

Recent UWE decisions of the European Committee of Social Rights

BARBARA KRESAL, University of Ljubljana,
Member of the European Committee of Social Rights

„Current Reflections on EU Gender Equality Law“, Webinar for
University Professors and Law Lecturers, organised by the ERA Trier,
30.11.-1.12.2020



This training session is funded under the "Rights, Equality and Citizenship Programme 2014-2020" of the European Commission.

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

„Despite the obligations deriving from the Charter and other international and European instruments to recognise and ensure the right to equal opportunities and equal pay for women and men for equal work or work of equal value, **the gender pay gap still persists today**. The available statistics reveal both downward and upward trends in gender pay gap indicators in European States as well as **insufficient results of States' efforts to ensure a balanced representation of women in decision-making positions.** “

(from the ECSR's decisions on UWE collective complaints)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

University Women of Europe (UWE) v. Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden, Collective Complaints Nos. 124-138/2016, Decisions on the merits 5./6.12.2019

UWE ALEGATIONS (SUMMARY):

- ▶ gender pay gap
- ▶ under-representation of women in decision-making positions within private companies

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ▶ 15 collective complaints, alleging violations of the European Social Charter, a Council of Europe's human rights instrument,
- ▶ lodged by the University Women of Europe (UWE) - international non-governmental organisation
- ▶ against all 15 States which have accepted the collective complaints procedure
- ▶ Decisions on the merits became public on 29.6.2020

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

LIST OF DECISIONS:

all accessible in the European Social Charter HUDOC Database at

<https://hudoc.esc.coe.int/> and

at <https://www.coe.int/en/web/european-social-charter/processed-complaints>

- ▶ University Women of Europe (UWE) v. Belgium, Complaint No. 124/2016, Decision on the merits of 6 December 2019
- ▶ No. 125/2016 - Bulgaria (6.12.2019)
- ▶ No. 126/2016 - Croatia (5.12.2019)
- ▶ No. 127/2016 - Cyprus (5.12.2019)
- ▶ No. 128/2016 - Czech Republic (5.12.2019)
- ▶ No. 129/2016 - Finland (5.12.2019)
- ▶ No. 130/2016 - France (5.12.2019)
- ▶ No. 131/2016 - Greece (5.12.2019)
- ▶ No. 132/2016 - Ireland (5.12.2019)
- ▶ No. 133/2016 - Italy (6.12.2019)
- ▶ No. 134/2016 - Netherlands (6.12.2019)
- ▶ No. 135/2016 - Norway (5.12.2019)
- ▶ No. 136/2016 - Portugal (5.12.2019)
- ▶ No. 137/2016 - Slovenia (5.12.2019)
- ▶ No. 138/2016 - Sweden (6.12.2019)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

RELEVANT PROVISIONS OF THE EUROPEAN SOCIAL CHARTER:

- ▶ Articles 4§3 and 20 (or Article 1 of the 1988 Additional Protocol)

→ Right to equal pay, equal opportunities and treatment: 4§3 and 20.c (1.c of the 1988 AP)

→ Right to equal opportunities and equal treatment in employment and occupation, more specifically in the field of career development, including promotion: 20.d (1.d of the 1988 AP)

! obligation of the States to recognise and enforce the right, and to promote its actual realisation in practice

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

Article 4 - The right to a fair remuneration

With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

...

3 to recognise the right of men and women workers to equal pay for work of equal value;

...

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

Article 20 -The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex

With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

...

c terms of employment and working conditions, including remuneration;

d career development, including promotion.

(Article 20 = Article 1 of the 1988 Additional Protocol)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

→ a „fresh look“ at the provisions of the Charter with a view to analysing and clarifying the obligations arising from Articles 4§3 and 20

... *the Charter is a living instrument*

... provisions of the Charter must be interpreted in a *dynamic manner* having regard to *present day requirements*...

ECSR, Preliminary considerations (for example, UWE v. Belgium, paras. 113, 114)

→ WHAT ARE THE REQUIREMENTS STEMMING FROM ARTICLES 4§3 and 20 OF THE CHARTER ?

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

Structure of the ECSR assessment

Preliminary considerations (for ex. Belgium, par. 115)

- ▶ (a) assessment of UWE's allegations concerning the respect of the right to equal pay for equal work or work of equal value FROM TWO ANGLES:
 - ❖ Recognition and enforcement of the right to equal pay (Art 4§3, 20.c)
 - ❖ Recognition of the right to equal pay in legislation
 - ❖ Ensuring the assess to effective remedies
 - ❖ Ensuring pay transparency and enabling job comparision
 - ❖ Maintaining effective equality bodies and other relevant institutions
 - ❖ Obligation of the State to adopt measures to promote the right to equal pay (Art 20.c)
 - ❖ Collection of reliable, standardised data → measuring gender pay gap
 - ❖ Adoption of measures to promote equal opp. through gender mainstreaming
- ▶ (b) assessment of the issues in relation to the representation of women in decision-making positions within private companies under Art 20.d

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

„The right of workers to a fair remuneration is *at the heart* of the Charter...
... One of the *constituent elements of fair remuneration* is the right of women and men to equal pay for equal work or work of equal value. ...“

„ ... Already in the 1961 Charter, under Article 4§3, the States Parties undertook to recognise the right to equal pay, thus going beyond mere promotion of the principle and conferring an *absolute character* on this provision (Conclusions II (1971)). “

„All the States Parties to the Charter having accepted Articles 4§3 and/or 20 are aware that this *right has to be practical and effective, and not merely theoretical or illusory* (International Commission of Jurists (ICJ) against Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32).“

ECSR, Preliminary considerations (for ex. Belgium, paras. 105, 106, 108)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

„ ... *gender pay gap indicators do not measure discrimination as such, rather they reflect a combination of differences in the average pay of women and men*. The unadjusted gender pay gap, for example, covers both possible discrimination between men and women (one component of the “unexplained” pay gap) and the differences in the average characteristics of male and female workers (the “explained” pay gap). Differences in the average characteristics result from many factors, such as the concentration of one sex in certain economic activities (sectoral gender segregation) or the concentration of one sex in certain occupations (occupational gender segregation), including the fact that too few women occupy the better paid decision-making positions (vertical segregation). “

ECSR, Preliminary considerations (for ex. Belgium, par. 112)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ❖ Recognition and enforcement of the right to equal pay (Art 4§3, 20.c)
 - ❖ **Recognition of the right to equal pay in legislation**
 - ❖ Ensuring the access to effective remedies
 - ❖ Ensuring pay transparency and enabling job comparison
 - ❖ Maintaining effective equality bodies and other relevant institutions

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ▶ expressly provided for in legislation
- ▶ equal work, work of equal value
- ▶ must cover all elements of pay
- ▶ no direct or indirect discrimination

„The principle of equal pay precludes unequal pay irrespective of the mechanism that produces such inequality. The source of discriminatory pay may be the law, collective agreements, individual employment contracts, internal laws of an employer.“

(for ex. Belgium, paras. 139-141)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ❖ Recognition and enforcement of the right to equal pay (Art 4§3, 20.c)
 - ❖ Recognition of the right to equal pay in legislation
 - ❖ **Ensuring the access to effective remedies**
 - ❖ Ensuring pay transparency and enabling job comparison
 - ❖ Maintaining effective equality bodies and other relevant institutions

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ▶ appropriate and effective remedies in the event of alleged pay discrimination
- ▶ adequate compensation
- ▶ burden of proof
- ▶ retaliatory dismissal

„ ... Workers who claim that they have suffered discrimination must be able to take their case to court. Effective access to courts must be guaranteed for victims of pay discrimination. Therefore, proceedings should be affordable and timely.“

„ ... ceiling on compensation that may preclude damages from being commensurate with the loss suffered and from being sufficiently dissuasive is contrary to the Charter.“

(for ex. Belgium, paras. 145-148)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ❖ Recognition and enforcement of the right to equal pay (Art 4§3, 20.c)
 - ❖ Recognition of the right to equal pay in legislation
 - ❖ Ensuring the access to effective remedies
 - ❖ **Ensuring pay transparency and enabling job comparison**
 - ❖ Maintaining effective equality bodies and other relevant institutions

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ▶ pay transparency instrumental
- ▶ job classification and objective job evaluation systems
- ▶ *evaluation criteria must be gender-neutral*
- ▶ job comparison - what to compare and how?

„ ... pay transparency is instrumental in the effective application ... [it] contributes to identifying gender bias and discrimination and it facilitates the taking of corrective action ...“

„ ... the possibility of making job comparisons is essential to ensuring equal pay. Lack of information on comparable jobs and pay levels could render it extremely difficult for a potential victim of pay discrimination to bring a case to court. ...“

(for ex. Belgium, paras. 154-158)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ❖ Recognition and enforcement of the right to equal pay (Art 4§3, 20.c)
 - ❖ Recognition of the right to equal pay in legislation
 - ❖ Ensuring the access to effective remedies
 - ❖ Ensuring pay transparency and enabling job comparison
 - ❖ **Maintaining effective equality bodies and other relevant institutions**

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ▶ specialised equality bodies, other institutions
- ▶ what is the mandate of such equality bodies?
- ▶ sufficient resources necessary

„ ... in addition to having a clear and comprehensive mandate, these specialised equality bodies must be equipped with the necessary human and financial resources as well as infrastructure to ensure that they can effectively combat and eliminate pay discrimination.“

(for ex. Belgium, paras. 167-170)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

❖ Obligation of the State to adopt measures to promote the right to equal pay (Art 20.c)

- ❖ Collection of reliable, standardised data → measuring gender pay gap
- ❖ Adoption of measures to promote equal opp. through gender mainstreaming

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ▶ collection of high-quality pay statistics broken down by gender, statistics on the number and type of pay discrimination cases
- ▶ collect data, analyse the causes, adopt appropriate measures, monitor impact, evaluate measures, adjust the policies
- ▶ measurable progress
- ▶ gender mainstreaming

„ ... States are under an obligation to analyse the causes of the gender pay gap with a view to designing effective policies aimed at reducing it. ...“

„ ... States Parties must take measures to actively promote equal opportunities. Besides the fact that legislation must not prevent the adoption of positive measures or positive Action, the States are required to take specific steps aimed at removing *de facto* inequalities that affect women's and men's chances with regard to equal pay.“

(for ex. Belgium, paras. 202-208)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ▶ (b) assessment of the issues in relation to the representation of women in decision-making positions within private companies under Art 20.d

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

- ▶ positive obligations on States to tackle vertical segregation
- ▶ balanced representation of women and men in decision-making positions
- ▶ binding legislative measures vs. non-binding measures
- ▶ PACE Resolution 1715(2010) - the proportion of women on management boards of companies should be at least 40%
- ▶ measurable progress

(for ex. Belgium, paras. 218-220)

B. Kresal: Recent UWE decisions of the European Committee of Social Rights

THANK YOU FOR YOUR ATTENTION !
Questions, comments...