

**THE PRINCIPLE OF NON-DISCRIMINATION AGAINST PART-TIME
WORKERS IN THE LIGHT OF THE COUNCIL DIRECTIVE 97/81/EC
CONCERNING THE FRAMEWORK AGREEMENT
ON PART-TIME WORK**

**ZAKAZ DYSKRYMINACJI ZE WZGLĘDU NA ZATRUDNIENIE
W NIEPEŁNYM WYMIARZE CZASU PRACY W ŚWIETLE
DYREKTYWY RADY 97/81/WE ZAWIERAJĄCEJ RAMOWE
POROZUMIENIE DOTYCZĄCE ZATRUDNIENIA W NIEPEŁNYM
WYMIARZE CZASU PRACY**

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ABSTRACTS

Labour law has been developed in order to protect implicitly ‘typical’ employment relationships, based on a contract of full-time employment for an indefinite period of time. The development of non-full-time form of employment required new legal regulations to secure that workers employed part-time should not be in a less favourable position in comparison to those being in full-time employment. Polish part-time work-oriented regulations have been evidently created under the influence of the Directive 97/81/EC. The paper focuses on the comparative analysis of the notion of part-time worker in the Directive and the Polish Labour Code and the protection for part-time workers against unequal treatment. In many cases the regulations under discussion implement the Directive’s requirements or they are even more restrictive than the Directive itself however other still has not fully implemented its provisions. For further development of part-time employment it is essential that the requirements of the Directive 97/81/EC should be met.

Prawo pracy powstało w celu ochrony typowych stosunków pracy, opartych o umowę o pracę zawartą na czas nieokreślony. Rozwój nietypowych form zatrudnienia, w tym zatrudnienia w niepełnym wymiarze czasu pracy, wiązał się z potrzebą stworzenia regulacji prawnych, które zapew-

nią równość w zatrudnieniu niezależnie od wymiaru czasu pracy, na jaki zatrudniony został pracownik. Polska regulacja w zakresie zatrudnienia w niepełnym wymiarze czasu pracy niewątpliwie powstała pod wpływem Dyrektywy Rady 97/81/WE. Celem artykułu jest ocena implementacji Dyrektywy do polskiego prawa pracy w odniesieniu do definicji pracownika zatrudnionego w niepełnym wymiarze czasu pracy oraz jego ochrony przed nierównym traktowaniem ze względu na zatrudnienie w niepełnym wymiarze czasu pracy. Przeprowadzona analiza pozwala na wyciągnięcie wniosku, iż pewne postanowienia Dyrektywy zostały implementowane do prawa polskiego zgodnie z jej wymogami, a niektóre regulacje kodeksu pracy są nawet bardziej restrykcyjne niż wymogi Dyrektywy. Z kolei inne postanowienia Dyrektywy w zakresie ochrony przed dyskryminacją pracowników zatrudnionych w niepełnym wymiarze czasu pracy nie zostały dotąd wdrożone do polskiego porządku prawnego i dalszy rozwój zatrudnienia nietypowego wymaga ich implementacji.

KEY WORDS:

Flexible forms of employment, atypical employment, part-time work, discrimination in employment, equal treatment in employment, the principle of pro rata temporis

Elastyczne formy zatrudnienia, zatrudnienie nietypowe, praca w niepełnym wymiarze czasu pracy, dyskryminacja w zatrudnieniu, równe traktowanie w zatrudnieniu, zasada pro rata temporis

INTRODUCTION

Part-time work has become increasingly commonplace in the European Union. The proportion of the EU-27 workforce reporting that their main job was part-time increased steadily from 16.2% in 2001 to 19.5% by 2011. The highest proportion of part-time workers was found in the Netherlands (49.1% in 2011), followed by the United Kingdom, Germany, Sweden, Denmark and Austria, where part-time work accounted in each case for over a quarter (25% to 27%) of those in employment. By contrast, part-time employment was relatively uncommon in Bulgaria (2.4% of employment) and Slovakia (4.1%). Part-time employment in Poland decreases (10.3% in 2001, 9.6% in 2006, 8.0% in 2011)(Eurostat, 2012).

Part-time work has been seen as a tool for promoting market flexibility and reorganising working time, for family policy and for reducing

unemployment (thereby redistributing existing employment). The attractiveness of the form of employment under discussion follows from the wide possibilities which it offers with regard meeting the needs of various subjects within the labour market. For employers, part-time employment can permit greater flexibility in responding to the needs and requirements of the market. They are capable of adjusting an employee's working time to actual needs of the company and can lower labour costs, especially with regard social insurance (Szejniuk, 2012, Zawisza, 2011). For employees, a part-time option allows to adjust his or her work time to individual needs, by which it makes it possible to reconcile professional life with family life (Bulińska-Stangrecka, 2011). For policymakers confronting the problem of high unemployment, the growth of part-time work may reduce the number of job-seekers, or, at least, the number of people register as such. Indeed, the EU employment guidelines and recommendations encourage the social partners and public authorities to foster the development of part-time work as a means of modernisation the organisation of work.

THE INFLUENCE OF THE EU EMPLOYMENT REGULATIONS CONCERNING PART-TIME WORK ON POLISH LABOUR LAW

New forms of flexible working can bring benefits for employers and employees alike. But part-time work has to be on in fair footing without unjustified discrimination against part-time workers. The development of non-full-time form of employment required new legal regulations which should secure that workers employed part-time should not suffer injustice and should not be in a less favourable position in comparison to those being in full-time employment.

Within European Union law part-time employment is regulated by the Council Directive 97/81/EC concerning the framework agreement on part-time work. The implementation of the directive had the aim of securing that workers were not discriminated on grounds of work time; it also aimed to improve the quality of such work and to facilitate the development of part-time work on voluntary basis and contribute to the flexible organisation of working time in a way that takes into account of employers' and employees' needs (clause 1, 4 and 5 of the Agreement). The Agreement, in the form of an annex to the Directive 97/81/EC, was limited to constituting general and minimal requirements with regard part-time work. These were meant to create legal instruments which could eliminate discriminatory actions against non-full-time employees. The regulations

stated in the Agreement are of the same force as regulations laid down in the Directive (Sitek, 2009, p. 15). Thus, Member States were obligated to adjust their national laws to the requirements of the Directive by 20 January 2000.

The regulation of non-full-time work in the Polish Labour Code (PLC henceforth) arises from the implementation of the Directive 97/81/EC. This law was introduced into PLC by the Parliamentary Act of 14 November 2003 (Act of 14.11.2003 r. amending the Bill on Labour Code and selected other Acts, enforcing the Act on 1.01.2004). The new law came into force on 1 January 2004. Prior to that date PLC had not regulated part-time work in any particular way (apart from the issues of social insurance). However, there was a provision which allowed for job sharing via agreement, which resulted from the principle of free contracting (Wratny, 2007, p. 4). The parties were free to establish the amount of work time under the condition that, due to the protection involved, it did not exceed the maximum statutory amount (Muszalski, 2006, p. 14). Part-time employment as regulated by prior laws induced a number of difficulties, especially in the context of granting vacation leave (Muszalski, 2006, p.14). The relevant requirements laid down in the Directive 97/81/EC were carefully implemented in the new version of PLC. PLC had been considerably changed with regard part-time work, i.e. with regard non-discrimination at work (Art. 11³) and equal treatment (Art. 18^{3a-3e} and 94 § 1 point 2b), prohibition of discrimination and changing of work time (Art. 29²), information on the availability of part-time and full-time positions (Art. 94²), establishing of the level of remuneration for part-time work free from deductions (Art. 87¹ § 2), establishing of work time entitling to additional remuneration for overtime work (Art. 151 § 5), as well as establishing mandated leave (Art. 154 § 2) and employer's obligation to lower work time for an employee entitled to maternity or paternity leave (Art. 186⁷) (Bomba, 2010). Selected solutions enforced in 2004 are even more restrictive than the EU law. This is legal because the Directive 97/81/EC stipulates minimal standards. Due to the limited scope of the present study, the focus is on the issue of the principle of non-discrimination against part-time workers and the results of its violation.

THE DEFINITION OF PART-TIME WORKER

The discussion concerning the status of part-time work under the Polish law should start with comments on the scope of its subject matter.

According to clause 3 of the Agreement a part-time worker is an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are fewer than normal hours of work of a comparable full-time worker. However the Agreement recalls to the term of “employee” it does not include the definition of „employee”, „labour contract”, „labour relation”. According to point 16 of the Directive 97/81 whereas, with regard to terms used in the Agreement which are not specifically defined therein, the Directive leaves Member States free to define those terms in accordance with national law and practice. The aim of the Agreement instead of harmonization at the Community level in relation to the legal regulations of Member States on labour contract or labour relation is setting out the general principles and minimum requirements for part-time working for eliminating discrimination against part-time workers (point 11 of the Directive 97/81). The Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State (Case C-313/02 Wippel Nicole v. Peek & Cloppenburg GmbH & Co. KG, Judgment of the European Court of Justice, Grand Chamber, of 12 October 2004, point 11). However the Member States are not totally free to define those terms. From the need to safeguard the effectiveness of the principle of equal treatment enshrined in the Agreement, an exclusion may be permitted if it is not to be regarded as arbitrary, only if the nature of the employment relationship concerned is substantially different from the relationship between employers and their employees which fall within the category of “workers” under national law (Case C-393/10 Dermot Patric O’Brien v. Ministry of Justice, Judgment of the European Court of Justice, Second Chamber, of 1 March 2012, point 42) . In examining whether the nature of the employment relationship is substantially different from that between employees falling, according to national law, within the category of “workers” and their employers, it has to bear in mind that, in order to have regard to the spirit and purpose of the Agreement, that distinction must be made in particular in the light of the differentiation with self-employed person (Case C-393/10 Dermot Patric O’Brien v. Ministry of Justice, Judgment of the European Court of Justice, Second Chamber, of 1 March 2012, point 42).

The Polish Labour Code contains the legal definition of an employee. According to Art. 2 of PLC an employee shall be a person employed under a contract of employment, appointment, election, nomination or

under a co-operative¹. However there is no legal definition of a part-time worker in PLC, thus the terms 'part-time worker' and 'part-time work', as used in the Polish legal system, are defined by the Agreement in clause 3. Irrespective of the exact phrasing of the definition of a 'part-time worker' given in the Agreement, the scope of the Directive does not cover workers employed with a reduced working time as stipulated by the Polish law² (Hajn, 1998, p. 75). Such workers are in fact employed full-time with the provision for normative reduction of work time relative to their status. In clause 2, point 2, the Agreement makes a provision that, for objective reasons, Member States may exclude wholly or partly from the terms of the Agreement part-time workers working on a casual basis. However, as there is no legal definition of a casual worker within the Polish law, and Polish legislature does not exclude casual work from the subject matter of part-time employment regulations; the Directive 97/81/EC does not apply here (Bomba, 2010).

THE PROTECTION FOR PART-TIME WORKERS AGAINST UNEQUAL TREATMENT

Clause 4 of the Agreement, where is stipulated in detail that part-time workers shall not be treated in a less favourable manner the comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds. The problem of unequal treatment in employment with regard part-time workers could not be successfully solved by prohibition of discrimination arising from existing laws and regulations, i.e. Art. 32, point 2 of the Polish Republic Constitution, which included a clause on prohibition of discrimination of any person for whatever reason in both economic and social life, i.e. also in employment relations, and Art. 11³ in PLC, which prior to amendments introduced in 2004, prohibited discrimination in employment relations and included an open catalogue of reasons for discriminatory actions; however, it did not directly stipulate work time as a discriminatory factor. Both regulations did not provide the protection for part-time workers against unequal treatment (Bomba, 2010). The introduction of the clear principle of non-discrimination with regard part-time workers was of special importance as less favourable treatment of part-time workers, based on their working time, did not give rise to public disapproval (Hajn, 1998). Changes addressing this issue, i.e. clearly indicating work time as a reason for discriminatory action were further necessary because of directly discriminatory character of certain statutory

regulations, e.g. the issue of the availability and access to work on the part of part-time employees. This concerns Art. 2, point 2 of the Parliamentary Act of 20 April 2004 on the promotion of employment and labour market institutions³ (Act of 20.04.2004 on the promotion of employment and labour market institutions) which defines an unemployed persons as a person capable of and ready to enter employment relations in a full-time manner, as specified for the particular job, service or other type of work⁴ (Art. 2 section 2 of the Act on the promotion of employment...). This regulation excludes persons capable of and ready to enter an employment relation only part-time from the system of social protection secured in the Act on the promotion of employment, by which it diminishes their chances to find employment. Such people are only eligible to exercise these forms of assistance which are available to all people seeking employment, i.e. job agencies and career counselling. The quoted example of discrimination against part-time workers, which happened despite the legislator's efforts, emphasises the importance of the introduction of a clear principle of non-discrimination with regard part-time employees into PLC.

The basic aim of the legal changes introduced in 2004 was to introduce protection and secure non-discrimination for part-time workers (Art. 11³, Art. 18^{3a-3e}, Art. 29², Art. 94 § 1 point 2b in PLC). Finally a clear principle of non-discrimination with regard part-time workers was done by adding part-time work to the list of discriminatory factors associated with Art. 11³ of PLC. The principle of non-discrimination included in the quoted clause was phrased in an imperative manner, which means that it should be included within the employer's obligations. The prohibition included in Art. 11³ of PLC was phrased in a general way and covers all stages of employment relations, most significantly it relates to the commencement and termination of employment, work conditions, promotion and access to vocational training (Hajn, 1998, p. 51). However this has no influenced on the regulation concerns Art. 2, point 2 of the Parliamentary Act of 20 April 2004 on the promotion of employment and labour market institutions which shall be interpreted that persons capable of and ready to enter an employment relation only part-time are excluded from the system of social protection secured by the Act. The Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the national law and not to unemployment so the regulation of Art. 2 point 2 of the Act on the promotion of employment and labour market institutions should not be seen as contradictory with the Agreement⁵.

Art. 11³ of PLC includes the fundamental principle of non-discrimination. The refinement and application of this principle was carried out by the legislator via Art. 18^{3a-3e} of PLC (Gerdorf, Rączka, Raczkowski, 2011), where it is stipulated in detail that employers must apply equal treatment to workers falling under the provision of Art. 18^{3a} KPC and Art. 94 § 1 point 2b, which obligates the employer to act in order to eliminate discrimination at work.

Following the principle of equal treatment in employment as stipulated in Art. 18^{3a} §1, the situation of part-time workers should not be differentiated in any unjustified way, in any sphere of employment, based on being employed non-full time. Art. 18^{3a} of PLC makes a distinction between direct and indirect discrimination; the definition of these notions can be found in Art. 18^{3a} § 3 and § 4 of PLC. While direct discrimination involves unequal treatment of some workers in relation to others⁶ (Naumann, 2007, p. 286), indirect discrimination involves unequal treatment in recruitment of all or a considerable number of workers who belong to a differentiated group due to one or several factors deemed as discriminatory. Thus, it is a case in which a superficially neutral clause, criterion, or practice lead to less favourable situation for a particular group of people due to a discriminatory factor, e.g. different work time in relation to others. The Polish law allows indirect discrimination if unequal treatment of certain groups of employees can be justified by objective reasons.⁷ The most frequent example of indirect discrimination is the practice of establishing lower remuneration for part-time workers than for fully employed (Gersdorf, Rączka, Raczkowski, 2011). It should be emphasized that part-time work may not be so much a reason for discrimination as its consequence, due to factors such as age, gender, or disability, when e.g. work time is reduced for women with small children, employees approaching retirement age or disabled workers. The provisions of Art. 18^{3b} of PLC point to an exemplary catalogue of the most typical consequences brought about by the violation of the principle of equal treatment in recruitment. The Polish legislator, using there the notion of recruitment and not employment relations, indicates that the consequences of the violation of this principle may affect other spheres of the employee's life, e.g. stipulating only such conditions in the company retirement agreement which can be accepted by full-time employees. For example, the European Tribunal of Justice taking the cases-law C-395/08 and C-396/08 into account confirmed that the term "employment conditions" within the meaning of the clause 4 point 1 of the Agreement

covers pensions which depends on an employment relationship between worker and employer, excluding statutory security pensions, which are determined less by that relationship than by considerations of social policy (Joint Cases C-395/08 and C-396/08 *Instituto nazionale della previdenza sociale v. Tiziana Bruno, Massimo Pettini*, Judgment of European Court of Justice, Second Chamber, of 10 June 2010, point 42).

The quoted regulation of 18^{3b} of PLC recognizes, among others, dismissal based on working time as an instance of the violation of the principle of equal treatment. Undoubtedly, this regulation followed the model set in point 2 of the clause 5 in the Agreement, which stipulates that a worker's refusal to transfer from full-time employment to part-time, or *vice versa*, should not constitute a valid reason for the termination of employment. It raises the question about the nature of violation of the principle of equal treatment as the reason for dismissal i.e. Art. 45 § 1 of PLC regulates that the termination of an employment contract concluded for an indefinite period of time is unjustified or violates the provisions of law, it entitles the worker to regulated there claims. It stipulates two situations: when the termination is unjustified or violates the provisions of law. The justification of the termination of employment contract is necessary only to terminate an open-ended employment contract. Art. 50 of PLC provides the protection the employees' against only the termination of a fix-term contract with violation the provisions of law. The dismissal based on working time as an instance of the violation of the principle of equal treatment regards with unjustified dismissal. The quoted regulation of 18^{3b} of PLC does not limit its scope only to a permanent employment contract and in effect it provides the protection the employees' employed on a fix-term contract against unjustified dismissal based on working time which does not exists in Art. 50 of PLC (Nowik, 2012, p. 229). This type of discrimination gives the employee the right to exercise his or her eligibility for compensation thanks to Art. 45 § 1 of PLC and Art. 18^{3b} of PLC (dismissal of an open-ended employment contract) or only on the ground of Art. 18^{3b} of PLC (termination of a fix-term contract).

THE GUARANTEES FOR THE RESPECTING OF THE PRINCIPLE OF NON-DISCRIMINATION WITH REGARD WORKING TIME

The guarantees for the respecting of the principle of non-discrimination with regard working time are included in Art. 18^{3d} and 18^{3e} in PLC. The legislator had envisaged a direct sanction of compensatory damages for

a violation of the principle of equal treatment in recruitment by unjustified differentiation in the conditions experienced by part-time employees and full-time workers. According to Art. 18^{3d} PLC, the compensation cannot be lower than minimal work remuneration, established on the basis of other rules and regulations (Act of 10.10.2002 on minimal work remuneration). The exact level of such compensation in a particular case depends on the type of the employer's discriminatory action and its consequences. The right to receive compensation seems to hold irrespective of suffering a wrong on the part of the worker (Jaśkowski, Maniewska, 2009). However, if it is the case that the worker suffered some damage, its gravity provides a basis for establishing the amount of compensation to be paid (Art. 361 PLC in connection with Art. 300 PLC). The right to receive this type of compensation is not connected with other employee's claims based on a discriminatory action performed by the employer (Jaśkowski, Maniewska, 2009). One of the examples of such a case is termination of employment based on work time. This type of discrimination entitles the employee to exercise his or her right for compensation thanks to Art. 45 § 1 and Art. 18^{3d} with the provision that if it is the case that one precedent gives rise to two types of compensation, the lower should be included in the higher one, where it is treated as a profit resulting from the same event which caused liability (Jaśkowski, Maniewska, 2009). Unless the legislator gives to the worker the right to exercise his or her eligibility for compensation regard with termination a fix-term employment contract based on working time the worker has a right to compensation according to Art. 18^{3d} of PLC.

Thus, any violation of the principle of non-discrimination constitutes an independent basis for compensation connected with employment protection on all its levels. Art. 18^{3b} § 1 *in fine* transfers the allocation of the burden of proof in cases involving violation of the principle of equal treatment based on working time, as stipulated in Art. 6 PLC, onto the employer. A part-time worker does not have to prove the fact that he or she suffered discrimination however he must first produce evidence that makes his or her claim of unequal treatment in recruitment credible. Then the burden of providing evidence is transferred onto the employer, who has to prove that that a particular differentiation in treatment was objectively justified and as such could not be characterized as discrimination⁸ (Decision of the Supreme Court of 24 May 2005, II PK 33/05; Decision of the Supreme Court of 9.06.2006, III PK 30/06).

Moreover the violation of the principle of non-discrimination with

regard working time entitles an employee to terminate employment without prior notice on the basis of Art. 55 § 1¹ PLC. This direct sanction is foreseen for cases of grave violation of a basic obligation towards a worker on the part of the employer, i.e. non-withholding discriminatory action. If the employer takes discriminatory action based on working time while establishing work conditions or remuneration, as well as while granting other benefits associated with the job, the employee may sue him or her based on Art 189 PLC claiming the need to establish employment relations of a certain kind, and especially with the claim to establish fair remuneration if it had been lowered in a discriminatory way (Gersdorf, Rączka, Raczkowski, 2011). It further seems that, in the case of a claim on the part of the employee which results from the employer's discriminatory action, which is based on laws different from Art. 18^{3d} PLC, the worker should retain his or her litigation rights irrespective of the legal basis for the claim (Naumann, 2007, p. 289).

Art. 18^{3e} § 1 of PLC stipulates that a part-time employee's exercising his or her rights granted for cases of violation of the principle of equal treatment in recruitment with reference to work time cannot constitute a justifying basis for termination of employment by the employer. Nor can it be treated as grave violation of employee's obligations, which could justify termination of employment relations without notice (Art. 52 PLC) (Jackowiak, 2004). The protection of the part-time employee is limited to termination of employment with and without notice. It does not cover other retaliatory activities on the part of the employer, such as imposing penalties. Thus, protection of the employee against the employer's retaliating action seems to be too narrow in comparison to European Union legislation and does not guarantee fair protection for the employee (Król, 2004, p. 94). It is thus postulated that Art. 18^{3e} PLC should be reinterpreted as wider so that to include other, unfavourable for the employee, types of action on the part of the employer, which is further justified by the regulations introduced in Art. 9 of the Council Directive 2000/43 and Art. 11 of the Directive 2000/78.⁹ Art. 18^{3e} § 2 of PLC enlarges the prohibition on termination of employment with and without notice in cases of violation of the principle of equal treatment in employment with reference to part-time work.. It regards with the worker who support discriminated part-time employee exercising his or her right granted for violation the principle of equal treatment in employment. This provision including the term of "support" seems to be so meaningful that it creates the possibility

abusing the protection based on Art. 18^{3e} § 2 of PLC by employee who is at risk of dismissal. Exercising by only one part-time discriminated worker his or her eligibility for compensation thanks to Art. 18^{3d} of PLC may entitle numerous employees who might support discriminated employee to the protection against termination of their employment during not limited time. Thus, this regulation should be more precise i.e. Art. 18^{3d} of PLC should limit this protection to employee who act as a witness during a proceeding.

THE PRINCIPLE OF *PRO RATA TEMPORIS*

Clause 4 point 1 of the Agreement states that with regard work conditions part-time employees must not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds. Point 2 states that wherever it is justified, the principle of *pro rata temporis* (i.e. proportionality with regard working time) should be applied e.g. with regard remuneration and other benefits with exemption. To allow access to particular conditions of employment the Directive states (point 1 *in fine*) the exception from the proportionality with regard working time to the rule of proportionality with regard factors such as a time worked, where it is justified by objective reasons.

Consequently, the remuneration of part-time workers and other benefits with exemption must be equivalent to that of full-time workers. Accordingly, the European Tribunal of Justice explains that the calculation of the amount of the pension is directly dependant on the amount of time worked by the employee and the corresponding amount of contributions, in accordance with the principle of *pro rata temporis*. Taking into account the amount of time worked by a part-time worker during his career, as compared with amount of time actually worked by a person who has worked on a full-time basis throughout his career, is objective criterion allowing his pension entitlement to be reduced proportionally (Joint Cases C-395/08 and C-396/08 *Instituto nazionale della previdenza sociale v. Tiziana Bruno, Massimo Pettini*, Judgment of European Court of Justice, Second Chamber, of 10 June 2010, *op. cit.*, points 64 and 65. Case C-537/07 *Gómez-Limón Sánchez-Camacho Evangelina v. Instituto Nacional de la Seguridad Social*, Judgment of the European Court of Justice, of 16 July 2009, point 59). On the other hand, the principle of *pro rata temporis* is not applicable for the purpose of determining the date required to acquire

pensions rights, since that depends solely on the worker's length of service. The Tribunal explained that the length of service is the actual duration of the employment relationship and not the amount of time worked during that period. In accordance with the principle of non-discrimination as between full-time and part-time workers, therefore, the length of the period of service taken into account for the purpose of determining the date on which a worker becomes entitled to a pension should be calculated for a part-time worker as if he had held a full-time post, periods not worked being taken into account in their entirety (Joint Cases C-395/08 and C-396/08 *Instituto nazionale della previdenza sociale v. Tiziana Bruno, Massimo Pettini*, Judgment of European Court of Justice, Second Chamber, of 10 June 2010, op. cit., point 66).

The principle of *pro rata temporis* is reflected in the Polish labour law in Art. 29² § 1 PLC, which is associated with Art. 11³ PLC as well as Art. 18^{3a} § 1 PLC. It follows from Art. 29² § 1 PLC that work conditions and remuneration stipulated in the employment contract where a part-time worker is a party cannot be established on a level less favourable than those for full-time employees who perform the same or comparable work. The exception regards with remuneration and other benefits with exemption to which the principle of *pro rata temporis* should be applied. The principle of *pro rata temporis* should be understood in the context of remuneration in the wide scope of the Agreement interpretation¹⁰ (Boruta, 1996, p. 72-76), thus, also in relation to other benefits which are defined and established with regard remuneration (Hajn, 1998, p. 88). The principle of proportionality should not however be mechanically applied in all cases involving and not involving money. It does not relate to such benefits as e.g. coverage of business travel costs, fee for vocational training, social benefits, etc.

Art. 29² § 1 PLC is more restrictive than the Directive nr 97/81/EC. It does not envisage under the Polish law the possibility to relate access to particular conditions of employment subject to factor such as time worked even when there are justified objective reasons. Art. 29² § 1 PLC states that the part-time employee's work conditions and remuneration cannot be defined in a less preferable manner than it is done in the case of comparable full-time workers and non-proportional enlargement of duties or reducing the part time employee's rights is prohibited. Such discrimination can be illustrated by limiting access to vocational training, right to bonuses, shares etc. (Gersdorf, Rączka, Rączkowski, 2011).

The notion of “workers performing the same or comparable work“ must be understood in a general manner” (Jaśkowski, Maniewska, 2009). The scope should include a period of service and the employee’s qualifications. Clause 3 point 2 of the Agreement defines the term “comparable full-time worker”. It means a full time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work or occupation, due regard being given to other considerations which may include seniority (i.e. time worked), qualification/skills. The Agreement explains that where there is no comparable full-time worker in the same establishment, the comparison shall be made by the reference to the applicable collective agreement or, where is no applicable collective agreement, in accordance with national law, collective agreements and practice. A narrow understanding of this notion would suggest that an employee with low qualifications and short time worked, employed part time, e.g. half of the full time, should earn half the amount of the salary of a person employed full time with long time worked and high qualifications engaged in the same or similar work (Jaśkowski, Maniewska, 2009). Differentiation of work conditions subject to such criteria is not an instance of discrimination with regard working time (Art. 18^{3b} § 2 point 4 PLC) but it means a differentiation the remuneration and other benefits with exemption with regard the quality of an employee’s work. This principle *pro rata temporis* is applied as a mandatory method of establishing minimal remuneration for part-time workers. Its level is defined in proportion to the number of hours to be worked by an employee in a given month and on the basis of the minimal remuneration established on the basis of other laws (Art. 8 of the Act of 10.10.2002 on minimal work remuneration). The principle under discussion is used in establishing the amount free from work remuneration reductions (Art. 87¹ § 2 PLC), as well as in establishing a part-time employee’s vacation leave (art. 154 § 2 PLC).

THE TRANSFER FROM FULL-TIME EMPLOYMENT TO PART-TIME EMPLOYMENT AND VICE VERSA

According to clause 5 point 3 of the Agreement requires that employers, as far as possible, should give consideration to requests by workers to change the form of employment defined in the work contract. This involves both transfer from full-time employment to part time and *vice versa*, i.e. transfer from part time to full time employment. This regulation reflects one of the aims of the Agreement, which is to facilitate the development of

part-time work on a voluntary basis (clause 1 point b in the Agreement). To make the request by worker to change form of employment possible for him the Agreement in clause 5 point 3 section (c) envisages that employers should give consideration, as far as possible, to the provision of timely information on the availability of changing their work time in order to facilitate transfers from full-time to part-time and *vice versa*. In clause 5 point 3, section (d) and (e), Framework Agreement further stipulates other obligations on the part of the employer whose aim is to facilitate access to part-time employment and transfers between full-time and part-time for workers.

In Polish labour law Art. 29² § 2 and Art. Art. 94² of PLC implement clause 5 point 3 of the Agreement. It is accepted that the phrasing used in § 2 Art. 29² PLC – “the employer shall, as far as possible, give consideration to requests by a worker” – means that the employer is under relative obligation. If work management in the establishment allows that the employer can grant permission in answer to a request by a worker concerning changing his or her work time, the employer is obligated to do so. The employer’s obligation in this matter is related to the employee’s claim to change employment contract in the section concerning work time (Gersdorf, Rączka, Raczkowski, 2011) as well as to the introduction of a related change in remuneration and other benefits connected with work. In the case when there are requests to transfer from part-time to full-time employment or *vice versa* by a number of workers, employer, using non-discriminatory criteria, may choose one of them for transfer.

The provision of Art. 29² § 2, PLC, which requires that employers, as far as possible, should give consideration to requests by workers concerning desired work time, reaches further than the Agreement, which envisages much weaker rights for the employee¹¹ (Hajn, 1998, p. 89). Clause 5, point 3 of the Agreement, concerning giving consideration by employers to such requests by workers, is of stipulating character. It states that, “as far as possible, employers should give consideration to requests by workers” concerning change of work time. Thus, the Agreement imposes on the employer the obligation to give consideration to requests, not to accept them. In clause 6 point 1 it allows, however, that more favourable provisions than those laid down in the Agreement be introduced. The Polish legislator, departing from the text of the Agreement in the Labour Code, clearly indicated the intention that employees be granted the right requested (Jaśkowski, Maniewska, 2009).

To exercise by employee the right granted him or her in Art. 29² § 2, PLC, the legislator in Art. 94², PLC, imposed on the employer the obligation to inform employees, in a way adopted in the enterprise, about the availability of full-time and part-time employment. Clause 5 point 3 (c) of the Agreement states that, as far as possible, employers should give consideration to the provision of timely information of the availability of part-time and full-time positions in the establishment so this provision in the Agreement has a relative nature (“as far as possible, employer should consider to inform”). Imposing in Art. 94², PLC, on the employer obligation to inform employees the Polish legislator exceeds the requirements stipulated in the Agreement. The Polish legislator has not made provisions for sanctions in cases where the employer does not fulfil the obligation to inform which arises from Art. 94² PLC. As a result, the employee who, due to the lack of information concerning the availability of changing work time, has not made a request to the employer to change his or her employment contract conditions, has no grounds for a claim to change it if the employer filled the vacancy with a person from outside the enterprise. However, such worker can claim damages based on general provisions (Art. 471 PLC in association with Art. 300 PLC) (Jaśkowski, Maniewska, 2009).

Some provisions included in the Agreement i.e. clause 5 point 3 (d) and (e) are not reflected in the Polish legal system, i.e. the employer should perform action in order to facilitate access to part-time employment on all levels of the enterprise, including skilled and managerial positions as well as facilitate access by part-time workers to vocational training in order to enhance career opportunities and occupational mobility. The employer should also provide existing bodies representing workers with information concerning the availability of part-time employment within the enterprise. Thus, the Council Directive 97/81/CE has not yet been fully implemented.

CONCLUSIONS

Labour law has been developed in order to protect implicitly ‘typical’ employment relationships, based on a contract of full-time employment for an indefinite period of time. The development of non-full-time form of employment required new legal regulations to secure that workers employed part-time should not be in a less favourable position in comparison to those being in full-time employment. Polish part-time work-oriented regulations discussed above have been evidently created

under the influence of the Directive 97/81/EC. There is no legal definition of a part-time worker in PLC, thus the terms “part-time worker” and “part-time work”, as used in the Polish legal system, are defined by clause 3 of the Agreement. In conformity with the Agreement is also the wide interpretation of equal treatment in recruitment. Art. 18^{3b} of PLC includes all spheres of the employee’s life depend on an employment relationship between worker and employer the term in “employment conditions”. In many cases the regulations under discussion are even more restrictive than the Directive itself, e.g. with respect to the employer’s obligation, as far as possible, to give consideration to a request by a worker to change the form of work time (Art. 29² § 2 of PLC) while the Agreement imposes on the employer the obligation to give consideration to requests, not to accept them. Art. 94² of PLC is also more restrictive than the Agreement. It imposes on employer the obligation to inform employees, in a way adopted in the enterprise, about availability of full-time or part-time employment while the Agreement states only that the employer as far as possible should give consideration to inform employees about it. Art. 29² § 1 PLC is also more restrictive than the Directive nr 97/81/EC. It does not envisage under the Polish law the possibility to relate access to particular conditions of employment subject to factor such as time worked even when there are justified objective reasons. However, the regulations introduced into the Labour Code in 2004 did not fully implement the Directive, especially with regard the measures taken in order to facilitate voluntarily engaging in part-time employment (Clause 5 of the Agreement). Also the protection of the employee against employer’s retaliating action in Art. 18^{3e} of PLC seems to be too narrow in comparison to the Council Directives 2000/78/EC and 2000/43/EC. It is limited to termination of employment with and without notice and it does not cover other retortive activities on the part of employer, thus, it does not guarantee fair protection for the employee. For further development of part-time employment it is essential that the requirements of the Directive 97/81/EC should be met. It is also necessary that part-time employment plans should be created and implemented. These act as measures enhancing employment among people who are not able to engage in full-time work, such as some parents, students, etc.; they are also a means to facilitate gradual termination of active professional life for elderly people (Hajn, 2004, p. 69). It also seems functional to take steps to encourage part-time workers to enter trade unions, among others in order to be able to execute the employer’s obligation to provide information about the availability of full-time work (Wratny, 2007, p. 4-5). Provisions

of the Act of 23.05.1991 on trade unions grant part-time workers the right to associate under the same conditions as for other workers together with full trade union-oriented rights. However, not belonging to a trade union does not mean absence of protection. Workers may exercise their mandatory right granted in the Act, following which they may indicate the trade union which then becomes a legitimate body which provides them with the protection of their rights under the same conditions which are applied with regard its members (Art. 30 § 2 of the Act).

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(Endnotes)

1 Art. 22 § 1 PLC states that: „By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for

remuneration”. Cf. Matkiewicz, 2012).

- 2 Reduction of working time is envisaged by the legislator for employees working under especially hard conditions or conditions detrimental to health, those employed to perform monotonous work or work with pre-defined constant rate (Art. 145 PLC), for underaged employee, under 16 (Art. 202 PLC) and handicapped people: Art. 15-18 of the Act of 27.08.1997 on vocational and social rehabilitation and employment of handicapped persons.
- 3 A similar regulation was present in the previous legal system. Cf. Art. 2 section 1 of the Act of 14.12.1994 on employment and elimination of unemployment.
- 4 Handicapped people are exceptions to the rule; they need to be capable of and ready to enter an employment contract with at least one half of full-time working hours.
- 5 Cf. Comment to the definition of an unemployed person in: Z. Góral, *The definition of the Unemployed Person in the Light of the Act on Employment Promotion and Labour Market Institutions*, p. 23.
- 6 According to E. Naumann direct discrimination happens when the discriminated person is characterised by a feature which can be a basis for discrimination, also in the case of association, i.e. a relation with a person who is characterized by such a feature, or in the case when the third party can feel consequences of discrimination applied against other people and based on their protective actions or standing for the discriminated person.
- 7 Solutions under the Polish law are more liberal than the requirements of the Directives, which allow indirect discrimination only in the cases when it is ‘objectively justified by a lawful aim and the measures taken in order to achieve the aim are relevant and necessary’. In the Polish regulations the assessment of discrimination lacks the criterion of a lawful aim of such action. (more on the topic in: Naumann, 2007, p. 287)
- 8 This forms a departure from Art. 6 PLC, according to which the burden of providing a proof for the fact lies with the person who draws legal consequences from the fact.
- 9 Art. 11 of the Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation requires that Member States, acting against victimization, should introduce into their national systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. In addition, Art. 9 of the Council Directive 2000/43/EC of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin requires that Member States, acting against victimization, should introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.
- 10 According to I. Boruta such remuneration constitutes ‘normal, basic or minimal pay or remuneration as well as all other benefits paid directly or indirectly, in cash or in kind, by the employer to an employee as a result of work contract’.
- 11 This regulation is not widely accepted. According to Z. Hajn, establishing of

the obligations to give considerations to such requests by workers, even 'within the employer's means' constitutes excessive limitation of the free action on the part of the employer.