35 The Effectiveness of the Principle of Equal Pay in Hungarian Judicial Practice

With Special Attention to the New Directions of European Legal Practice

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35.1 Introductory Thoughts – Equal Pay on the Level of Legislation and Jurisdiction

The principle of equal pay for equal work as one of the oldest and fundamental aspects of equal treatment[1] is present in the Hungarian legal system, namely Act CXXV of 2003 Act on Equal Treatment and Promoting Equal Opportunities (hereinafter: Ebktv.) and Act I of 2012 Act on the Labour Code[2] contain certain rules in connection with this principle.[3] Due to the particularities of these pieces of legislation it is mainly up to the courts to interpret and develop this principle to give it full effect. Based on an assessment of the judgments of the Curia of Hungary (hereinafter: Curia) we may make the general statement that it is often difficult for courts to apply this principle together with other equality norms – to synchronize them – in legal disputes, which raises a further problem: to what extent can domestic judicial practice fulfil the criteria of the common application and common interpretation set forth under Article 2 of the Ebktv.? Enforcing the principle of equal pay for equal work in connection with other notions such as wage paid as performance pay,[4] the obligatory minimum wage,[5] the concept of the elements of wage[6] is particularly difficult, since these pose challenges of interpretation of their own.[7]

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1 S. Bornstein et al., 'Discrimination against Mothers Is the Strongest Form of Workplace Gender Discrimination: Lessons from US Caregiver Discrimination Law', 28(1) *International Journal of Comparative Labour Law and Industrial Relations* (2012), pp. 45-62.

2 We must mention here the predecessor of the Mt. because before the entry to force – 1 July 2012 – of the Mt. Act XXII of 1992 Act on the Labour Code (former Labour Code) also contained these kind of rules and these rules were/are taken into consideration in the Hungarian legal practice because of the 'young age' of the new Mt.

3 In spite of the fact that the latter rules are not interpreted separately in the resolutions, it is worthy to mention them, since in my opinion the Ebktv's interpretation and protection scope is closer to the norms of the EU. *See* e.g. Resolution 219/2012, Equal Treatment Authority.

4 KGD 5/2013 and BH 210/1997, Curia of Hungary.

5 EBH 2425/2011 and EBH 2343/2011, Curia of Hungary.

6 EBH 1899/2008, Curia of Hungary.

7 BH 423/2007, Curia of Hungary.

Among the rules of the European Union – as well as the system of international labour law[8] – the requirement of equal treatment is of exceptional importance and in fact, its origins lie in the principle of equal pay for equal work.[9] Though the principle is not new in EU law, it can be observed that in the last two decades new tendencies have emerged in connection with it, which does not mean that the 'classical' elements have disappeared, they are much rather undergoing further development. The respective new judgments turned out to be frequently cited milestones in the practice of the Court of Justice of the European Union (hereinafter: CJEU) such as the *Defrenne or Barber* cases.[10] These developments are complemented by a special tendency, where the CJEU occasionaly faces undefined labour law concepts that are directly connected to the principle of equal wage (employment relationship,[11] employee, and wage).[12]

In the following I shall examine Hungarian legal practice in light of the CJEU's jurisprudence focusing on the equal pay for equal work principle. The strict criterion of equal pay should be interpreted in connection with the prohibition of gender discrimination, and it is clear from judicial practice that the principles should be applied in compliance with the relevant directives. This way, important questions such as the concept of remuneration, the aspects of equality and the legality of discrimination are examined also in the light of the 'classical' principles governing differences between the remuneration of women and men.

In most of these cases the courts – and also the Curia – seek to answer following questions in their judgments: should the principle of equal pay for equal work be applied to the employees concerned, and if so, what may be regarded equal or unequal pay in the context of the given position; how can the injured party's situation be compared with that of other employees; what was the basis for the different treatment; can the discrimination in question be regarded lawful? The latter two aspects are often jointly assessed in the judgments, therefore, I shall examine them together exploring the necessary connection below.

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8 *See* especially ILO Convention No. 100, No. 111 and No. 156.

9 *See* e.g. Judgment of 1 April 2008 in Case 267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, [2008].

10 *See* e.g. Judgment of 3 October 2006 in Case 17/05 *B.F. Cadman v. Health & Safety Executive* [2006], Judgment of 16 February 2006 in Case 215/04 *Marius Pedersen A/S v. Miljøstyrelsen* [2006], Judgment of 9 December 2004 in Case 19/02 *Viktor Hlozek v. Roche Austria Gesellschaft mbH.* [2004], Judgment of 13 January 2004 in Case 256/01 *Debra Allonby v.Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] and Judgment of 9 February 1999 in Case 167/97 *Regina v.Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999].

11 *See* B. Waas, 'The Legal Definition of the Employment Relationship', 1(1) *European Labour Law Journal* (2010), pp. 45-57.

12 *See* especially Judgment of 1 March 2012 in Case 393/10 *Dermod Patrick O'Brien v. Ministry of Justice,* [2012].

35.2 The Scope of Application of the Principle

First of all, the problem resurfacing in both Hungarian and European legal practice the scope of application of the equal wage principle, namely, for which groups of employees and on the basis of which aspects of equality should the principle be applied. Since Hungarian legislation follows the Directives of the European Union, the new problems and challenges in both Hungarian and EU legal practice can be examined in parallel.

35.2.1 Personal Scope

The method of assessment of the Curia depends on the legal title of the pecuniary claim.[13] The Curia – in accordance with European Union law – normally orders the application of the principle of equal pay for equal work for all groups of employees[14] quite independently of the fact whether the person concerned is employed in an economic – classical – employment relationship in the private sector or in public/civil service.[15] It must be added that the relevant Directives allow Member States to depart from these norms to a minor extent, however, such cases have not reached the Curia so far. It is important to state that from the point of view of the applicability of the principle, the nature of the employment relationship is not decisive; however, in cases where the amount of the compulsory remuneration of public servants lies at the heart of the labour law dispute, judicial practice seems less strict.[16]

The requirement of equal treatment must be enforced both under Act CXCIX of 2011 Act on the Legal Status of the Public Servants (hereinafter: Kttv.) or Act XXXIII of 1992 on the Legal Status of Civil Servants (in the following: Kjt.), in accordance with the earlier case-law of the Curia earlier.[17] This is of great importance since public service-type legal relationships are different than economic-type employment relationships; what is more, the main departure from the classical employment relationship being the statutorily defined, typically cogent rules related to wage.[18] In spite of this – in my opinion – the Curia applies the principle of equal pay for equal work correctly to the public service legal relationship,

13 The finding regarding the infringement of equal treatment in itself is not enough; the court has to decide on the damages and other sanctions as well.

14 Parliament and Council Directive 2006/54/EC Para. 4. referring to Art. 141 of the Treaty Establishing the European Community (Art. 157 of the Treaty on the Functioning of the European Union).

15 *See* e.g. BH 74/2012 (public servants), EBH 2175/2010 (civil servants) and EBH 2103/2009 (employees), Curia of Hungary.

16 EBH 2175/2010 and BH 250/2008, Curia of Hungary.

17 *See* e.g. EBH 2424/2011, Curia of Hungary.

18 T. Prugberger, *Európai és magyar összehasonlító munka- és közszolgálati jog*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest 2006, pp. 189-192.

due to the broad scope of the principle, and the most basic social function of the wage.[19] However, it is worth noting that Hungarian courts do not interpret the principle – not even the Curia – in these cases as widely as would be necessary; in cases where the Curia does not make any real comparison between the employees and only refers to the cogent type of the law, it actually contravenes the legal practice of the CJEU.[20] The situation is further complicated in special cases where a part of the remuneration is not covered by law and its payment depends exclusively on the discretion of the employer.[21]

At this point it is worth mentioning a relatively new European case[22] in which the CJEU had to decide the questions mentioned above: to what extent can the concept of employee be connected to the strict concept of employment relationship when the part-time worker's employment relationship differs from the 'regular' employee's labour relationship to such an extent that the two working activities cannot be compared; and whether on that basis of the problem of the equality of wages could emerge. The CJEU analyzed this question in detail and finally arrived at the conclusion that – departing from the General Advocate's opinion[23] – in the ambit of the labour law of the European Union establishing a uniform concept of employee is inconceivable, therefore, this question is left up to the Member States to decide, on condition that they should comply with the relevant directives. Such a complex system does not exist in Hungarian law either but practical experiences show that the courts follow the consistent practice according to which the principle of equal pay must be applied for every employee working in both the private and the public sphere.[24]

35.2.2 The Aspects of the Equality of Wage

The next important point is that courts must examine under what circumstances the wage of employees concerned may be considered equal to the wage of those who are in a comparable situation.

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19 Gy. Kiss, *Munkajog*, Osiris Kiadó, Budapest 2005, pp. 123-127.

20 *See* e.g. Judgment of 18 November 2004 in Case 284/02 *Land Brandenburg v. Ursula Sass* [2004].

21 In these cases the Curia seems to forget that if the employer grants privilege in a form of extra remuneration to certain groups of employees of its own choice, discrimination may emerge between persons in a comparable situation, even if the remuneration does not have a concrete legal basis. Though such cases abound in the world of private labour law too, they are extremely frequent in the sphere of civil and public servants. *See* for example: EBH 1980/2009, BH 74/2012, BH 250/2008, BH 52/2008, BH 423/2007, BH 593/2001, BH 610/1998, BH 449/1998 and BH 210/1997, Curia of Hungary.

22 Case 393/10, *O'Brien*.

23 *See* Rec. 32-34. of the judgment and Rec. 42-46. of the opinion of the Advocate-General.

24 Otherwise it must be added that since the concept of employment relationship is partly undefined in Hungarian law it is problematic to decide how the principle of equal wage can be applied not in labour law but typically in civil law legal relationships (agency contract, enterprise). According to the Commitment No. 384/2/2008 of the Council Board of the Equal Treatment Authority it is necessary to correspond the principles in these cases, too.

The problem can be expressed – as it emerged in several judgments[25] – by asking whether it is even feasible to achieve the equal wage of the persons affected. If the court decides that it is not possible, then the employee's demand is not substantiated, since the employer's procedure was not discriminative or there are other circumstances – for example special legal provisions[26] – that justify the difference between the respective wages.[27] In these cases we can arrive at the conclusion that the courts have to balance the aspects of equal pay broadly; although in most cases the interpretation of the legal problems of the judgments is correct, this approach in judicial interpretation is often too narrow.[28] With respect to the issue of equality the comparison of scopes of activities is always necessary, i.e. if two or more positions have the same or at least similar attributes and the employer does not have any other legitimate reason for differentiation,[29] the wages of those involved must be equal. This basic principle appears markedly in the European legal practice,[30] but it plays an important role in Hungarian legal practice as well.

At the same time, in the domestic judicial practice it is a recurrent problem that in most cases defining the relationship between parties' positions is rather difficult,[31] or even impossible, therefore, the discrimination test cannot be carried out with due care. Thus, it can be stated that the most important aspect is the comparison of the parties' positions, which is rarely accompanied by a comparison of activities, while in the practice of the European Court this is the dominant aspect.[32] From the resolutions of the Equal Treatment Authority it can also be inferred[33] that the assessment of the given position is not necessarily sufficient to decide whether the employer's act was discriminative or not. From the point of view of the judicature the application of Article 12 paragraph 3 of the Labour Code would be the correct solution, namely, the comparison should be made on the basis of the systematic aspects laid down in the said provision. However, it is also doubtful whether these aspects were adjusted to the individual job positions or activities, since several judgments[34] reveal that even if the law lists several aspects of comparison, courts rarely explore the real circumstances of the wage on this basis. In my opinion, these aspects may even give rise to different conclusions.[35]

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25 *See* e.g. EBH 2155/2010 and BH 298/2012, Curia of Hungary.
26 *See* e.g. EBH 2343/2011.
27 EBH 2155/2010 and KGD 10/2011, Curia of Hungary.
28 *See* especially EBH 1980/2009, Curia of Hungary.
29 E.g. service period, further position, the type of other tasks.
30 G. Beck, 'The State of Anti-Sex Discrimination Law and the Judgment in Cadman, or How the Legal Can Become Political', 32(4) *European Law Review* (2007), pp. 549-562.
31 EBH 2343/2011, EBH 2175/2010, EBH 2155/2010, EBH 1899/2008 and BH 74/2012, Curia of Hungary.
32 *See* Judgment of 10 March 2005 in case of 196/02 *Vasiliki Nikoloudi v. Organismos Tilepikoinonion Ellados AE,* [2005].
33 *See* Resolution 831/2007 and 700/2007, Equal Treatment Authority.
34 EBH 1980/2009, EBH 2155/2010 and BH 74/2012, Curia of Hungary.
35 *See* in connection with sex-discrimination: Parliament and Council Directive 2006/54/EC Para. 9.

Furthermore, the Curia interprets the principle of equal pay in connection with job classification as it follows from the EBH 2343/2011. It states that besides examining the attributes of a given job position it is at least as important to examine the existence of the necessary conditions to fill this position – qualifications, education, practice etc. – because if discrimination is justified on the basis of these conditions, then the principle of equal pay cannot be infringed. A further question regards the legal consequences of an employer employing somebody notwithstanding the fact that the person concerned lacks certain prerequisites, but the employer regards her to be the most suitable candidate for the position.[36] In such a scenario, the employees' situation is comparable to those who satisfy the conditions laid down in the Labour Code. In its decision the Curia stated that the employee is only entitled to equal pay if she possesses the required qualifications, otherwise the principle of equal treatment would be infringed, since the Labour Code also stipulates that possessing the qualifications necessary for filling the position is one aspect to be assessed when deciding about the equal value of the work. The reasoning of the Curia – and also the court of first instance – seems logical, but we cannot disregard that in the Labour Code there are other aspects to be taken into account besides qualification. This is actually contrary to Union law, since the case-law of the Court of Justice of the European Union indicates that the principle of equal pay is the most fundamental element of the requirement of equal treatment, which should be interpreted narrowly.[37]

The findings in EBH 1980/2009. about wage discrimination in connection with the attributes of a job position are also inconsistent. The Curia declares in the cited decision that depending on the place of work, different sums and allocation of remuneration in kind is not discriminative. The applicants in the case referred to the infringement of the requirement of equal treatment and the principle of equal pay claiming that the employer granted a double sum of allowances in kind to those, who worked at the headquarters, as compared to those, who could not use hot meal vouchers at the same place, receiving cold meal vouchers of half the value. The first instance labour court refused the action, but it did not state the reasons for the lack of discrimination. From its reasoning it may be inferred that the mere fact that the vouchers differ in the aspect of applying to hot or cold meals is insignificant.[38] The court of second instance agreed with this judgment but complemented

36 BH 103/2013 and BH 298/2012, Curia of Hungary.

37 *See* Case 19/02 *Hlozek,* Judgment of 7 January 2004 in Case 117/01 *K. B. v. National Health Service Pensions Agency, Secretary of State for Health* [2004] and Judgment of 17 September 2002 in Case 320/00 *A.G. Lawrence and Others v. Regent Office Care Ltd., Commercial Catering Group, Mitie Secure Services Ltd.* [2002].

38 In my opinion, the latter arguments are superficial and meaningless, because on the one hand in connection with work the Ebktv. itself prohibits all kinds of discrimination independently from its 'measure' and importance, and on the other hand the essence of the principle of equal treatment should keep the employer back/ prevent/ discourage the employer from performing any discrimination among/between (the) employees. *See* B. Nacsa, 'Jogharmonizáció: diszkrimináció helyett egyenlő esélyek az EU-ban és a Munka Törvénykönyvében', 3(6) *Cég és Jog* (2001), pp. 41-45.

the first instance judgment. It declared that the employer differentiated lawfully on the basis of the place of work, because under the given circumstances it would have been impossible to grant the same remuneration to the parties. Following the applicants' petition for review the Curia totally agreed with the merit and justification of the final judgment in spite of the fact that the employees' argument seemed convincing.[39] According to the applicants the differentiation was not proportional and the reason underlying it was neither relevant, nor legal. The Curia held that the employees' positions were not comparable because of the different workplaces, allowing for lawful differentiation.

Altogether we can say that according to the judgment the requirement of equal pay – following from the judgment in general the requirement of equal treatment – can be lawfully infringed on the basis of the place of work, even if the employment relationship of the employees concerned are the same regarding all further essential elements.[40] Furthermore, it must be added in connection with the above cited judgment that the principle of proportionality should be considered with more emphasis in discrimination cases.[41] This case is a good example, for even if we accept that differentiation shall be lawful on the basis of the place of work, the question may arise whether the aim the employer tries to achieve is legitimate and whether the chosen means are proportional or not.[42] It must assessed whether or not the extent of the legal injury can be justified. In my opinion, the nature[43] of the right to equality and the need to protect workers' rights especially in connection with remuneration must be duly considered.

A further judgment of the CJEU[44] should also be mentioned. In the *Lawrence case* the Court did not exclude the possibility of applying the principle of equal wage to several employees who, albeit not working for the same employer, carried out the same activity. Although such an approach would be suitable in the public sphere; in case of individual employment contracts this kind of interpretation seems overly extensive.[45] Although a similar example cannot be found in Hungarian legal practice, the above described cases suggest that wage discrimination is not allowed on the basis of the workplace – with a little exaggeration – even in the case of different employers unless it has some legal cause.

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39 Naturally, the legal situation could have been different if the employer would have marked such further conditions. *See* T. Gyulavári, 'Egyenlő bánásmód és esélegyenlőség', 13(47-48) *Café Bábel* (2004), pp. 111-129.

40 It is interesting to remark that according to the 45. § (3) of LC – differently from the previous regulation – the place of work does not belong to the obligatory content elements of the employment contract.

41 N. Hős, 'Az Európai Bíróság életkoron alapuló hátrányos megkülönböztetéssel kapcsolatos joggyakorlata, különös tekintettel az arányossági teszt alkalmazására', 15(3) *Európai Tükör* (2010), pp. 57-75.

42 T. Kalas, 'Egyes jogelvek szerepe az Európai Bíróság ítélkezési gyakorlatában', 56(7-8) *Jogtudományi Közlöny* (2001), pp. 313-320.

43 Because it is a fundamental human right and its source is the right to human dignity and the equal dignity.

44 Case 320/00 *Lawrence and Others*.

45 In this respect, the collective agreements are legal regular norms, so in case of their infringement to refer to the infringement of the principle would be possible.

35.3 The Interpretation of the Criteria of Comparability

The next aspect for assessment is the criteria of comparability. The legal basis of comparability is the list of concepts included in the Ebktv. comprising direct and indirect discrimination, furthermore, the aspects referring to equal pay enshrined in the Labour Code. In general, the essence of comparability regarding equal pay requires that the prohibition of discrimination should not become boundless, i.e. adjudicating the differences between persons or groups should be meaningful.

35.3.1 The Role of Comparability

The aspects on the basis of which the persons or groups are compared should be defined, so it cannot happen that two persons – in our case workers – are compared whose situations, circumstances are so different that in their case it would be impossible to speak about discrimination. At the same time, comparison also aims at examining specific attributes leading to discrimination. Basically, the aspects of comparability must be objective, however, in some cases it is necessary to take the employees' subjective circumstances into consideration.[46] Since Hungarian law affects only certain segments of comparability in the equality of employment, the practice of the Constitutional Court[47] and consequently the Curia determines the direction to be followed.

In general, it can be stated that in Hungarian judicial practice the principle is interpreted in accordance with relevant Union law, however, legal development in domestic law is scarce. The biggest problem is that courts narrow down the personal scope excessively when assessing comparability,[48] and it is also typical that even in case of infringement affects a single individual they insist on discovering groups in similar situations.[49] In my opinion, from the content of the Labour Code and the Ebktv. we cannot arrive at this conclusion, but it is also true, that a meaningful comparison of the employees' situation is very difficult, leaving lawyers and judges with the disquieting sense that such an examination is forced and fails to take into consideration the real circumstances of employees.

46 C. Costello and G. Davies, 'The Case Law of the Court of Justice in the Field of Sex Equality Since 2000', 43(6) *Common Market Law Review* (2006), pp. 1567-1616.

47 *See* 9/1990 (IV. 25) AB, Resolution of the Hungarian Constitutional Court.

48 EBH 2424/2011, EBH 2155/2010, EBH 1980/2009 and BH 74/2012, Curia of Hungary.

49 *See* e.g. EBH 2155/2010 and BH 74/2012, Curia of Hungary.

35.3.2 Comparability in Practice

In connection with the requirement of equal pay the Curia makes important statements in the EBH 2155/2010, where the judgment centred on the criteria of comparability and the definition of 'equal situation'. From a dogmatic point of view it is interesting that the plaintiff based his claim on Article 8 item t) of the Ebktv – direct discrimination – namely, the obligation of joint application. The Curia found the employees' situation not to be comparable, because the necessary education requirement for the position was different even though the employees' positions were basically the same. In spite of this, during the employment relationship the employer classified the plaintiff in the same way as those, who had the necessary education, but later a difference emerged in their wages. Although the entry level court found that since the employer was an extremely large company with several places of business all over the country and the tasks were not quite the same, it could not be substantiated that the plaintiff's wage was unreasonably lower than that of some of the colleagues'. Thus, the conclusion of the court was that the fact that in the given position the wage of only a small number of employees – who were otherwise in the same situation – was higher than the plaintiff's, cannot be regarded as discrimination. In consequence, it was not examined whether wage discrimination emerged on the basis of other circumstances referred to. The court of second instance correctly held that in connection with wage discrimination the Ebktv. and the Labour Code cannot be interpreted too narrowly and strictly since the principle of equal pay is protected by an express provision of the Constitution of Hungary.[50] Therefore, the exclusive assessment of the plaintiff's marked attribute is insufficient, in particular, because in this case 'other situation' is interpreted correctly if it is examined in the light of whether it is closely connected to the employee's employment situation.

On this basis, the Curia's legal conclusion was that the wage and wage developing conditions laid down in the individual employment contract are basically adapted to the circumstances stipulated in the collective agreement in force at the employer, i.e. they are defined as a consequence of the social partners' bargaining process. It is important to add that in respect of such a large employer it would be a fundamental requirement that the parties conform to the requirements of equal treatment as it is a common practice in the other Member States of the European Union,[51] however, this was not the case. According to the Curia's opinion, as a consequence of the new classification the plaintiff did not suffer an unlawful disadvantage, since his wage could not be higher on the basis of his classification. In my opinion, the Curia's argument – according to which the wage of the employee,

50 This norm is missing from the Basic Law /Fundamental Law, but it can be deduced from the domestic legal practice and the European and international labour law principles, so in my opinion the principle of equal wage for equal work is characteristic at a higher protection level.

51 A. Supiot, *Beyond Employment*, Oxford University Press, Oxford 2005, pp. 174-189.

who was in a comparable situation to the plaintiff, was fixed higher not because he had subjective right to such a wage on the basis of the law, collective agreement or the employer's regulation, but much rather because the employer defined a higher wage for the employee based on its discretion – is irrelevant. Altogether this argument would suggest that employers can violate the requirement of equal treatment supposing they refer to the fact that the decision about wage is based fully on their own discretion.

By contrast, we should not forget that – in most cases – directives deem employer's decisions to be discriminative in case these are based on the employer's discretion.[52] Finally, the Curia did not adjudge the employee's demand even though his situation could be compared to those who received higher wages under the same conditions, since only the wages of certain employees of the same classification wages were higher, and on this basis the Curia found that the plaintiff did not suffer a real disadvantage. In my opinion, this interpretation is rather narrow, since there are no rules in the law on equal opportunities on the basis of which it would be necessary to compare the employee's situation, who suffered disadvantage, in connection with that of other employees, since it was unambiguous in the present case that the disadvantage actually originated from unjustified differentiation.

The Curia gives a broader interpretation of comparability in its Judgment BH 74/2012, where it declares that the employer is obliged to pay for the surplus work according to the surplus burden for every employee working under the same circumstances, and the employer may only depart from this rule for appropriate reasons. In the action there were no important differences between the civil servants' work, only their workplaces were different. In spite of this, the employer paid less benefits to the plaintiff than the colleagues in a comparable situation, undoubtedly infringing thereby the requirement of equal treatment. The employer referred to the fact that it paid risk benefit on the basis of the collective agreement, but the higher wage was not adjusted to the job position but much rather to the organisational unit and what is more, the maximum number of staff was also stated. As a result, the employer came to the conclusion that on the basis of the collective agreement it could decide in it own discretion which employees shall receive the surplus benefits. In my opinion, it was not necessary to find a real cause for discrimination because this could be inferred from the provisions of the collective agreement. Altogether, according to the respondent employer the employees' situations cannot be considered to be comparable and as a consequence, they cannot suffer discrimination since none of the civil servants had a subjective entitlement to the benefits in question, thus, the plaintiff would not be entitled to it even in case of discrimination. It must be added that in most cases the employer made payments without a legal basis in contravention to the collective

52 Gy. Kiss, 'Az egyenlőségi jogok érvényesülése a munkajogban', 8(1) *Jura* (2002), pp. 48-60.

agreement, thus, according to the respondent's standpoint the plaintiff could not invoke loss of pay because these had no legal basis.[53]

In its decision the Curia pointed out that it is irrelevant on what legal title the payment was made, since the plaintiff employees suffered discrimination and their situation was comparable.[54] Since the employer did not have a legitimate reason to substantiate that it acted in accordance with the requirement of equal treatment, the Curia essentially only examined whether the employees had suffered any disadvantages or not. It is remarkable that by this judgment the Curia tries to define the interpretational aspects in two further directions in connection with equal treatment: on the one hand, it accepts that concerning the wage the principle must be applied to every element of remuneration, including additional benefits, while on the other hand, it interprets the criteria of comparability from the point of view of labour protection. Finally, it is worth pointing out that the Curia also mentions that in course of the application of the principle of equal pay included in the Labour Code, the assessment of the employee's real disadvantage is indispensable and in such cases it is of secondary importance whether the employee can substantiate that she possesses protected attributes.

35.4 The Causes of Wage Differentiation Based on Its Legality

The next aspect of assessment in domestic legal practice is the examination of the question whether wage discrimination actually occurred or which aspect or circumstance served as a basis for differentiation.[55] It is clear from Hungarian judicial practice that courts try to expose the reasons which lead to discrimination, albeit these are taken into consideration to a different extent.[56] Naturally, there are extreme cases – not exclusively in connection with remuneration – where the employer discriminates for revenge,[57] as a consequence of

53 Although the Curia did not consider these arguments to be correct and we must pay attention to the fact that according to the adequate interpretation of the wage such 'nonexistent' elements form part of the wage in case they are paid in connection with the performance of the employment contract. *See* Art. 1 of ILO Convention No. 95 reads as follows: 'In this Convention, the term wages means remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered.' The CJEU follows the same interpretation in connection with Art. 141 of the Treaty Establishing the European Community (Art. 157 of the Treaty on the Functioning of the European Union).

54 The Curia did consider it important to carry out the detailed examination of comparability, because it was unambiguous that the job positions are the same and in this case the judicature does not have to compare all the elements of the work activity; the cause for comparability was the type of the legal relationship.

55 It is of high importance from the point of view whether discrimination is lawful or not, but sometimes exploring the real causes of discrimination results in the findings revealing the essence of discrimination.

56 EBH 2343/2011, EBH 2175/2010, BH 298/2012, BH 73/2012, KGD 5/2013 and KGD 10/2011, Curia of Hungary.

57 BH 347/2011, Curia of Hungary.

some personal conflict,[58] but in my opinion the number of cases where incorrect interpretation of the legal regulation results in discrimination is rather high.[59]

The employer's behaviour can be interpreted in several ways in light of the prohibition of discrimination, however, in line with the resolutions of the Equal Treatment Authority[60] the courts adjucating employment cases should pay much more attention to the real causes of discrimination, because a discrimination case may lead to other serious infringements on the employee's side and in this respect the judicature bears great responsibility because it is difficult to control this field.

In connection with this, the Curia makes relevant statements in Decision BH 103/2013. as follows. Discrimination on the plaintiff employee's part emerged for several reasons, since this case concerns questions of both wage and advancement. It is interesting that the requirement of equal treatment appears indirectly in the case, which is a recurrent problem also in the European equal opportunities law.[61] The plaintiff employee complained that he suffered discrimination because after fulfilling the requirements of the contract for studies he was not classified into a higher category that would suit his new qualification. This case is extremely interesting from the aspect of equal opportunities because the plaintiff did not refer to any attributes as the basis of discrimination and the situation turned to the absurd when the plaintiff stated that the performance of the contract justified the discrimination.[62] The Curia found in its ruling that in case the employee does not refer to any attributes that are unrelated to his legal relationship and on which basis he suffered a real disadvantage, the infringement of equal treatment, i.e. the principle of equal pay is exclusive. Thus, the Curia held that the legal basis of discrimination may be any circumstance in connection with the employment relationship, which has an effect on the performance of the employment contract, at the same time, the employer's action cannot be traced back to any of the employee's personal attributes. This principle is authoritativ) from the point of view of both remuneration and advancement.

The adjudication of situations where the employer – due to coercion or its own economic or other circumstances – cannot observe the requirement of equal pay is problematic, since in these situations it is not certain that the employer's behaviour may be traced back to some discriminative cause.[63] In such cases the Curia has to decide whether discrimination

58 BH 132/2012 and BH 349/2011, Curia of Hungary.

59 *See* e.g. BH 204/2011, Curia of Hungary.

60 *See* Resolution 585/2012, 245/2012, 219/2012 and 700/2007, Equal Treatment Authority.

61 *See* especially Judgment of 12 October 2004 in Case 313/02 *Nicole Wippel v. Peek and Cloppenburg GmbH.& Co. KG.* [2004].

62 Altogether the existence or non-existence of other agreements in connection with the employment relationship can be regarded as an employment situation, but in such a situation the further conditions of discrimination must be examined more strictly. The plaintiff employee's situation is not necessarily comparable to the others' working in the same job position.

63 It is also true that infringement performed from this aspect has greater importance than the original cause.

based on a quasi operational cause may be deemed lawful or not. The Curia states that as a main rule this cannot be lawful because in this case the basis for the discrimination is the employer's behaviour (BH 210/1997). The employer fails to perform one of its main obligations when paying the employees unequally and from this perspective the cause is irrelevant. In the concrete case the employer did not give any real reasons for paying a reduced premium to the plaintiff, even though the specialities of the job position – management activities – could have justified it. The employer discriminated against the employee beyond doubt (he was the only person who did not get the whole sum). Consequently, discrimination cannot be deemed lawful if the employer – seemingly – differentiates unlawfully and disproportionately between the employees in connection with wage for economic reasons or due to coercion.[64]

35.5 Conclusion and Final Thoughts

On the basis of the relevant BHs and EBHs the principle of equal pay for equal work is generally interpreted correctly, but the use of the concept of equal pay for equal work remains problematic. It is not clear either how this principle may be enforced within the framework of special forms of employment relationship[65] in light of the parties' private autonomy which is a fundamental principle in civil law.[66]

The aspects of equal pay are not uniform in Hungarian legal practice: while it is clear from the commitment of the Council Board of the Equal Treatment Authority[67] which elements of remuneration should be taken into consideration, and what are the real elements of equal pay, judicial practice disregards these elements and often applies the principle of equal pay inconsistently with an overly general approach. In my opinion, the Ebktv. and the connected jurisprudence corrected partly rectified this tendency, but Hungarian interpretation of the principle of equal pay is, for the time being, far removed from the interpretation followed by the Court of Justice of the European Union.

The application of the criteria of comparability in Hungarian legal practice is more often than not deceivingly ambiguous. In approximately 50% of the cases the courts – and also the Curia – pay no attention to the criteria of comparability since they first examine the existence of a protected attribute and the cause for differentiation, while in the end,

64 Cs. Kollonay Lehoczkyné, 'Árnyak és árnyalatok az egyenlő bánásmód európai uniós elvének alkalmazása körül', 2(1-2) *Fundamentum* (1998), pp. 88-93.

65 L. Vékás, 'Egyenlő bánásmód a polgári jogi viszonyokban?', 61(10) *Jogtudományi Közlöny* (2006), pp. 355-364.

66 Gy. Kiss, 'Munkajog a közjog és a magánjog határán – egy új munkajogi politika kialakításának szükségessége', 63(2) *Jogtudományi Közlöny* (2008), pp. 70-81.

67 Commitment No. 384/2/2008. of the Council Board of the Equal Treatment Authority.

the assessment of the comparable situation turns out to be obsolete.[68] This practice is contrary to the practice of the CJEU.[69] A negligible part of the cases are more progressive, since in its new judgments[70] the Curia interprets the requirements of comparability in a rather wide spectrum by considering the same scope of activities – even if only their denominations are the same[71] – sufficient to determine comparability. Although this approach is going in the right direction, in light of EU legal developments the aspects of this examination should be more elaborate and should not only deal with the 'classical' aspects of comparability.

It is clear that in Hungarian legal practice the real cause for discrimination is often left unexplored, rendering the determination of comparability and unlawful treatment more difficult. In this respect, courts seem satisfied with exploring only one of the causes even if it is not a real cause.[72] Thus, the aspects for assessment are rather restricted, in particular, when the attribute referred to by the employee belongs to the category of 'other circumstance'. Meanwhile, according to the European jurisprudence the basis for differentiation can be any attribute, circumstance, situation, perception which is characteristic of the employee concerned, as a result, the courts or authoritys must examine all related aspects.[73] In particular, according to European legal practice attributes in connection with the employment relationship must be considered as protected, meaning that the infringement of equal pay may occur even if there is no named protected attribute.[74] However, we can only find very few examples for this approach in Hungarian judicial practice, since courts rarely apply the principle of proportionality even if it were necessary in order to strengthen employees' legal protection.

Typically, the judicial practice of the Curia regards unequal wages lawful in case the difference does not affect the base wage[75] with the employer invoking its own discretionary powers or substantiating discrimination by seemingly justifiable aspects.[76] The result is the same in case the employee cannot indicate a protected personal attribute on which the discrimination was based.[77]

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68 EBH 1980/2009, Curia of Hungary.

69 K. Kodlinská, 'Case Law of the European Court of Justice on Sex Discrimination 2006-2011', 48(5) *Common Market Law Review*, (2011), pp. 1599-1638.

70 EBH 2424/2011, EBH 2103/2009, BH 74/2012, BH 52/2008 and KGD 5/2013, Curia of Hungary.

71 EBH 2343/2011 and BH 74/2012, Curia of Hungary.

72 *See* especially EBH 1980/2009, Curia of Hungary.

73 C. Tomuschat, 'Case C-85/96 María Martínez Sala v. Freistaat Bayern, Judgment of 12 May 1998, Full Court. [1998] ECR I-2691', 37(2) *Common Market Law Review* (2000), pp. 449-457.

74 L. Waddington and M. Bell, 'More Equal Than Others: Distinguishing European Union Equality Directives', 38(3) *Common Market Law Review* (2001), pp. 587-611.

75 EBH 2175/2010, EBH 1899/2008, BH 103/2013 and BH 610/1998, Curia of Hungary; Personal base wage before 1 July 2012.

76 EBH 2343/2011, EBH 2155/2010 and EBH 1980/2009, Curia of Hungary.

77 EBH 2155/2010, EBH 1980/2009, BH 103/2013 and KGD 10/2011, Curia of Hungary.

In view of the above, it is clear that the criteria of equal pay are often applied directly in Hungarian judicial practice, with consideration to the criteria elaborated by the CJEU. However, jurisprudence often seems a little superficial as if the courts consider the protection of the requirement of equal treatment to be superfluous or at least they do not recognize the magnitude of the problem. In my opinion, this one of the greatest flaws of the relevant jurisprudence, since the courts' task would be to apply relevant labour law protection rules correctly. Since the rules of both the Ebktv. and the Labour Code must comply with the requirements set out under EU law, it would be advisable for labour courts to take into consideration both European case-law and the practice of the Equal Treatment Authority. It remains to be seen, how effective judicial labour protection in Hungary really is, of which the effective enforcement of the principle of equal pay for equal work forms an undoubtedly core part.