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EMPLOYER'S LIABILITY FOR DAMAGES IN DISCRIMINATION CASES

Summary

The paper describes practical problems relating to normalization of discrimination in labour law. It is about the role of compensation for discrimination, regardless of whether one takes into account either a compensatory or repressive role. The legal procedures with respect to employer's liability for discrimination are unclear, that is why there is a number of practical problems. The author has attempted to answer the question why, depending on the amount of compensation required, a damage have to or does not have to occur. The paper also refers to the issue of sharing the burden of proof in case of discrimination.

Key words: employer, compensation, damage, discrimination, burden of proof.

Introduction

Article 18(3d) of Labour Code¹ is one of the few regulations which provide employer's unlimited liability for damages (property). It has been repeatedly amended. All the changes were aimed at adapting its content to international regulations. The literature emphasizes that the principle of non-discrimination is one of the most secure principles among other labour law principles².

Initially, the legislator limited the amount of compensation, which an employee was entitled due to unequal treatment, up to an amount of equivalent of the maximum of six remunerations. In the original version the legal norm, resulting from the above provision, regulated an unequal treatment of men and women in employment³. Currently the provision

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¹The Act of June 26, 1974 - Labor Code, Journal of laws 2016, item 1666.

²P. Czarnecki, *Legal nature of compensation for discrimination in employment*, PiZS 2/2012, p. 17.

³As can be read in the justification for the amendment to Labour Code "In the field of

states that a person⁴, against whom an employer violated the principle of equal treatment in employment, has the right to compensation based on separate regulations and not lower than the minimum remuneration. Thus, as a result of the changes, the number of persons who can claim damages based on that regulation was expanded.

Simplifying, it can be stated that due to the implemented amendments a flat-rate quasi-compensation, described in the original version of the provision, took on the character of compensation *sensu stricto*. It is similar to the nature of compensation in a civilian sense. However such simplification is unjustified which is indicated by judicature⁵ and doctrine⁶. They point out the fact that the legislator did not specify the unambiguous nature of the above-mentioned compensation. Such a legal status, undoubtedly, makes the process of decoding of legal norms, contained in this provision, difficult. As a consequence, one can observe, from time to time, heated discussions on code-based regulations of discrimination.

The literature emphasizes that it is really difficult to define social goals of the above regulation.⁷ Discriminatory actions are generally described as behaviors aimed at social exclusion⁸. It introduces a socially negative aspect. This element is the basis for the broadly understood anti-discrimination solutions⁹. Therefore, the argument, according to which

equal treatment of men and women in employment: (...) grants an employee, who has been harmed as a result of violation of the principle of equal treatment of women and men by an employer, the right to compensation in the amount not lower than the lowest remuneration for work and no more than six times remuneration (Article 18-3d)".

⁴According to the well-established view, the injured person may not only be an employee, but also a former employee and an applicant for employment. See: T. Liszcz, *Employer's compensation liability towards an employee*. 2, PiZS ,1/2009, p. 2; P. Czarnecki, op. cit., p. 18.

⁵Cf. Judgment of the Supreme Court of 10 July 2014, II PK 256/13, LEX No. 1515454.

⁶A. Sobczyk, *Labor law in the light of Constitution of the Republic of Poland. Volume II. Selected problems and institutions of labour law and constitutional human rights and freedoms*, Warsaw 2013, p. 107.

⁷Ibidem, p. 108.

⁸M. Lekston, *Differentiation of labor law*, in: A. Świątkowski (ed.), *Studies in the field of labour law and social policy*, Krakow 2013, p. 60. See also A. Sobczyk, op. cit., p. 112

⁹A. Sobczyk draws attention to variety of anti-discrimination solutions. He emphasizes that "eliminating discrimination in labor law is only an element of a broader prohibition of discrimination in social life". See. A. Sobczyk, op. cit., p. 124.

the original goal of the principle of non-discrimination is to counteract this phenomenon and the secondary one is to prevent its effects¹⁰, seems justified.

Recently, the literature has also pointed out that discrimination may cause social exclusion of a person, because this phenomenon violates broadly understood personal freedom. Thus, the protection of human dignity becomes the basic assumption. The protection is understood both as full participation in social life by using social values that employment determines and an employee's freedom from fear, as well¹¹.

In practice, the legal regulation, resulting from Article 18(3d) of Labour Code, causes serious interpretation difficulties. It is not entirely clear which legal procedures on liability determine an employer's obligation for compensation. Secondly, there are discrepancies regarding the purpose of liability for damages. In the doctrine there is no uniformity in the assertion whether a compensation in question is intended to compensate for damages, or its primary goal is to implement a preventive and repressive functions.

Certainly, premises of liability for damages in this regard also require analysis. I think, that special attention should be paid to the notion of damage and its significance in terms liability. The second important issue is distribution of burden of proof. In practice, this issue is a reason for many controversial opinions.

1. Legal procedures on liability for damages for discrimination

It is justified that analyzing an employing entity's liability for damages (indemnity) for discrimination of we should pay attention to legal procedures on liability which determine it. Supreme Court stressed the special and complex nature of this compensation in its justification to Decisions of May 20, 2014. I PZP 1/14. In Its opinion, this liability is explicitly neither contractual nor tort liability¹². *Prima facie* it seems, that in practice, this liability could be based on the both law basics.

Talking about a contractual liability, it should be assumed, that it appears as a secondary element whilst establishing an employment

¹⁰ Ibidem, p. 112.

¹¹ A. Sobczyk, *Freedom of work and power*, Warsaw 2015, p. 159 and next.

¹² See: Order of the Supreme Court of 20 May 2014, I PZP 1/14, LEX No. 1515452.

relationship. Therefore, an application of these legal procedures on liability should not cause major difficulties when discrimination is committed by an employer. However, it should be remembered that according to the art. 471 of Civil Code, a debtor¹³, in this case, as an employer may be released from liability if non-performance or improper performance of duties result from circumstances which they are not liable for.

Thus, we can pose a question what happens when a perpetrator of discrimination is not the employer but another employee. *Prima facie*, in this case, it would be difficult to base an employer's liability on *ex contractu* basis. It should be noted, however, that in the literature it is assumed that an employer, as an organizer and beneficiary of work of human hands, is responsible for performances of the entire plant¹⁴. I think, that this assumption may justify contractual liability of an employing entity in the above scope.

In my opinion, it is also reasonable to consider employers' liability for discrimination in *ex delicto* legal procedures. The principle of risk or guilt should be taken into account as the first one. In this case, the principle of risk included in the article 430 of Civil Code seems to be suitable. It regulates liability for damages caused by a subordinate. According to its content, "whoever entrusts performances to a person, who is subjected to his or her direction and is obliged to follow his or her instructions, is responsible for a damage caused by that person who performs tasks entrusted to them."

Undoubtedly, it is liability for results. Therefore, the fact of discrimination justifies an employer's liability. It should be noted, that the principle of liability resulting from this article, in some way, is closer to the principle of guilt expressed in the art. 415 of C.C¹⁵. Referring to its content, an employee's liability can be proved, when the guilt of an employee, the perpetrator of discriminatory actions, is demonstrated¹⁶. This obligation causes, that

¹³ The Act of 23 April 1964, - Civil Code, Journal of laws 2017, item 459.

¹⁴ See: P. Prusinowski, [in:] Z. Góral (ed.) *Contractual Employment Basis*, Warsaw 2012, p. 52.

¹⁵ A. Rembéliński, *Civil liability for damage caused by the subordinate*, Warsaw 1971, p. 44.

¹⁶ See G. Bieniek (ed.) *Commentary on the Civil Code. Third book of commitment, Volume I*, Warsaw 2003, p. 344.

at this stage, a supervisor is not treated as the main accused.¹⁷

It should be noted, that according to the literal meaning of the art. 430 of C.C., a superior's liability can only be proved if a subordinate would discriminate other worker only when performing tasks entrusted to them under the employment relationship and not only during their performances¹⁸. I think that it cannot be difficult to decide that discrimination can take place within the scope of work activities. In my opinion, it always appears along with work processes.

Looking for legal procedures on liability describing an employer's liability for discrimination, it seems justified to pay attention to the principle due to which a person entrusting actions to someone else is liable for their actions. It is regulated in Article 429 of C.C. which says that "a person, who entrusts the execution of activities to another person, is responsible for a damage caused by a perpetrator during a performance of a task entrusted to them, unless he or she is not guilty in the choice or he or she entrusts performances to himself/herself, an agency or company which, in the field of their professional activities, carry out such activities. "

A certain difficulty in interpretation lies in the fact that an employer is responsible for their own fault in the choice (*culpa in eligendo*)¹⁹. Certainly, at the moment of employment activities an employer cannot know that an employee may commit discrimination.

It should be noted, that according to the literal wording of the provision its scope is similar to the art. 430 of C.C., and limited to damages caused during performing entrusted activities, and not to damages done alongside those activities. Nevertheless, I think that the above limitation does not result in the exclusion of possibilities of applying legal norms, resulting from these articles regarding employer's liability for damages for discrimination. In the labour law literature, it is noted that "specificity of an employment relationship justifies an application of solutions different from those adopted in the law of obligations (...)." ²⁰ Therefore, wider interpretation of Civil Law should be considered as justified. It is caused by the specificity of this branch of

¹⁷ A. Rembéliński, op. cit., p. 44.

¹⁸ J. Kuźmicka-Sulikowska, *Principles of tort liability in the light of new trends in Polish legislation*, Warsaw 2011, p. 62.

¹⁹ See: G. Bieńka (ed.), Op. cit., p. 337.

²⁰ Ł. Pisarczyk, *Employer's risk*, Warsaw 2008, p.210.

law. In my opinion liability principles arising from these two articles apply fully when discrimination occurs despite the fact that it cannot relate strictly to work processes.

In the literature of the 1970s, A. Rembieliński distinguished the principle of "clean risk"²¹. In this case, a debtor's liability is not based on the premise of guilt and unlawfulness.²² A proof in the absence of guilt (exculpation) does not release from liability.²³ It seems to me, that this principle could also determine an employer's liability for discrimination. In this case, employer's liability would be almost absolute and the freedom from it could only occur if one of the exoneration criteria is met.

A. Sobczyk has a different opinion on it. He emphasizes that an employer's liability, in this regard, is solely based on the principle of guilt, which results from the public-law nature of discrimination prohibition. He also points out that "(...) the Code introduces high standards of diligence for an employer. The fault does not occur only in a case in which, despite efforts made, discrimination took place. The lack of counteracting discrimination (even culpable) does not fit the content of the art. 18,3d of L.C. It only justifies the situation in which an employment contract is terminated due to the article art. 55 § 11 of L.C."²⁴

The discrimination prohibition applies not only to employees but refers to a process of recruitment and to an access to labour market services and instruments, as well²⁵. The opinion, expressed by A. Rycak, seems to be acceptable. He thinks that discrimination, in the field of access to employment, is also a failure to exercise the right to work expressed in the art. 10 of L.C.²⁶ Thus, a candidate for an employee may also be a victim of discrimination. So it is even more difficult to answer unequivocally the question about the basis of employer's liability for damages (property) for discrimination.

²¹ A. Rembieliński, op. cit., p. 42. See also: J. Kuźmicka-Sulikowska, op. cit., p. 163.

²² Z. Banaszczyk, *Responsibility for damage caused in the exercise of public authority*, Warsaw 2015, p. 28

²³ M. Kaliński, *Damage on property and its repair*, Warsaw 2014, p. 123.

²⁴ A. Sobczyk, *Law...*, op. cit., p. 117.

²⁵ A. Ludera-Ruszel, *Discrimination for disability in the field of access to employment*, PiZS 8/2014, p. 25; Lt. A. Ludera-Ruszel, *Discrimination on the grounds of sex in the light of EU and Polish labour law - remarks on the principle of equal pay*, PiZS 2/2015, p. 24; M. Tomaszewska, [i:] J. Stelińska (ed.), *Labor Law*, Warsaw 2013, p. 35.

²⁶ A. Rycak, *Universal protection of durability of employment relationship*, Warsaw 2013, p. 159.

In my opinion, there is not a rational justification for differentiating grounds of an employer's liability because of who and when committed discrimination. The opposite assumption would mean that an employer would be liable for their own acts on the basis of principle of liability *ex contractu* or on the basis of *ex delicto* liability on the principle of guilt and, finally, for unlawful acts of their employees on the basis of the tort 'risk principle' or 'clean risk'. Following this assumption we can notice that party's positions in a trial would be different, especially in the area of evidence duty.

Therefore, the *de lege ferenda* postulate seems legitimate for judicature to develop a unified opinion concerning employer's liability law procedures in this regard. Certainly, the existing law regulations are not very transparent and does not support the implementation of the principle of legal certainty.

2. Conditions of liability for damages

It is generally accepted that liability for discrimination²⁷ is determined by one positive premise. It is itself, broadly understood as a discrimination²⁸. Sometimes it is defined as a qualified form of unequal treatment²⁹. A. Sobczyk thinks, that such a formulation, however, is the result of a misinterpretation of the provisions on discrimination and unequal treatment.³⁰ The author points that discrimination at the stage of employment or termination of an employment contract is a violation of

²⁷ Due to the marginal character of the concept of "discrimination", in this paper, I do not introduce a full analysis of this issue. I also do not try to distinguish direct and indirect discrimination, as well as harassment and sexual harassment. These topics go significantly beyond the mainstream of discussion. For the purposes of the article, all these issues are mixed up in the concept of discrimination.

²⁸ Lt. L. Mitrus, [in:] K.W. Baran (ed.), *Labour Law*, Kraków 2005, p. 91; M. Głogowska, *Consequences of the violation of the principle of equal pay regardless of sex in Polish labor law* [in:] A. Świątkowski, op. cit., Krakow 2013, p.90. A different opinion has E. Maniewska, who also considers unlawfulness to the premises of liability in the subject matter. See: E. Maniewska, Deadline and conditions for claiming compensation for discriminatory, reason for termination of an employment contract, *PiZS* 7/2013, p.39.

²⁹ See: Judgment of Supreme Court of December 3, 2009, II PK 148/09, LEX No. 1108511.

³⁰ A. Sobczyk, *Law...*, op. cit., s. 108.

freedom of employment leading to violation of freedom in general.³¹ In such an approach, equality issues becomes less important while an issue on freedom, limited by forbidden reasons, to choose or maintain a job becomes more important.³²

The catalog of discriminatory reasons has been extended by doctrine and judicature.³³ In general, if we want to talk about discrimination, we should observe unjustified, and therefore not aimed at equalizing employee`s status in work processes, differentiation of employees' situation due to their personal characteristics³⁴. The differentiation of employees` position in order to equalize their situation does not constitute discrimination³⁵.

Talking about discrimination a damage is not a premise of liability³⁶. Nevertheless, it affects the scope of liability for damages.³⁷ K. Jaśkowski pointed out that determining an amount of compensation, the amount of property damage is an important element to be taken into account, but it

³¹Cf. A Sobczyk, *Freedom ...*, op. cit., p. 162.

³²Ibid, p. 154.

³³ G. Jędrejek, *Investigation of claims related to mobbing, discrimination and harassment*, Warsaw 2017, p.

³⁴ Despite the fact that according to Labour Code one of the manifestations of discrimination of an employee is the differentiation of their situation due to age. Supreme Court observes that the termination of an employment relationship with an employee due to their retirement age is not sufficient to recognize that an employee was discriminated against. Coimparte e.g: Judgments: SN of 6 February 2014, I PK 239/13, LEX No. 1646079; Th□ Supr□m□ Court of Jun□ 19, 2012, II PK 265/11, LEX No. 1250568; SN of 14 F□bruary 2013, III PK 31/12, LEX No. 1380964. Th□ord□r of th□ Supreme Court of July 18, 2003, I PK 210/03, LEX No. 108520. See also the arguments and literature cited by D. Dzienisiuk, *Protection of the permanence of an employment relationship and reaching the retirement age*, by G. Goździewicz (ed.), *Protection of the permanence of an employment relationship in the social market economy*, Warsaw 2010, pp. 353 and n.

³⁵ Judgment of Supreme Court of 9 May 2014, I PK 276/13, LEX 1483571. See: Judgments: SN of 3 June 2014, III PK 126/13, LEX 1487089. also, for example, L. Florek, *Labour Law*, War□aw 2011, p. 19; M. L□k□ton, *Differentiation of labour law*, by: A. Świątkowski (ed.), Op. cit., Krakow 2013, p. 63, A. Sobczyk, *Freedom*, op. cit., pp. 154-155.

³⁶ S□□ E. Mani□w□ka, op. cit., p.39; E. Mani□w□ka, *Claims for violation of the principle of equal treatment*, PiSZ 11/2010, p. 39.

³⁷ See: K. Jaśkowski, E. Maniewska, *Labour Code. Comment. Volume I*, Cracow 2006, p. 99.

is not the only determinant of the amount of damage.³⁸

A different opinion is presented by P. Czarnecki, who thinks that amount of compensation awarded to a victim always relates to damages. He states that a compensation in the minimum amount, in practice, corresponds to alleged damages.³⁹ I think that a damage always occurs, even in the form of harm, when somebody discriminates other person. Nevertheless, a generalization, that a damage must always occur when we talk about compensation, is a simple adaptation of compensation solutions, based on Civil Law, to the ground of Labour Law. Making such a comparison we should consider that Civil Law does not describe the concept of an alleged damage, as damages are awarded within the limits of proven damage.

I think that this assumption does not change anything. We can cite a situation in which an employee claims compensation within limits of the minimum remuneration, and it does not matter whether there is no damage or it is an alleged damage, in both cases the effect is the same because a court does not investigate the existence of damage. The legislator imposes on courts the obligation to award compensation as a result of an employee's demonstration of evidence that discrimination has taken place.

In my opinion, this element stresses the difference between the meaning of a damage in Labour Law and its meaning in Civil Law.

3. Burden of proof

An employee, claiming discrimination, must demonstrate⁴⁰, make it plausible that discrimination really took place. Thus, an employee's general statement that they were treated worse than other employees is not enough. They must indicate what worse treatment was and because of

³⁸ K. Jaśkowski, *A few remarks on compensation for discrimination against an employee* (Article 183d of the Code), [in:] B. Cudowski, J. Iwluski, *On current issues of labor law and social insurance. Jubilee book of Professor Walerian Sanetra*, Białystok 2013, p. 174.

³⁹ P. Czarnecki, *op. cit.*, p. 20.

⁴⁰ It seems that the phrase "demonstrate" used by judicature in the field of labour law is not identical with the concept of "prove". Thus, an employee is not obliged to prove discrimination, only to demonstrate (indicate) circumstances that make discrimination possible.

what feature they should be legally protected⁴¹.

When an aggrieved employee fulfills the obligation to substantiate the fact of discrimination, burden of proof is transferred to an employer⁴². A. Sobczyk does not agree with this opinion. According to him there is not any transfer of burden of proof to an employing party but it only confirms the principle that "in the case of a breach of public-law obligations, proving the correctness of acting in accordance with the public model is an obligation to those who must comply with this pattern"⁴³.

An employer may be released from liability for discrimination if they prove that any non-objective actions have not been applied to an employee. This is their obligation, regardless of whether discrimination was committed either by him or her, or by their subordinates⁴⁴.

If circumstances of a case show that a victim was subjected to discriminatory actions a court is entitled to award damages to an employee in the amount of the minimum remuneration for work. A court is not obliged to investigate whether a worker suffered damage or not as a result of discriminatory actions⁴⁵.

A situation changes somewhat, when adverse effects for a victim exceed the value of the minimum remuneration for work. If a claim is extended by an employee beyond the amount of statutory damage, a victim must prove that a damage is bigger than the minimum remuneration for work⁴⁶. I think it is reasonable to claim, that the principle relating to changes in burden of proof should be applied due to existing discriminatory actions. Therefore, only a damage must be proven. Remaining elements should still only be shown by a discriminated person. There are no objective reasons to put an employee in a worse proof situation during a trial only because they submit a claim exceeding the amount of one month's remuneration⁴⁷.

⁴¹ Stradomski, *Mobbing and discrimination in the workplace*, Warsaw 2013, p. 30.

⁴² Judgment of the Supreme Court of October 2, 2012, II PK 82/12, LEX No. 1365774. also T. Liszcz, *op. cit.*, pp. 2-3.

⁴³ See: A. Sobczyk, *Law...*, *op. cit.*, p. 116.

⁴⁴ P. Czarnecki, *op. cit.*, p.18.

⁴⁵ Compare: Judgment of the Supreme Court of February 14, 2013, III PK 31/12, LEX No. 1380964. also T. Liszcz, *op. cit.*, p. 3.

⁴⁶ Compare: Judgment of the Supreme Court of January 7, 2009, III PK 43/08, LEX No. 584928. also E. Maniewska, *Claims ...*, *op. cit.*, p.39.

⁴⁷ The above statement results from the content of the art. 183b § 1of L.C. This

I think that this assumption would be accepted both by supporters of the civil and public-law character of the above compensation.

4. The nature of compensation for discrimination

The nature of compensation for discrimination is not clear⁴⁸. The literature mentions that this is not compensation under Civil Law⁴⁹. Liszcz T. noted that compensation, depending on the situation, has different functions such as: compensation, redress or a specific civil penalty⁵⁰.

Both jurisdiction and the doctrine emphasize that compensation adjudicated, on the basis of the art. 18,3d of L.C., should cover compensation of damages to property and non-property goods⁵¹. Such a statement is significantly different from the axiology of Civil Law which assumes, that a court may award a victim an adequate sum of money as compensation, but only in *expressis verbis* cases described in the Act. Therefore, it is justified to claim that, due to Civil Law, it is a rule to compensate property damages and an exception to compensate non-pecuniary damages⁵².

It is not entirely clear whether the compensation mentioned in Article 183D of L.C. should firstly compensate property damages or non-property damages. In the third judgment of PK 43/08, Supreme Court expressed the opinion that the compensation described in this article "(...) includes compensation of damages to an employee`s property and non-property goods. If discrimination of an employee does not cause damage to a property or a damage is lower than the minimum remuneration, an employee has the right to a compensation (which is only compensation or

provision does not give reasons to a different treatment of employees depending on whether they claim compensation in a minimum amount or in a higher one. If an employee demands compensation exceeding one month's remuneration, a damage and causal relationship must be proved on the basis of Civil Law, but the fact of discrimination or non-discrimination occurrence remains unchanged.

⁴⁸ See: G. Jędrejek, *op. cit.*, p. 130.

⁴⁹ See: E. Maniewska, *Claims ...*, *op. cit.*, p. 39

⁵⁰ T. Liszcz, *op. cit.*, p. 2.

⁵¹ Judgments: Supreme Court of July 10, 2014, II PK 256/13, LEX No. 1515454; The Supreme Court of December 3, 2009, II PK 142/09, LEX No. 823871; The Supreme Court of January 7, 2009, III PK 43/08, LEX No. 584928. also by P. Czarnecki, *op. cit.*, p. 18k.

⁵² See: G. Bieńka (ed.), *Op. cit.*, p. 429.

partly also a compensation *sensu stricto*)." ⁵³ According to the above judicature the primary role of this compensation is a compensation to property damage. However, if a damage has not occurred or is lower than the amount of the statutory damages, then in this case, a certain legal fiction should be adopted, according to which a compensation amount exceeding an amount of a damage is a pecuniary compensation.

Therefore, the compensation in this case is of a secondary nature and should be awarded at least in the amount of statutory compensation. This notion has been criticized in the literature. P. Czarnecki draws attention to the fact that the above concept goes beyond the content of the art. 18(3d) of L.C. The author also states that it is inconsistent with the logic, "according to which an amount of non-material prejudice caused by discrimination is inversely proportional to an amount of material damage."⁵⁴ A. Sobczyk also criticizes the above-mentioned Supreme Court's opinion. The author considers it to be a complete misunderstanding which is a consequence of the confusion of concepts.⁵⁵

It should be noted that there is also a different view in judiciary. According to it, a compensation is primarily intended to compensate for a non-pecuniary damage.⁵⁶ This point of view is also criticized by A. Sobczyk, who emphasizes the public-law nature of this benefit. According to him, Supreme Court incorrectly accepted the interpretation of a compensation, described in the article 18,3d of L.C., which aims to compensate for damages to property and non-property goods, because a sanction is obviously not a compensation.⁵⁷ The author claims that a sanction that is only a compensation (redress) is not a sanction.⁵⁸

The public-law nature of this compensation is often mentioned in jurisprudence. Supreme Court in the justification of the judgment of 3 April 2008, II PK 286/07, stated that this compensation has features of a sanction for the violation of the principle of an equal treatment.⁵⁹ Summarizing the dispute on the nature of the compensation in question,

⁵³ Judgment of Supreme Court of January 7, 2009, III PK 43/08, LEX No. 584928.

⁵⁴ P. Czarnecki, *op. cit.*, p. 20.

⁵⁵ See: A. Sobczyk, *Law...*, *op. cit.*, p. 115.

⁵⁶ See: e.g. Judgments: SN of 10 July 2014, II PK 256/13, LEX No. 1515454; SN of February 3, 2009, I PK 156/08, LEX No. 496999; The Supreme Court of April 3, 2008, II PK 286/07, LEX No. 511691.

⁵⁷ A. Sobczyk, *Law...*, *op. cit.*, s. 115.

⁵⁸ There.

⁵⁹ See: Judgment of Supreme Court of 3 April 2008, II PK 286/07, LEX No. 511691.

some representatives of the doctrine state that punitive liability would be more appropriate than compensation.⁶⁰

5. Effective, proportionate and dissuasive compensation

Judicature emphasizes the fact that the compensation in question should be effective, proportionate and dissuasive.⁶¹ The above opinion is the result of a situation in which Polish legal anti-discrimination solutions become similar to European ones.⁶² Due to Article 15 of Council Directive 2000/43 / EC of 29 June 2000, which implements the principle of equal treatment of a person regardless their racial or ethnic origin,⁶³ and Article 17 Council Directive 2000/78 / EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation,⁶⁴ sanctions that may include payment of compensation to a victim of discrimination, must be effective, proportionate and painful.

I think that the analysis of the current legal situation allows us to come up with a thesis that courts cannot fully implement the legal norm resulting from Article 15 and 17 of the above-mentioned directives. The arguments in favor of this notion can be found in the Code of Civil Procedure.⁶⁵ According to the opinion expressed by Supreme Court "in a court case for compensation for discrimination, a premise for awarding damages determines discrimination in employment(...)." ⁶⁶ In the further part of this decision, the Court expressed Its opinion according to which determining the value of a subject of a dispute we should apply the article 19 § 1 of Code of Civil Procedure. This provision states that in monetary claims cases, reported in exchange for another item, the monetary amount stated is a value of the subject of a dispute. Therefore, an aggrieved employee is obliged to indicate a value of a subject of a dispute at the early stage of presenting a claim against an employer.

If, however, an employed victim, as the subject of a claim in

⁶⁰ P. Czarnecki, *op. cit.*, p. 23.

⁶¹ Judgment of Supreme Court of June 6, 2012, III PK 81/11, LEX No. 1318418.

⁶² Z. Góral, *About the Code Catalog of Principles of Individual Labor Law*, Warsaw 2011, p.

⁶³ Journal. A. UE.L.2000.180.22

⁶⁴ Journal. A. UE.L. 2000.303.16.

⁶⁵ The Act of November 17, 1964, - Code of Civil Procedure, Dz.U.2016.1822.

⁶⁶ Decision of Supreme Court of 29 October 2014, I PZ 24/14, LEX No. 1544221.

a lawsuit, would indicate the amount of money as an equivalent of a precisely calculated damage to a property and a court would decide that the amount would not be enough to perform the three functions of compensation, *de facto*, nothing else can be done under the current legal situation. According to the art. 321 § 1 and 4771 of Code of Civil Procedure, a court cannot decide more than a demand.⁶⁷ If a court ignore the norm described in these articles, it will violate the principle of availability and adversariality.⁶⁸ This opinion was also expressed by the legislator justifying the draft amendment to Code of Civil Procedure and some other acts indicate that the ban on going beyond the scope of a request is an inviolable and strictly observed principle in all legal systems. It also co-operates with individualist essence of Civil Law based on the principle of freedom and autonomy of private rights.⁶⁹

Prior to the entry into force of the Amending Act of July 2, 2004. about the change of the act of Code of Civil Procedure and some other acts,⁷⁰ the situation was completely different. By virtue of § 1 art. 321 of C.C.P., which has not been changed by the amendment, "a court cannot decide on the subject that was not covered by a demand, nor award over a demand." However, as a result of the above amendment the § 2 of the analyzed article was repealed. According to its wording, "the provision of the preceding paragraph is not applied in cases relating to maintenance claims and for compensation for damages caused by an unlawful act. In such cases, a court decides on claims arising from facts cited by a plaintiff, also, when a claim was not covered by a demand or when a claim was submitted in a size smaller than the agreed compensation due to court proceedings. It does not raise the slightest doubt that discrimination is a labour law tort.

I think that the repealed provision gave courts the opportunity to issue judgments implementing postulates resulting from the directives cited above. However, accepting the postulates contained in the

⁶⁷See: Judgment of Supreme Court of November 16, 2010, IPK 79/10, LEX No. 725007.

⁶⁸Compare. Judgment of Supreme Court of 25 June 2015, V CSK 612/14, LEX No. 1771393.

⁶⁹Justification of the draft of act on amending the act - Code of Civil Procedure and some other acts together with the draft of basic executive acts. Sejm print no. 965 from October 4, 2002. See: [http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/965/\\$file/965.PDF](http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/965/$file/965.PDF)

⁷⁰Journal A. Nr 172, item 1804.

justification to the amendment of Code of Civil Procedure, it should be assumed that the repeal of § 2 of the quoted article has its axiological bases in Civil Law.

The situation, regarding the amendment of the art. 4771 of C.C.P, is different, because § 1, 1 and 2 of this article were deleted. The current wording of the provision states that "if an employee has chosen one of their alternative claims and a claim submitted turns out to be unjustified, a court may "ex officio" take into account other alternative claim." Therefore, the provision applies only to a situation in which Labour Code gives a victim employee a choice of a claim.⁷¹ In my opinion, the current wording of the provision does not allow courts to comply with the legal norm resulting from the articles 15 and 17 of the directives mentioned above. Judicature, on its basis, cannot decide more than a demand if it thinks that a compensation awarded will not be effective, proportionate and dissuasive.

I think that the original wording of the provision gave courts such a possibility. By virtue of the § 1 of this article, a court, pronounces a verdict, can rule on claims that arise from facts cited by an employee, also, when a claim was not covered by an employee's request or when it was submitted in a size smaller than the agreed compensation due to court proceedings.

In my opinion, the arguments invoked by the legislator, that constitute the basis for the deletion of Art. 4771 § 1 of L.C., should not be accepted, This provision described a special type of proceedings concerning cases relating to labour law. The arguments, presented by the legislator, justifying the amendment of this article, axiologically refer to Civil Law not Labour Law.

Article 477 of C.C.P. was also amended.⁷² I think that the legislator by adding the second sentence in this article, according to which a chairman instructs an employee about claims arising from facts they cite, is an insufficient action. A more appropriate solution seems to be the one in which a court decides, on the base of collected evidence, what compensation would be effective, proportionate and dissuasive.

A solution, in which a victim employee already in a lawsuit is

⁷¹G. Jędrejek, *op. cit.*, p. 135.

⁷²"In proceedings initiated by an employee, summons, referring to art. 194 § 1 and § 3, to participate in a case a court may also perform ex officio. A chairman instructs an employee about claims arising from the facts he cites.

obliged to indicate what compensation will not only fulfill a compensatory function but also be effective, proportionate and dissuasive, seems to be defective for several reasons. Firstly, an employee does not act objectively. Secondly, it is difficult to decide whether allegations against employers can be confirmed.

We cannot forget that this solution is somehow irrational, because it is difficult for me to imagine a situation in which a court instructs a victim employee, that on the base of directives, that a demand, as a repression for an employer, can be extended for an abstracted amount.

Jurisdiction also expresses the opinion that Labour Court is not obliged to instruct an employee if a plaintiff explicitly requests a demand.⁷³ If an aggrieved employee demands compensation, the value of which is indicated with great accuracy in relation to a damage, a court will not instruct them about the possibility of extending this claim and such conduct is consistent with the adopted case-law.

I think that the above actions of the legislator, to some extent, make courts impossible to award compensations which should be always effective, proportionate and dissuasive. Therefore, according to Ms. E. Maniewska's opinion, "(...) if an employee suffered damage to property, and a compensation covering is not sufficiently effective, proportionate and dissuasive (especially if it would be a small amount of money), then it is necessary to award an additional amount-a compensation-in order to perform the correct functions of compensation specified in the directives"⁷⁴ moreover, it will be applicable only if a victim employee, in a deliberate or unconscious manner, has inflated an actual damage in a claim. I think that in the current legal state, in such a situation a court will be able to award damages that go beyond the actual material damage.

In my opinion *de lege ferenda*, the legislator, as soon as possible, should take appropriate measures to help judicature in implementation norms resulting from the above-mentioned directives.

Conclusions

By analyzing Article 183D of L.C. one can justify the claim that even though an employer can use the phrase "compensation" it does not decide

⁷³Judgment of Supreme Court of March 27, 2007, II PK 235/06, LEX No. 400477.

⁷⁴E. Maniewska, *Claims ...*, op. cit., p. 39.

about its civil law origin. Public and legal elements are visible in it. I think that the aim of this function is to show that compensation must be effective, proportionate and dissuasive.

In practice, one can observe a problem regarding a question to what extent a public-law objective is implemented. I think that in the absence of a damage, statutory damages not always fully meet this objective. Also, if a victim precisely indicates an amount of a damage, the public-law purpose may not be achieved by the above-mentioned compensation. In this case, it performs only a compensating function. This state of affairs is worrying. The legislator should strive to ensure that the public lawful character of this compensation is fully implemented. Courts should be able to decide over a request when they can achieve this objective only in this way.

The *de lege ferenda* postulate is also justified to make judicature unequivocally establish law procedures on employer's liability for discrimination. It is not clearly defined by the legislator, and it seems to be of great importance.

Legal acts

- [1.] Act of April 23, 1964, - Civil Code, Journal of laws 2017, item 459.
- [2.] Act of June 26, 1974. - Labour Code, Journal of laws 2016, item 1666.
- [3.] Act of November 17, 1964, - Code of Civil Procedure, Journal of laws 2016.1822.
- [4.] Act of July 2, 2004, amending the act - Code of Civil Procedure and some other acts, Journal of laws. No. 172, item 1804.
- [5.] Council Directive 2000/43 / EC of 29 June 2000, OJ.U.E.L.2000.180.22.
- [6.] Council Directive of 27 November 2000, DZ.U.U.E.L. 2000.303.16.

Jurisdiction

- [1.] Judgment of the Supreme Court of 25 June 2015, V CSK 612/14, LEX No. 1771393.
- [2.] Judgment of the Supreme Court of 9 May 2014, I PK 276/13, LEX No. 1483571.

- [3.] Judgment of the Supreme Court of 3 June 2014, III PK 126/13, LEX 1487089.
- [4.] Judgment of the Supreme Court of July 10, 2014, II PK 256/13, LEX No. 1515454.
- [5.] Order of the Supreme Court of 29 October 2014, I PZ 24/14, LEX No. 1544221.[6] Judgment of the Supreme Court of February 14, 2013, III PK 31/12, LEX No. 1380964
- [6.] Judgment of the Supreme Court of June 6, 2012, III PK 81/11, LEX No. 1318418.
- [7.] Judgment of the Supreme Court of 19 June 2012, II PK 265/11, LEX No. 1250568.
- [8.] Judgment of the Supreme Court of October 2, 2012, II PK 82/12, LEX No. 1365774.
- [9.] Judgment of the Supreme Court of November 16, 2010, I PK 79/10, LEX No. 725007.
- [10.] Judgment of the Supreme Court of January 7, 2009, III PK 43/08, LEX No. 584928.
- [11.] Judgment of the Supreme Court of 3 February 2009, I PK 156/08, LEX No. 496999.
- [12.] Judgment of the Supreme Court of December 3, 2009, II PK 142/09, LEX No. 823871.
- [13.] Judgment of 3 April 2008, II PK 286/07, LEX No. 511691.
- [14.] Order of the Supreme Court of July 18, 2003, I PK 210/03, LEX No. 108520.

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- [5.] Florek L, Labor Law, Warsaw 2011.
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