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The Border between Employment Fiction and Discrimination: Reflection on the Employment of Pregnant Women from the Polish Perspective

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Abstract: *The paper discusses the issue of the fine line between fictitious employment and discrimination. The presented study is a reflection from the Polish perspective. The purpose of this paper is to present the Polish regulation and authorities' practices concerning the entitlement of women who began employment during pregnancy to social security benefits. The manuscript emphasizes that pregnancy does not create any presumption of fictitious employment, and the refusal to grant social security benefits to such women often leads to discrimination.*

Key Words: *Labour Law; Discrimination; Employment Fiction; Employment of Pregnant Women; Social Security; Poland.*

Introduction

Protecting health, employment and ensuring a proper level of income for employed women before and after childbirth remains a challenge.[1] Pregnancy discrimination remains a problem for society. In all parts of the world, working women who become pregnant are faced with the threat of job loss and suspended earnings due to inadequate safeguards for their employment and the rights which derive therefrom.[2] The scale of the problem is difficult to capture. It is partly shown by the number of court cases involving discrimination against pregnant women, but even

[1] See Report V(1): Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised), 1952 (No. 103), and Recommendation, 1952 (No. 95). In: *International Labour Organization* [online]. Geneva: International Labour Office, 1999 [cit. 2022-08-05]. Available at: https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-v-1.htm.

[2] See Report V(1): Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised), 1952 (No. 103), and Recommendation, 1952 (No. 95). In: *International Labour Organization* [online]. Geneva: International Labour Office, 1999 [cit. 2022-08-05]. Available at: https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-v-1.htm.

these do not provide a full understanding of the scope of pregnancy discrimination. Indeed, only a minority of discrimination claims make it to court.

However, it is not only discrimination against pregnant women that is a real problem. At the opposite extreme is the problem of dishonest practices by the insured to defraud social security benefits. The issue of defining the borderline between overusing the law to obtain certain social security benefits related to employment and discrimination due to the pregnancy status has long given rise to many doubts in the case law.

Both national and international courts have emphasized that the actual existence of an employment relationship (and thus also the right to social security and health insurance benefits) is not determined by the formal conclusion of an employment contract, but by the actual and real realization of elements characteristic for an employment relationship. However, can a woman's pregnancy create a presumption of fictitious employment? In year 2021, the European Court of Human Rights ruled that refusing a pregnant woman the right to social and health insurance on the ground that she began employment during the *in vitro* fertilization procedure constituted discrimination and a breach of her right to respect for her property. In Poland, a woman who enters employment while pregnant can be almost certain to suffer problems with the payment of social insurance benefits. The practice of the Polish Social Security Institution Zakład Ubezpieczeń Społecznych (hereinafter referred to as the "Social Security Institution"), which conducts intensive inspections in such situations, is based on the stereotypical attitude that a woman who had entered employment at a stage of pregnancy is fictitiously employed. As soon as the Social Security Institution decides that a pregnant woman's employment contract is fictitious, it automatically deprives her of the status of an employed insured person and denies her the right to any benefits relating to possible illness and maternity allowance. A wrong decision issued by the Social Security Institution is of great importance to a woman who may be deprived of benefits during pregnancy and maternity leave. However, she may appeal the decision to the court, but the process may be long[3] and may require the assistance of a lawyer. Here

[3] Data from the Polish Ministry of Justice show that the average duration of the court proceedings in social security cases (in the first instance only) in the first quarter of year 2022 was more than a year. See Opracowania wieloletnie. In: *Informator Statystyczny Wymiaru Sprawiedliwości* [online]. 2022 [cit. 2022-08-05]. Available at: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.

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another problem arises. Namely, whether it is not the court that should have the exclusive authority to interfere in an employment relationship entered between private individuals. Answering this question requires to consider two values – the individual's right to benefits and the protection of the interests of all insured persons. Accepting a situation of defrauding of undue benefits from the Social Security Institution (no interference by the relevant authorities) is contrary to the principles of social conscience and social justice, the principle of equal treatment of the insured and the principle of equivalence of contribution and benefit.

The reason for writing this paper is the growing problem in Poland of the Social Security Institution increasingly questioning the employment of pregnant women. Particular attention is given to the number of decisions issued by the Social Security Institution in Poland questioning the employment of pregnant women, compared to the total number of such decisions in recent times. The paper presents the basic conditions that employment must meet in order to be the basis for being subject to social insurance in Poland as well as the rules regarding the control of employment by the Social Security Institution. The study concludes with a reflection on the need to consider the principles of non-discrimination during any control undertaken for employees.

1 Actual work performance versus fictitious employment

The social security system is closely related to the performance of work. Therefore, the grounds for social insurance is actual employment (Article 22 of the Polish Labour Code, Article 6 and Article 13 of the Polish Act on Social Insurance System).

In the Polish labour law regulations, the employment relationship has its legal definition in the Labour Code.[4] According to the Article 22 § 1 of this Code, by establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his/her supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration. Whether an employment relationship has been established is not determined by the formal conclusion of an employment contract, but by the actual and real realization of elements characteristic for an employment relationship (judgement of the Su-

[4] See *Act of June 26, 1974 – Labour Code* [1974]. Journal of Laws of Poland, 1974, no. 24, item 141.

preme Court of Poland, 24 February 2010, II UK 204/09). The features of an employment relationship are as follows: an employee is a natural person who undertakes to work in exchange for remuneration and the subject of the contract on the part of the employee is the performance (execution) of work in which he/she is not subject to the risk of performance of the obligation, the employee is obliged to perform work in person, being in the performance of the obligation subordinate to the employer (judgement of the Supreme Court of Poland, 24 February 2010, II UK 204/09). The creation of an employment relationship always causes legal consequences, not only directly in the sphere of its content, but also in many other areas. One of such consequences is the right to social insurance benefits in the case the conditions provided by the law are met. The Polish case law accepts that the purpose of concluding an employment contract may be to obtain social security and health insurance benefits (judgement of the Supreme Court of Poland, 4 August 2005, II UK 320/04). Since achieving this purpose is not against the law, the parties aiming at such a goal do not circumvent the law.

However, in some situations, such a contract may be questioned. Under certain circumstances, despite the formally concluded employment contract, the parties to the employment relationship are accused of its invalidity. Such a situation is most often the case when public authorities conclude that work is not actually being performed, and the contract was concluded only to obtain social security benefits. The assessment of the validity of the content of employment contracts is basically made by the principles of the Polish civil law. Challenging a concluded employment contract can generally be based on two alternative grounds: on the Article 58 of the Polish Civil Code,[5] which regulates the avoidance of the law, and the Article 83 of the same Civil Code, which regulates the situation in which the statement was made for the sake of appearance. In accordance with the Article 58 § 1 of the Civil Code, a legal act that is contrary to the law or intended to avoid the law is invalid. A legal act with the aim of circumventing the act consists of such shaping of its content that from the formal point of view does not contradict the act, but aims at the realization of the goal, the achievement of which is prohibited by the act. The prohibition of circumventing the law comes down to the prohibition of generating a certain legal effect, which is prohibited by the mandatory provisions, by means of such shaping of the legal act, that externally,

[5] See *Act of April 23, 1964 – Civil Code* [1964]. Journal of Laws of Poland, 1964, no. 16, item 93.

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formally it has features that do not oppose the binding law. The statement that the agreement is aimed at avoiding the act requires making specific factual findings concerning the circumstances of its conclusion and the purpose that the parties intended to achieve (resolution of the Supreme Court of Poland, 8 March 1995, I PZP 7/95, judgement of the Supreme Court of Poland, 23 September 1997, I PKN 276/97). In accordance with the Article 83 § 1 of the Civil Code, a declaration of intent made to another party with its approval for the sake of appearance shall be null and void. If such a declaration was made in order to conceal another act in law, the validity of the declaration shall be assessed according to the character of that act in law. Appearance is a defect in a declaration of intent consisting of the fact that the parties create the appearance of actually performing a legal act with certain content, while, in fact, they do not want to produce any legal effects or to produce other than in the ostensible act they declare. Apparent legal action is invalid and has no legal effects from the beginning (*ex tunc*). An apparent statement, although it is a statement of intent that exists and has the constitutive features of legal events of this category, is invalid when the maker of the apparent statement has no real will to cause legal effects. Appearance, to some extent, may consist of circumvention of the law, since a contract from a formal point of view (ostensibly) may not oppose the law, although it is concluded to circumvent the law. The apparentness of legal action can be demonstrated by any means of evidence. It can be proven, in particular, using witness testimony and hearing the parties (also between the parties to this action).

The biggest problem in applying the regulations governing circumvention and appearance is their lack of precision and high risk of different interpretations.

2 Social insurance – between individuality and social solidarity

Under the Polish law, social security has not been defined. However, according to the Article 67 of the Polish Constitution:[6]

1. *A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute.*

[6] See *Constitution of the Republic of Poland of April 2, 1997* [1997]. Journal of Laws of Poland, 1997, no. 78, item 483.

2. *A citizen who is involuntarily without work and has no other means of support, shall have the right to social security, the scope of which shall be specified by statute.*

By "security" is meant the legal protection and guarantee of safety in the event of a specific threat (danger). The adjective "social" defines more clearly the nature of this security; it refers to the type of threat (danger) as the common fate of a threatened group of people and to the joint efforts of this community made to reduce this threat and to mitigate its effects. The social security relationship is not a civil law relationship based on the equality of its subjects and equivalence of benefits, but a statutorily regulated public law relationship based on the principle of solidarity, and the resulting benefits of the parties to this relationship are not civil law benefits (resolution of the Supreme Court of Poland, 21 April 2010, II UZP 1/10). Despite the different (public law) nature of the social insurance legal relationship, it is closely related to the employment relationship. The employment agreement, as the source of the employment relationship, causes effects not only direct, concerning directly the mutual relations between the employee and the employer, but also further, indirect, including in the field of social insurance. It shapes the social insurance relationship, determines the amount of the contribution and may consequently lead to the corresponding benefits. Due to the importance of these effects, both from the point of view of the interest of the employee (insured) and the public interest, it is assumed that the evaluation of contractual provisions can and should also be made from the point of view of social insurance law (judgement of the Court of Appeal in Warsaw, Poland, 27 May 2015, III AUa 2740/13).

At the axiological basis of social insurance lies social solidarity. Everyone at risk of a certain social risk contributes to a common fund, but only some of them will realize the risk and receive the benefit. Undoubtedly, this is also a manifestation of the mutuality of insurance benefits. This mutuality is also evident in the way insurance benefits are financed. As a rule, these benefits are financed by the contributions of the insured.[7] Thus, the public element has become very prominent in social security law. In some circumstances, an unjustified preference for an employee's payment may be contrary to the law, the principles of social coexistence,

[7] See JAWORSKA, K. Główne cechy ubezpieczeń społecznych. In: M. CZURYK and K. NAUMOWICZ, red. *Prawo ubezpieczeń społecznych: Wybrane problemy*. 1. wyd. Olsztyn: Uniwersytet Warmińsko-Mazurski w Olsztynie, Wydział Prawa i Administracji, 2016, pp. 33-40. ISBN 978-83-62383-91-7.

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or intended to circumvent the law. Consequently, it will be contrary to the principle of social solidarity.[8] The unconditional action of seeking to guarantee one's own protection provided by labour social insurance is justified only from a personal, not from a social point of view (judgement of the Court of Appeal in Szczecin, Poland, 9 December 2021, III AUa 354/21). Therefore, grasping the line between the individual interest of the insured and the social solidarity is crucial.

3 Inspections by the Social Security Institution (Zakład Ubezpieczeń Społecznych)

According to the Polish Act on Social Insurance System,[9] the scope of the Polish Social Security Institution is (among others) to establish and to determine the obligation of social insurance, to assess and to collect contributions, and to determine eligibility for benefits. The Social Security Institution is entitled to verify whether the person reported by the payer of contributions to the insurance has the title to it, including the fact of concluding an employment contract and its validity (judgement of the Supreme Court of Poland, 21 November 2011, II UK 69/11). It is not the payment of remuneration, accession to the insurance and payment of contribution, or issuing of a certificate of employment, but the actual and real realization of elements characteristic for an employment relationship that determines whether the parties have indeed established an employment relationship constituting a title to social insurance. If the Social Security Institution finds that these conditions did not occur, it will refuse to pay social insurance benefits, and a person who does not agree with this decision will only be able to challenge it in the court.

The Social Security Institution's challenge to the employment grounds results in ineligibility for social security benefits. A decision declaring that there is no basis for the payment of social security benefits is issued after an investigation. In the process of the investigation, the Social Security Institution takes the steps necessary to clarify the facts and to settle the case. The findings are usually based on such evidence as the

[8] See CZURYK, M. Kwestionowanie przez Zakład Ubezpieczeń Społecznych wysokości wynagrodzenia za pracę stanowiącego podstawę wymiaru składek. In: M. CZURYK and K. NAUMOWICZ, red. *Prawo ubezpieczeń społecznych: Wybrane problemy*. 1. wyd. Olsztyn: Uniwersytet Warmińsko-Mazurski w Olsztynie, Wydział Prawa i Administracji, 2016, pp. 41-50. ISBN 978-83-62383-91-7.

[9] See *Act of October 13, 1998, on the Social Insurance System* [1998]. Journal of Laws of Poland, 1998, no. 137, item 887.

employer's financial books, employee's statements and documents regarding the employment relationship. As a result of the proceedings, the Social Security Institution issues a decision in which it may state (among other things) that the person is not subject to social insurance. Thus, the Social Security Institution has the power to unilaterally and authoritatively determine the existence or nonexistence of an employment relationship, and consequently also decides on the benefits to be paid. Everything is done without involving the court. The issued decision can, therefore, in practice deprive pregnant women of needed benefits. Only a legal appeal filed with the court, on the other hand, will start the process in which the court may eventually determine that the qualification made by the Social Security Institution was incorrect after all. The entire process, however, can be lengthy and cumbersome.

Granting such power to the Social Security Institution raises serious questions. As mentioned above, the assessment of the validity of the employment contract is made by the Social Security Institution by the principles of the Polish civil law. Challenging a concluded employment contract can generally be based on two alternative grounds: on the Article 58 of the Civil Code,[10] which regulates the avoidance of the law, and the Article 83 of the Civil Code, which regulates the situation in which the statement was made for the sake of appearance. The practice of the Social Security Institution's application of civil law solutions in the sphere of public social insurance law raises significant questions. It should be emphasized that social security law does not provide for the institution of abuse of public law by subjects of civil contracts. Nor can such a legal construction result from the creation of rights from the sphere of private law to the sphere of public law by transferring civilian constructions to public law. At the level of the law, this is opposed by the scope of the Civil Code's regulation.[11] Such an action may also offend the European Union principles: the rule of law, legalism and good administration (judgement of the District Court in Częstochowa, Poland, 12 April 2019, IV U 1371/18). The Social Security Institution's application of these regulations on the grounds of public law relations may also conflict with the rule of the state of law. This is because it leads to the fact that, when concluding an employment contract, both the employer and the employee must consider

[10] See *Act of April 23, 1964 – Civil Code* [1964]. Journal of Laws of Poland, 1964, no. 16, item 93.

[11] According to the Article 1 of the Civil Code, "This Code regulates civil law relationships between natural persons and legal persons."

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the possible charge of circumvention or appearance. This is because the Social Security Institution may in the future apply unclear and vague criteria for evaluating the actions of the parties to the employment relationship, which makes it impossible to predict whether and to what extent the employee will be entitled to insurance protection. Assessing the effectiveness of an employment contract through the principles decoded from civil law or the legal system can create a state of indiscriminate discretion in the application of the law. In addition, such an assessment can sometimes create restrictions on economic activity, as it creates a state of extreme legal uncertainty. In the case of the public sphere, it is indeed legitimate to claim that the court, protecting the interests of all taxpayers, has the right to assess whether a benefit is being defrauded. However, it is difficult to agree with the claim that the right to such an assessment should also be granted to the Social Security Institution, which (in principle) should be the administrator of social insurance funds. Instead, it should not interfere in the content of contracts concluded by private entities, thereby violating the principles of freedom of economic activity. The problem is even more serious because data from the Polish Ministry of Justice show that in year 2021 more than 40 % of all decisions issued by the Social Security Institution were changed as a result of a court intervention.[12]

In recent years in Poland, attention has repeatedly been drawn to the many decisions of the Social Security Institution excluding pregnant women from social insurance. Several parliamentary interpellations have been received on this issue,[13] highlighting the Social Security Institution's over-reaching interference in the employment relationship established between the employer and the employee. It was pointed out that in some cases, if the insured person performed work or other activities under the contract and was reported for social insurance (there is evidence in the form of signatures and documents, witness testimony), the Social Security Institution interfered with the employer's decisions on the need to employ the employee. During its investigations, the Social Security Institution questioned the professional experience of the hired employees

[12] See Opracowania wieloletnie. In: *Informator Statystyczny Wymiaru Sprawiedliwości* [online]. 2022 [cit. 2022-08-05]. Available at: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.

[13] See e.g. FRYDRYCH, J., M. NYKIEL, Z. CZERNOW and K. MUNYAMA. Interpelacja nr 21659 do ministra rodziny i polityki społecznej w sprawie legalności kontroli ZUS. In: *Sejm Rzeczypospolitej Polskiej* [online]. 2021-03-17 [cit. 2022-08-05]. Available at: https://www.sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=BZDBYU.

and interfered with the amount of remuneration charged. The official data from the Polish Ministry of Family and Social Policy[14] show that the Social Security Institution has issued:

in the first half of year 2019:

- decisions excluding from social insurance persons reported as employees who applied for short-term benefits, of which 1,188 for pregnant women,
- 765 decisions excluding from social insurance persons reported as self-employed who applied for short-term benefits, of which 334 for pregnant women;

in year 2018:

- 2,943 decisions excluding from social insurance persons reported as employees who applied for short-term benefits, of which 1,701 for pregnant women,
- 687 decisions excluding from social insurance persons reported as self-employed who applied for short-term benefits, of which 227 for pregnant women.

The above-stated figures show that a great part of the social security exclusion decisions was made against pregnant women. Most importantly, however, it deprives the women of monetary benefits, which may (under certain circumstances) result in discrimination. Inspections should not be "directed" at the employment of pregnant women (automatically qualifying such employment as "suspicious"). Here, authorities should not apply any presumption indicating an illegality of the employment of pregnant women. The opposite situation may have negative consequences in the area of the employment of pregnant women. Discouraged by the threat of a control, entrepreneurs may no longer be interested in employing such women. In the absence of any other (other than the employee's pregnancy) grounds for inspection and verification of the correctness of the employment, the Social Security Institution should not initiate an inspection, especially given the number of persons covered.[15]

[14] See SZWED, S. Odpowiedź na interpelację nr 350 w sprawie kontroli w zakresie wypłacanych świadczeń przez ZUS. In: *Sejm Rzeczypospolitej Polskiej* [online]. 2020-01-17 [cit. 2022-08-05]. Available at: https://www.sejm.gov.pl/Sejm9.nsf/InterpelacjaTresc.xsp?key=BKZJUF.

[15] As of December 31, 2019, more than 14.4 million people were covered by sickness insurance. See SZWED, S. Odpowiedź na interpelację nr 3757 w sprawie masowych kontroli ZUS wobec kobiet prowadzących działalność gospodarczą. In: *Sejm Rzeczypospolitej Pol-*

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4 Pregnancy discrimination. Regulations of the international, European Union and the Polish law

Poland is bound by numerous international and European Union laws regarding non-discrimination in the employment. Many of these regulations have also had a significant impact on the shape of the Polish legislation.

In international law, the prohibition of discrimination is directly linked to the human rights. Gender equality was made part of the international human rights law by the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly on 10 December 1948.[16] The prohibition of sex discrimination can also be found in other international human rights agreements adopted at the universal level – within the United Nations system.[17] The European Court of Human Rights has stressed on many occasions that the advancement of the equality of the sexes is a major goal in the member states of the Council of Europe. "Where a difference of treatment is based on sex, the margin of appreciation afforded to the State is narrow, and in such situations, the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary for the circumstances."[18] In year 2021, the European Court of Human Rights ruled that refusing a pregnant woman the right to social and health insurance on the ground that she began employment during the *in vitro* fertilization procedure constituted discrimination and a breach of her right to respect for her property. Based on the facts that the court considered in this particular case, the applicant was refused the status of an insured employee and, in that context, an employment-related benefit (compensation of salary during sick leave) on the grounds of employment that had been declared

skiej [online]. 2020-05-20 [cit. 2022-08-05]. Available at: https://www.sejm.gov.pl/Sejm9.nsf/InterpelacjaTresc.xsp?key=BPTHY8.

[16] See Gender Equality. In: *United Nations* [online]. 2022 [cit. 2022-08-05]. Available at: https://www.un.org/en/global-issues/gender-equality.

[17] See e.g. *Convention on the Elimination of All Forms of Discrimination against Women* [adopted and opened for signature, ratification and accession by the General Assembly Resolution 34/180 of 18 December 1979]; and FENWICK, H. and T. K. HERVEY. Sex Equality in the Single Market: New Directions for the European Court of Justice. *Common Market Law Review* [online]. 1995, vol. 32, no. 2, pp. 443-470 [cit. 2022-08-05]. ISSN 1875-8320. Available at: https://doi.org/10.54648/cola1995020.

[18] See *Case of Emel Boyraz v. Turkey* [2014-12-02]. Judgement of the European Court of Human Rights, 2014, Application No. 61960/08, paragraph 51.

fictitious due to her pregnancy. The European Court of Human Rights noted that such a decision could only be adopted in respect of women since only women could become pregnant. It, therefore, established that in the applicant's case such a decision constituted a difference in treatment on the grounds of sex.

Also the European Union law prohibits discrimination based on sex (including pregnancy discrimination). Characteristic of the anti-discrimination law of the European Union is the broad approach to the various forms of discrimination.[19] "Discrimination for reasons of pregnancy is considered as direct discrimination under the European Union law and, therefore, also in the Member States. Any less favourable treatment of a woman related to pregnancy or maternity leave is included in the prohibition of discrimination."[20] A special role, in this respect, is played by the Court of Justice of the European Union, which derived some definitions from its case law (among others, the definition of indirect discrimination).[21] There are currently several legal bases in the European Union law (both in primary and secondary law) that prohibit sex discrimination. The Article 157 of the Treaty on the Functioning of the European Union[22] prohibits discrimination based on sex, including a disadvantage linked to pregnancy or maternity leave.[23] Discrimination based on sex is also prohibited by the Directive 2006/54/EC[24] (Article 14). The European Union protection against sex discrimination extends to the social se-

[19] See BUREK, W. and W. KLAUS. Definiowanie dyskryminacji w prawie polskim w świetle prawa Unii Europejskiej oraz prawa międzynarodowego. *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* [online]. 2013, vol. 11, pp. 72-90 [cit. 2022-08-05]. ISSN 1730-4504. Available at: https://doi.org/10.26106/j964-dd82.

[20] See TIMMER, A. and L. SENDEN. *Gender Equality Law in Europe: How are EU Rules Transposed into National Law in 2016?* [online]. 1st ed. Luxembourg: Publications Office of the European Union, 2016. 88 p. [cit. 2022-08-05]. ISBN 978-92-79-63354-6. Available at: https://doi.org/10.2838/63725.

[21] See *Case of J. P. Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981-03-31]. Judgement of the Court of Justice of the European Union, 1981, C-96/80.

[22] See *Consolidated Version of the Treaty on the Functioning of the European Union: Part Three Union Policies and Internal Actions: Title X Social Policy: Article 157* [ex-Article 141 of the Treaty of the European Community]. OJ EU C 115, 2008-05-09, pp. 117-118.

[23] See *Case of Susanne Lewen v. Lothar Denda* [1999-10-21]. Judgement of the Court of Justice of the European Union, 1999, C-333/97.

[24] See *Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation*. OJ EU L 204, 2006-07-26, pp. 23-36.

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curity system (Directive 79/7/EEC,[25] Directive 2006/54/EC). Also the case law of the Court of Justice of the European Union on the prohibition of direct sex discrimination has since year 1990 contributed to protect women participating in the labour market, in particular when they are denied a job, have less favourable working conditions and are dismissed in relation to pregnancy and/or maternity.[26] The Court of Justice of the European Union case law on the prohibition of refusal and termination of the employment on the grounds of pregnancy is remarkably extensive and is based on the premise that the mere finding that the reason for the differential treatment is pregnancy is sufficient to establish the existence of discrimination, without the need to compare this situation to that of men or a woman who is not pregnant (*special position approach*).[27] A great impact on jurisprudence was the *Dekker* case, in which the Court of Justice of the European Union held that refusing to hire or to renew the contract of a female worker on the account of her pregnancy amounted to direct discrimination on the grounds of sex.[28]

The provisions of the Polish Labour Code contain a catalogue of prohibited criteria for differentiating employees. In accordance with the Article 18^{3a} § 1 of the Labour Code: "Employees should be treated equally in relation to establishing and terminating an employment relationship, employment conditions, promotion conditions as well as access to training to improve professional qualifications, in particular regardless of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, as well as regardless of employment for a definite or indefinite period or full-time or part-time employment." Although pregnancy is not explicitly mentioned in the Polish Labour Code as a criterion for prohibited differentiation between employees, it is undoubtedly included in the scope of the principle of

[25] See *Council Directive 79/7/EEC of 19 December 1978 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security*. OJ EC L 6, 1979-01-10, pp. 24-25.

[26] See BURRI, S. Protection and Rights Related to Pregnancy and Maternity in EU Law. *Revue de droit comparé du travail et de la sécurité sociale* [online]. 2019, n° 4, pp. 16-25 [cit. 2022-08-05]. ISSN 2262-9815. Available at: https://doi.org/10.4000/rdctss.1305.

[27] See LEWIS, P. Pregnant Workers and Sex Discrimination: The Limits of Purposive Non-comparative Methodology. *International Journal of Comparative Labour Law and Industrial Relations* [online]. 2000, vol. 16, no. 1, pp. 55-69 [cit. 2022-08-05]. ISSN 1875-838X. Available at: https://doi.org/10.54648/260939.

[28] See *Case of Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990-11-08]. Judgement of the Court of Justice of the European Union, 1990, C-177/88.

equal treatment in employment. Firstly, the catalogue of prohibited differentiating criteria is not exhaustive in the Polish law; secondly, the maternity of women is subject to increased legal protection, already in the Polish Constitution itself (Article 71 paragraph 2 of the Polish Constitution). Pregnancy and maternity as personal characteristics of a woman can also be considered as an element of the gender criterion listed in the Article 18^{3a} § 1 of the Labour Code. As a rule,[29] an employer cannot refuse to hire a woman based on the fact that she is pregnant, as this would constitute discrimination. According to the Polish law, an employer cannot also ask a job applicant about her pregnancy status or plans for maternity during the recruitment process. The information that an employer may request about a job applicant is enumerated in detail in the Article 22^{1} of the Labour Code. Among them, information about the employee's pregnancy is not indicated. The current form of the Polish regulation is a result of coordination with the European Union law, in particular with the Data Protection Directive.[30] During her employment, a woman may benefit from certain protection regulations (e.g. prohibition of overtime and night work, special protection against termination of employment). The status of a woman's pregnancy is confirmed by a medical certificate. Nevertheless, again, the employer cannot require the woman to present such a certificate. It is up to the woman to decide when she informs her employer of her pregnancy. However, if she informs her employer of her pregnancy with the medical certificate, she will be entitled to special protection.

In the context of equal access to social security benefits in Poland, the constitutional principle of equality before the law plays an important role. In the Polish legislation, this general principle is formulated in the Article 32(1) of the Polish Constitution, according to which "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities." The Article 32(2) of the Polish Constitution introduces the prohibition of discrimination, but the legislator did not specify the characteristics, on the basis of which differentiation cannot be made, contenting with the general formulation that "No one shall be discriminated against in political, social or economic life for any rea-

[29] The exception is when a woman is required to perform work that is prohibited for pregnant women.

[30] See *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*. OJ EC L 281, 1995-11-23, pp. 31-50.

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son whatsoever."[31] In the provisions of the Polish Act on Social Insurance System, the legislator has specified the regulation of the principle of equality only for the insured. According to the Article 2a of this regulation, the Social Insurance System Act stands on the basis of equal treatment of all insured persons, regardless of gender, race, ethnicity, nationality, marital status and family status. The current shape of the principle of equal treatment of the insured was given on the basis of the Act of December 3, 2010, on the Implementation of Certain Provisions of the European Union on Equal Treatment, the main purpose of which was to implement the provisions adopted by the European Union in the form of directives, thanks to which Poland was to fulfil its international legal obligations and, in addition, to strengthen compliance with the principle of equal treatment in particular aspects of social life provided for by the above-mentioned Act.[32, 33]

The rules of equality and non-discrimination between the parties to the social insurance relationship can be used in two different aspects: 1) as the principles of social intercourse opposing the defrauding of unduly paid benefits from the social security system in the event of a potential finding of invalidity of an employment contract indicated as the title of social insurance, 2) as a basis for social insurance claims in the event

[31] See BARTOSZEWSKA, M. Art. 2a. [Zasada równego traktowania ubezpieczonych]. In: J. WANTOCH-REKOWSKI, red. *Ustawa o systemie ubezpieczeń społecznych: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2015, pp. 24-29. ISBN 978-83-264-3438-9.

[32] See BARTOSZEWSKA, M. Art. 2a. [Zasada równego traktowania ubezpieczonych]. In: J. WANTOCH-REKOWSKI, red. *Ustawa o systemie ubezpieczeń społecznych: Komentarz*. 1. wyd. Warszawa: Wolters Kluwer, 2015, pp. 24-29. ISBN 978-83-264-3438-9.

[33] Based on this Act, the following legal acts were implemented into the Polish legal order: 1) *Council Directive 86/613/EEC of 11 December 1986 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity, Including Agriculture, in a Self-employed Capacity, and on the Protection of Self-employed Women during Pregnancy and Motherhood*. OJ EC L 359, 1986-12-19, pp. 56-58 (no longer in force, date of end of validity: 4 August 2012); 2) *Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin*. OJ EC L 180, 2000-07-19, pp. 22-26; 3) *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation*. OJ EC L 303, 2000-12-02, pp. 16-22; 4) *Council Directive 2004/113/EC of 13 December 2004 Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services*. OJ EU L 373, 2004-12-21, pp. 37-43; 5) *Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation*. OJ EU L 204, 2006-07-26, pp. 23-36.

that an insured person is found to have been wrongly denied benefits in violation of the principle of non-discrimination.

An insured who believes that the principle of equal treatment has not been applied to him or her has the right to claim social insurance in the court. In this regard, the provisions allowing an insured person to challenge a decision that violates the principle of equal treatment by filing an appeal with the competent court will apply accordingly. In one of its decisions, the Supreme Court of Poland stated that subject to constitutional and statutory increased legal protection, the state of pregnancy, cannot discriminate against a woman in obtaining legal protection in social security relations, although neither should it give her a bonus (preference) above the recognized legal standards under the provisions and the principles of social security law (judgement of the Supreme Court of Poland, 15 December 2009, II UK 138/09). Certainly, the state of pregnancy, the setting of a high salary for work, neither the short period of employment before the occurrence of a certain risk protected by the norms of social security law, nor the whole of the circumstances surrounding the conclusion of the contract do not in themselves (*eo ipso*) justify declaring invalid an employment contract that meets the formal and structural features of an employee's obligation and is actually carried out by the parties to the employment relationship.

5 Refusing pregnant women the right to social insurance as a form of discrimination

Pregnancy itself and its protection cannot be considered in separation from its consequences in the sphere of earning capacity. Therefore, the protection of pregnant women, in addition to the aim of protecting the physical condition of the woman and her bond with her child, is also aimed at protecting her from the adverse effects in the material sphere. "It follows from all the foregoing that, although the national legislation provides for maternity leave to protect a woman's biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth, the Community law requires that taking such statutory protective leave should interrupt neither the employment relationship of the woman concerned nor the application of the rights derived from it and cannot lead to discrimination

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against that woman."[34] The purpose of the social security system is, among others, to protect against loss of earning capacity due to legally prescribed circumstances (e.g. illness or maternity). Social security is closely related to the performance of work. The Social Security Institution's challenge to the employment grounds results in ineligibility for social security benefits. Due to the far-reaching consequences of such a decision, the statement that employment is fictitious should be preceded by an in-depth analysis. The authorities have a duty to execute applicable laws and to verify all the facts of relevance to the enjoyment of particular rights. In many cases, there is a fine line between fictitious employment and pregnancy discrimination. A woman who is treated unfavourably because of pregnancy suffers discrimination on the grounds of sex.[35]

The Polish regulations and the practice of authorities should be judged by taking into account the international and European Union regulations binding on Poland. In the context of equal treatment in social security, the Directive 79/7/EEC is being held of particular importance. Undoubtedly, the Member States of the European Union retain the authority to regulate the area of social security in accordance with their national laws. However, the European Union, intervening indirectly, has obliged them to guarantee the principle of equal treatment between men and women in the field of formulating national social security systems.[36] The Article 4 of the Directive 79/7/EEC is worded as follows:[37]

"1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by

[34] See *Case of Land Brandenburg v. Ursula Sass* [2004-11-18]. Judgement of the Court of Justice of the European Union, 2004, C-284/02.

[35] See *Case of Joan Gillespie and Others v. Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996-02-13]. Judgement of the Court of Justice of the European Union, 1996, C-342/93, paragraph 22; *Case of Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS) v. Évelyne Thibault* [1998-04-30]. Judgement of the Court of Justice of the European Union, 1998, C-136/95, paragraphs 29 and 32; and *Case of Michelle K. Alabaster v. Woolwich plc and Secretary of State for Social Security* [2004-03-30]. Judgement of the Court of Justice of the European Union, 2004, C-147/02, paragraph 47.

[36] See KÖKKILINÇ ERALTUĞ, A. and G. KAYA. Transposing the EU Gender Equality Norms into the Turkish Labour Law: Where Do We Stand?. *International Journal of Emerging and Transition Economies*. 2008, vol. 1, no. 1, pp. 41-58. ISSN 1308-2701.

[37] See *Council Directive 79/7/EEC of 19 December 1978 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security*. OJ EC L 6, 1979-01-10, pp. 24-25.

reference in particular to marital or family status, in particular as concerns:

- the scope of such schemes and the conditions of access to them;
- the obligation to contribute and the calculation of contributions;
- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity."

As a result of the third indent of the Article 4(1) of the above-mentioned Directive 79/7/EEC, the principle of equal treatment means that there is to be no discrimination whatsoever on the grounds of sex either directly, or indirectly by reference, in particular, to marital or family status as regards the calculation of benefits. According to the Court of Justice of the European Union settled case law, discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations.[38] Thus, it is appropriate to ascertain whether the difference in treatment between men and women created by the national legislation at issue in the main proceedings concerns categories of persons who are in comparable situations.[39]

The decision refusing insurance status on the grounds of employment that had been declared fictitious due to the pregnancy could only be made in respect of a woman. In some cases, a difference can constitute in treatment on the grounds of sex. Actual pregnancy itself could not be fraudulent, and the financial obligations imposed on the state during a woman's pregnancy by themselves could not constitute sufficiently weighty reasons to justify the difference in treatment based on sex.[40] The decision denying the right to social security benefits and recognizing employment as fictitious due to the state of pregnancy can only be made in

[38] See *Case of Joan Gillespie and Others v. Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996-02-13]. Judgement of the Court of Justice of the European Union, 1996, C-342/93; and *Case of RE v. Praxair MRC SAS* [2019-05-08]. Judgement of the Court of Justice of the European Union, 2019, C-486/18, paragraph 73.

[39] See *Case of WA v. Instituto Nacional de la Seguridad Social (INSS)* [2019-12-12]. Judgement of the Court of Justice of the European Union, 2019, C-450/18, paragraph 43.

[40] See *Case of Jurčić v. Croatia* [2021-02-04]. Judgement of the European Court of Human Rights, 2021, Application No. 54711/15.

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relation to women. Therefore, if the pregnancy is the only basis for such a decision of the authority, such action will constitute a case of different treatment on the grounds of sex.

Conclusions

Aiming to guarantee the protection provided by the labour social insurance cannot, by definition, be aimed at performing an illegal act or aimed at circumventing the law. However, the purpose of such an action must not be to create apparent, purely formal grounds for coverage, but the actual, reliable implementation of the conditions that guarantee such protection. Under specific circumstances, the establishment of an employment relationship (which, in the field of labour law itself, would fall within the scope of freedom of contract) in social insurance law (in which the public element is very visible) may be considered an abuse of social insurance benefits. The Social Security Institution is entitled to check whether the facts on which a person has based his/her social insurance status are still valid. Granting the authority to control a contract between private entities to the Social Security Institution (bypassing the court) raises serious doubts, because it constitutes an interference with the legal relationship established between private parties. The authority of the Social Security Institution in this area should, therefore, be confronted with the principle of freedom of economic activity expressed in the Polish Constitution and with the fundamental rights of the European Union, i.e. the principle of the rule of law requiring clarity and predictability of the law made by the legislator.

Pregnant women are often automatically placed in the category of "suspicious" employees whose employment deserves to be verified, although, according to the Polish law, no employer may refuse to employ a pregnant woman due to her pregnancy. Making such an automatic assumption has been repeatedly criticized.[41] This approach was also explicitly negated by the European Court of Human Rights.[42] Moreover (with few exceptions), the employer cannot ask the woman about her pregnan-

[41] See e.g. DZIAMBOR, A., K. KAMIŃSKI, J. KORWIN-MIKKE, J. KULESZA and D. SOŚNIERZ. Interpelacja nr 3757 w sprawie masowych kontroli ZUS wobec kobiet prowadzących działalność gospodarczą. In: *Sejm Rzeczypospolitej Polskiej* [online]. 2020-03-30 [cit. 2022-08-05]. Available at: https://www.sejm.gov.pl/Sejm9.nsf/interpelacja.xsp?typ=INT&nr=3757.

[42] See *Case of Jurčić v. Croatia* [2021-02-04]. Judgement of the European Court of Human Rights, 2021, Application No. 54711/15.

cy during the recruitment process. An employer who asks such a question runs the risk of negative legal consequences. As a result, the employer is put in a very uncomfortable situation, in which he/she must balance between the accusations of discrimination and fictitious employment. The analysis conducted in this paper leads to the following conclusions:

1) In Poland, a great number of social security exclusion decisions were made against pregnant women.
2) By the Polish and (binding on Poland) international and European Union law, actual pregnancy itself could not be fraudulent, and the financial obligations imposed on the state during a woman's pregnancy by themselves could not constitute sufficiently weighty reasons to justify the difference in treatment based on sex.
3) There is no presumption that the employment of pregnant women is fictitious. Although the Social Security Institution may determine the fictionality of the employment of a pregnant woman, in order to make such a statement, the authority should conduct evidentiary proceedings which unanimously indicate that the employment is fictitious (regardless of the state of pregnancy).
4) Employment for social security benefits (provided that the employee is actually performing work) is not prohibited.
5) The frequency of inspections carried out by the Social Security Institution against pregnant women proves that the authority uses an unlawful assumption that their employment is fictitious.

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