2021/3

Application of a collective agreement and discrimination based on membership (non-membership) of a trade union (LT)

CONTRIBUTOR Vida Petrylaitė*

Summary

On 16 December 2020, the Supreme Court of Lithuania (Cassation Court) delivered a ruling in a case where an employee claimed that the employer, JSC 'Lithuanian Railways', did not apply the regulations of the company's employer-level collective agreement and did not pay a special bonus – an anniversary benefit (i.e. a benefit paid to employees on reaching a certain age) – because the employee was not a member of the trade union which had signed the collective agreement. According to the employee, she was discriminated against because of her membership of another trade union, i.e membership of the 'wrong' trade union.
The Supreme Court held that combatting discrimination under certain grounds falls within the competence and scope of EU law, but that discrimination on the grounds of trade union membership is not distinguished as a form of discrimination. Also, the Court ruled that in this case (contrary to what the employee claimed in her cassation appeal) Article 157 of the Treaty on the Functioning of the European Union (TFEU) is not applicable because it regulates the prohibition of discrimination on other (sex) grounds. Moreover, the Court found that there was no legal basis for relying on the relevant case law of the ECJ which provides clarification on other forms of discrimination, but not on discrimination based on trade union membership.

Facts

The company's collective agreement was concluded between the employer and three trade unions operating in the company (in total, four trade unions were operating separately in the company).
The application of the collective agreement was extended by the special procedure of universal voting to all employees of the company, regardless of their membership of the trade unions. However, paragraph 4.9.7. of the collective agreement indicated that employees – only members of the trade unions which signed the collective agreement – who are celebrating their 50th and 60th birthdays and additionally have at least 10 years of service in the company and at least six months of trade union membership, would be paid a lump sum bonus payment from the employer of € 300.
The employee asked for the payment of the above-mentioned bonus. She had 11 years of service in the company and was a member of a trade union for a similar period of time. However, the employee was a member of the fourth trade union operating in the company which had not participated in the collective bargaining and had not signed the collective agreement. This was the only reason the employer refused to pay the bonus.
The employee appealed against the employer's refusal to the Labour Disputes Commission under the Lithuanian State Labour Inspectorate (obligatory pre-trial stage for individual labour disputes). The Commission found that by refusing to pay the bonus, the employer had discriminated against the employee on the grounds of trade union membership. The employer disagreed with the decision of the Commission and claimed to the court of the first instance. The court of first instance found in favour of the employer. The court of appeal upheld the decision of the first instance court and stated that the parties had been free to lay down additional social guarantees applicable only to the members of trade unions which participated directly in the collective bargaining and signed the collective agreement.

Judgment

The Supreme Court, after analysis of the relevant EU legal norms, *inter alia*, Articles 10, 18 and 19 of the TFEU, Article 21(1) of the Charter of Fundamental Rights of the European Union, and (Anti-Discrimination) Directives 2000/43/EC, 2000/78/EC,

* Vida Petrylaitė is an associate professor at Vilnius university.

doi: 10.5553/EELC/187791072021006001004

2004/113/EC, 2006/54/EC and 2008/104/EC, stated that:

i. the EU shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
ii. the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
iii. any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited;
iv. there is only a limited list of grounds for prohibition of direct discrimination in primary and secondary European Union law, such as citizenship, sex, racial or ethical origin, religion, disability, age, sexual orientation etc.

Taking into account these conclusions, the Court found that membership of the trade unions is not one of the grounds on which EU law prohibits discrimination.

The Court also noted that EU law promotes the collective representation of employees' interests, but that EU competence in this area is limited and only supplementary to that of the Member States. Article 153(5) of the TFEU excludes both payment and the right of association from EU competence.

After the interpretation of relevant *national* legal norms, the Court held that employees are free to choose membership of any trade union and accordingly acquire certain rights and responsibilities. Trade unions, as well, are obliged to represent, initiate and participate in the collective bargaining in favour of their members. According to the general rule of the Lithuanian Labour Code, the collective agreement applies to employees who are members of the trade union which negotiated and signed the agreement. Although the Labour Code provides the exception – after fulfilment of certain conditions – that the company collective agreement can be applied to employees who are not members of a trade union (which is a party to the collective agreement) this does not mean, however, that such extended application of the collective agreement may change the content and provisions agreed by social partners, *inter alia* differentiated social guarantees and benefits applicable for a clearly defined group of employees (in this case for members of trade unions which negotiated and signed the collective agreement). According to the Court, a contrary interpretation would infringe the principle of freedom of collective bargaining.

Commentary

This case is extremely important for Lithuanian labour law and its further application. The new Labour Code entered into force on 1 July 2017. One of the main reforms introduced by the new Labour Code relates to different regulation of the application of collective agreements. The legislator chose to introduce new general provisions – that collective agreements apply only to members of a trade union which is a party to the agreement, except in cases where both parties (trade union and employer) agree the collective agreement can be extended to all employees regardless of their trade union membership. Additionally, there was no prohibition on agreeing on and applying different conditions of a collective agreement for members and non-members of a trade union (e.g. additional social guarantees). Such a new regulation was not accepted without criticism from legal scholars, practitioners and social partners. Preliminary discussions and questions concerning the possible discriminatory nature of the new regulation have been raised from the day of its entry into force. Thus, the final decision of the court after more than three years of legal uncertainty had been anticipated and is welcomed.

Comments from other jurisdictions

Austria (Lukas Wieser and Vera Habe, Zeiler Floyd Zadkovich): This is an interesting judgment, as the question of whether collective bargaining agreements (CBAs; *Kollektivverträge*) should apply only to members of certain trade unions is not under discussion in Austria. The applicability of a collective bargaining agreement depends on the type of work or trade carried out by the employer. The relevant statutory applicable collective bargaining agreement applies to all employees of the employer, regardless of the employees' trade union membership, if any.

As in Lithuania, a general statutory protection against discrimination based on trade union membership does not exist under Austrian labour law. However, the principle of equal treatment provides that employees doing similar kinds of work are not to be treated differently for unjustifiable reasons. An employee's trade union membership may qualify as such an unjustifiable reason. Thus, a CBA providing different regulations based on the employee's trade union membership may under Austrian labour law violate the principle of equal treatment. Moreover, a termination of the employment relationship by the employer based on the employee's joining, membership or activity in a trade union can be challenged on the basis of undue motive. Although Austrian employees do not enjoy a general protection against discrimination due to trade union activities, a

doi: 10.5553/EELC/187791072021006001004

protection against termination due to trade union membership is provided by Austrian labour law.

Denmark (Christian K. Clasen, Norrbom Vinding): The ruling described in the Lithuanian case report illustrates that discrimination on grounds of union membership or non-union membership is not prohibited by EU law. Still the case law of the European Court of Human Rights (ECHR) concerning Article 11 of the European Convention on Human Rights has had a great influence on Danish case law as well as new legislation on freedom of association in relation to union membership.
One of the defining judgments from the ECHR in that respect was given in *British Rail*. In this case, the ECHR ruled that it was in violation of Article 11 of the European Convention on Human Rights that three employees were dismissed because of their refusal to join the trade unions covering their trade.
On the basis of this case as well as other rulings, the Danish Freedom of Association Act was passed. This Act prohibits employers from discriminating against job candidates or employees on grounds of union membership or non-union membership in connection with recruitment and termination. Later the Act was amended because of *Sørensen and Rasmussen – v – Denmark* where the ECHR concluded that the Freedom of Association Act was in violation of Article 11, as closed shop was allowed under the Act. When passing the bill, the Danish Parliament made it clear that the purpose of the amendment was only to ensure compliance with the recent ruling. Thus, the new Act does not prohibit discrimination based on union membership or non-union membership in relation to pay and other employment terms.
The question of whether such discrimination could be in violation of the European Convention on Human Rights was later examined by the Danish Supreme Court. The case concerned two employees who received full sick pay until their employer learned that they were members of another trade union than the one that had entered into the collective agreement covering their employment. From that point on, they received a lower sick pay equivalent to the statutory sickness benefits as only members of the trade union that was a party to the collective agreement were entitled to supplementary sick pay.
It should be noted that, contrary to Lithuanian labour law, in Denmark collective agreements normally apply to all employees working in a specific area in a company, irrespective of membership of the trade union that is a party to the applicable collective agreement or non-union membership.
The Supreme Court referred to case law from the ECHR and noted that, apart from situations of dismissal or non-recruitment, it is generally not contrary to Article 11 if an employee experiences adverse effects of non-union membership.
However, it may constitute discrimination within the meaning of the European Convention on Human Rights if the effect of non-union membership may *de facto* force an employee to join a trade union, particularly if the discrimination threatens the employee's basis of existence or is similarly invasive in nature. As the employees were not *de facto* forced to join the trade union based on the fact that they did not receive full sick pay, the Supreme Court ruled that the difference in treatment did not violate Article 11 of the European Convention on Human Rights.
Consequently, the Supreme Court would probably have come to a similar conclusion in the Lithuanian case with reference to case law on Article 11, as the privilege of an anniversary bonus is an adverse effect of non-union membership but does not threaten the employee's basis of existence and does not *de facto* force the employee to join a trade union.

Germany (Sarah Rijo Langenegger, Luther Rechtsanwaltsgesellschaft mbH): An exact transfer of this case to German law is difficult, as German collective bargaining law is somewhat different, but in the constellations conceivable in Germany, the employee would also not be entitled to the special bonus.
First of all, an essential difference is that under German collective bargaining law, it is not up to the parties to the collective bargaining agreement to decide whether it is generally binding. In fact, Section 5 of the German Collective Bargaining Act (*Tarifvertragsgesetz*, 'TVG') explicitly states that only the Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*, 'BMAS') is authorised to declare a collective bargaining agreement to be generally binding.
Because of that, a combination of a generally binding collective agreement and a paragraph like 4.9.7. covering just members of special trade unions, would be unlikely to come up in Germany. Nevertheless, having said this, it can be assumed that under German law the exclusion of members of a trade union that are not a party to a collective agreement would not constitute discrimination.
According to Sections 3(1) and 4(1) TVG a regular collective bargaining agreement only applies between the parties that are bound by the collective agreement, i.e. according to Section 3(1) TVG the members of the collective bargaining party. This means that if the BMAS has not declared a collective agreement to be generally binding or if there is no corresponding reference clause in the employment contract, an employee cannot claim any entitlements under the collective bargaining agreement. This neither leads to any inequality of treatment nor even discrimination.
Furthermore, the collective bargaining parties are more or less autonomous in deciding what they want to include in the collective bargaining agreement and thus who they want to include in or exclude from the scope of the agreement. Hence, the content of the collective bargaining agreement may only be subject to a modified equal treatment control. In this respect, according to the German Federal Labour Court ('BAG'), the review of a collective bargaining agreement and thus a possible differentiation of the scope of the agreement is restricted to checking for arbitrariness: An infringement of the prin-

doi: 10.5553/EELC/187791072021006001004

ciple of equality can only be assumed if there is no reasonable, logical or otherwise plausible reason for the legal differentiation, so that the provision can only be described as arbitrary (30 August 2000 – 4 AZR 563/99). This seems unlikely in the present case.
In Germany, the EU legal norms and directives analysed by the Supreme Court of Lithuania have been transposed into the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'). According to Section 1 AGG "The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation."
The membership in a trade union or not, however, is not covered by any of these groups of cases.
Moreover, at the constitutional level Article 3 of the Basic Law for the Federal Republic of Germany (*Grundgesetz der Bundesrepublik Deutschland,* 'GG'), protects against unequal treatment; however, this only applies to comparative pairs. Therefore, an employee who is a member of a trade union that is not a party to a collective bargaining agreement or not a member of a trade union at all cannot invoke Article 3 GG, as s/he is frequently not comparable to members of a trade union that is bound by a collective bargaining agreement, and in any case the difference in trade union membership justifies unequal treatment. This assessment is also supported by the fact that the freedom of association, which also applies in Germany in Article 9 GG, allows workers to freely choose whether to join a trade union and, if so, which one. Membership in a trade union is automatically accompanied by rights or benefits, so it cannot be interpreted as the employer exerting undue pressure on the employee and thus also not as a violation of the negative freedom of association by bringing about a compulsion to join.
Apart from the statutory regulations, the view that such clauses are permissible is also in line with the established case law of the BAG (24 February 1999 – 4 AZR 62/98; 18 March 2009 – 4 AZR 64/08; 23 March 2011 – 4 AZR 366/09; 15 April 2015 – 4 AZR 796/13; in a generally binding collective bargaining agreement 23 March 2005 – 4 AZR 203/04). With regard to decisions the BAG decided that simple differentiation non-binding bargaining clauses are permissible (24 February 1999 – 4 AZR 62/98; 18 March 2009 – 4 AZR 64/08; 23 March 2011 – 4 AZR 366/09; 15 April 2015 – 4 AZR 796/13) and this shall apply according to the BAG to the limitation of a claim under generally binding collective agreements to members of the party to the collective agreement (23 March 2005 – 4 AZR 203/04).

Italy (Caterina Rucci, Katariina's Gild): The national courts in Italy would have come to a different conclusion, since discrimination related to trade union membership is prohibited in Italy according to the well-known law, *Statuto dei lavoratori*, namely Section 15, which already in 1970, when it was first enacted, prohibited discrimination *inter alia* due to trade union membership.
This provision has applied since 1970 to any employee in Italy (and also outside of Italy if the employer is subject to Italian law), making any discrimination based on trade union membership null and void.
If such a discrimination was the basis for a termination, the latter would be declared null and the employee entitled to reinstatement. Despite recent changes to Italian termination rules, the conclusion would still be the same. As is usual in discrimination cases, it might be still debated in which way discrimination should be eliminated, i.e. by granting the same treatment to all employees or by deleting discriminatory provisions.
What makes this judgment interesting is not the main point of debate (discrimination related to union membership), but the new rules introduced in Lithuania about the application of collective agreements.
This topic has always been debated in Italy, basically due to a principle of the Italian Constitution, necessary in order to have collective agreements applied to all employees, which has never been accepted by trade unions – who have refused State control concerning democracy within their structure. As a consequence, collective agreements should only apply to the parties to it, according to general contract law.
What, however, has happened in Italy is that application has been extended in the widest possible way, on the basis of the courts' interpretation. Consequently, Italy has a situation where actually the national collective agreement normally applies to all employees, either because an employer member to its association should apply it on the basis of the association's rules to all of its employees, and/or because it is usual, even if not mandatory by law, that employers (or judges!) apply the main collective agreement, normally entered into by larger trade unions. A so-called national collective agreement shall be applied until its expiry date.
This principle has been recently confirmed, after a number of cases debated in lower courts, by the Court of Cassation, which has stated that an employer may not, even if it withdraws from its employers' association, sign its own collective agreement before the collective agreement has come to an end and despite having given notice of withdrawal.

The Netherlands (Peter Vas Nunes): I know of four Dutch cases where a court has ruled on an arrangement that favoured members of a union above non-members. Three of these cases dealt with a 'social plan', one with a regular collective agreement. In all four cases the plaintiff relied mainly on the doctrine under Dutch law that an employer is bound to treat its employees as a 'good employer'. In one case the employee also relied on Article 26 of the UN International Covenant on Civil and Political Rights (ICCPR).
A social plan is an agreement under which an employer and one or more unions make arrangements on how to conduct a restructuring (selection of redundant staff, etc.) and how to compensate the employees who lose

doi: 10.5553/EELC/187791072021006001004

their job. In one of the three said cases the parties had negotiated (1) a social plan under which all redundant staff got certain compensation, and (2) a secret 'side letter' under which redundant union members received an additional sum equalling four weeks of salary. The fact that the parties attempted to keep this extra benefit confidential is an indication of the sensitivity in The Netherlands of the issue of favouring union members. However, the court accepted the discrimination. In the second 'social plan' case, the union negotiated a 'consultancy fee' of € 64,000 for itself, which it then distributed amongst its three redundant members. This devious method of favouring union members may also be indicative of such sensitivity. In the third 'social plan' case, the court found the advantage for union members so significant (the plaintiff got less than half of what she would have got had she been a union member) that it was in breach of the employer's 'good employer' duty.

The one case where the discriminatory provision was not a social plan concerned a collective agreement according to which members of one of the unions that was a party to the agreement received certain benefits that were slightly higher than those for non-union members. The court, applying the 'good employer' doctrine, held that a distinction in a collective agreement between members and non-members of a union needs to be objectively justified. In the case at hand, the court found the extra benefits for union members justified given the fact that (1) these members had paid their union dues, (2) all employees, including non-union members, benefited from the union's efforts, (3) the extra benefits for union members did not concern base salary but merely fringe benefits, and (4) those extra benefits were relatively small.

Given the case law summarised above, I expect that a Dutch court would have ruled more or less as the Lithuanian court did in the case reported here. It can be noted, however, that none of the plaintiffs in the Dutch cases invoked the EU Charter, Article 21 which prohibits discrimination based on *any ground* such as sex, etc. The Lithuanian Supreme Court in this case referenced this provision, but apparently concluded "that membership of a union is not one of the grounds on which EU law prohibits discrimination". A Dutch court may have felt a need to balance this 'general' principle of non-discrimination against the principle of freedom to bargain collectively.

Portugal (Mariana Azevedo Mendes, SRS Advogados):

This case is particularly interesting for Portugal, not because there is contradictory or similar case law, but because it is possible that similar cases will be subject to court decisions in the not too distant future as this topic should progressively gain relevance due to the introduction of recent legislative changes regarding the application of collective agreements to employees who are not members of unions.

By way of context, Portuguese law principles regarding the application of collective labour agreements appear to be similar to those inscribed in Lithuanian law, the basic rule being that collective agreements are applicable to (i) employers that subscribed to the agreement (or are members of employers' associations that subscribe to them), and (ii) employees who are members of the unions that subscribed to the agreement. Collective agreements can then be extended to employees who are not members of unions if (i) they individually and voluntarily adhere to the agreement, or (ii) if the government extends its effects through an extension decree.

However, the fact that non-unionised employees could benefit from the advantages achieved by the unions by merely adhering to the agreement, led to the unions pushing for the revision of such facility as in a way it negated the competitive advantage of being a union member.

Consequently, the law was altered and since 2019 the individual choice made by non-unionised employees automatically expires after 15 months, after which either the employee joins a union or the agreement ceases to apply to them. As a reaction, and to avoid social conflicts within the companies, this is leading many employers to ask the government to extend the effects of the collective agreements by decree and, as a rule, the government has been granting them.

Therefore, to attract added value to their members (and since the 2019 legislative changes were not the remedy the unions expected), it is possible that unions try to bring to collective agreements clauses that afford benefits exclusively to union members.

If that were the case, and if a non-unionised employee were to challenge such a clause, I believe that a court ruling in Portugal would be equivalent to that upheld in this decision of the Supreme Court of Lithuania and that the following arguments would be paramount for such a decision (in addition to those invoked by the Lithuanian Court, namely regarding the principle of freedom of collective bargaining):

i. firstly (and although this is subject to some debate), Portuguese courts also tend to consider that membership in a union that subscribed to a collective agreement is an objective criteria that justifies different remuneration between employees;
ii. secondly (and to avoid the controversy of the above argument), I believe that a Portuguese court would also resort to the argument that the lump bonus paid to union members does not qualify as remuneration as it is not regular nor aimed to compensate the execution of work itself. Therefore, the lump sum would not have the same level of protection afforded to remuneration in a strict sense (namely under the 'equal work, equal pay' principle), it being admissible that the parties differentiate who receives it in light of the specific objectives/incentives they have in mind and provided that the eligibiliy criteria is not subjective; and
iii. finally, and to the extent the lump sum bonus does not qualify as remuneration, it could be argued that union members subsidise (although indirectly) the execution of collective agreements since they pay fees to the unions who negotiate such agreements.

doi: 10.5553/EELC/187791072021006001004

Therefore, it would not be considered unbalanced from a contractual point of view, if they are indeed afforded an advantage in relation to employees who do not contribute financially to the execution of collective agreements.

Subject: Collective Agreements, Other Forms of Discrimination

Parties: JSC "Lithuanian Railways" – v – T.Ž.

Court: Supreme Court of Lithuania (cassation court)

Date: 16 December 2020

Case number: e3K-3-348-403/2020

Internet publication: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=974cda94-0784-426b-8465-bb7005bc982a.

doi: 10.5553/EELC/187791072021006001004