

Judgment of 5<sup>th</sup> December 2000, [K 35/99](#)  
**DIFFERENTIATION OF THE SITUATION OF EMPLOYEES  
 AT RETIREMENT AGE ON THE GROUNDS OF THEIR GENDER**

<b>Type of proceedings:</b> <a href="#">Abstract review</a> <b>Initiator:</b> Commissioner for Citizens' Rights	<b>Composition of Tribunal:</b> 5-judge panel	<b>Dissenting opinions:</b> 0
<b>Legal provisions under review</b>		<b>Basis of review</b>
The power of a State or communal employer to terminate the employment relationship with an employee of an office who reached retirement age – lower by 5 years for women than for men  <small>[State Offices' Employees Act 1982 (with amendments): Article 13(1) point 5;          Local Self-government Employees Act 1990 (with amendments): Article 10(1) point 5]</small>		Principle of equality and prohibition of discrimination  Equal treatment of women and men  <small>[Constitution: Article 32 and Article 33]</small>

In principle, the retirement age in Poland is set at 60 years for women and 65 years for men. The provisions challenged in the present case by the Commissioner for Citizens' Rights allowed a State or communal (local self-government) employer to terminate, by notice, the employment relationship with an appointed State or local self-government employee from the moment the latter reached retirement age, wherever he/she fulfilled the remaining requirements for acquiring the right to a retirement pension. *Ipsso facto*, this reversed the situation beneficial for female employees whereby the retirement age is lower, turning it into the risk – also emerging within some other professions – of loss of employment taking place earlier than in the case of male employees.

The Constitutional Tribunal's views summarised below in points 3 and 4 give expression to the principle of interpreting Polish law, including the Constitution of the Republic of Poland, in a manner sympathetic towards European integration. The Tribunal referred to the said principle long before Poland's accession to the European Union – at a time when Poland only enjoyed associate status with the European Communities.

The earlier judgments of the Constitutional Tribunal referring to European law as they address similar issues of statutory inequality in the professional situation of women and men were issued in cases: [K 15/97](#), [K 27/99](#) and [K 15/99](#) (respectively concerning members of the civil service, teachers and pharmacists).

Later, in the context of Poland's membership of the European Union, the aforementioned principle was expressed in, inter alia, the Tribunal's judgments in cases: [K 33/03](#) (bio-components in gasoline and diesel), [K 24/04](#) (inequality in competences of Sejm and Senate Committees in respect of EU legislative proposals) and [K 18/04](#) (the Accession Treaty – Poland's membership in the EU) – as summarised separately.

## RULING

**The challenged provisions, insofar as they create grounds for the earlier termination by notice of an employment relationship with a woman than with a man, do not conform to Articles 32 and 33 of the Constitution.**

## PRINCIPAL REASONS FOR THE RULING

1. A particular aspect of the general principle of equality (Article 32(1) of the Constitution) is the principle of equal treatment of women and men, expressed in Article 33 of the Constitution.
2. While departures from the equal treatment of similar situations under the law are permissible, three conditions have to be fulfilled. The first is the prerequisite of relevance – the necessary existence of a direct relationship between the differentiation of the situation of similar entities and the aims and principal content of provisions containing the given norm. The second condition is the proportionality requirement, according to which the importance of the interest to be protected by means of the differentiation must be proportionate to the importance of the interests of the subjects against whom the differentiation will operate, and whose interests will be infringed by the unequal treatment. Thirdly, the given provision must remain in conjunction with other constitutional norms, principles and values that justify the legislator's differential treatment of similar entities; one of such principles being the principle of social justice.
3. The interpretation of Articles 32 and 33 of the Constitution must take into account Poland's international obligations stemming, in particular, from Articles 1 and 11 of the United Nations Convention of 18<sup>th</sup> December 1979 on the Elimination of All Forms of Discrimination against Women, and Articles 68 and 69 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded on 16<sup>th</sup> December 1991, read in conjunction with Article 141 of the Treaty establishing the European Community. The content of the latter Article has, inter alia, been developed within Council Directive 76/207/EEC of 9<sup>th</sup> February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
4. In light of the jurisprudence of the European Court of Justice, Article 5 of the aforementioned Directive must be interpreted in such a manner that discrimination on grounds of gender in non-compliance with the said Directive shall have been constituted by a general employment policy that envisages the retiring of a woman only on account of her having reached or passed the retirement age required for a State pension to be acquired, whenever the said retirement age is different for men and women.
5. The fact that, as in the reviewed provision, a statute allows an employer full discretion to decide on earlier termination of the employment relationship in the case of female than male employees, in connection with the different regulation of retirement ages for women and men, leads to a situation in which women are deprived of the possibility to continue their professional activity on an equal basis with men. This constitutes

discrimination against women on the grounds of their gender, and thereby amounts to an infringement of Articles 32(2) and 33 of the Constitution.

6. In the light of the social reality that the maternal and educational functions served by women very often ensure their occupation of weaker positions, there exists a constitutional justification for the introduction of regulations that vest certain privileges in women, with a view to the inequalities between men and women that genuinely do emerge being diminished (the so-called compensatory privileged treatment).
7. The principle of equality does not require that each case in which the legal situation of a female employee features privileged treatment in some respect vis-à-vis the position of a male employee be compensated for by the imposition upon female employees of obligations or restrictions that do not relate to male employees.

**Provisions of the Polish Constitution, the United Nations Convention on the Elimination of All Forms of Discrimination against Women the Treaty establishing the European Community and the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part**

**Constitution**

**Art. 2.** The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

**Art. 32.** 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.  
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

**Art. 33.** 1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.  
2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.

**UN Convention**

**Art. 1.** For the purposes of the present Convention, the term "discrimination against women" shall mean 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.

**Art. 11.** 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

**EC Treaty**

**Art. 141.** 1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

**Europe Agreement**

**Art. 68.** The Contracting Parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.

**Art. 69.** The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment.