

Poland, Constitutional Tribunal, Judgement of 15 July 2010, Retirement age, discrimination

Deciding bodies and decisions

Polish Constitutional Tribunal, Supreme Court

Subject matter

Non-discrimination on grounds of gender, retirement age, termination of employment contract upon attainment of minimum retirement age, pension rights.

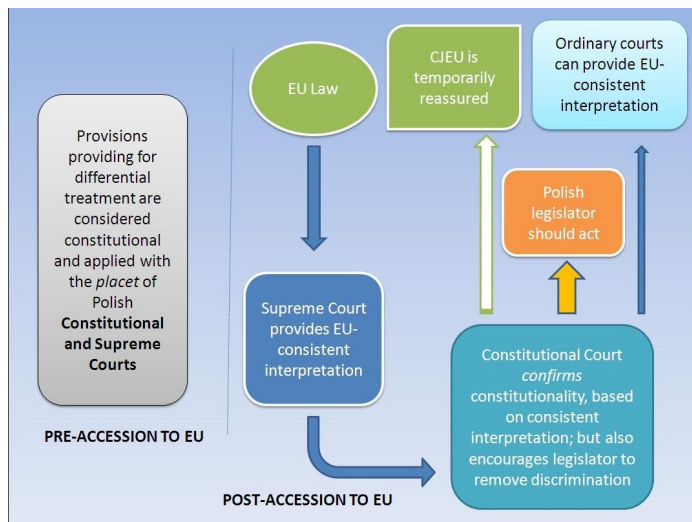
Summary Facts Of The Case

The Polish Constitutional Tribunal declared the constitutionality of domestic regulations providing for different minimum retirement ages for men (65) and women (60). It pointed out that the alleged discriminatory effect (lower pension benefits are granted on average to women, on account of their shorter service) is not related to the age differentiation but to the consequences of women's choice to avail themselves of the possibility to retire earlier. The Constitutional Tribunal noted that women are able to work after 60 and increase their expected benefits. The Tribunal recalled some early judgments of the Supreme Court and of its own, in which the differential was justified based on the idea that a lower minimum age for retirement is a privilege, not a disadvantage. However, it acknowledged that since Poland's access to the EU the legal framework on non-discrimination has evolved and differential treatment based on sex is increasingly seen as inappropriate.

It ultimately concluded that the domestic provisions were constitutional, also in light of Poland's supra-national obligations, and recalled that the Supreme Court had started to provide an EU-compliant reading thereof, finding that attainment of the minimum retirement age could not be the only reason for termination of an employment contract.

Nevertheless, it conceded that the principle of equality promoted within the EU would encourage the removal of all differential treatment using sex as a comparator, and extended to the legislator an invitation to harmonize retirement ages, irrespective of sex (through the contemporaneous 'signaling judgment' S 2/10).

Diagram



Vertical (ordinary courts – Constitutional Court; Constitutional Court – EU level)

Horizontal (Supreme Court – Constitutional Court; [Constitutional Court – legislator])

Through the use of consistent interpretation technique, the Constitutional Court and Supreme Court abandon a well-established interpretation of domestic regulation to foster the implementation of EU principles on non-discrimination; The consistent interpretation technique enables the national judges to circumvent the gaps in the domestic regulation in the light of EU law and refer to the EU-inspired judgments of the Constitutional Court.

Impact on Jurisprudence

Ordinary judges, while unable to rely on a new statute treating men and women alike, refer to the signalling judgment of the Polish Constitutional Court and to the recent case law of the Supreme Court in disputes regarding work termination and minimum pension age. By doing so, they are able to find against employers terminating employment agreements with woman employees upon the reach of the minimum retirement age.

Impact on Legislation / Policy

The Constitutional Court explicitly encourages the legislator to adopt harmonizing legislation.

Sources - ECHR

- Article 14
- Article 1 of Protocol No. 1

- Article 1 of Protocol No. 12
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Sources - CJEU Case Law

- Case 152/84 Marshall (1986)
- Case 262/84 Vera Mia Beets-Proper (1986)
- Case C-262/88 Barber (1990)
- Case C-188/89 Foster (1990)
- Case C-9/91 Equal Opportunities Commission (1992)
- Case C-328/91 Thomas (1993)
- Case C-92/94 Graham (1995)
- Case C-196/98 Hepple (2000)
- Case C-157/99 Geraets-Smits and Peerbooms (2001)
- Case C-92/02 Kristiansen (2003)

The Constitutional Tribunal relied on CJEU case law to confirm a new interpretation of national legislation in the light of EU non-discrimination law developments and to stress the dynamic dimension of the social perception on gender equality.

Sources - ECtHR Case Law

- Stec and others v. the United Kingdom, No. 65731/01 and 65900/01, 12 April 2006
 - Barrow v. the United Kingdom, No. 42735/02, 22 August 2006
 - Walker v. the United Kingdom, No. 37212/02, 22 August 2006
 - Pearson v. the United Kingdom, No. 8374/03, 22 August 2006
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Sources - Internal or external national courts case law

Decisions of the Polish Constitutional Tribunal:

- Decision P 2/87 of 03.03.1987, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 1987, item 2;
- Decision U 7/87 of 09.03.1988, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 1988, item 1;
- Decision Kw 5/91 of 24.09.1991, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 1991, item 5;
- Procedural decision Tw 7/94 of 07.09.1994 (unpublished);
- Decision K 15/97 of 29.09.1997, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 1997, nos. 3-4, item 37; Special Bulletin Leading Cases 1 [POL-1997-S-002]; Bulletin 1997/3 [POL-1997-3-020];
- Judgment K 8/97 of 16.12.1997, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 1997,

nos. 5-6, item 70;

- Judgment K 24/97 of 31.03.1998, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 1998, no. 2, item 13; Bulletin 1998/1 [POL-1998-1-007];
- Judgment SK 4/98 of 24.02.1999, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 1999, no. 2, item 24;
- Judgment K 5/99 of 22.06.1999, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 1999, no. 5, item 8;
- Judgment K 6/98 of 21.09.1999, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 1999, no. 6, item 117; Bulletin 1999/3 [POL-1999-3-026];
- Judgment K 18/99 of 04.01.2000, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2000, no. 1, item 1;
- Judgment K 27/99 of 28.03.2000, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2000, no. 2, item 62; Bulletin 2000/2 [POL-2000-2-010];
- Judgment SK 22/99 of 08.05.2000, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2000, no. 4, item 107;
- Judgment K 15/99 of 13.06.2000, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2000, no. 5, item 137;
- Judgment K 1/00 of 12.09.2000, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2000, no. 6, item 185;
- Judgment K 33/99 of 03.10.2000, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2000, no. 6, item 188; Bulletin 2000/3 [POL-2000-3-020];
- Judgment K 35/99 of 05.12.2000, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2000, no. 8, item 295;
- Judgment K 19/00 of 07.05.2001, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2001, no. 4, item 82;
- Judgment P 10/01 of 28.05.2002, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2002, no. 3A, item 35;
- Judgment P 3/03 of 28.10.2003, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2003, no. 8A, item 82;
- Judgment SK 31/04 of 30.11.2004, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2004, no. 10A, item 110;
- Judgment P 13/04 of 24.10.2005, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2005, no. 9A, item 102;
- Judgment K 1/05 of 21.02.2006, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2006,

no. 2A, item 18;

- Judgment P 9/05 of 24.04.2006, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2006, no. 4A, item 46;

- Judgment P 30/05 of 29.06.2006, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2006, no. 6A, item 70;

- Judgment SK 15/06 of 11.12.2006, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2006, no. 11A, item 170;

- Judgment K 40/04 of 28.03.2007, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2007, no. 3A, item 33;

- Judgment P 10/07 of 23.10.2007, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2007, no. 9A, item 107; Bulletin 2008/1 [POL-2008-1-003];

- Judgment K 43/07 of 28.02.2008, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2008, no. 1A, item 8;

- Judgment K 33/07 of 11.12.2008, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2008, no. 10A, item 177;

- Judgment P 47/07 of 18.11.2008, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2008, no. 9A, item 156;

- Judgment U 10/07 of 02.12.2009, Orzecznictwo Trybunalu Konstytucyjnego (Official Digest), 2009, no. 11A, item 163; Bulletin 2010/1 [POL-2010-1-002].

Judgments of the Polish Supreme Court:

- Resolution III PZP 10/85 of 27.06.1985, OSNC, no. 11/1985, item 164;

- Judgment I PKN 419/97 of 04.12.1997, OSNP, no. 20/1998, item 598;

- Judgment I PK 219/07 of 19.03.2008, OSNP, nos. 13-14/2009, item 173;

- Judgment I PK 22/08 of 12.09.2008, OSNP, nos. 3-4/2010, item 32;

- Resolution I PZP 4/08 of 19.11.2008, OSNP, nos. 13-14/2009, item 165;

- Judgment I PK 86/08 of 16.12.2008, Lex, no. 497682;

- Resolution II PZP 13/08 of 21.01.2009, OSNP, nos. 19-20/2009, item 248;

- Judgment I PK 185/08 of 20.03.2009, Monitor Prawa Pracy, no. 7/2009, item 366.

Decisions of the European Court of Justice:

- Judgment 152/84 of 26.02.1986, Marshall;

- Judgment 262/84 of 26.02.1986, Vera Mia Beets-Proper;
 - Judgment C-262/88 of 17.05.1990, Barber;
 - Judgment C-188/89 of 12.07.1990, Foster;
 - Judgment C-9/91 of 07.07.1992, Equal Opportunities Commission;
 - Judgment C-328/91 of 30.03.1993, Thomas;
 - Judgment C-92/94 of 11.08.1995, Graham;
 - Judgment C-196/98 of 23.05.2000, Hepple;
 - Judgment C-157/99 of 12.07.2001, Geraets-Smits and Peerbooms;
 - Judgment C-92/02 of 04.12.2003, Kristiansen.
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Comments

1. The Constitutional Court strategically uses the EU non-discrimination law to foster a domestic reform and to prevent a negative judgment by the CJEU:

By issuing the signaling judgment, the Constitutional Court put pressure on the legislature and in the meanwhile provided ordinary judges with some normative support. It leveraged the EU obligation of consistent interpretation to adjust the effects of a statute that had no clear issues of constitutionality, and caused a rupture with previous domestic case law by both the highest tribunals. Notably, the Supreme Court had already led by example, constructing national law to avoid discriminatory effects.

2. Disapplication of domestic law

Through the highest courts' reference to the EU principles on non-discrimination, domestic courts are relieved from applying domestic law as it was applied before accession to the EU. This encourages ordinary courts to make an active use of the consistent interpretation techniques to limit the discriminatory effect of domestic regulation that is still in place (the legislator has not yet taken action to remove it) and is not clearly against the constitution (see K 63/07), without any reverential fear relating to the possibility of reversal in appeal or cassation.

3. Dissenting opinion:

It is noteworthy that three of the four women judges issued a dissenting opinion.
