**Márton Leó Zaccaria: Some thoughts about the legal practice of the Curia of Hungary in the field of equal employment***
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## Raising the problem – employment equality in the Hungarian judicial practice

The requirement of equal treatment in the field of employment is of great importance even if we speak about the establishing a legal relationship, or its termination or remuneration.[1] In general the prohibition of discrimination – which principle can be found both in international[2] and Union context universally[3] and also in connection with employment – is such a fundamental principle of the labour law system which interpretation and correct application is a serious task and this task will not be made easier by the fact that its interpretation is not unified either in the Member States of the European Union or in the case-law of the Court of Justice of the European Union.[4] These facts definitely influence the legislative and judicature methods of the Member States, and of course, Hungary cannot be an exception of it.

Though the principle in its present form can be regarded young but several questions have emerged in connection with it recently and on analyzing the native legal practice these questions should be taken into consideration. It is clear that there are several aspects on which basis this kind of examination can be made and the following questions may be put: to what extent does the Hungarian legal practice treat the questions of employment anti-discrimination uniformly, to what extent is it regarded emphatic among the labour law norms is it relevant to the Union legal practice, to what extent does it develop the legal regulation, is the practice itself relevant and does it ensure efficient protection for the employees? Besides all these aspects it is necessary to mention that the practice of the Curia of Hungary – earlier the Supreme Court of Hungary – in accordance with the changes of the relevant regulations also changes even if these changes are not necessarily consequent. At the same time there are such constant values and legal principles in our native juridical practice which –together with the Constitutional Court's legal interpretation[5] – may form the base of a special legal protective system.

Furthermore, regarding to the legal practice it is clear that this field of labour law seems a little bit „neglected" in the light of the European standards, namely, even if the Hungarian judicial interpretation deals with such questions, we cannot see a definite development, what is more, some judgements suggest that this topic is not really „popular" among the Hungarian labour law judges. To search its causes would be useful but it is rather impossible as far as I think. In this paper I'd like to highlight the greatest contradictions and imperfections in connection with equal employment in Hungary.

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[1] GYULAVÁRI Tamás, KÖNCZEI György, *Európai szociális jog*, Osiris Kiadó, Budapest, 2000, 134-135.

[2] SZEMESI Sándor, *Az élet és az emberi méltóság, valamint a diszkrimináció tilalmának összefüggései az Emberi Jogok Európai Bírósága* esetjogában, Jogtudományi Közlöny, 2007/5. 216-232.

[3] GYULAVÁRI Tamás, *Az Európai Unió szociális joga*, Jura, 2003/2. 45-58.

[4] SCHIEK, Dagmar, *A new framework on Equal Treatment of Persons in EC law?,* European Law Journal, 2002/2. 290-314.

[5] BITSKEY Botond, GYULAVÁRI Tamás, *Kell-e anti-diszkriminációs törvény*, Jogtudományi Közlöny, 2003/1. 1-8.

One of the most typical features of the above mentioned contradictory situation is that a unified judicial practice which would give guidelines to the judges has not formed in Hungary so far. Its consequence is that these kinds of difficulties in interpretation delay the modern and efficient legislation and result two-faced norms which do not solve necessarily the employees' interests. In my opinion this is the case in connection with the relevant regulations – paragraph 12 – of the new Labour Code (LC) since the base of the major part of the new LC is the judicial practice of the past 20 years[6], and though the minister's reasoning in connection with the requirement of equal treatment refers to this, but this element seems to be left out from this field. I also regard a deficiency that the Hungarian legal practice does not intend to follow the judicial practice of Luxembourg, even if we can find some examples when the Curia does not insist on the text of the LC exclusively (e.g. the principle of equal pay for equal work ).[7]

**The instruments at the Curia's disposal, with special attention to the Commitments of the Labour Court Chamber of the Curia of Hungary**

For the content analysis it is necessary to take into consideration the legal instruments which are at the Curia's disposal to unite the legal interpretation. The Curia is in a special situation since its decisions are not bound so it does not legislate either, so it can form our national equal opportunities law only indirectly. It must be added at this point that its decisions – because of their content and importance – can form definitely the native legal practice, namely, the courts must take into consideration the Curia's crystallized commitments and judgements. This ensures a relatively wide scope of action for the Curia: though its decisions are made in connection with one or two legal disputes, but its decisions are at such a high level of abstraction that these legal arguments can be applied at other cases, too. In my opinion we can say that the Curia has great responsibility on forming the right and correct legal interpretation and judicature.

The commitments of the Chamber (MKs) are of great importance from among the decisions of the Curia, since most of them have received such great importance during the years in the legal practice that they definitely influence the judicature, they nearly are at the same level as the laws in the sense that they are completed by the most important MKs, they make the law regulations more concrete, namely, they have much stronger bond since they function not only as directions. Otherwise, this special legal situation inspires the whole labour law application, what is more, the justification and the necessity of these commitments are questioned by many people and regarding that after the promulgation of the new Labour Code all of these were also sustained, the courts will have to apply them in the future, at least to such extent as it is allowed by the changed legal environment.

But we can find one exception, that is, the MK 97. which deals with the requirement of equal treatment in general, namely, the justifiability of the disadvantageous differentiation. It states as a general rule that discrimination coming from the character or nature of the work is not illegal, its typical example may be every discrimination based on all important and legal condition taken into consideration at the employment. Though, at the birth of this commitment the regulations of the requirement of equal treatment laid in the Labour Code was different from that of today, but in my opinion these differences also show how the Curia interpreted the essence of this principle. It states on theoretical level on the basis of the LC as a general rule that the advantageous differentiation among the employees is forbidden and this

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[6] *Ministerial reasoning/commentary of the Bill T/4786. Act on the Labour Code,* http://www.parlament.hu/irom39/04786/04786.pdf (12. 06. 2013).

[7] See for example: *EBH 2155/2010, EBH 2103/2009, EBH 1980/2009, EBH 1899/2008, BH 52/2008* and *250/2008,* OptiJus, Opten Informatikai Kft.

prohibition refers to every kind of discrimination according to the commitment. The Curia remarks on the basis of the old text of the law that the protected attributes, namely personal and other circumstances which are characteristic of the employee suffered disadvantage, and on which basis she/he suffered disadvantageous treatment cannot be catalogued taxatively, but the most typical ones are mentioned as examples (e.g. gender, age, nationality, race, religion, circumstances which have no connection with the employment relationship). In connection with justifying the difference making, namely the different treatment the Curia separates the attributes which are the base of the discrimination, namely, the attributes which have no connection with the employment relationship are judged illegal without exception, while the discrimination in connection with the labour relationship, that is, discrimination coming from the character of doing the work or the work itself is not judged illegal necessarily. It is important that only the discrimination unambiguously resulted from these are legitimated by the commitment, namely the Curia does not regard enough explanation reason on the employer's side if she/he names the reason of discrimination only the fact that this discrimination is the consequence of the nature of this kind of legal relationship, or the discharged work. In such cases the employers could use discriminative means without restraint, but the regulation serves its opposite. It can be criticized that the commitment does not go into the details of the prohibition, so it does not express when the employer's measures which has real connection with the labour relationship are discriminative. Namely, it states the exception, but does not regard the correct interpretation of the main rule to be important. All these are very important in practice, since the general rules have become more severe, but the employers show a preference for using the discrimination based on the nature of the labour relationship against women or older employees, while in such cases the parties can hardly enjoy legal remedy. At the same time we cannot keep back that this type of discrimination also causes trouble in other Member States, but the Court of Justice of the European Union is rather definite in this respect.[8]

The MK 57. is noteworthy, because the legal questions along which the decision was made are clear, but especially general principles, methods can be traced from it, too. Basically, the women employees are protected by several rules in the LC, on the basis of the principle that because of their own personal attributes their protection against the men is justified. The commitment states as a general rule that the women need legal protection in the interest that their labour law status would not be prejudged as more unfavourably than their men colleagues', namely, it fixes in general one of the fundamental principles of gender equality. Besides, the commitment declares such special rules which do not come – or only in an indirect way – from the text of the law, so among the frames of the principle of equal pay for equal work it says that a female worker transferred permanently during her pregnancy has the right for her average wage at her original job (today absence wage) even if the working hours are shorter at her new position, or at her new scope of duties she does not work in shift or she does not work at in a way that she would have the right for shift extra pay ex lege. Namely, in this case the Curia appreciates that in case of transfer a pregnant woman the transfer is not fulfilled as the employee's will, so she would not suffer discrimination because of her pregnancy and as a consequence of it, her work can be fulfilled at only changed conditions (from the view of remuneration it may be unfavourable). On the basis of the law the only exception can be when the woman employee must be released from work because the employer cannot ensure suitable sphere of activity or working time, but in this case she has the right to her personal base wage for the downtime. The commitment declares that regarding the question whether a woman employee can be transferred to another position of work even against her will or not the principle of proportionality from the Union case law

[8] SCHLACHTER, Monika, *Mandatory Retirement and Age Discrimination under EU Law*, International Journal of Comparative Labour Law and Industrial Relations, 2011/3. 287-299.

must be applied[9], of course, the women employee cannot be forced to fulfil the new position, because it would be contrary to the fundamental principles, so the employer has greater responsibility in the respect that she/he would ensure appropriate work for the employee. However, the employee cannot misuse this right, so from the point of the applicability of this rule the standard of proportionality would be normative, so it must be balanced whether the employer really ensured the different employment regarding to the woman's state and whether the employee refused it with good reason.[10]

Regarding the restricted size of this issue I mention briefly the MK 74. which prohibits the age discrimination and the relevant rule is expressed by such a case that is typical in the whole European legal practice.[11] It states that the employee cannot be deprived of any of her/his emolument, preferences, allotment only because she/he is retired, in case she/he has a valid employment relationship while being retired. It is important that these preferences are due to the non-retired employees on even terms, so their situations must be comparable. Furthermore, the commitment names that regarding to the remuneration and the working hours timing the employees cannot suffer discrimination because of their age. The commitment does not mention applicable exceptions, diversities. The MK 19. also should be mentioned which interprets the principle of pro rata temporis in case of part-time work, namely, it declares that the principle of pro rata temporis must be applied, typically regarding to the remuneration which is adjusted to the fulfilled working time.[12] However, this rule should not be applied in case of the annual paid leave, otherwise discrimination would be fulfilled against those full-time workers being in comparable situation. It must be fixed that the annual leave and the right to it is not linked to the fulfilled (or should be fulfilled) work time, but to the calendar year[13], and the part-time employees "work through" the year like the full-time employees, divergence can be fulfilled only if the employee works on not each day of the calendar week (according to the assignment of working time), and in this case when giving annual leave divergence from the main rule is permitted. Totally, some preferential rules are expressed and its main aim is to protect the part-time workers basic rights and to make this kind of employment more popular. Finally, I'd like to mention the MK 6. in which the requirement of equal treatment appears as a legal instrument. This decision deals with the employments with fixed-term employment contracts referring to the parties' rightful interests. The requirement of equal treatment would be damaged basically if an employee suffers any discrimination by her/his employer because she/he is not employed permanently, but atypically for a fixed period of time.[14] This kind of procedure is an often recurrent element in the legal practice, it is not accidental that the European Union regarding this type of legal practice declared a directive within which the requirements of equal treatment have an important role.[15]

**Discretion vs. discrimination**

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[9] KALAS Tibor, *Egyes jogelvek szerepe az Európai Bíróság ítélkezési gyakorlatában*, Jogtudományi Közlöny, 2001/7-8. 313-320.

[10] PRUGBERGER Tamás, *Az európai munkajog vázlata*, Lícium-Art Kiadó, Debrecen, 2007, 27-30.

[11] HŐS Nikolett, *Az Európai Bíróság életkoron alapuló hátrányos megkülönböztetéssel kapcsolatos joggyakorlata, különös tekintettel az arányossági teszt alkalmazására*, Európai Tükör, 2010/3. 57-75.

[12] BANKÓ Zoltán, *Az atipikus munkajogviszonyok*, Dialóg-Campus Kiadó, Budapest-Pécs, 2010, 91-99.

[13] PRUGBERGER Tamás, *A munkaidő, a pihenőidő és a szabadság várható új szabályozásának kérdéshez*, Jogtudományi Közlöny, 2011/11. 539-549.

[14] BLANPAIN, Roger, *Fixed-term Employment Contracts: The Exception to the Rule?*, International Journal of Comparative Labour Law and Industrial Relations, 2008/1. 123-131.

[15] See for example: *C-393/10. O'Brien case and other judgements cited in this judgement* (for example: Kücükdeveci, Del Cerro Alonso, Tiziano Bruno and Others, Martínez Sala cases).

From the standard Hungarian legal practice it is clear that one of the most dangerous fields of discrimination suffered by the employees is the sphere of cases when the measures resulting discrimination exclusively belong to the circle of the employer's discretion without strict legal regulation. In the practice the contradictory situation often can be observed when the courts regard the employer's discretion as a special kind of "exoneration reason", since in such cases when the employer acts discriminatively regarding to preferences and remunerations which are due to the employees not on the basis of law, but if one group of the employees enjoys these while another does not, this problem of legal interpretation can emerge easily. According to the sense the law designates only the frames regarding the equal treatment but based on the employer's wide deliberation to violate these legal rules is very easy.

Basically, the Curia should designate the border beyond which the employer's balancing is not permitted, since in a basic situation the employer does not act discriminatively as far as she/he keeps the requirements of equal treatment. However, in such cases when a concrete legal norm protects the employees, the courts are stricter against them, but in such cases when the legal damage is the consequence of the employer's own one-sided decision, the courts are much more compliant.[16] The situation is contradictory also because a legal norm exists for such cases (that is the principle of equal pay for equal work) but the circle of its use and real content is questionable, mainly in the light of the fact that the concept of wage is not quite unambiguous in Hungarian labour law.[17]

In my opinion in such cases that are hard to be judged, the courts of trial should take into consideration at greater extent the criteria of proportionality which is rather emphatic in the case-law of Luxembourg, since in some cases the Curia itself refers to the proportionality or disproportion of the differentiation suffered by the employees, but it is clear that working out such system of criteria would be desirable. In a concrete situation it must be examined what are the real consequences of the withdrawal of a given advantage for the employee, whether these deprives could be compensated anyway, and the clause of comparability also needs to be interpreted more precise.

## Conclusions

It would be expedient – with special attention to the changing labour law system – if the Curia would action more definitely for legal unifying and legal development in the field of employment equality, for this to take into consideration the legal practice of the Court of Justice of the European Union more effectively would be necessary. From the point of the judges' practice I regard important the decisions of the Authority of Equal Treatment among other things because the Authority regards the Union norms more definitely than usually the Hungarian courts judging in labour law cases. Though this connection cannot be made compulsory legally, but the relevant practice of the Authority should inspire the courts. Finally, I'd like to remark that the equal opportunities law does not exist for itself but for good reasons and is of greater and greater importance in the law of European Union[18], namely, one of the most important rights of the employees' is the right to be treated equally, and the damage of the equal treatment may be the basis of several other legal damage.[19] In

[16] See for example: *BH 423/2007, BH593/2001, BH 610/1998, BH 449/1998* and *BH 2010/1997,* OptiJus, Opten Informatikai Kft.
[17] It is declared in the judicial practice: EBH 1899/2008, OptiJus, Opten Informatikai Kft.
[18] BEKKER Sonja, KLOSSE, Saskia, WILTHAGEN, Ton, *Making (It) Work: Introduction to the Special Issue on the Future of the European Employment Strategy*, International Journal of Comparative Labour Law and Industrial Relations, 2007/4. 489-499.
[19] BERCUSSON, Brian, *European Labour Law* (second edition), Cambridge University Press, Cambridge, 2009.

this process the Curia must show determination by interpreting the relevant rules progressively and consequently.