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LEGAL PROTECTION AGAINST DISCRIMINATION AND MOBBING IN THE EMPLOYMENT RELATIONSHIP— IS IT STILL EFFECTIVE?

Abstract

Discrimination, harassment and mobbing are still a large problem on the Polish labour market. Despite growing awareness of how negative and dangerous these phenomena are, the scale of their occurrence is still not decreasing. At the same time, there is a significant discrepancy between the scale of the problem of mobbing, discrimination and harassment at work, as indicated by academic research and public opinion surveys, and the number of cases brought on this account in the labour court. This may be due to the complex legal nature of these phenomena and the difficulty in interpreting and proving the legal grounds for their assertion. The small role of the State Labour Inspection in this respect also draws attention. The aim of this article is to assess the legal tools for the protection of employees against discrimination, harassment and mobbing from the point of view of their actual effectiveness, paying particular attention to the powers of labour inspectors to control compliance with legal provisions in this area.

Słowa kluczowe: dyskryminacja, mobbing, molestowanie, Państwowa Inspekcja Pracy

Keywords: discrimination, mobbing, harassment, State Labour Inspection

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Introduction

Discrimination, harassment and mobbing have already received a great deal of attention in labour law scientific and in the jurisprudence of labour courts. This issue functions globally, being one of the main subjects of international and European labour law regulation. Representatives of other scientific disciplines are also interested in it, examining the problem of its occurrence in the work environment from a non-legal perspective. However, despite the growing awareness of how negative and dangerous these phenomena are, the scale of their occurrence is still not decreasing.

Data from the State Labour Inspection (hereinafter: "SLI") show that in 2022, the SLI received a total of 50.5 thousand complaints, of which more than 3 thousand concerned discrimination, harassment and mobbing at work (Report on the activities of the State Labour Inspectorate in 2022, https://orka.sejm.gov.pl/Druki9ka.nsf/0/83817DDCD5B7398EC12589E200495956/%24File/3435.pdf, access: 1 March 2024). For comparison: in 2020—2.4 thousand such complaints were filed, and in 2021—2.8 thousand, which shows that the number of complaints addressed to the SLI in this regard is steadily increasing. Also scientific studies and public opinion surveys conducted in various professional groups indicate the growing scale of the problem of discrimination and mobbing in the Polish work environment (e.g. CBOS 2014; Szewczyk 2020, p. 107 et seq.; Jarosz et al. 2021, pp. 32–33; Mazurkiewicz 2023). However, only a small number of complaints filed in this area (8.6%) were confirmed during inspections conducted by the SLI. This may be due to the lack of competence to establish discrimination, harassment and mobbing by the labour inspector, so that in most cases it is not possible to establish a violation of labour law in this area. These can only be established through proceedings before the labour court, but the number of cases ending in a finding of discrimination, harassment or mobbing by the court is equally low. In 2022, a total of more than 1.7 thousand cases were submitted to labour courts of first instance, of which 905 cases were settled by the end of 2022. Of these, only 98 cases were fully or partially taken into account (Records of cases in labour courts of first instance—discrimination, mobbing, sexual harassment I. 2011–2022, https://isws.ms.gov.pl/pl/bazastatystyczna/opracowania-wieloletnie/, access: 1 March 2024).

The analysis of the above data leads to the conclusion that there is a considerable discrepancy between the scale of the problem of discrimination, harassment and mobbing at work, as signalled by academic research and public opinion surveys, and the number of cases submitted to the labour courts on this account. This may be due to the complex legal nature of these phenomena and the difficulty in interpreting and proving the legal preconditions for their assertion. The small role of the SLI in this respect also draws attention. The aim of this article is to assess the legal tools for the protection of employees against discrimination, harassment and mobbing from the point of view of their actual effectiveness, paying particular attention to the powers of labour inspectors to control compliance with legal provisions in this area.

1. Employee compensation claims for discrimination, harassment and mobbing under the Labour Code

The prohibition of discrimination against employees is directly expressed in Article 18^{3a} of the Labour Code (Journal of Laws of 2023, item 1465, consolidated text, hereinafter: "LC"). According to the wording of § 1 of this provision: "Employees shall be treated equally with regard to the establishment and termination of the employment relationship, terms and conditions of employment, promotion and access to training for the purpose of improving professional qualifications, in particular without regard to sex, age, disability, race, religion, nationality, political opinion, union membership, ethnic origin, religion, sexual orientation, employment

for a definite or indefinite period of time, full-time or part-time employment." From 2019, the catalogue of prohibited discriminatory criteria is fully open, irrespective of whether the reason for unequal treatment is based on characteristics relating to the employee's person or employment-related issues. In view of this, each case of differential treatment of employees who are in the same factual and legal situation, not justified by objective and rational reasons, constitutes discrimination and thus a violation of the principle of equal treatment of employees (decision of the Supreme Court of 29 September 2021, II PSK 118/21, LEX No. 3517446; decision of the Supreme Court of 21 June 2022, II PSK 310/21, LEX No. 3453096).

Discrimination may take the form of direct discrimination, where an employee, for one or more reasons constituting prohibited discriminatory criteria, has been or could be treated less favourably than other employees in a comparable situation, or indirect discrimination, where, as a result of an apparently neutral action, there is or could be a disadvantage or a particular disadvantage in respect of the establishment and termination of the employment relationship, terms and conditions of employment, promotion and access to training for the purpose of improving professional qualifications against all or a significant number of employees belonging to a group distinguished on the basis of one or more discriminatory criteria. Manifestations of discrimination also include harassment, i.e. unwanted conduct, the purpose or effect of which is to violate the dignity of an employee and to create an intimidating, hostile, degrading, humiliating or offensive environment against that person (Article 18^{3a} § 5 point 2 of the LC) and sexual harassment, understood as unwanted behaviour of a sexual nature or relating to the sex of an employee, the purpose or effect of which is to violate the employee's dignity, in particular to create an intimidating, hostile, degrading, humiliating or derogatory atmosphere towards the employee (Article 18^{3a} § 6 of the LC).

According to Article 18^{3d} of the LC, a person against whom an employer has violated the principle of equal treatment in employment has the right to compensation in an amount not lower than the minimum wage. Proceedings in this respect take place before the labour court and are initiated by the employee. He or she should present before the court the facts from which the presumption of discrimination can be derived, i.e. indicate the circumstances making it plausible that he or she was treated worse in comparison with other employees and the prohibited discriminatory criterion or criteria which was the cause of this (decision of the Supreme Court of 29 September 2020, III PK 177/19, LEX No. 3148272; judgment of the Court of Appeal in Warsaw of 8 June 2021, III APa 20/20, LEX No. 3305625). The burden of proving that the employer was guided by objective reasons when differentiating the treatment of employees then shifts to the employer (Article 18^{3b} § 1 of the LC). In doing so, it is not sufficient to prove that the aim of differentiating the situation of employees was lawful, but also that the means used by the employer to achieve this aim were appropriate and necessary. What is important is to establish whether this aim could not have been achieved in a different way, with the inequality of treatment of the employees (judgment of the Supreme Court of 21 March 2023, I PSKP 3/22, OSNP 2023, No. 12, item 128). Therefore, it is not the mere fact of differentiation of the situation of employees, but the lack of objective and justified reasons for it, that is the premise for holding the employer liable for damages. At the same time, compensation for a breach of the principle of equal treatment in employment

should be effective, proportionate and dissuasive and compensate both the financial damage incurred and the nonmaterial damage suffered by him (judgment of the Supreme Court of 27 October 2021, II PSKP 63/21, OSNP 2022, No. 9, item 85).

In the case of mobbing, the legislator has applied a slightly different method of regulation. It has imposed an obligation on the employer expressed in Article 94^3 of the LC to prevent mobbing, defining mobbing as: "actions or behaviours concerning an employee or directed against an employee, consisting of persistent and prolonged harassment or intimidation of an employee, causing an employee's appraisal of his/her professional suitability to be lowered, causing or aimed at humiliating or ridiculing an employee, isolating him/her or eliminating him/her from the team of co-workers". The LC provides, in Article 94^3 § 3–4, for two types of claims to which employees are entitled for mobbing: damages if the mobbing has caused the employee's health disorder and compensation in an amount not lower than the minimum wage for suffering mobbing or for termination of the employment contract due to mobbing. The addressee of these claims is the employer as the entity obliged to preventing the mobbing, regardless of whether it was the direct perpetrator or not. This is due to the legal construction of the duty to preventing mobbing adopted on the basis of the LC, which can be considered on three levels: first, as a direct prohibition of mobbing by the employer and persons performing acts on its behalf in labour law matters; second, as an obligation to eliminate mobbing in the event of its occurrence in the organisation; and third, as the application of appropriate anti-mobbing prevention (judgment of the Supreme Court of 22 January 2020, III PK 194/18, LEX No. 3260248). Particularly in the second and third dimensions, the contractual nature of the duty to prevent mobbing, as a duty consisting of diligent action, becomes apparent. The employer may therefore free himself from liability for mobbing if he demonstrates that he has taken real measures to preventing mobbing, in particular by training employees, by informing them of the dangers of mobbing and of the consequences of mobbing or by applying procedures to detect and put an end to it, and the court, assessing these measures from an objective point of view, confirms their potential effectiveness (judgment of the Supreme Court of 3 August 2011, I PK 35/11, OSNP 2012, No. 19–20, item 238, dissenting, Zwolińska 2023, p. 19, the author's position is that the employer's liability for damages is not a consequence of the non-performance or improper performance of the obligation to prevent discrimination and mobbing respectively, and that the employee's claims for damages on account of discrimination and mobbing are secondary to the employer's breach of the obligation to ensure employment free from discrimination and mobbing).

The burden of proof in mobbing cases lies with the employee, as the party deriving legal effects from this fact (Article 6 of the Civil Code, Journal of Laws of 2023, item 1610 consolidated text as amended, in connection with Article 300 of the LC). Thus, unlike in the case of discrimination, the employee must indicate before the court the circumstances justifying, and not merely making probable, the claims of mobbing he or she is making, and it is only by demonstrating these circumstances that the burden of proof to the contrary can be shifted to the employer (judgment of the Supreme Court of 27 June 2018, I PK 70/17, LEX No. 2660108; judgment of the Court of Appeal in Szczecin of 24 May 2018, III APa 15/17, LEX No. 2584010). In the case of a claim for compensation, the employee must additionally

prove the occurrence of a health disorder and its connection to the mobbing (decision of the Supreme Court of 9 July 2020, III PK 112/19, LEX No. 3153448; decision of the Supreme Court of 27 April 2022, I PSK 208/21, LEX No. 3432965, see Gładoch 2019, p. 30).

The setting of general rules for the distribution of the burden of proof in mobbing cases may be one of the reasons why employees give up pursuing mobbing claims in court. The legal definition of mobbing consists to a large extent of contextually undefined concepts (Piątkowski 2013, p. 498). This is justified by the complex nature of the phenomenon, which can manifest itself through a wide variety of behaviours, but on the other hand, it creates a lot of difficulties for employees, who have the burden of proving before the court the cumulative occurrence of all prerequisites for mobbing. However, it does not seem reasonable to reverse the burden of proof in mobbing cases, as is the case in discrimination claims. Mobbing is a phenomenon closely related to the internal experiences and emotional state of the employee and requires an individual approach to the circumstances of the case (judgment of the Court of Appeal in Łódź of 22 June 2021, III APa 2/21, LEX No. 3456361). The mere feeling of an employee that he/she is being mobbed is not yet a sufficient basis for the determination of mobbing (judgment of the Court of Appeal in Białystok of 30 June 2015, III APa 6/15, LEX No. 1781864). It is necessary to adopt in this respect the so called "objectivised standard of employee sensitivity", which only allows for an objective and detached from the employee's individual experiences assessment of behaviour identified by the employee as mobbing (judgment of the Court of Appeal in Białystok of 18 May 2016, III APa 5/16, LEX No. 2079196). It is difficult to require an employer, under a reversed burden of proof, to face in court each time the employee's subjective belief that he or she is being mobbed (judgment of the Supreme Court of 27 June 2018, I PK 70/17, LEX No. 2660108; Tyc 2016).

In addition to the above-mentioned legal instruments, an employee who has been a victim of discrimination or who has suffered mobbing may terminate his/her employment contract without notice on the grounds of a serious breach by the employer of his/her obligations towards the employee pursuant to Article 55 § 1^1 of the LC. In such a case, the employee is entitled to compensation in the amount of the remuneration for the notice period, and in the case of termination of an employment contract concluded for a fixed period, the compensation is entitled to the amount of the remuneration for the period until which the contract was to last, but no more than for the notice period.

The common denominator of the above legal regulations is their follow-up nature, i.e. the provisions of the LC provide for certain legal remedies that can be used by an employee already after the occurrence of discrimination, harassment or mobbing at work. Outside the framework of the study, the topic of civil law grounds for employee claims of discrimination and mobbing at work remains (Jędrejek 2010; Szabłowska-Juckiewicz 2019, pp. 236–239). However, the potential possibility for an employee to pursue claims under the tort provisions of the Civil Code is also follow-up. On the other hand, the legal instruments for protection against these phenomena lack solutions that put more emphasis on preventive and deterrent actions. Admittedly, Article 94^3 § 1 of the LC expressly articulates the employer's obligation to prevent mobbing, Article 94 point 2b of the LC includes preventive discrimination in employment within the scope of the employer's obligations specified therein, while Article

94[1] of the LC imposes an obligation on the employer to make the text of the provisions on equal treatment in employment available to employees or to provide them with access to these provisions. However, the manner and extent of their implementation is more often considered from the perspective of the impact of the employer's failure to exercise due diligence in this regard on the extent of its liability for damages for mobbing (compare: Zwolińska 2023, p. 18). The mere failure to prevent mobbing or discrimination does not constitute mobbing or discrimination and, in general, does not constitute a violation of personal rights either, so it does not create grounds for individual employee claims on this level (see Sobczyk 2015, p. 178). However, does the employer face any legal sanctions for noncompliance with anti-discrimination and anti-mobbing provisions beyond individual employee claims raised once discrimination or mobbing has already occurred? Since the SLI is the body set up to control compliance with labour legislation and the cited report on the activities of this institution shows that it receives more complaints on discrimination, harassment and mobbing each year than individual claims on this account are filed in labour courts, the remainder of this article will be devoted to the powers of labour inspectors in this regard.

2. Powers of the State Labour Inspection

The SLI is the body set up to supervise and control compliance with labour law. Its organisation and rules of operation are regulated by the Act of 13 April 2007 (Journal of Laws of 2024, item 97 consolidated text). Among the many tasks of the SLI set out in Article 10 of the Act, it is possible to distinguish taking preventive and promotional actions aimed at ensuring compliance with labour law or prosecuting offences against employee rights set out in legislation, including the LC. The SLI performs its tasks mainly through inspections carried out by labour inspectors, the purpose of which is to establish the factual state of compliance with labour law. Such inspections can also be carried out by the SLI in cases of discrimination, harassment or mobbing, with the exception that the labour inspector does not have adequate tools in this respect that would enable him to carry out an factual inspection of the employer's compliance with labour law in this respect. In particular, it is not possible to verify the information obtained in the course of the inspection from the person complaint to have suffered discrimination, harassment or mobbing at work or the information obtained in this regard from witnesses. Many of these complaints are also anonymous, which makes it even more difficult for an inspector to carry out an inspection. The competence to establish discrimination, harassment and mobbing lies exclusively with the labour court. This means that as long as the employee does not decide to bring an individual claim against the employer, the employer will not face any serious consequences related to the violation of labour laws on discrimination, harassment and mobbing, despite the dangers and threats they entail (on the negative consequences of mobbing and discrimination for employees, employers and society, see Lewandowska, Nawrocki 2010, pp. 520–526).

A greater role for labour inspections in eliminating violence and harassment in the world of work is envisaged by supranational regulations, including the 2019 International Labour

Organisation (ILO) Convention No. 190 (for more on the Convention see Tomaszewska 2023, pp. 3–11). The Convention requires its members to provide effective measures for the control and investigation of cases of violence and harassment, including by labour inspectorates or other competent authorities. In turn, the chapter on enforcement and remedies obliges members of the Convention to ensure that labour inspectorates and other competent authorities have adequate powers, such as issuing orders requiring measures with immediate enforceability and orders to stop work in cases of imminent danger to life, health or safety, subject to such right of appeal to judicial or administrative authorities as may be provided by law (Article 10 point h). However, Poland has not yet ratified ILO Convention No. 190.

In the Polish legal system, the labour inspector not only lacks the power to establish discrimination, harassment or mobbing in the work environment, but also lacks legal provisions that would allow him to effectively enforce the employer's obligations to prevent discrimination, harassment or mobbing. The scope of action of the labour inspector in this case depends to a large extent on the willingness of the employer to cooperate. Admittedly, there are views expressed in the literature on the subject assuming that prevention discrimination and mobbing should be placed in the sphere of obligations related to the provision of safe and hygienic working conditions to the employee, which would entitle the labour inspector to order the employer to remove the identified shortcomings within a specified period of time, and even to hold the employer liable for an offence under Article 283 of the LC for violation of health and safety regulations and rules (Ilnicki 2019, p. 135 et seq.). However, considerations of a systemic nature, i.e. the location of the anti-discrimination and anti--mobbing provisions and their distinction next to, rather than within, obligations in the sphere of occupational health and safety, dictate that great caution should be exercised in interpreting the labour inspectors' powers extensively, especially when it comes to holding the employer liable for offence liability.

The LC provisions also do not provide for legal sanctions for violations of these obligations, nor do they specify how they should be implemented (with regard to tools for protection against discrimination for employees fulfilling parental duties see Chakowski 2010, p. 639; Czerniak-Swędzioł 2020, pp. 56–57). The labour inspector, having no statutory template for conducting anti-discrimination and anti-mobbing policies, cannot oblige the employer to apply specific methods or instruments and then hold him/her accountable for it (Kryczka 2018). Rather, for the above reasons, it should be assumed that in the current state of the law, the labour inspector can only advise the employer to introduce certain procedures at the workplace when he perceives that they are not in place or when they are insufficient, but he can no longer effectively enforce this from the employer.

3. The employer's offence liability and breach of the duty to prevent discrimination, harassment and mobbing

Looking at the problem of discrimination, harassment and mobbing from the perspective of the severity of the consequences of these phenomena for the employee and society, the

legislator should place greater emphasis on preventive and deterrent measures. The activities of the labour inspector would be much more effective in this respect if the violation of labour law provisions on the obligation to prevent these phenomena were included in the catalogue of offences against employee rights.

Article 281 of the LC sets out a number of violations for which an employer or a person acting on its behalf may be held liable for an offence. These include, inter alia, entering into a civil law contract in conditions in which an employment contract should have been concluded; failing to confirm in writing an employment contract concluded with an employee before allowing him or her to work; terminating or dissolving an employment relationship with an employee in gross violation of the law; violating the provisions on working time or the provisions on parental rights and the employment of juveniles; or failing to keep employee documentation. Violation of the provisions in this regard is punishable by a fine of between PLN 1,000 and PLN 30,000. The labour inspector imposes a fine on the employer by way of a ticket or directs, as a public prosecutor, a motion to the court to punish the employer, in accordance with the provisions of the Code of Conduct in Offence Cases (i.e. Journal of Laws of 2022, item 1124 consolidated text as amended). This catalogue does not provide for offence liability for breach of anti-discrimination and anti-mobbing obligations by the employer (Baran, Baran, 1997, p. 107). It is true that situations cannot be excluded in which the employer will be held liable for offence liability, e.g. in the case of termination of an employment contract in gross violation of the law, when such action is at the same time one of the manifestations of discrimination or falls within the scope of behaviour fulfilling the prerequisites of mobbing, but this only indirectly relates to the duty to prevent discrimination and mobbing in the employment relationship, covering rather situations in which the employer is the direct perpetrator of mobbing (Warylewski 1999; Unterschütz 2010).

An effective prevention policy plays a very important role in the process of preventing the negative effects of discrimination, harassment and mobbing at work. However, its potential in the current state of the law is not fully exploited and many employees still silently face discrimination, harassment and mobbing at work. The above considerations entitle one to conclude that the employer's violation of obligations in the field of anti-discrimination and mobbing should be included in the catalogue of offences set out in Article 281 of the LC. This would significantly increase the scope of the labour inspector's powers in the sphere of control over the observance of labour legislation in this respect and would make it possible to realistically prevent the occurrence of discrimination and mobbing in the work environment. At the same time, the legislator should clearly set out guidelines on how to establish and carry out a prevention policy, perhaps even more stringent in groups of employees who are particularly vulnerable to discrimination and mobbing, in order to develop minimum standards in this respect and at the same time create a reference point for the assessment of the employer's actions by the labour inspector or the court. It is also insignificant that one of the functions of misdemeanour liability is its deterrent character. The fear of the possibility of being held liable for offence liability in the event of a breach of anti-discrimination and anti-mobbing obligations can effectively motivate employers to carry out their obligations in this respect with due diligence.

Conclusions

Discrimination, harassment and mobbing remain a major problem in the Polish labour market. Many employees signal that these phenomena occur in their working environment, but few cases are brought to court on this account, despite the fact that the Labour Code provides for solutions in the event of their occurrence, giving employees grounds to pursue individual claims for damages against the employer. The competence to establish the existence of discrimination, harassment or mobbing lies exclusively with the labour court. The State Labour Inspection has only very limited possibilities to control compliance with labour laws in this respect.

The legal regulation of discrimination and mobbing in its current form does not meet the real needs of the working environment and does not provide adequate protection against these phenomena in the workplace. One of the key issues in this area is the effective prevention of discrimination, harassment and mobbing at work, including the introduction of sanctions in the legal order for violation of the implementation of this obligation. One possible solution is to supplement the catalogue of offences against the employee's right with violations of the implementation of an anti-discrimination and anti-mobbing policy, with the simultaneous development of guidelines at the statutory level on how to establish and implement it. The labour inspector would then have adequate powers to effectively enforce the implementation of this duty by the employer.

Equally important from the perspective of the issue at hand is the role of trade unions in preventing discrimination and mobbing at work. Because of its complexity, this topic requires a separate study, and here it is only necessary to signal the benefits that could arise from trade union involvement in an employer's anti-discrimination and anti-mobbing policy. The development of such a policy within the framework of cooperation between the social partners at company level would most accurately reflect the nature of the job and the needs of employees. A solution worth considering is the introduction of explicit provisions in the LC on the procedure for developing an anti-discrimination and anti-mobbing policy with the involvement of trade unions or employee representation at employers not covered by a trade union organisation (by consultation or agreement).

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