

Employer's liability for mobbing (workplace bullying) in Polish labour law

Odpowiedzialność pracodawcy z tytułu mobbingu w polskim prawie pracy

Abstract

The regulation regarding mobbing was introduced into the Polish Labour Code by the Act of 2003. Since then, the issue of responsibility has been the subject of numerous analyses in doctrine as well as jurisprudence. Despite this, it can still seem controversial or arguable in many aspects. In 2019, the legislator decided to introduce a significant change in the conditions for the employer's liability in this respect. This article presents the issue of claims against the employer under the discussed title, and outlines issues enlisted in doctrine in this regard. Definite remarks were preceded by a brief outline of the content of the concept of mobbing in the Polish Labour Code.

Keywords

mobbing, employer liability, compensation, redress

JEL: I38

The legal concept of mobbing in the Polish Labour Code

The regulation devoted to mobbing was introduced into the Polish Labour Code by the Act of November 14, 2003 amending the Act — Labour Code and amending some other acts (Journal of Laws item 2081). Prior to the amendment introduction, mobbing phenomenon was described in the literature, and the employer's obligation to counteract it, should have been derived from other provisions (Szewczyk, 2002, p. 9; Cieślak & Stelina, 2003, p. 76), however, the Labour Code did not explicitly provided the provisions regulating liability in this scope. As a consequence, the employee being subject to mobbing, had to seek protection using the provisions of the Civil Code. Pursuant to the applicable labour law regulation, the employer is responsible for the occurrence of the mobbing phenomenon in the workplace (it does not matter whether the person

Streszczenie

Regulacja dotycząca mobbingu została wprowadzona do polskiego kodeksu pracy ustawą z 2003 r. Od tamtej pory zagadnienie odpowiedzialności było wielokrotnie przedmiotem zarówno analiz w nauce jak i wypowiedzi judykatury, pomimo tego do dnia dzisiejszego w wielu aspektach bywa kontrowersyjne czy wręcz sporne. W 2019 r. ustawodawca zdecydował się wprowadzić istotną zmianę w zakresie przesłanek odpowiedzialności pracodawcy z tego tytułu. W niniejszym artykule autor prezentuje problematykę roszczeń przysługujących przeciwko pracodawcy z omawianego tytułu, a także zarysowuje sporne w nauce zagadnienia w tym zakresie. Właściwe uwagi zostały poprzedzone krótkim omówieniem treści pojęcia mobbingu w polskim kodeksie pracy.

Słowa kluczowe

mobbing, odpowiedzialność pracodawcy, odszkodowanie, zadośćuczynienie

"using" the mobbing is the employer, employee or a third party).

Legal definition formulated in Article 94³ para. 2 of the Labour Code states that mobbing is behavior: 1) concerning an employee or directed against an employee, 2) consisting in persistent and long-term harassment or intimidation of an employee, 3) causing an underestimated assessment of his/her professional suitability, 4) causing or aiming to humiliate or ridicule an employee, 5) isolating or eliminating the employee from a team of colleagues. The content of this definition indicates that the statutory features of mobbing specified therein must be met jointly (Szewczyk, 2020, p. 112; see also the Supreme Court's judgment of 8.12.2005, I PK 103/05). Importantly, the length of harassment or intimidation of an employee within the meaning of Article 94³ para. 2 of the Labour Code must be considered on a case-by-case basis and take into account the circumstances of the individual case. It is

therefore not possible to rigidly indicate the minimum period necessary for mobbing to occur. However, Article 94³ para. 2 and 3 of the Labour Code states that for the assessment of longevity, one should consider the moment of occurrence of the effects of harassment or intimidation of an employee, as well as the persistence and severity of such activities (indicated in the judgment of the Supreme Court of 17.01.2007, I PK 176/06). Moreover, the long duration of behaviours considered mobbing should be considered simultaneously with their persistence, which is understood as a significant increase in mobber's bad will, which tends to underestimate the victim's self-esteem and eliminate him/her from the team. Persistence means stretched in time, constantly repeated and inevitable (from the victim's point of view) behaviours that are onerous and continuous. However, the harassment referred to in Article 94³ para. 2 of the Labour Code, in accordance with the natural meaning of the word, means worrying, disturbing someone, not giving a moment of peace, as well as constant tormenting, disturbing or teasing someone (causing him pain). In addition, the premises of "persistence" and "longevity" interact with each other. They cannot be considered separately. Therefore, the intensification of negative behaviors prompts us to consider even the shorter period as fulfilling the definition of long-term harassment (Supreme Court judgment of 29.01.2019, III PK 6/18).

The jurisprudence has established the view that in order to assess whether mobbing has occurred in a particular case, it becomes necessary to create an objective model of a reasonable victim, which in the scope of mobbing will eliminate cases resulting from excessive employee sensitivity or lack of such sensitivity (Supreme Court judgments of 14.11.2008, II PK 88/08 as well as of 22.04.2015, II PK 166/14). An examination and assessment of the subjective feelings of a person who believes that his or her supervisor is abusing him/her cannot constitute the basis for determining responsibility for mobbing. The assessment of whether harassment and intimidation of an employee has occurred and whether these activities were intended and could have or led to an underestimation of his professional suitability, humiliation, ridicule, isolation or elimination from a team of colleagues must be based on objective criteria (Supreme Court ruling from 19.03.2012, II PK 303/11). What is important, to determine mobbing within the meaning of Article 94³ para. 2 of the Labour Code it is not required to demonstrate the direct intent to induce a health disorder in an employee subject to this prohibited mobber behavior, which means that any unlawful, including unintentional, mobber acts or behaviors concerning or directed against the employee that comply with the statutory features of mobbing may be considered mobbing, in particular, if they caused an employee's health disorder (Supreme Court judgement of 16.03.2010, I PK 203/09).

The employer's use of mobbing may also consist of taking action within the limits of his statutory rights (Supreme Court judgment of 8.12.2005, I PK 103/05). However, it should be emphasized that there is no mobbing in the case of actions taken by the employer which are not intended to humiliate an employee, but only to ensure that the correct organization of work is carried out.

The employer's responsibility for mobbing under the provisions of the Labour Code reduce to two separate cash benefits that an employee may claim. An employee that suffered mobbing that caused a health disorder may claim from the employer an adequate amount of money in redress of damages for the harm suffered. The second benefit is compensation, which — after the law amendment, which entered into force on September 7, 2019 — can be claimed by an employee who "suffered" mobbing or terminated an employment contract as a result of mobbing.

Redress

Pursuant to Article 94³ para. 3 of the Labour Code, an employee who has been subjected to mobbing may claim an appropriate amount from the employer as financial redress for the harm suffered. The employer is liable for that mobbing even if the managers of the workplace were unaware of the use of mobbing by another employee (Skoczyński, 2004, p. 416–417; Dörre-Nowak, 2004, p. 8; Liszcz, 2009, p. 4), the possible fault of the employer is being irrelevant in that case (Sanetra, 2006, p. 348). Pursuant to Article 94³ para. 3 of the Labour Code, this liability arises only if the employee has suffered a health disorder — qualified in medical terms as a result of mobbing. In this case it is not sufficient to demonstrate the consequences in the mental sphere of the injured party, such as feelings of sadness, depression, grief and other negative emotions, or violation of personal interests (Supreme Court judgment of 7.05.2009, III PK 2/09). Health disorder is explained in the jurisprudence as a dysfunction of the human body by leading to disruption of the functioning of its individual systems — such as the digestive system, nervous system, emotional system, immune system (Supreme Court judgment of 14.12.2010, I PK 95/10).

The jurisprudence points out that an employee is entitled to redress for health disorder caused by mobbing, and not for health disorder only related to work (Supreme Court judgment of 10.10.2012, II PK 68/12). According to the general rules of proof, the burden of proof in this respect lies with the employee.

The legislator has not specified the criteria to be followed when determining the amount of redress. However, these criteria were set out in the jurisprudence, where it was stressed that there are no grounds for treating the redress as an expression of civil penalty. Redress is not a punishment, but a mean of compensation for non-pecuniary damages. It refers

to the harm presented as physical suffering, i.e. pain and other ailments and mental suffering (Supreme Court judgment of 3.02.2000, I CKN 969/98). In the case of harm caused by a health disorder, the following factors are taken into account: the degree, duration of physical and mental suffering, its type and intensity, permanence of the effects of the disorder, forecasts for the future, as well as possible inability to practice the profession (Dyka, 2001, p. 613). The aim of redress is primarily to alleviate these sufferings. It should be of a holistic nature and include all physical and mental suffering, both already experienced and likely to occur in the future (i.e. forecasts for the future).

The provisions of the Labour Code are legal basis for awarding an "appropriate sum" of money as redress for employee's harm caused by mobbing. However, when determining the appropriate sums of money as redress, labour courts are guided by the principles and criteria developed in the judicature of civil courts (Jędrejek, 2010, p. 33; Supreme Court judgment of 29.03.2007, II PK 228/06). The term "appropriate sum" used in Article 94³ para. 3 of the Labour Code, which may be claimed by an employee in the case of a health disorder, is an undefined concept. It is assumed in the case law that the non-pecuniary compensation is aimed to be primarily of a compensatory nature, so that its amount cannot constitute a symbolic payment, but must present an economically perceptible value. At the same time, this amount must not be excessive in relation to the harm suffered, but must be "appropriate" in the sense that it should be — taking into account the harm of the injured party — maintained within reasonable limits, corresponding to the current conditions and average standard of living of the society (Supreme Court judgment of 8.08.2017, I PK 206/16).

A controversial issue, in both doctrine and judicature is whether the redress due for mobbing that caused a health disorder is meant to cover only non-pecuniary damage or also certain related pecuniary damage — e.g. medical costs. According to the first position, in the absence of regulations in this area in the Labour Code, the provisions of the Civil Code should be applied accordingly (e.g. Dörre-Nowak, 2004, p. 8 and the Supreme Court judgment of 2.10.2009, II PK 105/09). The Supreme Court expressed a different position in its judgment of 20 March 2007 (II PK 228/06) assuming that in some cases compensation of damage (in the form of health disorder caused by mobbing) may include both non-pecuniary and pecuniary damages (Kuba, 2012, p. 155). The second position is controversial — it assumes that the legislator unwillingly omitted in this provision the aspect of compensation for pecuniary damage (Barzycka-Banaszczyk, 2017) and, moreover, it leads to the employer being charged with liability in the scope not resulting from an explicit decision of the legislator but by way of an extensional interpretation of the provision (Pisarczyk, 2016, p. 14).

Compensation

On the basis of the provisions of the Labour Code, in the wording in force until 7 September 2019, an employee could claim compensation from the employer — in the amount not lower than the minimum wage nationwide established on the basis of separate provisions — provided that "due to mobbing he terminated his employment contract". There had to be a causal link between the mobbing and the termination of the employment contract. The employee was obliged to indicate the reason for the termination of the employment relationship within the declaration of termination — he should cite the specific mobbing actions committed against him (Gersdorf, 2014).

The amendment to the Labour Code, which entered into force on 7 September 2019, added a second premise for claiming the compensation in question — "experiencing mobbing". Undoubtedly, the effect of its introduction is a significant extension of the employer's liability for compensation for mobbing. The employer is liable not only if the employee has terminated his employment contract as a result of mobbing, but it is sufficient the he "suffered" mobbing. As doctrine points out, this premise absorbs the premise of "termination of contract by the employee due to mobbing" because the employee previously had to suffer mobbing if he terminated his contract for this reason (Maniewska, 2020).

As for the amount of due compensation, it is payable in an amount not lower than the minimum wage. Consequently, the employee is entitled to claim damages in full (both as *damnum emergens* and *lucrum cessans*), but if he claims damages exceeding the minimum wage, he must indicate all the grounds for liability (in particular the extent of the damage). On the other hand, the proving the one suffered from mobbing and failing to prove the damages (or proving them at an amount lower than the minimum wage) should result in the awarding the compensation at the level of the minimum wage.

Taking into account the employee's right — resulting from Article 55 para. 11 of the Labour Code — to terminate the employment contract without notice of termination (in the case when the employer has committed a serious breach of his basic obligations towards the employee) and the compensation due on this account (in the amount of remuneration for the notice period) should be considered a concurrence of the grounds of responsibility in the case when the employee terminates the employment contract due to mobbing. It should be recognised that the rights to such compensation arise independently of each other (Dörre-Nowak, 2004). The compensation under Article 55 para. 11 of the Labour Code aims at compensating for damage resulting from the fact that an employee is deprived of earnings during the notice period, while the

compensation under Article 94³ para. 4 of the Labour Code aims at compensating for damage resulting from mobbing.

Obligation to prevent mobbing and the possibility of relieving the employer of responsibility

Pursuant to Article 94³ para. 1 of the Labour Code, the employer is obliged to prevent mobbing; this provision, combined with the obligation to respect the dignity and other personal rights of the employee, creates a coherent system obliging the employer to take care of the work environment. This does not only mean that the employer should not become a mobber himself. It must also eliminate the occurrence of this pathology between its subordinates and demand respect for the dignity of employees by other people. Regardless of who is the perpetrator of mobbing, the employer is always responsible for its occurrence at the workplace. The employer should therefore counteract mobbing, in particular by training employees — informing them about the danger and consequences of mobbing or by using procedures that will make it possible to detect and end this phenomenon (cf. Gersdorf & Reczyńska-Ratajczak, 2007, p. 3).

As emphasized by the Supreme Court in its ruling of 3.08.2011 (I PK 35/11, OSNP 2012/19-20/238), if, in proceedings involving the employer's liability for mobbing, the employer demonstrates that he has taken real action to counteract the mobbing and, by evaluating it from an objective point of view, their potential full effectiveness can be confirmed, then the employer may relieve himself of liability. The obligation to prevent mobbing is not an obligation "of result" but of "diligent action", as a consequence of which, if the employer demonstrates a sufficient number of anti-mobbing prevention activities, only the perpetrator may be held liable for this phenomenon (as a violation of personal rights).

What should be emphasized the follow-up actions taken by the employer after the occurrence of mobbing at the workplace, which have not brought real results, cannot release him from the responsibility in question (Supreme Court judgment of 21.04.2015, II PK 149/14). The employer's obligation concerns the implementation of real and effective preventive measures, so its implementation does not only consist in removing the effects of already existing phenomena (Szewczyk, 2007, p. 482).

Nature of the employer's liability for mobbing

There is a dispute in labour law doctrine and Supreme Court judicature about the legal nature of the employer's liability for mobbing — whether it is a tort or

contract liability. The difference between tort and contractual liability in Polish civil law comes down primarily to the role of compensation. In the case of tort liability, the compensation is the original benefit, existing from the moment the obligation arises, i.e. from the moment the tort is committed. On the other hand in the case of contractual liability, it is assumed that it constitutes a secondary benefit, subsequent to the primary benefit resulting from the obligation (Zoll, 2011). In this regime, compensation is the consequence of non-performance or improper performance of an obligation.

According to the first view, mobbing constitutes a qualified tort of labour law (Supreme Court in the judgments of 29.03.2007, II PK 228/06 and of 2.10.2009, II PK 105/09). According to the second concept, the employer's liability for mobbing is secondary to the employer's obligation, to put it simply, to employ an employee in conditions free from mobbing (Supreme Court judgment of 3.08.2011, I PK 35/11). Both positions are also presented in doctrine — M. Gersdorf is in favour of contractual character, pointing out that the liability for mobbing cannot be determined by similarity to the protection of personal rights in civil law (Gersdorf, 2014). A. Sobczyk, on the other hand, strongly advocates the tort character, pointing out that liability for mobbing is not secondary to the obligation to hire. Mobbing is an objectively forbidden social phenomenon and undoubtedly a tort. However, the obligation to counteract mobbing is a statutory obligation and not a derivative of the employment contract (Sobczyk, 2015; see also, among others, Tomanek, 2017).

This dispute has important doctrinal and practical consequences. The basic practical consequence is a different distribution of the burden of proof — the assumption that it is a tort regime leads to the need for the employee to demonstrate all the prerequisites for liability, whereas within the framework of contractual liability it is presumed that the non-performance or improper performance of the obligation was due to circumstances for which the debtor is responsible. As regarding the consequences of doctrinal value, assuming that the liability in question is of a contractual nature, would mean that redress could be awarded under that regime. In the doctrine of civil law, the dominant view is that nowadays (under the current Civil Code) granting redress is possible only within the framework of tort liability (e.g. Gudowski, 2017; Jastrzębski, 2006, p. 161; Osajda, 2006, p. 171). However, it is impossible not to notice the voices, that there is no rational justification for such division (Safjan, 2004, p. 255-280). The doctrine of labour law presents a view that there are no constructional obstacles to granting redress under the contractual regime within this area of law (unlike in the civil law) (Raczkowski, 2011, p. 51). I consider this view to be

justified. While there are no obstacles to claim liability from the perpetrator of mobbing within the framework of tort liability, the employer is liable for non-

performance or improper performance of the obligation to prevent mobbing (and thus within the framework of contractual liability).

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