INDEX OF UNEQUAL TREATMENT OF THE DISABLED.
A PRECEDENT JUDGMENT OF THE CJEU

WSKAŹNIK NIERÓWNEGO TRAKTOWANIA OSÓB NIEPEŁNOSPRAWNYCH. PRECEDENSOWY WYROK TSUE

Summary: An employer’s practice of paying a salary supplement to disabled employees who submitted a disability certificate after the date chosen by that employer and not taking into account disabled employees who submitted such a certificate before that date, may constitute direct discrimination. It is capable of definitively preventing this time condition from being met in a clearly defined group of workers, consisting of all disabled workers whose disabilities the employer must have known about when the practice was introduced.

Keywords: concept of discrimination, discrimination on grounds of disability, equal treatment, grant or exclude of an allowance to workers with disabilities, indirect discrimination

Streszczenie: Praktyka pracodawcy polegająca na wypłacie dodatku do wynagrodzenia pracownikom niepełnosprawnym, którzy przedłożyli orzeczenie potwierdzające niepełnosprawność po wybranej przez tego pracodawcę dacie i nieuwzględniająca pracowników niepełnosprawnych, którzy przedłożyli takie orzeczenie przed tą datą, może stanowić bezpośrednią dyskryminację. Jest ona w stanie definitywnie uniemożliwić spełnienie tego warunku czasowego w wyraźnie określonej grupie pracowników, składającej się ze wszystkich pracowników niepełnosprawnych, o których niepełnosprawności pracodawca musiał wiedzieć w momencie wprowadzania tej praktyki.

Słowa kluczowe: dyskryminacja ze względu na niepełnosprawność, koncepcja dyskryminacji, dyskryminacja pośrednia, równe traktowanie, zasiłek dla niepełnosprawnych pracowników

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INTRODUCTION

In January 26, 2021, the CJEU ruled in case C-16/19 that disability, as the criterion generally formulated in Article 1 of Directive 2000/78, may apply to a single group of disabled people. Thus, it comes to comparing and differentiating some disabled persons with other disabled persons employed by the same employer. Is it consistent with the principles and equal treatment? Council Directive 2000/78 sets out the legal framework for equal treatment in employment and employment relationships (Article 1). This principle has been defined with in Article 2 paragraph 1 as a prohibition of direct or indirect discrimination within the European Union (EU) of persons on the grounds set out in Article 1. One of these reasons is disability. A characteristic feature of discrimination is the introduction to the legal structure of the norms codified in Article 2 (2) (a) and (b) of the Directive under analysis, with appropriate reference points. These are other people who are in a comparable situation to the person accusing the employer of discrimination. The EU legal order, in particular Article 52 (1) of the EU Charter of Fundamental Rights and the judicature of the Court of Justice (CJ) of the EU, accepted as a basis of equal treatment of the rule according to which comparable situations in which there are no disabled people can be treated in a different manner, and different situations in the same way. Exceptions to this rule are allowed only in the cases mentioned in points “i” and “ii” letter “B” Art. 2 (2) of the Directive. The case of direct discrimination is where a disabled person is treated less favorably than another person in a comparable situation (Article 2 (2) (a)). With the exception of disability other indicators listed in Article 1 of Directive 2000/78 are applicable to different categories of persons or groups of persons. The Regional Court in Krakow, which submitted a question for a preliminary ruling (the referring court) the ECJ with the following problem: ‘Should Article 2 of [Directive 2000/78] be interpreted as meaning that the differing treatment of individual members of a group distinguished by a protected characteristic (disability) amounts to a breach of the principle of equal treatment if the employer treats individual members of that group differently on the basis of an apparently neutral criterion, that criterion cannot be objectively justified by a legitimate aim, and the measures taken in order to achieve that aim are not appropriate and necessary?’

2 This provision was entitled – „Concept of discrimination”.
5 Decision of the SO of 27 November 2018 It was submitted to the CJEU on 2 January 2019. The case was registered under reference number C-16/19. The participants in the preliminary ruling proceedings were: VL, who acted against Szpital Kliniczny im. Dr. J. Babinskiego, an independent public health care facility in Krakow, the government of the Republic of Poland, the government of the Portuguese Republic, the EU Commission. The legal opinion was presented on 18/06/2020 by the Advocate General of the CJEU, G. Pitruzzelli, ECLI: EU: C: 2020: 479. The judgment of the CJEU in the Grand Chamber was issued on January 26, 2021, ECLI: EU: C: 2021: 64.
6 C-16/19, point twenty.
THE FACTS OF THE CASE

The plaintiff, VL, was employed with the defendant in a clinical hospital in Kraków. On December 8, 2011 she was recognized as a person with a moderate and permanent degree of disability. In the same month, she notified her employer about her health. Two and a half years later, in the second half of 2013, the director of the above mentioned hospital decided to award a monthly bonus to remuneration for work in the amount of PLN 250 to employees who presented a medical certificate confirming their disability. The decisive criterion for granting the above, legally unregulated allowance was the date of submission of the above-mentioned medical certificate, and not the date of confirmation of the disability status by the certifying physician who issued the relevant certificate. As a result of such formulation of the criterion of granting additional property benefits, only 13 disabled employees became entitled to this allowance. The remaining 16 disabled workers who had notified their employer of their situation prior to the date of the above decision were not entitled to the above allowance. The aim of the director’s activity was to reduce the amount of contributions paid by the hospital to the State Fund for the Rehabilitation of the Disabled (PFRON). The bonuses to remuneration were to activate those disabled employees who had not submitted the relevant decisions prior to the above-mentioned in the second half of the 2013. The case was dealt with by the National Labour Inspectorate, which found that the nature of the criterion differentiating a uniform category of disabled employees working in a hospital was discriminatory and therefore inconsistent with the provisions of Directive 2000/78. One of the employees – VL made a claim for the payment of the allowance and compensation for material damage suffered due to breach of the principle of equal treatment. The district court in Krakow hearing the matter dismissed the claim, since found that the additive cannot be considered as due and unpaid by the employer’s share of wages. In addition, it ruled that the date of submission of the medical certificate on the degree of the employee's disability, set by the employer, was not included among the prohibited criteria for differentiating employees. The most important argument cited by the labour court adjudicating in the first instance was the conclusion that there was no discrimination due to the non-differentiation of employees due to disability. This type of legally prohibited differentiation requires a comparison of the situation of two completely different categories of employed, able-bodied workers with the disabled. The higher court examining the plaintiff’s appeal perceived the essence of the case differently. The court began to consider whether the discrimination – direct or indirect – regulated by the provisions of Article 2 of Directive 2000/78 could occur where the legal situation of employees falling within the same category of employed persons differed on account of the same, legally protected common feature, what is the disability of professionally active people. It began to consider whether discrimination governed by Article 2 of Directive 2000/78 may be the case for the differentiation of the legal status of workers belonging to the same category of employees, including those defined by the same rules, falling within the same category of employed persons differed on account of the same, legally protected common feature, what is the disability of professionally active people. The higher Polish court returned to the CJEU to provide guidelines for the determination of whether differentiation in employee...
rights within a single, homogenous group of people can be employed, in accordance with EU law, considered as a form of infringement of the principle of equal treatment protected by the provisions of the anti-discriminatory Directive 2000/78.

PURPOSE AND SCOPE OF THE ANTI – DISCRIMINATORY DIRECTIVE

PURPOSE OF DIRECTIVE 2000/78

The main purpose of Directive 2000/78 is to establish a general framework to prevent and eliminate all direct and indirect discrimination on the basis of the criteria set out in Article 1. In the case of unequal treatment due to disability, two different views emerged in the interpretation and application of this Directive in the EU institutions. In the case of unequal treatment due to disability, two different views emerged in the interpretation and application of this Directive in the EU institutions. On the one hand, it was considered that the abovementioned Directive merely constituted a general framework for measures taken by the Member States against employed persons with disabilities. On this basis, when interpreting the principle of equal treatment in employment and employment relationships for all five categories of persons mentioned in this provision (Art. 1), the CJEU guided solely by the considerations formulated in Art. 2 clause 1 of the Directive. The UE Court believed that it was sufficient to achieve the objective set out in the Directive under analysis to identify the presence of one of the two types of discrimination listed in Art. 2 clause 1 lit. “A” (direct discrimination) or lit. “B” (indirect discrimination). Despite the title by the EU legislator Art. 2 – “Concept of discrimination”, in the mentioned provision, consisting of five normative units, there is no legal definition of the phenomenon of discrimination. Only two forms are mentioned in Article 2 (1) (a) and (b). The same source, the essence and meaning of this phenomenon inconsistent with the EU’s principle of equal treatment has been partly defined in separate laws constituted by non-EU international organizations – the UN and the ILO, and the Council of Europe as well as systems of constitutional law and the labour laws of the Member States of these organizations. The EU legal norms concerning employment and employment relations of people employed and workers with disabilities people do not take into account either positive (“equality”) or negative (“discrimination”) key meanings: a comparator, a comparator’s group, and legal terminologies in acts of international law.

The EU institutions, in particular the Commission and the ECJ, were primarily interested in effective protection against discrimination. This attitude to the ECJ cases related to discrimination in employment and labour relations drew about to clear the existing jurisprudence of the

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7 Religion, philosophical beliefs, disability, age, sexual orientation.
8 M. Wujczyk, Prohibition of discrimination in labour law. Comparative considerations de lege lata and de lege ferenda on the basis of anti-discrimination provisions, Warsaw 2016, pp. 42 et seq., 60 et seq. In this book, the term „benchmark” is used.
CJEU, which preceded the adoption of the judgment of 26.01.2020 r.\textsuperscript{10} At some point, the ECJ duplicating the return of “effective protection” in any judgment on the non-observance of the principle of equal treatment regulated by Directive 2000/78 should have a basis for highlighting “the settled law of the Court”, the commitment about the use of the provisions of Directive 2000/78 of that due to the need to prevent, counter or punishment for practicing discrimination and because of the reasons listed in art. 1\textsuperscript{11}, among which is the also the age of an employee\textsuperscript{12}. Each of the five protection conditions set out in Article 1 of Directive 2000/78 deserves to be covered by the same – as age and four other criteria listed in this standard – intensity of protection of the rights of employees and employees. The CJEU spoke less frequently about the legal protection against all forms of discrimination in employment and labour relations. One of the few cases regarding effective protection against discrimination on the grounds of disability was the judgment of the CJEU of 17.7.2008 issued by the grand chamber of the EU judicial authority in the case of S. Coleman v Attridge Law and Steve Law\textsuperscript{13}. The request for issuing a preliminary ruling has been submitted by the British judicial authority ruling in matters of labour law: Employment Tribunal, London South versus United Kingdom. It concerned, inter alia, equal treatment in employment and occupation and direct discrimination on the basis of disability.

In point 38 of the justification of the judgment issued in this case, an extremely interesting view is included. It states that it does not follow from the provisions of Directive 2000/78 that the principle of equal treatment which that Directive is intended to ensure is limited to persons with disabilities. On the contrary, the principle of equal treatment of employees is intended to combat all forms of discrimination on the basis of disability in relation to employment and occupation. The CJEU stated expressis verbis that the principle of equal treatment applies not only to one category of specific persons, employees and workers. In depending on the reasons, referred to in Article. 1 of this Directive, it also applies to other, unequally treated persons. The above interpretation of the provisions of this Directive is confirmed by the Treaty on European Community (TEC), which in Art. 13 entrusted the Community with the competence to take the measures necessary to combat any discrimination based, inter alia, on disability. Following the above approach to the issue of unequal treatment, the CJEU ruled that the interpretation of Directive 2000/78, establishing the general framework for equal treatment in employment and occupation, and in particular its Art. 1 and art. 2 clause 1 and art. 2 clause 2 lit. a) should be done in such a way that the prohibition of direct discrimination, as envisaged, is not limited to persons who are themselves disabled. Taking the above position in cases concerning the protection of discriminated persons with disabilities, the CJEU paved the way to the interpretation of art. 2 of Directive 2000/78, according to which the differentiation by the employer of employee rights in one, identical group of employees, comprising disabled persons, may be considered

\textsuperscript{10} The above observation is stated in the following judgments of the CJEU: judgments of: 22 November 2005, Mangold, C-144/04, EU: C: 2005: 709, point 74; January 19, 2010, C-555/07, Küçükdeveci, C-555/07, EU: C: 2010: 734, points 28; 07/07/2011, Agafitei et al., C - 310/10, EU: C: 2011: 467, paragraph 34; 21.05. 2015 , SCMD, C - 262/14, unpublished, EU: C: 2015: 336, points 44-45; March 9, 2917, Milkova, C-406/15, EU: C: 2017: 198, point 34.

\textsuperscript{11} CJEU judgments of: June 18, 2009, Hütter, C - 88/08, EU: C: 2009: 381, point 33; as well as Georgiew, C - 250/09 and C - 268/09, EU: C: 2010: 699, point 26.


\textsuperscript{13} C- 303/06, ECLI: EU: C: 2008: 415.
a case of unequal treatment contrary to EU law. In this context the principle of equal treatment expressed in this norm (Article 2) applies to the above-mentioned reasons. If an employer treats an employee who is not himself disabled less favorably than he treats another employee in a comparable situation, and it has been shown that the less favorable treatment of the employee is related to the disability of his child, for whom he provides essential care appropriate to his needs, such treatment is contrary to the prohibition of direct discrimination set out in Art. 2 clause 2 lit. a) of this Directive. By adopting the above position in cases concerning the protection of discriminated persons with disabilities, the CJEU paved the way for the interpretation of Article 2 of Directive 2000/78, according to which the differentiation by an employer of employee rights in one identical group of employees, consisting of disabled persons, may be considered a case contrary to EU law unequal treatment.

THE SCOPE OF APPLICATION OF DIRECTIVE 2000/78

Before the judgment of the Court of Justice of the European Union was issued on January 21, 2021, there was a rule in the judicature of the EU judicial authority according to which the scope of application of Directive 2000/78 could not be extended by interpretation. Such a case was considered to be the situation of legally protected persons - disabled - without a point of reference with which to compare them. In the jurisprudence of the EU dimension of the body of justice rule in force according to which the scope of Directive 2000/78 cannot be extended by interpretation. For such and the case considered the situation in which there were persons protected by law - the disabled – who do not have a reference point from which you would be comparing them. For all other category and employees and workers, protected by Directive 2000/78, such as: religion, beliefs, age, sexual orientation, legally protected against discrimination, an appropriate point of reference could be found. Employed persons or employees covered by legal protection against discrimination could differ due to the mentioned – apart from disability – differentiation criteria. However, disabled people do not have such a possibility. Therefore, it is impossible to objectively compare their situation and assess whether it is compatible or inconsistent with the principle of equality, because it will not reflect the essence of differentiation, as it cannot be compared on the basis of the criteria mentioned in Article 1 of the analyzed Directive. Counteracting and fighting for equal treatment of disabled people in employment and labour relations are difficult or even impossible due to the point of reference formulated too generally by the EU legislator. The disabled by the will of the legislator are in any case protected. Theoretically speaking, they cannot be avoided differently. Meanwhile, in the “fight against all forms of discrimination on the basis of disability”14 automatically disabled persons should receive equal or comparable treatment. A question is asked, referring to the second element of the above alternative, which comparative criterion enables – in the case of disabled persons – to distinguish equal treatment from discrimination. Disability, as a criterion of differentiation between employee and another employee that is compatible or incompatible with EU law, requires details of the reasons for equal treatment or specifying the basis of reference for making comparisons. Limited disability or inability to take advantage of a precisely defined datum, such

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as may be disability, justifies the use of narrowing interpretation. In the opinion issued in Case C-16/19, Advocate General CJEU, rightly stated that “not every different treatment of employees constitutes discrimination within the meaning of Directive 2000/78”\(^\text{15}\). It only considered unfavorable treatment that could be related to one of the protective situations listed in Article 1 of Directive 20078 as incompatible with the principle of equal treatment\(^\text{16}\). However, the EU Commission is of the opinion that a restrictive interpretation could only be used if the subject matter of the case was to assess the lawfulness of the differentiated treatment of disabled persons in relation to other people employed or working in a given workplace\(^\text{17}\). Two governments of the EU Member States, Poland and Portugal, which were parties to the proceedings in the analyzed case C-16/19, did not share the Commission’s position. They considered that Directive 2000/78 could apply where an employer differentiated the situation of certain employees and/or workers belonging to the category of disabled persons on the basis of a criterion not directly linked to disability\(^\text{18}\). What kind of discrimination it is, direct or indirect? This is because it is a contentious problem between the EU judicial authorities – the Advocate General of the CJ and the CJEU. Now I must return to the controversy between the Commission and the authorities of the two above-mentioned Member States. In stating what I approve of about the possibility of using a narrow interpretation in the absence of differentiation of people with disabilities, the representatives of these countries are positive about the situation that is not the case here. The precedent problem in the EU judicature is the use of a narrowing interpretation to the case in which the employer did not differentiate in the group of disabled employees. If it were otherwise, there would be no sense in the precedent-setting dispute over an interpretation to restrict disability as a criterion set out in Article 1 of Directive 2000/78.

THE RELATIONSHIP BETWEEN THE EMPLOYER’S DECISION AND THE DISABILITY

In its legal opinion, the AG CJEU cites a few judgments in which the CJEU approved the application of a restrictive interpretation to other criteria for differentiating employees or employees listed in Article 1 of the Directive in question\(^\text{19}\). Neither of them substantiates the reasons why the use of an interpretation that disregards the scope of Directive 2000/78 is justified. A timid criticism of this state of affairs can be found in the justification of the judgment of the CJEU in the previously mentioned Coleman case\(^\text{20}\). In the indicated place, a statement about the necessity of “strict” interpretation, not only formulated in Art. 1 of Directive 2000/78, the principle of equal treatment of employees and employees, but also “the personal scope of application of that Directive”. In relation to all the indicators listed in this provision, including disability, these criteria “should be interpreted strictly”. This is required by the principles of effectiveness and unlimited protection guaranteed by the provi-

\(^{\text{15}}\) Opinion delivered on 18/06/2020, point 34 in fine.

\(^{\text{16}}\) CJEU judgments: of 26/09/2013, HK Danmark, C - 476/11, EU: C: 2013: 590, point 47; September 26, 2013, Dansk Jurist- og Økonomforbund, C - 546/11, EU: C: 2013: 603, point 41.

\(^{\text{17}}\) Ibidem, Paragraph 36.

\(^{\text{18}}\) Ibidem.

\(^{\text{19}}\) Judgment ECJ of 12 .01. 2010 Petersen, C - 341/08 , ECLI: EU: C: 2009: 20, paragraph 60.

\(^{\text{20}}\) C- 303/06, EU: C: 2008: 415, point 46.
sions of this Directive\textsuperscript{21}. The above need was emphasized in the opinion of the AG CJEU. In the opinion he wrote that in relation to the issue of persons covered by the legal protection guaranteed by the Directive and persons whose situation is comparable, for the purposes of assessing the existence of discrimination, a less stringent interpretation is recommended, and more emphasizing the objectives of this Directive and its effectiveness\textsuperscript{22}. He added that the above finding also applies to all the provisions of Directive 2000/78. By the way, he explained the reasons why the Commission “seemed to propose” a restrictive interpretation of the entire Directive under consideration. According to him, the Commission was of the opinion that a restrictive interpretation could also be used for “reasons closely and directly related to the disability itself”. This is evidenced by the view of the Commission presented at the hearing, during which it clarified its position by giving examples falling within the scope of Directive 2000/78\textsuperscript{23}. He added that the above finding also applies to all the provisions of Directive 2000/78. By the way, he explained the reasons why the Commission “seemed to propose” a restrictive interpretation of the entire directive under consideration. The type or degree of disability as a feature of differentiating the situation of a disabled person, complaining about treatment incompatible with the principle of equal rights, makes the relationship between a certain aspect of differentiation by the employer of selected and less favorably treated certain disabled people is clear. The criterion of differentiating people with disabilities in such situations is a feature defined by the EU legislator in Art. 1 of Directive 2000/78 as a disability more generally, rather than its type or degree. This provision indicates disability as such. They are the state and level of its advancement, their condition and level of its sophistication. The situation of people who are differentiated by reference to the generally worded, legally prohibited criterion of differentiating disabled people in Article 1 of Directive 2000/78 is not clear. There is no point of reference to another group of people falling into the same category of disabled people. This type of case may justify a critical attitude towards the CJEU judgment C-16/19. It gives the impression that, in that case, the Grand Chamber of the CJEU came up with a rather specific idea, advising the referring court to investigate in the main proceedings whether there was an incident of discrimination on grounds of disability in the community of people employed in the Krakow hospital. The lack of a reference point for such searches \emph{a limine} make it impossible to decide whether the phenomenon of discrimination against the disabled took place at all. AG CJEU, analyzing the legal problem presented by the referring court in the question referred for a preliminary ruling, rightly pointed out that the CJEU should answer the question about the relationship of the criterion distinguishing a group of some disabled people employed in a clinical hospital from others, also disabled, working there\textsuperscript{24}.

\textsuperscript{21} Ibidem, Paragraph 51.
\textsuperscript{22} Opinion of 18/06/2020, point 38.
\textsuperscript{23} Ibidem, Footnote 19.
\textsuperscript{24} Ibidem, Paragraph 48.
DISCRIMINATORY ACTION WITHIN THE GROUP OF PEOPLE WITH DISABILITIES

The Advocate General of the Court of Justice opted for an innovative concept of protection within the group of disabled employees and employees due to the lack of precise indication in Art. 1 of Directive 2000/78, a clear criterion making it possible to distinguish legal action from discrimination on the basis of disability. The date of submitting the disability certificate, set by the employer, cannot be considered such a criterion. The above requirement imposed on disabled people by the hospital director was rightly recognized by the AG CJEU as “having no relation to disability.” Therefore, it should not be used, because Article 2 (1) of the Directive under consideration expressly requires that a person claiming to be a victim must indicate any form of discrimination, direct or indirect, “on the grounds set out in Article 1” of that Directive. The actual reason for the differentiation of the disabled assumed by the employer was correctly classified into the category of “no legal significance.” Three entities acting as participants in the case analyzed by the ECJ: the worker concerned, the representatives of law and the Republic of Poland and the Portuguese Republic and the National Labour Inspectorate saw the existence of such a relationship. The clinical hospital, which is the defendant in the main proceedings, is in a special situation in the preliminary ruling proceedings. The Advocate General of the CJ critically assessed the position on the legal nature of the date of the “criterion” for dividing the disabled into two groups. With a “more peculiar” found about that when presented earlier argument in favor of the recognition of the legal criterion of differentiation with disabilities, was established “criterion” the date of receipt of this document. It put at a disadvantage the group of disabled people who had previously submitted such a document. The differentiation criterion adopted by the employer deprived the disabled of the right to a remuneration supplement and turned out to be contrary to the goal (reduction of the contribution to the state institution – State Fund for Rehabilitation of the Disabled) that the employer intended to achieve. A wage supplement should be paid to all disabled, employed and working persons. They all would equally contribute to the reduction of state contributions. The way of thinking and the argumentation of the employer presented in the preliminary ruling proceedings confirm his lack of objectivity. He treated in a different way two identical groups of disabled people, who are in the same situation. Both submitted to the employer a certificate of disability. One of them did it earlier than the other.

25 A participant in the preliminary ruling proceedings by the CJEU, a clinical hospital in Krakow, argued that his intention was to increase the number of disabled employees in order to reduce the contribution paid to the state institution. The RG CJEU found the above explanation “atypical”. Opinion of the RG CJEU, points 58-59.

26 Ibid., Paragraph 53.

27 On December 29, 2016, the National Labour Inspectorate sent the management of the clinical hospital in Krakow a request to remove the identified irregularities, expressed in the activity inconsistent with the principle of equal treatment, and informed the claimant - VL about her right to seek redress.

28 At the hearing before the CJEU, two entities – the Commission and the Republic of Poland changed their views on the legal nature of the date of delivery of the declaration of disability to the employer and recognized the above “criterion” as “illogical, absurd and inexplicable”. Opinion of the RG CJEU, point 56.

29 Opinion of the GC CJEU, point 57.


31 Ibidem, Paragraph 62.
TYPE OF DISCRIMINATION AGAINST DISABLED PEOPLE

By differentiating people with disabilities, the director of a clinical hospital was discriminatory. AG CJEU ruled out the case of direct discrimination because – in its opinion – this type of discrimination applies to another person or persons in a comparable situation. In the present case, disability is not related to the criterion of distinguishing – one group from the other – persons submitting appropriate certificates on their health condition. Therefore – in the opinion of the AG CJEU – the criterion of distinguishing two groups of disabled people does not refer directly to disability. But puts at a disadvantage one group of people with disabilities compared with another group of such persons, not when treated by the employer as people with disabilities. According to the AG CJEU, Art. 2 clause 2 lit. “B” of Directive 2000/78 should be interpreted as meaning that it also includes the possibility of comparing certain persons with a specific disability with others who may also be affected by the disability. In the opinion of AG CJEU, the examination of the phenomenon of discrimination consists in assessing the conduct which puts some disabled persons at a disadvantage in relation to other persons who are also disabled. However, it puts one group of disabled people at a disadvantage compared to another group of such people, not treated by the employer as disabled people. Arguments put forward by AG TS EU is manifested in the awareness that brought an employer some disabled people in disadvantage in relation to other people who also have a disability, it is against the law. In case C-16/19 AG, the CJEU considers that – in the light of all the circumstances – the condition of the comparable nature of the situation has been met. It was necessary to establish a violation of the prohibition of discrimination. Some disabled employees (those who did not receive a salary supplement) were treated less favorably than other disabled employees employed by the same employer. The above case of discrimination on the basis of disability took place despite the fact that all compared persons with disabilities were in the same situation. All of them contributed equally, by submitting their disability certificate, to the financial savings that the hospital was seeking. Therefore, the interpretation proposed by AG CJEU is not intended to protect a given group only due to the fact that it is in a situation protected under Art. 1 of Directive 2000/78. Its purpose is to prevent two homogeneous groups falling under the same protected feature (disability) from being treated unequally due to the situation inherent in that feature. This relationship does not have to be caused by it. AG CJEU added that the applied criterion refers to the date of submission of the decision and not to disability. This does not mean, however, that it is neutral. This is because such a ruling may be presented by employers only by people with disabilities, and yet professionally active (employed or working). It was called by the AG CJEU “seemingly neutral”. It puts, in relation to other disabled people, also people with disabilities in a particularly disadvanta-

32 Ibidem, Paragraphs 75-76.
33 Ibidem, Paragraph 80.
35 Opinion of RG CJEU, point 84.
36 Ibidem, Paragraph 85.
The difference between the employer’s privileged group of people with disabilities in comparison with the same people with disabilities refers to the effects of unequal treatment\textsuperscript{37}. Two homogeneous groups that share the same protected feature may not be treated unequally due to the situation related to the protected feature\textsuperscript{38}. This means that a group of disabled people can also be a point of reference for the comparison\textsuperscript{39}.

\textbf{ADJUDICATION BY THE CJEU}

In the verdict of January 26, 2022, C-16/19, the CJEU ruled that:

\begin{quote}
“Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that:

– the practice adopted by an employer and consisting in the payment of an allowance to workers with disabilities who have submitted their disability certificates after a date chosen by that employer, and not to workers with disabilities who have submitted those certificates before that date, may constitute direct discrimination if it is established that that practice is based on a criterion that is inextricably linked to disability, inasmuch as it is such as to make it impossible for a clearly identified group of workers, consisting of all the workers with disabilities whose disabled status was necessarily known to the employer when that practice was introduced, to satisfy that temporal condition;

– that practice, although apparently neutral, may constitute discrimination indirectly based on disability if it is established that, without being objectively justified by a legitimate aim and without the means of achieving that aim being appropriate and necessary, it puts workers with disabilities at a particular disadvantage depending on the nature of their disabilities, including whether they are visible or require reasonable adjustments to be made to working conditions”.
\end{quote}

In providing guidance to the referring court, the CJEU used examples of judgments issued in cases concerning the unequal treatment of employees and workers on grounds of criteria other than disability, formulated in Article 1 of Directive 2000/78. In each case – a day off from work – Good Friday\textsuperscript{40}, marital status\textsuperscript{41}, retirement\textsuperscript{42} – mentioned in the statement of reasons for the judgment in case C-16/19, the EU CJEU ruled that in each case we are dealing with direct discrimination because, if there was no direct link between the features listed in Article 1 of Directive 2000/78, the victims listed under Article 1 of Directive 2000/78 and protected against discrimination by law could not meet the conditions formulated by the legislator\textsuperscript{43}. The above relationship applies to other cases protected by separate anti-discrimination provisions\textsuperscript{44}. In the case C-16/19 analyzed in this study, CJEU authorized the concept

\begin{footnotesize}
\begin{enumerate}
\item Ibidem, Paragraphs 77-80.
\item Ibidem, Paragraph 85.
\item Ibidem, Paragraph 83.
\item CJEU judgment of 22.01.2010, Cresco Investigation, C - 193/17, EU: C: 2019: 43.
\item Judgment of the CJEU of 12.10.2010, Ingeniørforeningen and Danmark, C-499/08, EU: C: 2010: 600.
\item Judgment of the CJEU of 26 January 2021, C-16/19, point 43-46.
\item Directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal
\end{enumerate}
\end{footnotesize}

According to the CJEU, it is for the referring court to ascertain whether the difference in treatment applied to persons with a specific disability compared with persons with a different disability. Directive 2000/78 refers in a general way to the mentioned in Art. 1 of this Directive, the anti-discrimination feature of disability. Meanwhile, the concept of “disability” within the meaning of Directive 2000/78 should be understood as a restriction resulting, for example, from a long-term impairment of physical, mental or mental functions which, when interacted with various barriers, may hinder a person from full and effective participation in working life on an equal basis with other employees.\footnote{C-16/19, point 50.}

References


Wujczyk M., Zakaz dyskryminacji w prawie pracy. Rozważania porównawcze de lege lata i de lege ferenda na gruncie polskich i brytyjskich przepisów antydyskryminacyjnych (Prohibition of discrimination in labour law. Comparative considerations de lege lata and de lege ferenda on the basis of anti-discrimination provisions), Warszawa 2016.
