

Teisės aktualijos

THE RIGHT TO FAIR REMUNERATION: EUROPEAN STANDARDS

Andrzej Marian Świątkowski

Jean Monnet Professor of European Labour and Social Security Law,
Head of the Chair of Labour Law and Social Policy,
Faculty of Law and Administration, Jagiellonian University, Krakow, Poland
Vice-President of the European Committee of Social Rights, Council of Europe, Strasbourg
ul. Grodzka 53, 31-001 Kraków, Poland
Tel. (+012) 663 18 40
El. paštas: andrzej.swiatkowski@uj.edu.pl

Teisingo atlyginimo už darbą principas įtvirtintas 1961 m. Europos socialinėje chartijoje ir 1996 m. Pataisytoje socialinėje chartijoje. Tačiau minėtuose teisės aktuose nepateikiama teisingo atlyginimo sampratos, o neaiškus terminas leidžia rasti skirtingoms interpretacijoms, kurioms tirti iki šiol Lietuvoje buvo skirta mažai dėmesio. Šiame straipsnyje detalai analizuojami Socialinių teisių komiteto pateikti teisingo atlyginimo aiškinimo metodai. Tyrimo tikslas – išskirti skirtingas teisingo atlyginimo sampratą, jas palyginti ir įvertinti Lenkijos valstybės darbo užmokestį teisingo atlyginimo sampratos požiūriu. Naudojamos sisteminio aiškinimo, lyginamuoju, loginės analizės ir statistiniai metodai. Šiais metodais vertinamos Lenkijos Respublikos galimybės ratifikuoti Europos socialinės chartijos 4 straipsnio 1 dalį.

European Social Charter of 1961 and the Revised European Social Charter of 1996 establishes the principle of fair remuneration. However these legal acts do not give the exact definition of this principle. The vague term generates different interpretations which have not been properly analysed in Lithuanian labour law so far. This paper analyses the methods to define fair remuneration, provided by the Committee of Social Rights. The purposes of this research are to identify various interpretations, to compare them and to evaluate Polish remuneration in the terms of fair remuneration. The author of this paper uses systematic interpretation, comparison tests, logical analyses and statistical methods. These methods enable the author to conclude on the possibilities of Poland to ratify article 4 § 1 of the European Social Charter.

Introduction

Council of Europe labour laws standards concerning fair remuneration are established in art. 4 of the European Social Charter of 1961 and the Revised European Social Charter of 1996. It contains the following five guarantees of fair remunera-

tion: the right to fair remuneration (art. 4 § 1), the right to additional remuneration of overtime work (art. 4 § 2), the right of male and female employees and workers to equal remuneration for work of equal value (art. 4 § 3), the right of all employees and workers to fair remuneration dur-

ing reasonable period notice for termination of employment (art. 4 § 4) and the right to protection of wages (art. 4 § 5). Already during its first supervisory cycle the Committee of Social Rights was convinced that the right to fair remuneration should be treated as a right ensured by social rights regulated by three provisions of the Charter: right to work, right to appropriate work conditions, the right to safe and healthy working conditions [1, p. 25]. The above mentioned three provisions would be breached if the right to fair remuneration was not ensured. The right to appropriate work conditions in safe and healthy working conditions would lose its significance where there is no fair remuneration [1, p. 25]. The text of Article 4 of the Charter does not indicate a significant character to the above mentioned standard. The provision in question provides no indication how these standards could be connected to the other three provisions of the regulations in part II of the Charter. Legal practitioners, who specialise in labour law, regard that remuneration is the necessary distinguishing element in carrying out work. Remuneration compensates the type of work carried out, the amount and quality work or services provided as well as the qualifications and occupational skills of the worker. Remuneration varies according to whether the work undertaken is completed as part of relations under the civil law or under economic relations regulated by contract law provisions. The personal nature of the work and the worker complying to the employer are both elements which can separate work from employment not regulated by labour law

provisions. In this context it is important to note the Committee's view stipulating that remuneration for work should be treated as a guarantee of the realization of the right to work in appropriately safe and healthy working conditions.

Analysing the employment cases in terms of administrative responsibilities resting on the citizens, i.e. the reserve army, work by prisoners (as part of a prison sentence) – the Committee did not regard this as part of the compulsory work category, as considered by Article 1 of the Charter, but rather work that is not remunerated for even in part, as provided for by Article 4 of the Charter. These matters are considered further below. Therefore matters analysed here refer to the basic problem of the definition of “fair (decent) remuneration”. The purposes of this research are to identify various interpretations, to compare them and to evaluate Polish remuneration in the terms of fair remuneration. The author of this paper uses systematic interpretation, comparison tests, logical analyses and statistical methods.

Fair remuneration (Article 4 § 1 of the Charter)

Member states, which ratified Article 4 § 1 of the Charter, are obligated to ensure workers are remunerated in such a way which will give them and their families a decent standard of living. Decent remuneration is remuneration enabling an appropriate standard of living. Providing such a definition is substituting one vague term by another. An appropriate standard of living is an expression that has not been defined in labour law or social protection regula-

tions. The Committee of Social Rights from its first supervisory cycle was aware of the ambiguity of terms used within Article 4 of the Charter. Almost immediately it noticed it was impossible to refer to “fair” remuneration within the Council of Europe, an international organisation associating countries so differing in their economic development. As early as the second supervisory cycle the Committee addressed an important message to member states, parties to the Charter. The term fair (decent) remuneration has different meanings. All member states can understand it accordingly. Understanding of this term is directly related to the level of economic development of a particular state [2, p. 16].

The Committee sees all member states as one entity and does not accept diversity in cases of given states [3, p. 31]. Fair (decent) remuneration is a social policy category, applicable in the exact same manner to all member states. The rulings of the Committee of Social Rights on defining fair (decent) remuneration have had two phases. In both cases the point of reference for defining the term fair (decent) remuneration was the average national remuneration. Initially the Committee believed remuneration did not differ significantly from the average wage and would be regarded as fair (decent) [4, p. 25–26]. However this attempt of defining fair (decent) remuneration was not precise enough. It lacked a percentage relation between remuneration paid for a certain job and the average remuneration for this type of job in a given country. The Organisation for Economic Co-operation and Development and the Council of Europe undertook studies [5, p. 34]. The Committee familiar-

ised itself with the studies during the fifth supervisory cycle and utilised them to draft a more precise definition of fair (decent) remuneration [4, p. 25]. In a study prepared for the Council of Europe it was suggested that 68% might be regarded as measurable criteria of fair (decent) remuneration, determining a relation between the remuneration in question and the average remuneration in all of the member states of the Council of Europe. Therefore remuneration above the 68% rate was considered to be meeting requirements for fair (decent) remuneration formulated under Article 4 § 1 of the Charter. Any remuneration below this level cannot be qualified as fair (decent). The Committee decided upon utilising the rate, which allows for distinguishing remunerations into two categories: fair (decent) remuneration and not fair (decent) remuneration (“decency threshold” approach). Making an attempt to determine a measurable criterion of fair (decent) remuneration, the Committee took into consideration not only a nominal value of money paid for work (remuneration) but also other benefits employees are provided by their employer with. The Committee considered this only in cases where the real amount of remuneration received was lower than the 68% rate mentioned above. Authorities of member states had the responsibility to provide a fair (decent) rate of remuneration. They had to provide the Committee with details with which the rate was calculated: realistic remuneration amounts as well as the average remuneration. They were instructed that in cases when the latter rate was lower than the 68% rate, they should also provide details concerning

the material value of various types of social benefits allocated to workers, to the insured as well as to their family members. Amongst these various social benefits named, were family benefits, benefits covering part of training/educational courses, low level of tax or exemptions from it for those earning the lowest wage. Article 4 § 1 of the Charter tells authorities of member states to recognise such legal remuneration (fair – decent) that will ensure workers and members of their families a decent standard of living. Being supported by such guidelines, the Committee prepared separate techniques measuring the rate of remuneration, which were meant to satisfy the material needs of single individuals, married couples, single parents raising one, two or more children, and married couples with children. It measured the value of social benefits and other benefits utilised by families, especially non-nuclear families as well as families with multiple children, to see whether such benefits supplemented the difference between the remuneration received and the average remuneration. Lower wages than the 68% remuneration rate, defining fair (decent) remuneration, appeared frequently in reports provided by authorities of member states. In the Committee's experience there were cases where economically developed nations did not guarantee to keep fair (decent) remuneration standards, even when considering the definition as understood by Article 4 § 1 of the Charter not only incorporating the nominal amount of the pay, but also the material value of social benefits [6, p. 92].

The legal and factual basis appropriated by the Committee is evident in the reports prepared by the authorities of member

states. They are supplemented by additional opinions and comments made by national organizations representing the interests of employers and workers. The Committee also took advantage of information provided by sources from international organizations such as Organisation for Economic Co-operation and Development, International Labour Organisation. The above mentioned techniques prove to work in situations not requiring maximum precision as in cases of evaluating bodies such as the Committee of Social Rights for the Charter. In cases of gathering information concerning the rate of remuneration received by workers employed within a given member state and the average rate of remuneration paid on a national scale by workers employed in various trades and occupations, the Committee did not have enough statistical data. Primarily the Committee was unable to establish the value of social benefits, which should be taken into consideration when establishing the value of benefits being received by workers and members of their families, where there is no wage recipient within the family. The Committee did not have the technical possibilities, which would have allowed for the above information to be gathered. It based its information on the statistical data provided by authorities of member states. On more than one occasion authorities of these member states did not collect some of the above mentioned information and were unable to compare them to other indicators. The first intentions of the Committee, to construct objective measurable rates of remuneration to assist in assessing the standard of living of a worker and his/her families, were not realised. Dur-

ing the 13th supervisory cycle the Committee abandoned the technique of measuring fair (decent) remuneration. Because it did not create an alternate method of measuring the standard of living of a worker and his/her families, in that supervisory cycle it did not attempt to assess the national labour law standards in matters of remuneration, social benefits ensured by national social security schemes as well as social policies carried out by particular authorities of member states to create the possibility for fair remuneration for workers and to provide them with a decent standard of living [7, p. 215].

The method incorporated by the Committee during the next 14th supervisory cycle is based on a percentage rate, used for differentiating the categories of fair (decent) remuneration from remuneration which does not ensure workers and their families with a decency threshold approach (an appropriate standard of living) [8, p. 49]. The difference between the new and the former technique establishing the level of remuneration is based on the lowering from 68% to 60% rate as well as constructing a broad definition of remuneration. Currently remuneration encompasses all cash and non-cash benefits provided to workers by their employers. The level of remuneration comparable to the average rate is the net payable, after the worker makes tax and other insurance payments. To this cash remuneration, with the added non-cash benefits provided by the employer for the worker for work carried out, there are also added benefits from national social security schemes. A comparison basis with the average wage is the payment and value of social security benefits calculated according to the

different technique. The important *novum* when comparing real wages to the average remuneration in a given member state is the abandonment of calculating the profits per family member. The Committee analyses whether the remuneration is fair (decent) based purely on the remuneration received by one family member in employment. It is of no importance how many people within the family are employed and how many family members there are. The basis for this new method of analysing the level of remuneration is the net wage, non-cash benefits and the value of social benefits. If the remuneration of one family member, usually the main bread winner, crosses the 60% of the average domestic remuneration, the Committee claims that the given member state is fulfilling its obligations under Article 4 § 1 of the Charter.

Even if the remuneration is less than the 60% of the average domestic remuneration, authorities of member states may prove that the real wages earned enable workers and their families to fulfil their requirements and provide a decent standard of living. Free education, free medical services, discounts for public transport use and other benefits associated with payable non-cash benefits provided for by the employer for workers, are all taken into consideration by the Committee in the supervisory process of fulfilling obligations under Article 4 § 1 of the Charter [8, p. 52]. If the material value of the abovementioned benefits supplements the real wages earned, which is less than the 60% of the average remuneration within a given country, the Committee is of the view the authorities should fulfil the obligations set by the Charter.

The most reliable evidence for fulfilling obligations under Article 4 § 1 of the Charter is the establishment of a minimum wage [9, p. 76]. The following member states did just that: France, Great Britain, Ireland, Luxembourg, Malta, the Netherlands, Poland, Portugal, and Spain. This method enabled the comparison of the level of minimum wages (net) with the average wage (net) of a given country. If the minimum wage is 40% of the average wage, the Committee claims the member state in question is not fulfilling its obligations under Article 4 § 1 of the Charter. A 20% difference between a minimum wage and an average may be supplemented by the material value of benefits and services provided by the employer for the worker.

Summarising the above mentioned arguments concerning fair (decent) remuneration it is possible to deduce that according to the Committee's view a member state ensures its workers and their families' decent remuneration, only when it can ensure a minimum wage. The supervisory body requests that a minimum wage must be established and employers must be made to follow this obligation. The basis for this is the non-numerical paragraph of Article 4 of the Charter. The above mentioned standard obligates member states to fulfil the requirements provided by this provision of the Charter either when completing agreements concerning collective bargaining are being made with stakeholders or legally when deciding upon the work contracts, in accordance with domestic regulations. Minimum wage established by the authority of a member state is one of three abovementioned techniques to standardise domestic labour law regulations with Arti-

cle 4 § 1 of the Charter. When establishing the minimum wage authorities of member states take into consideration the costs involved in satisfying the basic needs. Identifying minimum wage with a fair wage, which ensures a decent standard of living, creates an uncertainty and questions for the Committee's technique in analysing remuneration within member states. It is possible to view that the method utilised by the Committee in assessing remuneration has been accepted by those bodies taking part in the process of abiding by the Charter, namely the Governmental Committee and the Committee of Ministers. The Council of Europe has failed to provide a decisive critique, authorised to partake in the supervisory process of fulfilling obligations under the Charter. During the debates of the Governmental Committee two major points were considered: to reduce the real wages rate from 68% to 60% which is comparable to the average pay, and to move away from the earlier applicable notion of measuring the level of remuneration according to the requirements of a family, and not just the bread winner. It was also pointed out that the newly reduced remuneration rate of 60%, similarly to the 68% rate, is arbitrary in its nature [8, p. 220]. The approval of the new technique is undoubtedly caused by the fact that the majority of member states fulfil the obligations under Article 4 § 1 of the Charter, because they recognise workers' rights to minimum wages.

Conclusion

Practical implication of the above mentioned methods to estimate compliance or noncompliance with legal standards established by the European Social Charter are

important for any country which government takes into consideration ratification of art.4 § 1 of the Charter. Poland did not ratify art. 4 § 1 of the European Charter of 1961. The most current relationship between average and minimal wages does not permit such ratification. In the second quarter of 2009 an average wage in Poland was as high as 3.081, 48 PLN which equals to 770,37 Euro. In 2009 minimal salary was established at the level of 1.276 PLN which equals to 319 Euro. It has risen to 1.317 PLN which equals 329, 25 Euro since January 1st, 2010. In 2009 the rela-

tionship between minimal and average salary in Poland reached 41,4 per cent. It has risen a little since 2010. Since the average salary is rising steady and gradually, at the best there is a chance that relationship between minimal and average salary remains at the previous level which does not satisfy requirements set up by the European Committee of Social Rights – the European monitoring body which major task is to guarantee the compliance of the Member States with legal requirements established in the European Social Charter.

BIBLIOGRAPHY

1. *Conclusions I*. Strasbourg: Council of Europe Publishing, 1969.
2. *Conclusions II*. Strasbourg: Council of Europe Publishing, 1971.
3. *Conclusions IV*. Strasbourg: Council of Europe Publishing, 1975.
4. *Conclusions V*. Strasbourg: Council of Europe Publishing, 1977.
5. *Conclusions XII-1*. Strasbourg: Council of Europe Publishing, 1992.

6. *Conclusions XIII-3*. Strasbourg: Council of Europe Publishing, 1995.
7. *Conclusions XIV-2*. Strasbourg: Council of Europe Publishing, 1998.
8. DALLOZ, J. P. *Methods of defining "decent remuneration"*. Strasbourg: Council of Europe Publishing, 1977.
9. HARRIS, D.; ir DARCZY, J. *European Social Charter*. New York: Transnational, 2001.

TEISĖ Į TEISINGĄ ATLYGINIMĄ: EUROPINIAI STANDARTAI

Andrzej Marian Świątkowski

S a n t r a u k a

1961 metų Europos socialinėje chartijoje ir 1996 metų Pataisytoje Europos socialinėje chartijoje įtvirtinamas teisingo atlyginimo už darbą principas, tačiau pats teisingo atlyginimo terminas nėra aiškus. Todėl šiame straipsnyje analizuojama teisingo atlyginimo už darbą samprata. Tyrimo tikslas – išskirti skirtingas teisingo atlyginimo sampratas, jas palyginti ir įvertinti Lenkijos valstybės darbo užmokesčių teisingo atlyginimo sampratos požiūriu. Darbe naudojami sisteminio aiškinimo, lyginamasis, loginės analizės ir statistiniai metodai. Skiriami skirtingi teisingo atlyginimo apibrėžimo metodai (pavyzdžiui, bendras principas, kai šis principas aiškinamas vienodai visose valstybėse

narėse, ir skirtingas, kai kiekviena valstybė narė savarankiškai aiškina šio termino reikšmę). Taip pat analizuojamas skirtingos teisingo atlyginimo sampratos (pavyzdžiui, tinkamumo ribos nustatymas, minimalios algos nustatymas), kurias pateikė Socialinių teisių komitetas. Ilgainiui pačios sampratos taip pat keitėsi. Straipsnyje analizuojami jų skirtumai, pokyčiai ir pokyčių reikšmė. Galiausiai įvertinama Lenkijos Respublikos atlyginimo už darbą atitiktis teisingo atlyginimo sampratai. Remiantis pastarųjų metų statistikos duomenimis, autoriaus manymu, Lenkijos Respublikos galimybės ratifikuoti Europos socialinės chartijos 4 straipsnio 1 dalį vertintinos skeptiškai.

Įteikta 2010 m. rugsėjo 1 d.

Priimta publikuoti 2011 m. kovo 9 d.