Polish law is largely in compliance with the international instruments, even those that were not ratified. This is, for the most part, due to Poland's membership in the European Union. The EU had forced Poland to introduce many changes in the law in order to comply with the European standards and the need to transpose EU Directives ensures constant amendments which improve Polish legal provisions on equality and non-discrimination in employment. The great impact of the EU law is seen especially with regard to the fact that none of the specific ILO Conventions on maternity protection, workers with family responsibilities, termination of and access to employment were ratified by Poland. This indicates that without actually having obligations to implement certain standards, Poland would probably remain passive.

However, there is one significant problem in this regard that needs to be discussed. Although, Poland had recognised age as a ground of discrimination, the international community, and as a result also international instruments are still paying little attention to it. Age is rarely explicitly recognised as a ground of discrimination, and even the ILO, an expert organisation in the labour rights had seldom discussed it. There are standards concerning the situation of young people, but older persons are largely ignored. There is only one ILO Recommendation on older persons and it carries no binding obligations. Some international instruments, like the ICESCR or CEDAW have recognised age discrimination in their General Comments/Recommendations, but went no further than that. Only the EU instruments have expressly put forward age as a ground of discrimination, but it still is not sufficiently discussed by the ECJ or the ECtHR. Moreover, for older women in Poland, a serious problem in the professional advancement is caused by the differential retirement ages for men and women, but states are given a wide margin of appreciation in connection with social and economic policies, so without European influence, older women are bound to continue to face unequal employment opportunities compared to men.

[333] Stec and Others v United Kingdom, ECtHR, Applications nos. 65731/01 and 65900/01, 12 April 2006, para 52

Chapter 6: Concluding remarks and Recommendations

6.1. Final remarks

Overall, since the fall of the Communist regime in 1989, the laws on equality and non-discrimination have undergone extensive development and the international instruments all contribute to the better understanding of anti-discrimination laws in Poland. Many new rights and concepts were introduced, mostly due to obligations arising out of Poland's membership in the European Union. The caselaw of the ECJ and the ECtHR is very helpful in interpreting the scope of protection against discrimination, while the EU Directives provide for very specific regulations, such as those concerning pregnancy and parental leave and also put forward definitions of direct and indirect discrimination, making it much harder for employers to discriminate against their employees. Moreover, the EU Directives are to be automatically transposed into the national law, so in the event of the State's failure to do so, EU citizens have recourse to the EU courts.

Both the EU regulations and ILO Conventions prohibit discrimination on various grounds in access to and termination of employment, promotion at work, vocational training, conditions of work and unequal pay. They therefore cover all aspects of employment relations. Although the EU Directives contain a closed list of grounds of discrimination, Poland had decided, in line with ILO Fundamental Conventions, to leave the list open for further development. However, it must be pointed out that Poland did not ratify any of the specific ILO Conventions, even though it is already obliged to introduce largely the same regulations due to its' membership in the EU. This may be interpreted as a lack of commitment to issues such as pregnancy, parental leave rights and the sharing of family responsibilities. Without clear obligations to amend its' laws, Poland often remains passive. Even so, there are some positive measures towards equality and non-discrimination in employment. The Ombudsman and the Plenipotentiary for Equal Treatment are both bodies responsible for the implementation of this principle in Poland. Several polices concerning gender and age discrimination were introduced, such as the National Action Plan or Solidarity between Generations.

The international conventions, though sometimes basic as far as non-discrimination provisions are concerned, provide a lot of guidance through General Comments and Recommendations. As an example, they discussed relatively new concepts, such as multiple discrimination, discrimination by perception or association, which are still seldom considered by the States. Although multiple discrimination in theory exists in the Labour Code, it is largely ignored by the Courts. Discrimination by perception and discrimination by association are neither recognised, nor prohibited under the Polish law. Yet, those specific forms of discrimination affect women in particular. The aspect of multiple discrimination based on gender and age is usually dismissed as a simple gender discrimination, however, in my opinion, a lifetime of gender discrimination has an even more disproportionate impact on women in the old age.

6.2. Recommendations

Poland's laws on equality and non-discrimination in employment are better now than they have ever been, but there is still room to improve. Firstly, it seems that the formulation of some of the Labour Code provisions creates confusion as to its' actual scope. Since the Supreme Court differentiated between 'unequal treatment' and 'discrimination', it would be useful to make it clear that people can only claim compensation in case of discrimination on a particular ground. As was discussed in Chapter 3, even legal advisors may sometimes be unaware of this situation.

Secondly, although the ECJ indicated that in some circumstances, a search for a 'comparator' is not limited to a single employer, the Supreme Court had expressly stated to the contrary. Since finding a suitable 'comparator' is difficult in itself, it would be better if this rule was relaxed and became more in line with the ECJ's reasoning.

Thirdly, the Supreme Court had often dealt with the issue of equality and non-discrimination and provided much guidance on the interpretation of this principle, compared to the other courts. As the Report of the Polish Anti-Discrimination Society had shown, lower courts face difficulties in the correct interpretation and implementation of anti-discrimination provisions, often unable to decide whether the list of grounds is open or closed, or not mentioning it at all. An even more serious problem here lies in these courts' treatment of the burden of proof in discrimination cases, with some claiming that the burden lies on the claimant when it is clearly stated that it is shared, while other courts fail to even mention it. There is also a general lack of recognition of the distinct forms of discrimination in Poland, such as multiple discrimination, discrimination by association and discrimination by perception. A better training of the judiciary in the application of equality and non-discrimination provisions is therefore recommended.

Fourthly, although the protections in relation to parenthood are extensive, there are some issues that should be looked at. It is advisable that Poland ratifies C183 as it provides protection for women against dismissal for a certain period of time after maternity leave ends, since the protection of the Labour Code ceases when women return to work. It would also be good if the Polish Courts took into account the ECJ's reasoning in Mahlburg regarding the pregnant women's access to employment, so that their temporary situation does not prevent them from obtaining permanent employment. In addition, the Labour Code's provisions are not in full compliance with the EU Parental Leave Directive, as they stipulate a highly unequal distribution of maternity and paternity leaves between the parents and undermine the equality between men and women in the sharing of family responsibilities, so changes should be made here to ensure compliance with this Directive.

Fifthly, Polish provisions on non-discrimination provide less protection in certain areas. It seems all too easy to dismiss employees due to 'objective reasons', which, unlike the EU Directives, justify

both direct and indirect discrimination. There are also several exceptions, which allow for a differentiation of employees, that are not found in the EU Directives. In addition, the definition of indirect discrimination is framed in such a way that it requires that either "most or all persons" within a particular group must be discriminated against, while the EU Directive barely refers to "persons", and so provides more protection in this regard. Therefore, the definition of indirect discrimination should be reformulated to comply with the EU Employment Directive, and the scope and number of exceptions to the prohibition of discrimination ought to be limited.

Sixthly, the differential retirement ages for men and women are seen as a 'privilege' in Poland. In my opinion, it should be seen as a multiple discrimination based on gender and age. Women are at a risk of being discriminated throughout their lives, which is already detrimental to their professional career. As they get older, this risk increases as they are pushed out of the labour market earlier due to a differential retirement age between women and men. From the outset, they are put at a greater disadvantage with regard to employment opportunities than men, but instead of protecting women by equalising their chances with those of men, they are put in a position which only reinforces the already discriminatory practices of the employers and makes them worse. The road to a true equality between men and women must start with a realisation that the differential retirement age, although to some extent may constitute a temporary special measure, is not a 'privilege'. To the contrary, it is a result of the state's failure to ensure equality between men and women, and should be abolished as soon as possible. The best way to do this is to reinstate the law reform, which took place in 2012 and equalised the retirement ages for men and women and set them at 67 years. This law reform has already been set up and provides the necessary framework for the practical implementation of the new pension system, so it is advisable to make use of it.

Finally, the last recommendation is aimed more towards the international community, rather than Poland. Discrimination of older workers in Poland has been recognised for a while now, but the international instruments, even the ILO standards, largely ignore this matter. There is not a single convention that deals with older persons. There are only recommendations, but no obligations to include 'age' as a ground of discrimination. Rare recognitions of discrimination of older persons, though are definitely a positive development, do not seem to have any serious long-term consequences on the protection of older persons' rights. In Europe, with a rapidly ageing populations, it is important for the economy that older workers stay longer in employment, but the attention of the international community seems to be focused solely on young workers. It is of course important to take care of the young population, but it is not a reason for older workers to be pushed aside and ignored. There is some recognition of discrimination of older persons by the UN, ILO and the EU in General Comments, Surveys or EU Directives, but it is not enough, so a specific convention or a directive dealing with this issue could bring about the necessary change in this area.

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