

# Cases of Violation of the Principle of Equal Treatment in the Field of Employment Relationships of Public Property Inspectors and Assistant Inspectors

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*The main objective of Act CXXV of 2004 on equal treatment and the promotion of equal opportunities is to promote the conformity with the principle of equal treatment, including – inter alia – the legal relationships of local governments. In terms of performing the policing duties of local governments, more specifically concerning the jobs of public property inspector and assistant inspector, respectively, significant differences can be observed in the rules pertaining to the same types of employment of the laws governing said jobs (Mt. and Kttv.). This study is aimed at disclosing said discrepancies and proposing solutions to their elimination in conformity with the respective EU directives.*

The main objective of the Act CXXV of 2004 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter: Ebktv. Act) – as the title of the study infers – to ensure and observe equal treatment, inter alia by the Hungarian State, the local and minority self-governments and the bodies thereof, in the course of establishing relationships, in their relationships, in the course of their procedures and measures.<sup>1</sup> This includes the employment relationship qualified by the law as occupational relationship, and the (special) public service relationship, respectively. While preparing for this survey, however, I have been confronted with cases related to the above-mentioned legal relationships, where the principle of equal treatment, also defined as a priority in the respective directives of the European Union,<sup>2</sup> is not being applied. This brief study of mine focusses on the discrepancies found in two specific issues within said topic, i.e. those of the rest period and the wages, respectively, while suggesting possible solutions to the problems.

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1 Said obligation is stipulated in Sections 4–5 of the Ebktv. Act.

2 Inter alia, the directive 2000/78/EC, and the Section 5 of directive 2008/104/EC may be referred to in this respect.

## Background to the occupational legal relationships concerned

Thus, the two types of occupational legal relationships underlying this study are the occupational relationship defined by the law as employment relationship, and the public service relationship. The employment relationship is governed by Act I. of 2012 on Labour Code (hereinafter Mt. Act), while for the (special) public service relationship the respective rules of the Act CXCIX of 2011 on Public Servants (hereinafter: Kttv. Act) are to be applied.

As a matter of fact, occupations in the form of employment relationship do occur in the public sector too through companies established for this specific purpose. Public property inspectors and assistant inspectors being occupied in the same workplace and under the same working conditions constitutes, for example, a situation actually present on the level of self-governments too. Public property inspectors are occupied – in the case examined by me – as public servants of the (policing organ) of the self-governments (municipalities), while assistant inspectors are occupied in employment relationship, on a full-time basis.

Pursuant to the Act CXX of 2012 on Special Policing Responsibilities and the Amendment of Certain Laws with the Aim of Addressing Truancy, (also) assistant inspectors may support the work of public property inspectors.<sup>3</sup> An assistant inspector is not entitled to take measures autonomously, he/she is obliged to carry out his/her work on public and peripheral fields exclusively in the presence of and according to the instructions of the public property inspector.

Under said circumstances, the inspector and the assistant inspector carry out their respective work side-by-side, in a joint effort, and in our case by performing the same activity on a continuous, uninterrupted basis.<sup>4</sup> Pursuant to Section 90 para a) of the Mt. Act, the general condition of continuous work in terms of the employer's activity is, that the time of stoppage on a given calendar day is less than six hours, or if operation is suspended only and exclusively for the reasons and for the duration required by the technology employed in any calendar year. The legislator has stipulated – in harmony with the previous legislation – as an additional condition that the employer's activity shall aim at the provision of basic public services on a regular basis.

The fulfilment of the above two conditions in our case, highlights the nature of the order of work actually applied. The application of this order of work (schedule) is lawful for public property inspectors too, considering that – in addition to allowing the applicability of the above provisions in public service relationships –, the Kttv. Act enables the person exercising employer's rights to introduce a working schedule differing from the general work schedule, namely from 8.00 to 16.30 hours in the period from Mon-

3 Section 4 subsection (1) of the Act CXX of 2012.

4 While in Section 118 subsection (2) of the Act XXII of 1992 on Labour Code, a continuous (uninterrupted) order of work is stipulated, under Section 90 para a) of the Mt. Act, the concept of continuity is already linked to the employer's activity. This approach is correct, considering that the order of work (schedule) is nothing more than the allocation of the working time, which while being in connection with the nature of the employer's activity, however, the continuity ("lack of interruption") is no concept to express that reality. The employer's mode of operation, his activity constitutes the foundation upon which said concept may be based. Berke-Kiss (2014) 66.

day through Friday, and from 8.00 to 14.00 hours on Fridays, which is realized in the case of both types of job in a framework working time system ('banking').<sup>5</sup>

From the point of view of work assignment, for persons employed in both posts, each day of the week counts as working day, i.e. they may be ordered to work according to the ordinary work schedule even on Sundays and on public holidays. Indeed, they may be assigned to work in ordinary working hours on a public holiday, considering that even under the respective provisions of the Mt. Act, and under the Act LXIII of 1999 on public property supervision (hereinafter: Kfttv. Act), respectively, they (also) pursue private security activities aimed at (municipal) asset protection.<sup>6</sup>

Also, according to the explanatory memorandum to the Mt. Act, employees may be ordered to work in ordinary working hours on Sundays and on public holidays, respectively, for the purpose of activities only, the carrying out of which serves public interest or is objectively necessary for the proper functioning of the employer's facilities.<sup>7</sup>

## **Problems related to the compliance with the principle of equal treatment**

More specifically, the Ebktv. Act already mentioned in the introduction, provides definitions for the occupational working relationships, including the public service relationship and the employment relationship under scrutiny, while ordering for them the mandatory application of provisions related to the requirements of equal treatment, as laid down in diverse legal rules and laws.<sup>8</sup>

In relation of persons employed as public property inspectors or assistant inspectors – subjects of this study – the absence of the requirement of equal treatment emerges on grounds of their work assignment and the work time (order of work) for which they are scheduled. Thus, their occupation in their place of work is uninterrupted but is exercised in the framework of a shift work system at the same time.

Under the applicable law, shift work may only be interpreted as an activity pursued under employment relationship, as the only law containing provisions in this respect is the Mt. Act, while the Kttv. Act does not prescribe the application of the relevant legislation in connection with public service relationship.<sup>9</sup>

Nevertheless, based on its existence in practice, it can be established that shift work is present in the occupation of public property inspectors as well, due to the fact that the activity of employers – in common places of work – is not suspended on a single day of the calendar year, and in both types of job, the start of the daily working time, by the ordered schedule, regularly varies between 06.00 hours and 18.00 hours.

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5 The framework working time ('banking') is a decisive factor of flexible worktime management. More, specifically it suggests that the quantity of working time to be achieved by the employer may also be allocated in a framework system. Horváth–Szládovnyik (2013) 116.

6 Section 102 subsection (3) para b) of the Mt. Act, as well as Section 2 subsection 1 of the Kfttv. Act.

7 A general explanatory memorandum to Labour Code (2011), Sections 101–102.

8 Based on the respective provisions of Section 3 para a) of Ebktv. Act.

9 By Section 90 para b) of the Mt. Act, the employer's activity is shiftwork, if its duration reaches 80 hours in a week.

It can be stated that said change is of regular nature, as each month the starting hour of the scheduled daily working time is different on at least one third of the total working days, furthermore there is a time difference of more than four hours between the earliest and the latest work start.

With respect to working in shifts, the Mt. Act prescribes the payment of a thirty per cent shift premium for work performed between eighteen hours and six hours, which is – in my experience gained from the survey – is actually paid out to the assistant inspectors for the work they have performed.<sup>10</sup>

However, since said concept (shift work) is not dealt with or interpreted either by the Kttv. Act or in the context of the public service relationship, public property inspectors are not paid such work supplement. Although the employer is acting lawfully by the standards of the regulatory environment, I believe that said practice is nevertheless equal to discrimination in terms of wages, against persons occupied under public service relationship, in the present case against public property inspectors.

Apart from shift premium, even certain wage supplements are bound with practices, the application of which is contrary to the requirements of equal individual treatment.

Pursuant to Section 142 of the Mt. Act, employees – other than those entitled to shift premium – shall be entitled to a fifteen per cent wage supplement for night work (in the period from 22.00 to 06.00 hours), provided that it exceeds one hour. Unlike wage supplement, the supplement for night work is also regulated by the Kttv. Act.<sup>11</sup> 0.45 percent of the base remuneration (basis salary) mentioned therein, specifically corresponds to an hourly supplement of HUF 174, when calculating with the uniform base remuneration of HUF 38.650.

However, applying the respective provision of Mt. Act to the case of full-time assistant inspectors, and calculating with the mandatory applicable minimum wages (if expressed in hourly rate, with HUF 584),<sup>12</sup> the amount of wage supplement for night work thus obtained is only HUF 88. In other words, it is the assistant inspectors with minimum wages who are discriminated by said provision, as against the public property inspectors working together with them.

Still on the issue of wage supplements, pursuant to Section 140 subsection (2) of Mt. Act, employees required to work on public holidays in regular working time shall be entitled to a one hundred per cent wage supplement.<sup>13</sup> Said legal rule further specifies that this wage supplement shall be paid for working on Easter Sunday or on Whit Sunday, or on public holidays falling on Sundays too.

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<sup>10</sup> Section 141 subsection (1) of the Mt. Act.

<sup>11</sup> Pursuant to Section 140 subsection (3) of the Kttv. Act, entitled to night work wage supplement is the one who, based on his/her scheduling of working time, performs work in the period from 22.00 to 6.00 hours. The hourly rate of said wage supplement corresponds to 0,45 per cent of the base remuneration (basis salary). If the work scheduled falls in the period from 22.00 to 6.00 hours just partly, the night work wage supplement shall be due on a pro rata temporis basis.

<sup>12</sup> Based on Section 2 subsection (1) of Government Decree 483/2013. (XII. 17.)

<sup>13</sup> According to Section 102 subsection (1) of the Mt. Act, public holidays are 1 January, 15 March, Easter Monday, 1 May, Whit Monday, 20 August, 23 October, 1 November and 25–26 December.

Pursuant to Section 98 subsection (6) of Kttv. Act, however, government officials, public servants obliged to perform work on a public holiday in regular working time, are 'only' entitled to time off, corresponding to twice the duration of work actually performed, as consideration for their work. By applying this legislation, public property inspectors – unlike assistant inspectors – do not obtain in fact any wage supplement for the work they perform on a public holiday. I think that – as regards the two types of job examined – the requirements of equal treatment are not met in this field either, as time off and the rate of statutory wage supplement are not comparable in case of work performed in regular working time, while different wages (and emoluments) are paid out, which also influence the level of wage supplements.

### **Proposal for the solution to the problems raised**

Also in the case under study, the fundamental problem is that the practice of equal treatment results in equality of a pure formal nature only, in fact it is insufficient for the elimination of the existing disparities. Although in the case of employers providing occupation under public service working relationship, the occurrence of cases of disparity referred to above is rare, however, the theoretical and – as we have seen – practical possibility of said inequalities taking effect does exist, while the respective provisions of the Kttv. Act provide a basis for such development. I attach importance to the elimination of said differences, considering that the conformity with the principle of equal treatment in the social conditions of the member states, is also a priority aim of the European Union, whereby the field of employment relationships is also affected.

As a concrete step, it would be desirable to supplement or amend the respective legislations referred to below, like this:

In form of an addendum, the concept of shift supplement should be integrated in the text of the Kttv. Act as well, considering that for the time being, it is a concept that cannot be interpreted in the framework of public service relationship, despite the fact that it may occur and it does occur in practice.

The simplest solution in the given case would be if the respective passage of Mt. Act dealing with shift supplement were adopted and integrated in the corresponding passage of the Kttv. Act – like some other passages have already been adopted from the Mt. Act –, together with the determination of the level of such supplement. Thereby the dispositions could have an uniform effect and impact both on those employed by public sector bodies and on those occupied under public service legal relationship.

When performing the review of the amount of the mandatory minimum wage each calendar year,<sup>14</sup> the harmonization of the wage supplements for night work related to employment relationships should be reconsidered. Thereby the differentiated amounts of supplements could be prevented from being materialized.

With respect to Section 98 subsection (6) of the Kttv. Act, dealing with government officials, public servants obliged to perform work on a public holiday in regular working

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<sup>14</sup> Section 153 subsection (4) Mt. contains the provisions for the supervision.

time, said legal rule should be amended in such a way that instead of “being entitled to time off, corresponding to twice the duration of work actually performed, as consideration for their work”, said officials and servants should be entitled to a wage supplement equal to the one hundred per cent wage supplement as stipulated by the Mt. Act.

The changes detailed above could promote, inter alia, the conformity with the EU legal acts, as enumerated under Section 261 of the Kttv. Act.

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## ÖSSZEFOGLALÁS

### **Az egyenlő bánásmód követelményének sérelmei a közterület-felügyelők és a segédfelügyelők foglalkoztatási jogviszonyainak területén**

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Az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló 2004. évi CXXV. törvény fő célja az egyenlő bánásmód biztosítása, többek között a helyi önkormányzatok jogviszonyaiban is. Az önkormányzatok rendészeti feladatellátásának területén a közterület-felügyelői, illetve segédfelügyelői munkaköröket illetően, az azokat szabályozó törvények (Mt. és Kttv.) azonos foglalkoztatási esetekre vonatkozó szabályait vizsgálva azonban jelentős eltéréseket figyelhetünk meg. A tanulmány célja ezek feltárása, illetve javaslattétel a megszüntetésükre vonatkozóan, az uniós irányelveknek megfelelően.