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PROTECTION OF THE SELF-EMPLOYED TO THE EXTENT OF NON-DISCRIMINATION AND EQUAL TREATMENT – AN OVERVIEW OF THE ISSUE¹

Abstract. The subject of the foregoing study is the analysis of the legal regulation of the protection of the self-employed to the extent of non-discrimination and equal treatment. The author positively assesses the very fact of adopting the Equality Act, which contributed to raising the standards of protection of self-employed people in this area. Unfortunately, however, a number of detailed regulations included in this act raise justified doubts and deserve criticism. Moreover, some provisions of the Equality Act are inconsistent with international agreements binding Poland, and also violate Art. 32 of the Constitution of the Republic of Poland. This leads to an unjustified lowering of the standards of protection against discrimination and unequal treatment of the self-employed in relation to the legal situation in which employees find themselves. A critical analysis of the Equality Act shows the far-reaching inconsistency of the legislator and the inconsistency of the entire system of protection against discrimination. This, in turn, makes this law ineffective, as shown by statistics in which a very small number of cases are brought to court and end up with a positive outcome for the person discriminated against.

Keywords: discrimination, principle of equal treatment, self-employment, Equality Act, protection against discrimination

OCHRONA SAMOZATRUDNIONYCH W ZAKRESIE NIEDYSKRYMINACJI I RÓWNEGO TRAKTOWANIA – ZARYS PROBLEMATYKI

Streszczenie. Przedmiotem opracowania jest analiza prawnej regulacji ochrony osób samozatrudnionych w zakresie niedyskryminacji i równego traktowania. Autor pozytywnie ocenia sam fakt uchwalenia ustawy równościowej, która przyczyniła się do podwyższenia standardów ochrony osób samozatrudnionych w tym obszarze. Niestety jednak wiele szczegółowych regulacji ujętych w tym akcie budzi uzasadnione wątpliwości i zasługuje na krytykę. Co więcej, niektóre przepisy ustawy równościowej są niezgodne z wiążącymi Polskę umowami międzynarodowymi, a także naruszają

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art. 32 Konstytucji RP. Prowadzi to do nieuzasadnionego obniżenia standardów ochrony przed dyskryminacją i nierównym traktowaniem samozatrudnionych w relacji do sytuacji prawnej, w której znajdują się pracownicy. Krytyczna analiza ustawy równościowej pokazuje daleko idącą niekonsekwencję ustawodawcy oraz niespójność całego systemu ochrony przed dyskryminacją. To z kolei czyni tę ustawę nieskuteczną, co potwierdzają statystyki, w ramach których bardzo niewielka liczba spraw trafia do sądów i kończy się rozstrzygnięciem pozytywnym dla osoby dyskryminowanej.

Słowa kluczowe: dyskryminacja, zasada równego traktowania, samozatrudnienie, ustawa równościowa, ochrona przed dyskryminacją

1. INTRODUCTION

In Poland, for a long time we have been witnessing in the market economy the phenomenon of the spread of civil law forms of employment and self-employment, which more and more often displace the classic employment relationship (cf. e.g., Chobot 1997; Davies 1999; Jończyk 2000, 39 et seq.; Kubot 2000, 5 et seq.; Hajn 2003, 48 et seq.; Pisarczyk 2003). According to GUS (Statistics Poland) data from the first quarter of 2020, the number of self-employed people in our country reached over 1.33 million. However, after the COVID-19 pandemic, GUS research showed that this number increased to nearly 1.39 million (fourth quarter of 2021). The prevalence of self-employment is determined by the need to reduce the costs of the activity carried out by the entity commissioning the work and the need to make the process of its provision more flexible.

The spread of self-employment, under which people who engage in gainful activity very often operate in conditions similar to those of employees, necessitated the need to cover these contractors with protection, which until recently was reserved exclusively for those having an employee status. Therefore, both in the Polish legislation and in the regulations of many European countries, we are observing a tendency to extend some employee rights to self-employed people (Duraj 2018, 37 et seq.). This trend is to a large extent a consequence of the adaptation of national legal orders to standards resulting from the norms of international and EU law, under which the legislator, when introducing protective regulations, covers all working people, using the term “pracownik” in a broad sense (“workers” or “travailleurs”). In addition, in Poland it is also associated with the need to adapt labour legislation to constitutional requirements, which broadly define protective guarantees (Gersdorf 2019, 2 et seq.). *De lege lata* under Polish law, the self-employed already benefit from legal protection in the field of life and health, non-discrimination and equal treatment in employment; guaranteed minimum wage and protection of wages for work; motherhood and parenthood; and the right to associate in trade unions, which consequently gives them broad collective rights.

The subject of the foregoing study is the analysis of the legal protection of the self-employed to the extent of non-discrimination and equal treatment, which

was introduced into the Polish legal system on 1 January 2011 pursuant to the Act of 3 December 2010 on the implementation of certain provisions of the European Union in the field of equal treatment.² This was one of the first areas in which the Polish legislator saw the need to extend the rights of civil law contractors, including self-employed people. However, the explanatory memorandum to the Equality Act draft shows that the direct impulse for its adoption was the formal allegations formulated by the European Commission regarding the improper or incomplete implementation by Poland of the provisions of EU directives. In two cases, they have already taken the form of complaints submitted to the Court of Justice of the EU, which could result in the imposition of high financial penalties on our country in the future.³

As a rule, the regulations adopted in the Equality Act should be positively evaluated. Undoubtedly, they have contributed to raising the standards of protection in the area of equal treatment and non-discrimination in non-standard forms of employment. Unfortunately, however, the Polish legislator has not properly implemented the EU regulations on this issue, and the solutions adopted do not sufficiently take into account the specificity of work provided on the basis of civil law forms of employment, including by self-employed people running a sole proprietorship. Consequently, in practice, the Equality Act is ineffective, as it does not provide such contractors with effective protection against discrimination and unequal treatment. This is confirmed by the available statistics, which show that a small number of such cases are brought to court, and even smaller is the percentage of lawsuits ending with awarding compensation to a person discriminated against on the basis of the provisions of this legal act (Wróblewska 2020, 78 et seq.). Analysing the title issue, for the purposes of the study, I assume that self-employment is the provision of services for one or several (many) contracting entities in B2B conditions by natural persons conducting business activity as entrepreneurs under their own responsibility and risk, and without the possibility of hiring employees or using someone else's work on the basis of civil law contracts (Duraj 2007, 21 et seq.).

2. LEGAL PROTECTION OF THE SELF-EMPLOYED TO THE EXTENT OF NON-DISCRIMINATION AND EQUAL TREATMENT IN THE LIGHT OF INTERNATIONAL AND EU STANDARDS

Nowadays, guarantees of non-discrimination and equal treatment are the cornerstone of any democratic state governed by the rule of law that implements social justice. They have a significant impact on socio-economic development,

² Consolidated text Journal of Laws of 2020, item 2156, hereinafter: the Equality Act.

³ Sejm paper of 16 September 2010, No. 3386, Sejm of the sixth term, <http://orka.sejm.gov.pl/Druki6ka.nsf>

as well as the situation on the labour market. This is recognised by the legislator at the level of acts of international and EU law (cf. Świątkowski 2006, 230 et seq.; 2008, 170 et seq.; Florek 2010, 58 et seq.), which for the most part provide for a wide scope of subjective protection in the area of non-discrimination and equal treatment covering all contractors, regardless of the basis of employment, including self-employed persons.

This trend can be seen well on the example of UN acts. The Universal Declaration of Human Rights of 10 December 1948 includes in the catalogue of basic human rights, among others, the right not to be discriminated against and the right to equal treatment (see more broadly Wujczyk 2019, point 11.3). Article 2 of this document grants to every person the enjoyment of the rights and freedoms guaranteed by this act, regardless of any differences of race, colour, sex, language, religion, political or other views, nationality, social origin, property, birth, as well as other circumstances. Protection against discrimination and unequal treatment is therefore also available to the self-employed, and the catalogue of grounds constituting discriminatory criteria is open (Góral, Kuba 2017, point 1.2). Article 7 of the Declaration, on the other hand, states that all people are equal before the law and have the right, without distinction, to equal legal protection, including against any discrimination in violation of this Act and against any exposure to such discrimination. The United Nations International Covenant on Economic, Social and Cultural Rights of 19 December 1966⁴ also provides for broad safeguards on non-discrimination and equal treatment, which also apply to the self-employed (cf. Kuźniar 2000, 15). In accordance with Art. 2(2) of that act, States must guarantee the exercise of the rights set out therein without any discrimination on grounds of race, colour, sex, language, religion, political or other views, national or social origin, financial situation, birth or any other circumstances. On the other hand, Art. 7 of the Covenant obliges States to recognise the right of everyone to benefit from working conditions which are fair and favourable (see Florek, Seweryński 1988, 15). In particular, it emphasises the need of equal pay for work of equal value without any distinction, in addition to guaranteeing women working conditions no worse than those enjoyed by men and equal pay for equal work. In addition, Art. 7b of that act introduces the right to equal opportunities for promotion at work to a correspondingly higher post based solely on the criteria of length of service and qualifications. The broad scope of protection against discrimination is also visible in Art. 2(1) of the UN International Covenant on Civil and Political Rights of 16 December 1966.⁵ Article 26 of that act states that all people are equal before the law and are entitled, without any discrimination, to equal legal protection. Any discrimina-

⁴ Journal of Laws of 1977, No. 38, item 169.

⁵ Journal of Laws of 1977, No. 38, item 167.

tion in this respect should be prohibited by law and effective protection against discrimination on grounds such as race, colour, sex, language, religion, political or other views, national or social origin, financial situation, birth or any other circumstances should be guaranteed by law and for all.

An act of the ILO which guarantees broad protection with regard to non-discrimination and equal treatment, regardless of the legal basis for the performance of work, including for the self-employed, is Convention No 111 of 25 June 1958 on Discrimination in Respect of Employment and Occupation. It obliges States to establish and pursue national policies aimed at promoting equal opportunities and equal treatment to the extent of employment and occupation in order to eliminate all discrimination in this area. That Convention makes any discrimination in respect of employment unacceptable, irrespective of the legal basis for the performance of work. That act, in Art. 1(1), broadly defines discrimination as any distinction, exclusion or preference based on race, colour, sex, religion, political or other views, national or social origin which has the effect of nullifying or prejudicing equal opportunities or treatment in respect of employment or occupation. The list of criteria for unjustified differentiation is not exhaustive, since, pursuant to Art. 1(1)(2), the Convention requires that account be taken of other forms of discrimination which will be mentioned by the member concerned after consulting representative organisations of employers and workers.

Also, the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe on 4 November 1950⁶ provides for protection in the field of non-discrimination and equal treatment, which includes self-employed persons (cf. Nowicki 2013, 984 et seq.). Article 14 of that act provides that the exercise of the rights and freedoms set out therein shall be ensured without discrimination on grounds such as sex, race, colour, language, religion, political or other views, national or social origin, membership of a national minority, property, birth or any other reason. The catalogue of discriminatory criteria is open, which guarantees legal protection for every person (including a self-employed person) regardless of the reason for discrimination. From this point of view, Protocol No 12 to the Convention of 4 November 2000 is also relevant. It has sanctioned the general principle of equality of all persons before the law and has ensured that the exercise of any right provided for by law should be ensured without discrimination on the grounds of sex, race, colour, language, religion, political or other views, national or social origin, membership of a national minority, property, birth or any other reason. Protection in the field of non-discrimination and equal treatment is further strengthened by the European Social Charter of the Council

⁶ Journal of Laws of 1993, No. 61, item 284, as amended.

of Europe of 18 October 1961,⁷ which already in the Preamble emphasizes that the exercise of social rights should be ensured without discrimination on the basis of race, colour and sex, religion, political views, national or social origin. The Additional Protocol to the Charter, adopted on 5 May 1988 in Part II, introduces the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on grounds of sex (Art. 1(1)).

A direct impulse for the Polish legislator to introduce legal protection to the extent of non-discrimination and equal treatment were standards developed at the level of the European Union, which for many years has been emphasizing the need for broad guarantees in this area, including non-standard employment relationships as well as self-employed people. The foundation of EU regulations is the Treaty on the Functioning of the European Union,⁸ which in Art. 10 indicates that in defining and implementing its policies and activities, the Union shall seek to combat any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁹ Article 18 of that act prohibits discrimination on grounds of nationality and Art. 19 confers on the Council legislative powers, after obtaining the consent of the European Parliament, to take the measures necessary to combat any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Additional safeguards on non-discrimination and equal treatment for the self-employed are enshrined in the Treaty rules on the free movement of persons, services and capital. With regard to this issue, the Union legislator in Art. 45(2) of the Treaty accepts that this freedom includes the elimination of any discrimination on grounds of nationality between workers of the Member States as regards employment, remuneration and other working conditions, and that Art. 49 of that act provides for freedom of establishment and prohibits any restrictions on the taking up and pursuit of activities as self-employed persons as well as on the establishment and management of undertakings. The above guarantees are supplemented by Art. 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000,¹⁰ which, including self-employed persons in its subjective scope, provides for the prohibition of any discrimination based in particular on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other views, membership of a national minority, property, birth, disability, age or sexual orientation, as well as nationality.¹¹

⁷ Journal of Laws of 1999, No. 8, item 67, as amended.

⁸ Journal of Laws of 2004, No. 90, item 864/2, as amended.

⁹ Pursuant to Art. 8 of the Treaty, on the other hand, the European Union, in all its activities, shall aim to eliminate inequalities and to promote equality between men and women.

¹⁰ OJ C 303, 2007, 1, as amended.

¹¹ The EU legislator has established an open catalogue of discriminatory criteria in the Charter of Fundamental Rights of the EU, which deserves special attention in view of subsequent

The protection of the self-employed with regard to non-discrimination and equal treatment is also strongly emphasised in the acts of secondary legislation of the European Union. The forerunner here is Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in a self-employed capacity, including in agriculture, and on the protection of self-employed women during pregnancy and maternity,¹² which set the standards in this area. In its place, Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity was adopted.¹³ That act, which extended protection to the self-employed, introduced the concepts of direct discrimination, indirect discrimination and harassment for the purposes of that legislation. According to Art. 4 of that act, the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex, whether direct or indirect, in the public or private sector, for example in connection with the establishment, equipping or expansion of a business or in connection with the commencement or extension of any other form of self-employed activity. The Directive also prohibits harassment against the self-employed, including sexual harassment, which it explicitly considers to be discrimination based on sex. That act, in Art. 10, guarantees them the right to real and effective compensation or damages. Its amount should effectively discourage discrimination and at the same time be proportionate to the loss or damage suffered. These acts are complemented by successive directives covering protection in the field of non-discrimination and equal treatment of the self-employed, which are commonly included in the core of EU anti-discrimination law (see Wujczyk 2020, point 13.3). These include Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,¹⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 180, 2000, 22), and 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.¹⁵

considerations regarding Polish legal regulation in this area. Article 23 of that act, on the other hand, guarantees equality between men and women in all areas, including employment, occupation and pay, which also applies to self-employed persons.

¹² OJ L 359, 1986, 56.

¹³ OJ L 180, 2010, 1.

¹⁴ OJ L 180, 2000, 22.

¹⁵ OJ L 204, 2006, 23.

3. LEGAL PROTECTION OF THE SELF-EMPLOYED TO THE EXTENT OF NON-DISCRIMINATION AND EQUAL TREATMENT IN THE LIGHT OF POLISH LEGISLATION – REMARKS *DE LEGE LATA*

On the basis of Polish law, basic guarantees in the field of non-discrimination and equal treatment of self-employed persons should be sought in the regulations of the Constitution of the Republic of Poland of 2 April 1997.¹⁶ This act formulates the principle of equal treatment as a fundamental and universal freedom and right of every human being. According to Art. 32(1) of the Basic Law, everyone is equal before the law and has the right to equal treatment by public authorities. In the judgment of 9 March 1988 (U 7/87, OTK 1988, No. 1, item 1). The Constitutional Tribunal stated that the constitutional principle of equality before the law consists in the fact that all subjects of law (addressees of legal norms), characterized by a given essential (relevant) characteristic to an equal extent, are to be treated equally. This therefore means treating according to the same measure, without differentiations that are either discriminatory or favouring¹⁷ (cf. also, among others: judgment of the Constitutional Tribunal of 20 October 1998, K 7/98, OTK 1998, No. 6, item 96; judgment of the Constitutional Tribunal of 17 May 1999, P 6/98, OTK 1999, No. 4, item 76). The consequence of the constitutional principle of equality before the law is Art. 32(2) of the Basic Law, which introduces a universal prohibition of discrimination. According to this regulation, no one may be discriminated against in political, social or economic life for any reason.¹⁸ The constitutional prohibition of discrimination has a very broad approach, because it covers every person and applies to all spheres of political, social and economic life in which a person may come into direct contact with the actions of public authorities (Winczorek 2000, 51). Although the Constitution of the Republic of Poland does not introduce any catalogue of prohibited discriminatory features, the prohibition of discrimination “on any grounds” determines that

¹⁶ Journal of Laws of 1997, No. 78, item 483, as amended.

¹⁷ The principle of equal treatment does not consist in an absolute prohibition on differentiating the situation of certain persons, but in the correct selection of criteria for their differentiation. It is therefore permissible to treat persons in different factual and legal situations differently.

¹⁸ Applying this principle to employment law, the prohibited discrimination is understood as unfair treatment of a contractor (also a self-employed person), which is not justified by objective reasons, due to features or properties not related to the work performed personally, which are important from the social point of view (cf. Sobczyk 2017). In its judgment of 3 December 2009 (II PK 148/09, LEX No. 1108511), the Supreme Court stated that the principle of non-discrimination is a qualified form of unequal treatment of employees and means an unacceptable differentiation of the legal situation in the sphere of employment according to negative criteria prohibited by law. Therefore, it is not discriminatory to differentiate the rights of employees (or other contractors) on the basis of criteria not considered discriminatory.

this catalogue is open. In addition, the prohibition of discrimination is absolute, as it does not allow public authorities to derogate from it (Skrzydło 2013).¹⁹

However, the above-mentioned constitutional regulations in the field of non-discrimination and equal treatment have a significant disadvantage from the point of view of the legal situation of self-employed persons. In the science of law, it is generally accepted that they apply primarily in the vertical dimension, in the relationship between a natural person and the state (cf. Wróblewska 2020, 79–80). Article 32 of the Constitution of the Republic of Poland is addressed primarily to the state, formulating the obligation of equal treatment and non-discrimination by public authorities of all addressees of legal norms who are similar to each other. This, in turn, obliges state bodies applying the law to ensure that, in their individual decisions, they are not guided by the individual characteristics of the addressee, but take them in a correct, objective and impartial manner (Sadurski 1978, 55). Therefore, state authorities must treat entities in a similar situation similarly. On the other hand, the analysed Art. 32 of the Constitution of the Republic of Poland does not directly apply to horizontal relations – between private entities (in this case the employing entity and the contractor – see Jarosz-Żukowska 2010, 207).²⁰ In its opinion to the draft law on equal treatment of 12 August 2008, the Presidium of the Legislative Council ruled out the possibility of extending the principle of equal rights and non-discrimination to relations between private entities (Jarosz-Żukowska 2010, 207). Therefore, the adoption of the Equality Act of 3 December 2010 should, in principle, be assessed positively. In fact, this action led to the extension of protection in the field of non-discrimination and equal treatment and constitutional guarantees resulting from Art. 32 of the Basic Law to horizontal relations – between private law entities, in this case to non-standard employment relationships (contracting entity – civil law contractor, including a self-employed person).²¹

The broad personal scope of protection guaranteed by the Equality Act of 3 December 2010, consistent with both the norms of international and EU law and the Constitution of the Republic of Poland, is praiseworthy. It is granted to all

¹⁹ In the context of the principles of equal treatment and non-discrimination, Art. 33 of the Constitution of the Republic of Poland, which introduces equality between women and men, also plays an important role. According to this regulation, a woman and a man in the Republic of Poland have equal rights in family, political, social and economic life. In particular, this equality concerns: education, employment and promotion, the right to equal remuneration for work of equal value, to social security and to occupy positions, perform functions and obtain public dignity and decorations.

²⁰ Different view: Masternak-Kubiak (2002, 136).

²¹ Until the entry into force of the Equality Act on 1 January 2011, the only group of entities covered by broad protection guarantees in the field of non-discrimination and equal treatment were employees and persons applying for full-time employment, to whom the provisions of the Act of 26 June 1974 – Labour Code, consolidated text Journal of Laws of 2020, item 1320, as amended apply.

natural persons, regardless of any other characteristics, including having or not having legal capacity and regardless of the basis for performing work, with the exception of employees in the scope regulated by the provisions of the Labour Code (Art. 2). Therefore, there is no doubt that the Equality Act also covers self-employed persons rendering their services as sole proprietors. That argument is expressly confirmed by Art. 4(2) of that act, which provides that it is to apply to the conditions for taking up and pursuing a business or professional activity. This provision should be interpreted broadly as undertaking any gainful activity as an entrepreneur, whether on the basis of an entry in the Central Register and Information on Economic Activity, also in the form of a civil law partnership, or as a freelancer (Barzycka-Banaszczyk 2019, 9).²²

On the other hand, the way in which the legislator has regulated the scope of protection against discrimination and unequal treatment of self-employed persons raises far-reaching reservations. The Equality Act aims to counteract violations of the principle of equal treatment, which should be understood as treating natural persons in a way that is one or more of the following behaviours: direct discrimination, indirect discrimination, harassment, sexual harassment, as well as less favourable treatment of an individual resulting from rejection or submission to unwanted sexual advances or harassment, encouraging such behaviour or requesting such behaviour (Art. 3(5) in conjunction with Art. 1(1)).²³

In contrast to the provisions of the Labour Code, which provides for an open catalogue of criteria protected against discrimination, the analysed regulation is limited in relation to self-employed persons only to the characteristics enumerated therein. Pursuant to Art. 8(1)(2) of the Equality Act, as regards the conditions for taking up and pursuing a business or professional activity, unequal treatment of natural persons on grounds of sex, race, ethnic origin, nationality, religion, belief, disability, age or sexual orientation is prohibited. The adoption of a closed catalogue of criteria for legal protection against discrimination and unequal treatment of the self-employed²⁴ is a serious shortcoming of the analysed regulations, which significantly reduces the scope of guarantees in this area. Such a solution is not only inconsistent with the Constitution of the Republic of Poland, which in Art. 32 prohibits discrimination “on any grounds,” but also with the

²² By the way, it is worth noting that the Equality Act also covers legal persons and organizational units that are not legal persons, to whom the legislator grants legal capacity (Art. 1). However, since those entities do not have personal characteristics capable of constituting a basis for discrimination, it should be assumed that their protection will always be linked to the natural persons forming the legal person or organisational unit concerned.

²³ Art. 3 of the Equality Act defines the following concepts: direct discrimination, indirect discrimination, mobbing, and sexual harassment.

²⁴ The legislator did not decide to use in the Equality Act – similar to the provisions of the Labour Code – the phrase “in particular” or any other term indicating the open nature of these provisions.

norms of international law referred to above, where we are dealing with an open catalogue of legally protected features. This problem was also pointed out by the Commissioner for Human Rights in his speech addressed to the Government Plenipotentiary for Equal Treatment²⁵ after the entry into force of the Equality Act. He argued that the Equality Act, in so far as it limits the application of protection to situations of violation of the principle of equal treatment, due to the closed catalogue of discriminatory conditions, is incompatible with Art. 32 in conjunction with Art. 2 of the Constitution of the Republic of Poland,²⁶ as well as with international standards, in particular Art. 14 of the European Convention on Human Rights.

The analysis of the anti-discrimination regulations in force in Poland in the area of employment shows the far-reaching inconsistency of the legislator and the inconsistency of the entire system of protection against discrimination. It should be remembered that both the provisions of the Labour Code in the field of non-discrimination and equal treatment, as well as the Equality Act are the result of the implementation of the same regulations of EU law. There are therefore no reasonable grounds for differentiating the level of guarantees in this area between employees and the self-employed. The consequence of the closed catalogue of criteria for legal protection against discrimination against the self-employed is that they cannot effectively pursue claims for unequal treatment as regards the form of paid work. Self-employed persons under the Equality Act therefore do not have the possibility to challenge practices leading to an unjustified differentiation in the amount of their remuneration, which would result from a different legal basis for the provision of work.²⁷ However, this does not preclude the admissibility of comparing the situation of the self-employed to employees at other levels expressly mentioned in Art. 8 of the Equality Act and, on this basis, questioning discriminatory behaviour (see Walczak 2012, 121).

An additional strengthening of the protection of the self-employed in the field of non-discrimination and equal treatment is the right to compensation. According to Art. 13 of the Equality Act, everyone against whom the principle of equal treatment has been violated has the right to compensation, while in

²⁵ Speech delivered on 28 May 2012, RPO-687085-I/12/KW/MW see: https://bip.brpo.gov.pl/sites/default/files/Do_Pelnomocnika_Rzadu_ds_Rownego_Traktowania_ws_wdrazania_przepisow_UE_w_zakresie_rownego_%20traktowania.pdf

²⁶ The consequence of this position was the Ombudsman's request to the Constitutional Tribunal to examine the compliance of the analysed regulations with the Constitution of the Republic of Poland. Finally, pursuant to the decision of the Constitutional Tribunal of 11 October 2017 (K17/16), the present proceedings were discontinued due to the withdrawal of the application by the Ombudsman.

²⁷ In practice, it often happens that for the same work (performed in conditions of economic dependence on the contracting entity), a person employed on the basis of an employment relationship receives a higher salary than a self-employed person in the conditions of a sole proprietorship.

these cases the provisions of the Act of 23 April 1964 – Civil Code apply.²⁸ In practice, that appeal gives rise to significant doubts as to the legal nature of that service. Under civil law, it is assumed that compensation is intended only to compensate for the material damage suffered, and not to compensate for the non-material damage suffered. Pursuant to Art. 361 § 2 of the Civil Code, in the absence of a different provision of the Act or a provision of the contract, compensation for damage includes actual losses that the injured party has suffered (*damnum emergens*) and the benefits that he could have obtained if the damage had not been caused to him (*lucrum cessans*). This means that the possibility of seeking compensation for non-material damage as compensation for the harm suffered (the so-called compensation) has been limited under civil law only to cases where the legislator has expressly reserved it. The problem is that the Equality Act does not expressly provide for the right to claim such a benefit in connection with a breach of the principle of equal treatment towards the self-employed. Such a solution is in obvious contradiction with the nature of the phenomenon of discrimination, which often leads to non-material damage (harm). Therefore, the literature on the subject broadly interprets the concept of compensation, which is due under Art. 13 of the Equality Act (see Kędziora 2017, Commentary on Art. 13, point 1).²⁹ The judiciary is also going in this direction. The Regional Court in Warsaw in its judgment of 18 November 2015 (V Ca 3611/14, LEX No. 2147965) accepted that compensation under Art. 13 of the Equality Act is not distinguishable between compensation for material and non-material damage (harm), because Art. 13(2) of this act refers to all provisions of the Civil Code, i.e., both to the provisions on compensation for damage by means of compensation, as well as to the regulation of redress. Therefore, self-employed persons affected by discrimination have the right to compensation understood in a very broad sense, which also includes compensation for the harm caused. This problem was also pointed out by the Ombudsman in his speech of 28 May 2012 addressed to the Government Plenipotentiary for Equal Treatment. He pointed out that the compensation referred to in Art. 13 of the Equality Act should serve as compensation, as is the case under the provisions of the Labour Code. Such an interpretation coincides with the standard of protection that employees are entitled to.

Unlike Art. 18^{3d} of the Labour Code, the Equality Act does not introduce a lower limit on compensation, which in relation to employees is not less than

²⁸ Consolidated text Journal of Laws of 2022, item 1360, as amended.

²⁹ This interpretation is also confirmed by the case law of the Supreme Court, which in relation to employee cases broadly qualifies compensation under Art. 183d of the Labour Code, also in terms of compensation for the harm suffered. See. e.g., judgment of the Supreme Court of 3 April 2008, II PK 286/07, OSNP 2009, No. 15–16, item 202; judgment of the Supreme Court of 7 January 2009, III PK 43/08, LEX No. 584928. Differently: judgment of the Supreme Court of 10 July 2014, II PK 256/13, LEX No. 1515454.

the minimum wage for work, determined on the basis of separate provisions. This means that the amount of compensation due to the self-employed on the basis of Art. 13 of this act is determined in accordance with the provisions of the Civil Code and is based on the principle of full compensation for the damage suffered (Art. 361 of the Civil Code). It should be noted, however, that making pecuniary compensation for discrimination conditional on the occurrence of the damage and the need for the injured party to prove it would be contrary to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. This act, in Art. 17 sentence 2, indicates that the sanctions that may determine the payment of compensation to the victim must be effective, proportionate and severe (cf. Górski 2015). The Court of Justice of the EU, in its judgment of 8 November 1990 (C-177/88, LEX No. 124917), referring to the cited EU regulation, stated that if a Member State chooses a sanction that forms part of the principles of civil law (this is the case in Poland), any breach of the prohibition of discrimination is sufficient to establish the liability of the person guilty of that infringement and the conditions for exclusion of liability provided for by national law cannot be taken into account. In the literature on the subject, it is permissible to take into account the principles developed in the case law of courts with regard to compensation for discrimination in employment relations when determining the amount of compensation due to a self-employed person for violation of the principle of equal treatment (cf. Barzycka-Banaszczyk 2019, 12). At this point, it is worth recalling the judgment of the Supreme Court of 7 January 2009 (III PK 43/08, OSNP 2010/13–14/160), according to which the compensation provided for in Art. 18^{3d} of the Labour Code should be effective, proportionate and dissuasive. Compensation must therefore make up for the damage suffered by the worker, there should be an appropriate proportion between the compensation and the employer's breach of the obligation to treat employees equally, and it should act as a form of prevention. When determining its amount, account must therefore be taken of the circumstances relating to both parties to the employment relationship, in particular compensation intended to compensate for the non-material damage of the employee, which is compensation for the non-material damage. If the compensation awarded to a self-employed person under Art. 13 of the Equality Act is not sufficient, there is no legal obstacle to him making supplementary claims under the provisions of the Civil Code. That possibility is expressly guaranteed by Art. 16 of that act. According to this provision, pursuing claims under the Equality Act does not deprive the right to pursue claims under the provisions of other acts. This means that the self-employed may claim both additional compensation under tortious liability (Art. 415 et seq.) or contractual liability (Art. 471 et seq. of the Civil Code), as well as supplementary claims for infringement of his personal rights as a result of discrimination (Art. 24 Civil

Code).³⁰ In addition, if an entity commissioning work to a self-employed person uses contractual provisions that violate the principle of equal treatment within the meaning of the Equality Act, the sanction of their invalidity applies pursuant to Art. 58 § 1 of the Civil Code.

From the point of view of the legal effectiveness of the protection of the self-employed in the field of non-discrimination and equal treatment, an important role is also played by Art. 14 of the Equality Act, which modifies in favour of these contractors the distribution of the burden of proof in relation to the general principles set out in Art. 6 of the Civil Code. According to this regulation, anyone who alleges a breach of the principle of equal treatment has to provide evidence that it has been infringed. Where there is a *prima facie* case of infringement of the principle of equal treatment, the person who is accused of having infringed that principle is required to prove that he has not infringed it (Art. 14(2) and (3)). This means that the legislator, as is the case under the provisions of the Labour Code, adopted the principle of a reversed burden of proof. According to it, a discriminated self-employed person substantiate a probable violation of the Equality Act by pointing to one of the protected characteristics listed in the act. Next, it is for the contracting entity alleged to have infringed the principle of equal treatment to prove that that infringement did not occur. In this way, the presumption was introduced that if the defendant does not prove that he was guided by objective reasons, his action will be considered a violation of the principle of equal treatment (see, for more details, e.g., Tyc 2016, 235 et seq.; Barzycka-Banaszczyk 2019, 13–15). It should also be emphasized that all claims arising from the Equality Act or the Civil Code regarding discrimination are asserted on the basis of the provisions of the Act of 17 November 1964 – Code of Civil Procedure,³¹ and the court competent to settle disputes in this respect is the civil court.

Pursuant to Art. 15 of the Equality Act, the limitation period for claims for breach of the principle of equal treatment is 3 years from the date on which the injured party became aware of the breach of the principle of equal treatment, but not longer than 5 years from the occurrence of the event constituting a violation of this principle. This regulation should be negatively assessed as less favourable than the limitation periods for claims for compensation for damage caused by a tort specified in Art. 442¹ of the Civil Code. Under this provision, these claims are time-barred after 3 years from the date on which the injured party learned or with due diligence could have learned about the damage and about the person obliged to repair it. However, that period may not exceed 10 years from the date on which the harmful event occurred. This discrepancy raises significant doubts from the

³⁰ This is particularly important due to the fact that non-material claims are not time-barred (Art. 117 Civil Code), which means it is possible to pursue them also after the deadline specified in the Equality Act.

³¹ Consolidated text Journal of Laws of 2021, item 1805, as amended.

point of view of the compatibility of Art. 15 of the Equality Act with Art. 2 of the Constitution of the Republic of Poland referring to the principles of social justice.

Additionally, an effective mechanism to strengthen the protection of self-employed persons against discrimination is provided for in Art. 17 of the Equality Act. Under that provision, the exercise of the rights conferred by a breach of the principle of equal treatment cannot give rise to unfavourable treatment and must not have any negative consequences for the person who has exercised them. This protection is also granted to entities that have provided in any form of support to the self-employed exercising their rights for breach of the principle of equal treatment. It should also be positively assessed that the performance of tasks related to the implementation of the principle of equal treatment in relation to the self-employed is entrusted to the Ombudsman and the Government Plenipotentiary for Equal Treatment (Art. 18 of the Equality Act). This was intended to increase the effectiveness of the protection of these persons in the field of non-discrimination and equal treatment, although in practice the provisions of the act under consideration (as mentioned at the beginning) do not work properly.

The legal protection of the self-employed in the analysed area is complemented by regulations regarding collective employment relationships. Pursuant to Art. 8(1) (3) of the Equality Act, it is prohibited to treat them unequally on grounds of sex, race, ethnic origin, nationality, religion, political belief, disability, age or sexual orientation as regards joining and acting in trade unions, employers' organisations and professional associations, as well as exercising the rights of members of these organisations. This provision was practically inapplicable until January 1, 2019. At that time, the Act of 5 July 2018 amending the Act on Trade Unions and Certain Other Acts³² came into force, which extended the law of the coalition to self-employed persons performing gainful employment in the conditions of sole proprietorship. As a result of this amendment, the Act of 23 May 1991 on trade unions³³ guaranteed these contractors not only the possibility of creating their own trade union unions and joining the already existing ones, but also the right to perform trade union functions. In this respect, Art. 3(1) introduced a prohibition on unequal treatment in the employment of self-employed persons on the grounds of membership of or being outside a trade union or the exercise of a trade union function, which has the effect, in particular, of refusing to enter into or terminating a legal relationship, unfavourable determination of remuneration for paid work or other conditions of employment, omission in promotion or granting of other work-related benefits or omission in selection for professional training, unless the contracting entity proves that it was guided by objective reasons. On the other hand, under Art. 3(4) of the Trade Union Act, the provisions of civil law contracts under which self-employed persons perform work, which violate the principle

³² Journal of Laws 2018, item 1608.

³³ Consolidated Text Journal of Laws of 2019, item 263, as amended.

of equal treatment in employment because they belong to or remain outside a trade union, are invalid. Instead of such provisions, the relevant legal provisions governing the legal relationship between those persons and the contracting entity shall apply or, in the absence of such provisions, those provisions shall be replaced by appropriate non-discriminatory provisions.

Analyzing the anti-discrimination regulations regarding the self-employed in the area of collective employment relations, one can see a completely different approach of the legislator. Firstly, there is a significant narrowing, which is justified by the specificity of coalition law, of the scope of subjective protection in the area of equal treatment. Under Art. 2(1) in conjunction with Art. 11(1) of the Trade Union Act, that protection applies only to self-employed persons who perform paid work in the conditions of a sole proprietorship, if they do not employ other persons for that type of work, regardless of the basis of employment, and have rights and interests related to the performance of work which can be represented and defended by a trade union. Secondly, the legislator equates the situation of the self-employed in the context of the right to equal treatment with that of employees. Pursuant to Art. 3(2) of the Trade Union Act, in cases concerning claims for breach of the prohibition of unequal treatment in employment on grounds of membership in or being outside a trade union or performing a trade union function, the provisions of Articles 183d and 183e of the Labour Code concerning employees should be applied to the self-employed covered by coalition law, respectively. Furthermore, the provisions of the Civil Procedure Code on proceedings in matters of labour law apply accordingly to proceedings in these cases. This means that disputes arising on this background, unlike under the Equality Act, are subject to the jurisdiction of labour courts (see more broadly Duraj 2020, 67 et seq.). The example of these regulations is a clear evidence of the lack of a systemic approach of the legislator to the protection of the self-employed in the field of non-discrimination and equal treatment.

4. LEGAL PROTECTION OF THE SELF-EMPLOYED TO THE EXTENT OF NON-DISCRIMINATION AND EQUAL TREATMENT IN THE LIGHT OF POLISH LEGISLATION – REMARKS *DE LEGE FERENDA*

Summing up the above considerations, the very fact of adopting the Equality Act should be positively assessed. There is no doubt that this act has contributed to raising the standards of protection of the self-employed in the area of non-discrimination and equal treatment. As a rule, the provisions of the Equality Act are consistent with the standards of international and EU law and the Constitution of the Republic of Poland. Unfortunately, however, this is not the case in all areas of this regulation. The biggest drawback of these regulations is the closed catalogue of criteria for legal protection against discrimination and unequal

treatment of the self-employed. Firstly, such a solution is inconsistent with the international agreements binding Poland, and also violates Art. 32 of the Constitution of the Republic of Poland. Secondly, it leads to an unjustified lowering of the standards of protection against discrimination and unequal treatment of the self-employed in relation to the legal situation in which people employed on the basis of an employment relationship find themselves (here the catalogue of these criteria is open). The legislator should also consider the issue of extending protective guarantees in the analysed area to persons aspiring to being self-employed³⁴ and to family members cooperating as part of their business activity. *De lege lata* they do not enjoy the protection afforded to the self-employed.

In addition, anti-discrimination solutions do not take sufficient account of the specifics of work provided in the conditions of sole proprietorship. First, the scope of the claims available to the self-employed for breach of the principle of equal treatment should be harmonised and clarified. The legislator should expressly guarantee them both the right to cease discriminatory practices and the possibility of applying not only for compensation for the damage suffered, but also for pecuniary compensation for the non-material damage. Those rights should also apply to persons who have been refused cooperation or whose cooperation agreement has been terminated on grounds of discrimination. Secondly, it is necessary to reflect on a uniform approach of the legislator to the procedure for pursuing claims for infringement of the principle of equal treatment against the self-employed. It cannot be the case that, on the one hand, the Equality Act covers disputes arising in this area with the jurisdiction of civil courts and, on the other hand, the Trade Union Act on discrimination equates self-employed persons with the situation of employees, placing their cases under the jurisdiction of the labour courts. The legislator's far-reaching inconsistency and the inconsistency of the entire system of protection against discrimination can be clearly seen here. Thirdly, additional protection should be introduced for the self-employed against the use of contractual clauses which infringe the principles of non-discrimination and equal treatment. Such a solution successfully functions in Spanish law. Pursuant to Art. 6(4) of the Law of 11 July 2007 on the Law on the Self-Employed (Law 20/2007, Ley del Estatuto del Trabajo Autónomo³⁵), if there is an abusive clause in the contract with the self-employed, it is invalid by virtue of law and is considered invalid. In addition, in this situation, self-employed persons may claim compensation for the damage suffered. Fourthly, granting additional powers to represent the self-employed discriminated against before the court to the associations or trade unions of which they are members is also an idea worth considering. As a rule, these organizations have professional legal services that

³⁴ It should be remembered that the provisions of the Labour Code protect against discrimination and unequal treatment not only of employees, but also of persons with the status of a candidate for work.

³⁵ Boletín Oficial del Estado No. 166 of 12 July 2007.

can provide great support in pursuing claims for violation of the principle of equal treatment against the self-employed. Such a regulation applies in Spain on the basis of Art. 6 of the law cited above (see Barwaśny 2022, 310 et seq.).

The consequence of the above-mentioned shortcomings and imperfections of the applicable Equality Act is that in practice this act does not effectively protect civil law contractors (including self-employed persons) against discrimination and unequal treatment. This is confirmed by the available statistics, which show that a small number of such cases of discrimination and unequal treatment are brought to the courts, and an even smaller percentage of lawsuits resulting in the award of compensation to a discriminated person on the basis of the provisions of this act.

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