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*The Guarantees for Whistleblowers in The Polish Code of Civil Procedure*

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# Secção I

## Investigação Científica\*

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## The Guarantees for Whistleblowers in The Polish Code of Civil Procedure

### As Garantias para os Denunciantes no Código de Processo Civil Polaco

Małgorzata MEĐRALA<sup>1</sup>

**ABSTRACT:** The aim of this paper is to analyze current Polish regulations in civil procedure from the perspective of effective procedural protection for whistleblowers. In the conducted research, the formal-legal, theoretical-legal as well as comparative legal methods is used. The analysis is conducted on the basis of the regulations of Polish civil procedure, as well as by referring to the regulations of foreign countries (e.g. Irish and British), which could constitute model solutions for the Polish legislator in this regard.

The Author proposes the introduction of effective solutions enabling for a quick restitution of the employment relationship, in particular in the form of interim reliefs on the basis of procedural claims guaranteed by the provisions of substantive law (temporary reinstatement, payment of compensation, etc.) and other special regulations in civil procedure on this matter.

**KEYWORDS:** Whistleblowers; Civil procedure; Procedural guarantees.

**RESUMO:** O objetivo deste artigo é analisar a atual regulamentação polaca nos procedimentos civis a respeito de uma proteção processual efetiva para os denunciante.

Na investigação conduzida, são utilizados os métodos formal-legal, teórico-legal, bem como métodos jurídicos comparativos. A análise é conduzida com base nas normas do processo civil polaco, bem como através da referência às normas de países estrangeiros (por exemplo, irlandês e britânico), que poderiam constituir soluções-modelo para o legislador polaco a este respeito.

O Autor propõe a introdução de soluções efetivas que permitam uma rápida restituição da relação de trabalho, nomeadamente sob a forma de medidas provisórias com base em pretensões processuais garantidas pelas disposições do direito substantivo (reintegração temporária, pagamento de indemnizações, etc.) e outros regimes especiais em processo civil sobre esta matéria.

**PALAVRAS-CHAVE:** Denunciante; Processo civil; Garantias processuais.

#### 1. Introduction

On December 16, 2019, Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons reporting breaches of EU law<sup>2</sup>, entered into force, to ensure that persons

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<sup>2</sup> OJ L 305, 26.11.2019, p. 17–56, hereinafter: Directive.

operating within a private or public organization are able to safely and anonymously report violations of the law, which a given person learned about while working within this organization.

By December 17, 2021, the Member States of the European Union, including Poland, should implement Directive (EU) 2019/1937. Private employers with 50-249 employees have until the 17<sup>th</sup> of December 2023 to introduce solutions in this area. As of today, Poland hasn't implemented the Directive<sup>3</sup>.

The Directive provides for three means of reporting by whistleblowers:

- an internal channel, i.e. within the organization on the basis of internal procedures;
- through an external channel, by reporting the violation to the appropriate public authority;
- by way of public disclosure, i.e. by providing information on breaches to public channels - where the report was previously made via an internal or external channel, but no action was taken.

Poland, as one of Member States, should provide adequate legal remedies for whistleblowers, not only in material law provisions, but also in procedural law provisions. The Directive also provides for the obligation to guarantee appropriate protection to whistleblowers at the level of legal proceedings<sup>4</sup>. The weaknesses of the residual Polish whistleblowing regulations to date, albeit primarily on the grounds of substantive law, have already been pointed out in the literature on the subject<sup>5</sup>. The Directive is a response to the shortcomings in the legislation of Member States in this area.

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<sup>3</sup> This paper is the publication of my presentation during I Congresso Internacional Direito Processual Civil, on the 20-21<sup>th</sup> of May 2021; organized by Instituto Jurídico Portucalense e Instituto Jurídico do Politécnico de Leiria, em colaboração com a Universidade de Vigo, a Universidade de Málaga, a Universidade de Salamanca, a Universidade de Granada e a Universidade Federal do Rio de Janeiro. During reviewing the text in January 2022 the Author added some information about the latest draft of implementing the Directive in Poland –the draft of 14<sup>th</sup> of October 2021 of the Act on the protection of whistleblowers, <https://legislacja.rcl.gov.pl/projekt/12352401/katalog/12822845#12822845> (access: 21.01.2022) has just appeared. The text takes into account the legal status as of the date of 21 January 2022.

<sup>4</sup> See: Article 20-24 of the *Directive*.

<sup>5</sup> See: e.g. M. Wujczyk, *Podstawy whistleblowingu w polskim prawie pracy*, Przegląd Sądowy, June 2014, p. 121; H. Szewczyk, *Whistleblowing w zakładzie pracy w świetle nowej dyrektywy 2019/1937 Parlamentu Europejskiego i Rady (UE) w sprawie ochrony osób zgłaszających naruszenia prawa Unii*, Praca i Zabezpieczenie Społeczne, vol. LXI, 2020/2, DOI 10.33226/0032-6186.2020.2.1, p. 10; A. Wojciechowska-Nowak, *Skuteczna ochrona prawna*

The aim of this Article is to analyse current Polish civil procedure regulations from the perspective of effective procedural protection for whistleblowers.

In the conducted research, formal-legal, theoretical-legal as well as comparative-legal methods will be used. The analysis will be conducted on the basis of Polish civil procedure regulations, as well as by referring to the legal orders of foreign countries, which could constitute model solutions for the Polish legislator in this regard.

## 2. Public character of whistleblowing

There is no doubt that the institution of a whistleblower in Polish labour law has a public character, and that whistleblowing serves public purposes<sup>6</sup>. In fact, point 1 of the Directive already mentions „threats or harm to the public interest” and „safeguarding the welfare of society”. The literature indicates that, taking into account the experiences of other countries, „whistleblowing may contribute in particular to increase the competitiveness of the economy and become a tool to fight corruption”<sup>7</sup>. The protection of the common good, which is the workplace in this context, and the protection of the employer's interests are also indicated as whistleblowing objectives<sup>8</sup>. On the other hand, due to various negative historical connotations, this institution is often perceived negatively in Polish society<sup>9</sup>.

The public, and above all the social dimension, can be attributed to reporting on non-compliance with health and safety rules, financial and

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*sygnalistów. Perspektywa pracodawców, związków zawodowych oraz przedstawicieli środowisk prawniczych*, Warszawa, March 2014, the Batory Foundation, p. 4 and the following (downloaded from: [http://www.sygnalista.pl/wp-content/uploads/2016/10/Skuteczna-ochrona-prawna-sygnalistow\\_PP.pdf](http://www.sygnalista.pl/wp-content/uploads/2016/10/Skuteczna-ochrona-prawna-sygnalistow_PP.pdf), 3.05.2021).

<sup>6</sup> Cfr. Ł. Kobroń, *Interes Publiczny jako element podstawowy funkcji ochronnej prawa pracy - w kontekście ochrony sygnalistów*, Roczniki Administracji i Prawa, Humanitas 2019/1/XIX, p. 334 and the following.

<sup>7</sup> H. Szewczyk, *Whistleblowing w zakładzie pracy w świetle nowej dyrektywy 2019/1937 Parlamentu Europejskiego i Rady (UE) w sprawie ochrony osób zgłaszających naruszenia prawa Unii*, Praca i Zabezpieczenie Społeczne, vol. LXI, 2020/2, DOI 10.33226/0032-6186.2020.2.1, p. 4.

<sup>8</sup> Ł. Kobroń- Gąsiorowska, *Whistleblowing – nowa instytucja prawa pracy – perspektywa międzynarodowa*, Palestra, 2019/9, <https://palestra.pl/pl/czasopismo/wydanie/9-2019/artykul/whistleblowing-nowa-instytucja-prawa-pracy-perspektywa-miedzynarodowa> (access: 2.05.2021).

<sup>9</sup> See e.g. Ł. Kobroń- Gąsiorowska, *Whistleblower – strażnik wartości czy donosiciel?*, Palestra 2013/11-12, <https://palestra.pl/pl/czasopismo/wydanie/11-12-2013/artykul/whistleblower-straznik-wartosci-czy-donosiciel> (access: 2.05.2021).

accounting irregularities, corruption, discrimination or other types of abuse. The Directive refers to breaches of European Union law, but it is possible to extend it to national legislation.

Reporting various violations in the name of the public interest can be costly. The literature points, in this context, to the risk of losing a job and having difficulties finding another, loss of professional standing, exposure to trumped-up charges and lawsuits, often combined with health and family problems<sup>10</sup>. This may lead to professional and even social exclusion<sup>11</sup>. This therefore justifies the need to provide effective guarantees against retaliation. According to the Directive, a person who has been retaliated against should have the right to seek protection of his or her rights before an impartial and independent court (art. 22). For protection to be effective, it is important, in my opinion, that national regulations be introduced in such a way that restoration of the status quo is the rule in the first place, or that sufficiently high monetary claims be made to deter retaliation against whistleblowers. The Directive also authorizes States to introduce public law sanctions against obstructing reporting, taking retaliation, initiating burdensome proceedings against whistleblowers or violating the confidentiality obligation of the reporting persons (art. 23).

Therefore, the public interest justifies the application of appropriate guarantees at an early stage, also at the procedural level.

### **3. The personal scope of procedural protection and the material jurisdiction of the court**

In the context of analysing procedural solutions concerning the protection of whistleblowers, attention must first be paid to the personal scope of a person with the status of a whistleblower. The conditions for granting protection are set out in Article 13(1) of the Directive, pursuant to which, reporting persons shall qualify for protection under this Directive provided that:

- (a) they had reasonable grounds to believe that the information on reported breaches was true at the time of reporting and that such information fell within the scope of this Directive; and

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<sup>9</sup> H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia*, Scholar: Warszawa 2020, p. 19.

<sup>10</sup> *Ibidem*, p. 19.

(b) they reported either internally in accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15.

The Directive provides for a very broad personal scope of persons subject to protection<sup>12</sup>. At the same time, such scope affects the personal scope of active procedural legitimacy as well as the jurisdiction of the ordinary court.

In general, whistleblowers are persons who found out about irregularities concerning their work-related activities. This is confirmed directly by Recital 1 of the Directive which states that: „Persons who work for a public or private organisation or are in contact with such an organisation in the context of their work-related activities are often the first to know about threats or harm to the public interest which arise in that context”. In this context, employment should be viewed in a broad sense i.e. based on any legal basis, not only under an employment contract<sup>13</sup>. Moreover, Recital 1 of the Directive states that whistleblowers may be not only the persons employed on any legal basis but also the persons who are merely in contact with a given organisation. The status of a whistleblower is granted not only to Union citizens but also to third-country nationals (Recital 37 of the Directive).

The minimal personal scope of the definition of a whistleblower under Article 4 of the Directive includes (in both private and public sectors):

- persons having the status of an employee, within the meaning of Article TFUE<sup>14</sup>, including civil servants;
- persons having self-employed status, within the meaning of Article 49 TFUE;

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<sup>11</sup> Ł. Kobroń-Gąsiorowska, *Whistleblower w prawie europejskim - ochrona whistleblowerów czy informacji*, Humanitas, Roczniki Administracji i Prawa 2018/2/XVIII, p.137-138, which also refers to an autonomous definition of an employee developed in the judicature of the European Court of Justice, also discussed in A. M. Świątkowski (A.M. Świątkowski, *Swoboda przepływu „pracy”: pracowników czy zatrudnionych wewnątrz Unii Europejskiej*, Roczniki Administracji i Prawa 2014/14/2, p. 187-188).

<sup>12</sup> In the literature prior to the introduction of the Directive, negative views were rightly expressed about limiting the protection of whistleblowers only to those with employee status – see: G. Makowski, M. Waszak, *Ustawa o ochronie sygnalistów w Polsce – o potrzebie i perspektywach jej wprowadzenia* (in:) *Sygnaliści w Polsce okiem pracodawców i związków zawodowych*, eds. G. Makowski, M. Waszak, Warsaw 2016, p. 22-23. A broad subjective view of the whistleblower is also found in paragraph 14 of the European Parliament Resolution of 24 October 2017 on legitimate measures to protect whistleblowers acting in the public interest when disclosing confidential information held by companies and public authorities (2016/2224(INI)), [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0402\\_PL.html](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0402_PL.html) (access: 2.05.2021).

<sup>14</sup> Treaty on the Functioning of the European Union, EU Journal of Laws 2010, C 83/01.

- shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees;
- any persons working under the supervision and direction of contractors, subcontractors and suppliers;
- former employees;
- persons who are applying for a job.

In determined cases, protective measures for the persons reporting breaches specified in Chapter VI of the Directive, including measures of a procedural nature, are also granted to persons who assisted whistleblowers in submitting the report; third parties who are connected with the reporting persons and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons; and legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context.

The issue of persons assisting and associated with whistleblowers who may suffer retaliation remains problematic in this context. The draft law on the protection of whistleblowers<sup>15</sup> developed by the Batory Foundation defines, in Article 2, the concept of a whistleblower as a person who, in connection with the duties performed, work provided or contract executed:

- 1) made a whistleblowing report in accordance with the procedure set out in the Act, or
- 2) provided assistance in the reporting of irregularities by another person, in particular by providing that person with information about the irregularity.

The proposed personal scope therefore coincides with the broad understanding of the concept of work under the Directive. However, it no longer includes legal entities<sup>16</sup>. It seems that in practice, the greatest difficulties will be caused by the category of persons providing assistance in reporting irregularities by another person which may be abused in this wording of the draft law. In my opinion, therefore, the form and manner of this assistance

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<sup>15</sup> A draft law developed by the Batory Foundation, the Helsinki Foundation for Human Rights, Trade Union Forum and Institute of Public Affairs, <http://www.signalista.pl/projekt-ustawy/> (access: 3.05.2021).

<sup>16</sup> The similar concept of a whistleblower is provided in the latest draft of the Act of 14th of October 2021 on the protection of whistleblowers – Articles 4 and 12, <https://legislacja.rcl.gov.pl/projekt/12352401/katalog/12822845#12822845> (access: 21.01.2022).



should be specified, and it should not be limited merely to hearsay or accidental information, given that such a person is to be subject to appropriate procedural protection.

A question should also be asked about the jurisdiction of the court which would grant protection and hear cases within the scope under discussion. Certainly, at this point, a case within this scope goes beyond the personal scope of the labour law case within the meaning of Article 476 of the Polish Code of Civil Procedure, and even beyond the broadly understood scope of cases concerning labour law relations within the meaning of Article 1 of the Code of Civil Procedure. Therefore, when introducing appropriate solutions within this scope, it will be necessary to determine the court competent for such cases. In the current legal state, in my opinion, such cases, depending on the basis of employment, can be examined either by a civil court or a labour court. *De lege ferenda* it is also not out of the question for the Polish legislator to consider the jurisdiction of an administrative court due to the public interest of the report. If, in the future, the legislator decides to subject cases within this scope to the jurisdiction of labour courts, I consider it necessary in this context to broaden the definition of a labour law case within the meaning of Article 476 of the Civil Procedure Code, because the type of case under discussion will be inherently connected to work in the broad sense. *De lege ferenda* it seems justified to establish the jurisdiction of one court, regardless of the basis of employment.

Another issue will also be the determination of the disputed amount in cases within this scope. In my view, two types of claims may be involved: reinstatement of employment based on various legal grounds (for which the value of the object of dispute will be determined pursuant to Article 23(1) of the Code of Civil Procedure) or monetary claims, where the value of the asserted claim will constitute the disputed amount (Article 19 § 1 of the Code of Civil Procedure).

#### **4. Procedural measures for the protection of whistleblowers**

The Directive obliges Member States to introduce regulations that prohibit retaliation against whistleblowers. The sample catalogue of retaliation against which a whistleblower should be protected is broad and includes

activities such as (Article 19): termination of the employment contract, non-extension of the contract, if the whistleblower could reasonably expect such an extension to take place, mobbing, discrimination, negative evaluation, suspension of training, negative assessment of work, withdrawal of a license or damage to the reputation of a given person, especially in social media. Retaliation may also involve referring an employee to a medical or psychiatric examination<sup>17</sup>.

This means that employers will be obliged to adopt solutions preventing the indicated retaliatory actions. At the same time, persons who knowingly report false information will not be entitled to protection. In Recital 44, it is specified that there should be a close link between reporting and the adverse treatment suffered, directly or indirectly, by the reporting person, for that adverse treatment to be considered to be retaliation and consequently for the reporting person to be able to enjoy legal protection in that respect. Therefore, at this stage, a very important element will be a procedure under which the status of a whistleblower is granted; which should, in particular, also involve the issuance of appropriate certificates and the determination by the legislator of the competent authorities in such cases.

It follows from Article 2(1) that the Directive lays down common minimum standards for the protection of reporting persons. Among the appropriate support measures to be provided by Member States to whistleblowers are the following:

- instruments of indirect protection<sup>18</sup>, i.e., free legal assistance to whistleblowers, at a pre-trial stage and during the court proceedings<sup>19</sup>,
- the assistance of competent authorities, including the possibility to obtain a certificate confirming that one is subject to protection<sup>20</sup>.

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<sup>17</sup> See Article 19 of the Directive.

<sup>18</sup> This term is used by B. Baran, *Środki ochrony sygnalistów na podstawie dyrektywy 2019/1937 (tzw. dyrektywy o ochronie sygnalistów), point 4. Środki ochrony przed działaniami odwetowymi* [in:] *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości*, eds. B. Baran, M. Ożóg, Wolters Kluwer: Warsaw 2021, <https://sip-1lex-1pl-1ym3yi9750674.han.uek.krakow.pl/#/monograph/369479740/8?keyword=wujczyk&tocHit=1&cm=SREST> (access: 2021-05-02 22:17).

<sup>19</sup> Cfr. Article 20(1a and 1c) of the Directive and Recital 99; see G. Makowski, M. Waszak, *Ustawa o ochronie sygnalistów w Polsce – o potrzebie i perspektywach jej wprowadzenia* (in:) *Sygnaliści w Polsce okiem pracodawców i związków zawodowych*, eds. G. Makowski, M. Waszak, Warsaw 2016, p. 22-23.

Also, the possibility to organise assistance centres, including psychological support for whistleblowers, is provided for as an optional support measure.

In turn, as procedural measures for protection against retaliation, the Directive (Article 21) specifies:

- the transfer of the burden of proof onto the person who has taken the detrimental measure by the reporting person (Article 21(5))<sup>21</sup>,
- interim relief pending the resolution of legal proceedings, in accordance with national law (Article 21(6)),
- reporting persons shall have the right to seek dismissal of the case concerning defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law, if the reporting or public disclosure was pursuant to the Directive (Article 21(7)).

Therefore, the procedural challenges in the field of whistleblower protection are currently among the most urgent for the Polish legislator. In this context, interim relief pending the resolution of legal proceedings will be particularly important. In Recital 96 of the Directive it is emphasised that reporting persons should also have access to interim relief provided for in national law in order to prevent threats and attempts to take retaliation measures or to stop further retaliation measures. In my view, such protection should be granted for the pending investigation proceedings in a given case.

The Batory Foundation's draft also provides for quite specific (apparently as a deterrent to employers) regulations in the event of retaliatory action against whistleblowers (Article 10(2-6)). According to the proposals contained therein, legal actions or personal decisions of a retaliatory nature taken against a whistleblower within three years of the date on which the employer became aware of the fact that a report had been made are to be legally invalid. In labour law this is a fairly precedent-setting sanction, because under the current regulations, even in the case of unlawful or unjustified termination of employment, the legislator does not provide for the sanction of *ex lege*

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<sup>20</sup> This issue is also referred to in Recital 90 of the Directive.

<sup>21</sup> Cfr. H. Szewczyk, *Whistleblowing w zakładzie pracy w świetle nowej dyrektywy 2019/1937 Parlamentu Europejskiego i Rady (UE) w sprawie ochrony osób zgłaszających naruszenia prawa Unii*, *Praca i Zabezpieczenie Społeczne* vol. LXI, 2020/2, DOI 10.33226/0032-6186.2020.2.1, p.84.

invalidity, but for the possibility of invalidating specific actions due to their defectiveness. Moreover, the employer bears the burden of proving that the actions taken against the whistleblower during that period, which caused his situation to deteriorate, were not retaliatory. A whistleblower whose situation worsened as a result of retaliatory actions taken against him in that period is entitled to compensation from the employer to an amount proportionate to the degree of that worsening, but not less than PLN 10,000. Irrespective of the compensation, the whistleblower may demand reinstatement of work under the previous conditions or, if reinstatement would be impossible or inexpedient, compensation to an amount equal to two years' remuneration received in the last position held. These claims are also subject to *ex officio* security in the event that legal proceedings are initiated in connection with retaliatory actions taken against the whistleblower<sup>22</sup>. Awarding high levels of compensation in the event that reinstatement is impossible or inappropriate should discourage hasty decisions to dismiss an inconvenient employee, because the practice of applying Article 45 of the Labour Code or even Article 56 of the Labour Code to date shows that employers often prefer to pay compensation which is, in principle, limited, just to dismiss an unwanted employee.

A proposal for a whistleblower protection measure in the form of compensation amounting to twice the annual salary received by a whistleblower who has been dismissed from their employment or service in their last position was also put forward in the draft Act on Openness of Public Life in Article 65 Section 1 point 1<sup>23</sup>. It was criticised in the literature on the subject as a norm creating a specific amount of remuneration, and consequently of compensation due, detached from the amount of damage actually suffered and benefits lost as a result of retaliatory action<sup>24</sup>.

In this context it is worth indicating that Recital 94 of the Directive points to access to legal remedies and compensation. The appropriate remedy in each case should be determined by the kind of retaliation suffered, and the damage caused in such cases should be compensated in full in accordance with national

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<sup>22</sup> Article 11 of the Directive.

<sup>23</sup> The government draft law on the Openness of Public Life of 8.1.2018, KRM-10-3-18, UD 314, <https://www.rpo.gov.pl/sites/default/files/ustawa-o-jawnosci-zycia-publicznego-projekt-z%208-stycznia-2018.pdf> (downloaded: 1.05.2021).

<sup>24</sup> Cfr. M. Kozak-Maśnicka, *Dyrektywa w sprawie ochrony osób zgłaszających naruszenia prawa Unii jako wyzwanie dla polskiego ustawodawcy*, *Monitor Prawa Pracy* 2020/4, p. 17.

law. The appropriate remedy could take the form of actions for reinstatement, for instance, in the event of dismissal, transfer or demotion, or of withholding of training or promotion, or for restoration of a cancelled permit, licence or contract; compensation for actual and future financial losses, for example for lost past wages, but also for future loss of income, costs linked to a change of occupation; and compensation for other economic damage, such as legal expenses and costs of medical treatment, and for intangible damage such as pain and suffering. However, it seems that the Directive correlates the amount of compensation with the damage suffered. This is also emphasised in Recital 95, which lets Member States choose appropriate kinds of legal remedies as long as it is guaranteed that compensation or reparation is real and effective, in a way which is proportionate to the detriment suffered and is dissuasive.

The Directive also obliges Member States to introduce effective sanctions against natural and legal persons who obstruct whistleblowers, take retaliatory action, instigate vexatious proceedings, and fail to respect confidentiality obligations. Analogous sanctions and liability for damages should be introduced for those who knowingly make false reports (Article 23). In practice, it is unavoidable that the institution of a whistleblower is abused. The rule is that cases in this area are to be heard in the state courts. An arbitration agreement in cases related to whistleblowing is only possible after the dispute has arisen (Article 24). This is a clearly protective regulation aimed at preventing abuse by more powerful litigants when concluding such agreements<sup>25</sup>.

The latest draft of 14th of October 2021 of the Act on the protection of whistleblowers, provides primarily guarantees for the protection of whistleblowers under substantive law. The proposed guarantees include, among others: the ineffectiveness of any unilateral legal action involving termination of the legal relationship due to notification or public disclosure (Article 15 sec. 1); compensation for unfavorable treatment on account of filing or public disclosure (art. 15 sec. 2). Unfortunately, there are no direct

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<sup>25</sup> I express a similar view in the context of procedural agreements in cases within labour law – M. Mędrała, *Funkcja ochronna cywilnego postępowania sądowego w sprawach z zakresu prawa pracy*, Wolters Kluwer: Warszawa 2011, p. 216-218, 356-365.

procedural guarantees, such as a proper court, special procedural safeguards, etc.

## 5. Current regulations in the Polish Code of Civil Procedure

Back in 2009, the Ombudsman argued that the existing general procedural provisions on the possibility for an employee to claim damages or reinstatement of employment (Article 45 of the Labour Code) were sufficient to protect whistleblowers<sup>26</sup>. It seems that in light of the current wording of the Directive, this position has become outdated. In the case of employees not subject to special protection against termination of the employment relationship, it is quite common practice to award compensation claims to employees which, in principle, do not exceed three months' remuneration rather than reinstate the employment relationship. One has to agree with the view that the evidence procedure does not comply with the Council of Europe Resolution 1729 of 2010 on the protection of whistleblowers<sup>27</sup>.

There is a lack of procedural interim relief for whistleblowers. The need for such measures is clearly indicated in paragraph 39 of the European Parliament Resolution of 24 October 2017 on legitimate measures to protect whistleblowers acting in the public interest when disclosing confidential information held by companies and public authorities (2016/2224(INI))<sup>28</sup>.

In this context, analyses are primarily required by the provisions of separate proceedings in matters of labour law (Articles 459-477<sup>7a</sup> of Civil Procedure Code), and especially the newly added, in 2019, Articles 477<sup>2</sup> § 2 of the Civil Procedure Code, introducing the institution of the possibility of reinstating an employee by the court at the request of an employee in the form of imposing an obligation on the employer to continue employing an employee until the final conclusion of the procedure. However, the court is in no way obliged by the employee's request. The previously existing possibility was limited only to declaring the dismissal as ineffective, which, due to the lengthy

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<sup>26</sup> A statement of the Ministry of Labour and Social Policy of 29 April 2009 formulated in a response to the Ombudsman letter of 30 March 2009: DPR-I-0712-11/JS/BL/MP/09, source: <http://www.sygnaLista.pl/prawo-i-orzecznictwo/prawo-w-polsce/> (access: 24.04.2021).

<sup>27</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en> (access: 3.05.2021).

<sup>28</sup> [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0402\\_PL.html](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0402_PL.html) (access: 2.05.2021).

court proceedings, resulted in its low application in practice. In the doctrine, the imposition of this obligation is called temporary reinstatement<sup>29</sup>, which is possible on the basis of a non-final judgment<sup>30</sup>. I agree with the view that this institution applies to both termination and termination without notice of the employment relationship<sup>31</sup>. An application for reinstatement may be submitted both in the statement of claim and in other pleadings (or orally to the minutes) until the conclusion of the proceedings in the case. Despite the optional nature of this institution, the rule should be that the employer must continue to employ the employee<sup>32</sup>.

In the current legal situation, it seems that this institution should be of general use for whistleblowers in court practice. Nevertheless, in my opinion, it cannot be regarded as a sufficient means of procedural protection for whistleblowers from the perspective of the directive. Experience from judicial practice to date shows that courts apply it very cautiously.

## 6. Procedural regulations in foreign legislation

Currently, the most of European Union countries have only partial regulations on whistleblowing. The Directive has not yet been implemented in most European countries. But I analyze below some foreign regulations including procedural guarantees on whistleblowers' protection.

According to Luxemburg's law<sup>33</sup> (Law on Strengthening the Means to Fight Corruption passed in February 2011), if an employee is fired, he or she

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<sup>29</sup> K. Jaśkowski, E. Maniewska, *Tymczasowe przywrócenie pracownika do pracy (art. 477<sup>2</sup> § 2 k.p.c.)*, *Praca i Zabezpieczenie Społeczne* 2020, no. 9, p. 15 and the following; M. Mędrala, *Zasada szybkości postępowania w sprawach z zakresu prawa pracy po nowelizacji k.p.c.*, *Acta Universitatis Wratislaviensis*, no. 4049, *Przegląd Prawa i Administracji*, CXXIV, Wrocław 2021, <https://doi.org/10.19195/0137-1134.124.7>, p.96.

<sup>30</sup> M. Mędrala, *Zasada szybkości postępowania w sprawach z zakresu prawa pracy po nowelizacji k.p.c.*, p. 96.

<sup>31</sup> M. Mędrala, *Zasada szybkości postępowania w sprawach z zakresu prawa pracy po nowelizacji k.p.c.*, p. 97 with the views presented therein of K. Jaśkowski and E. Maniewska in the publication entitled *Tymczasowe przywrócenie pracownika do pracy (art. 477<sup>2</sup> § 2 k.p.c.)*, *Praca i Zabezpieczenie Społeczne* 2020/9, p. 16 and J. May, *Proceedings in matters of labour law after the amendment to the Polish Code of Civil Procedure*, *Praca i Zabezpieczenie Społeczne* 2020/3, p. 45.

<sup>32</sup> K. Jaśkowski, E. Maniewska, *op.cit.*, p. 17., M. Mędrala, *Zasada szybkości postępowania w sprawach z zakresu prawa pracy po nowelizacji k.p.c.*, p. 97.

<sup>33</sup> *Whistleblowing in Europe legal protections for whistleblowers in the EU*, Transparency International, 2013, downloaded from: [https://images.transparencycdn.org/images/2013\\_WhistleblowingInEurope\\_EN.pdf](https://images.transparencycdn.org/images/2013_WhistleblowingInEurope_EN.pdf), p. 61.

can appeal the decision to a Labour Court and the employer must prove that the firing was justified by objective grounds not related to whistleblowing.

The Whistleblower Protection Act binding in Romania<sup>34</sup> from 2004 only protects government employees. The law is intended to conceal a public sector whistleblower's identity, assumes that they acted in good faith unless proven otherwise, allows them to follow the progress of their case, and grants the right of court appeal. If the target of the disclosure has supervisory powers over the whistleblower, the law stipulates that the whistleblower's identity shall remain concealed<sup>35</sup>.

A special procedure for obtaining a temporary measure after dismissal due to signalling activities is provided for in section. 11 of the Irish Protected Disclosures Act 2014<sup>36</sup>. The application is submitted by the employee to the Circuit Court for interim relief. It should be submitted within 21 days of the dismissal of an employee. The employee shall give the employer prior written notice of intention to make the application for interim relief. The Court shall ask the employer whether the employer is willing, pending the determination or settlement of the claim to reinstate the employee or to re-engage the employee in another position on terms and conditions not less favourable than those which would have been applicable to the employee if the employee had not been dismissed. If the employee is willing to accept the position on those terms and conditions, the Court shall make an order to that effect. If the employee is not willing to accept the position on those terms and conditions, the Court can make an order for the continuation of the employee's contract of employment. An order for the continuation of an employee's contract of employment is an order that the contract of employment continue in force in all employment aspects.

According to the British Public Interest Disclosure Act, 1998 (Article 9), the application for interim relief in the case of unlawful termination of an

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<sup>34</sup> *Ibidem*, p. 73.

<sup>35</sup> *Ibidem*, p. 73.

<sup>36</sup> Protected Disclosures Act 2014, sec. 11, downloaded from: <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/print.html> (access: 2.05.2021); cfr. M. Kozak-Maśnicka, *Dyrektywa w sprawie ochrony osób zgłaszających naruszenia prawa Unii jako wyzwanie dla polskiego ustawodawcy*, *Monitor Prawa Pracy* 2020/4, p. 17.



employment contract should be submitted within 7 days of the termination<sup>37</sup>. The British legislator introduces presumptions of the unlawfulness of the dismissal in connection with whistleblowing activities<sup>38</sup>. The Employment Tribunal may reinstate the employee in a previously held position or decide that the contract will be treated as if it has not expired, which will allow the employee to claim compensation for the entire period of unemployment until the case is finally resolved<sup>39</sup>.

*De lege ferenda* it would be reasonable to introduce similar temporary protective procedural measures in Polish legislation. B. Baran also argues that such measures should be extended to administrative proceedings<sup>40</sup>.

In Slovakia (Act No. 54/2019 Coll. Rep. Słowacka, on the protection of whistleblowers), whistleblower protection is granted at the whistleblower's request and hinges on the fact that, without the consent of the Whistleblower Protection Office, the employer may not, under the sanction of nullity, take any legal action against the whistleblower or issue any decision under the employment relationship without the consent of the Whistleblower Protection Office<sup>41</sup>.

Polish regulations do not provide for any different solutions as part of procedural protection measures for whistleblowers. They do not even provide for the principle of the reverse burden of proof in the event of wrongful dismissal

<sup>37</sup> <https://www.legislation.gov.uk/ukpga/1998/23/contents> (access: 2.05.2021). More about British legislation on the whistleblowing: H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia*, Scholar: Warsaw 2020, p. 88 and the following. See also: M. Kozak-Maśnicka, *Dyrektywa w sprawie ochrony osób zgłaszających naruszenia prawa Unii jako wyzwanie dla polskiego ustawodawcy*, *Monitor Prawa Pracy* 2020/4, p. 17.

<sup>38</sup> By: H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia*, Scholar: Warsaw 2020, p. 89.

<sup>39</sup> By: *ibidem*, p. 89-90.

<sup>40</sup> B. Baran, *Środki ochrony sygnalistów na podstawie dyrektywy 2019/1937 (tzw. dyrektywy o ochronie sygnalistów)*, point 4. *Środki ochrony przed działaniami odwetowymi*, [in:] *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości*, eds. B. Baran, M. Ożóg, Warsaw 2021, <https://sip-1lex-1pl-1ym3yi9750674.han.uek.krakow.pl/#/monograph/369479740/8?keyword=wujczyk&toHit=1&cm=SREST> (access: 2021-05-02 22:17).

<sup>41</sup> By: P. Kłosowski, *Status osób ujawniających nieprawidłowości w Republice Słowackiej z perspektywy przepisów nowej ustawy z 1.03.2019 r.*, point 6. Wniosek o objęcie sygnalisty ochroną prawną and

point 7. Na czym polega ochrona sygnalisty przed pracodawcą? [in:] *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości*, eds. B. Baran, M. Ożóg, Warsaw 2021; <https://sip-1lex-1pl-1ym3yi9750674.han.uek.krakow.pl/#/monograph/369479740/90?keyword=wujczyk&toHit=1&cm=SREST> (access: 2021-05-02 23:00).

of a whistleblower. We do not have a regulated procedure for obtaining the status of a whistleblower for the purposes of court proceedings.

## 7. Final remarks

There should be no doubt that effective whistleblower protection requires not only material guarantees, but also procedural and criminal guarantees. Effective guarantees of substantive law are not possible without appropriate procedural guarantees for whistleblowers.

In my opinion, the current guarantees in the Polish civil procedure, as well as the material guarantees, are insufficient. In particular, there are insufficient temporary safeguards for whistleblowers, to whom, for example, retaliatory measures have been applied. The current regulation of Article 477<sup>2</sup> § 2 of the Code of Civil Procedure, though deserving of a positive assessment, does not meet all the requirements of the Directive. There is a lack of interim reliefs for whistleblowers. The latest Polish drafts of laws on whistleblowing also don't refer to typically procedural guarantees.

As the regulation *de lege ferenda* provides for a broad personal scope of a whistleblower, it is necessary that the competent authorities responsible for issuing whistleblower protection certificates, as well as the competent court to hear cases in this area be determined.

There is also a need of regulations which transfer the burden of proof onto the person who has taken the detrimental measure by the reporting person.

There is a need to constitute some competent authorities for whistleblowers and some assistance centres.

I express the view that both the construction of Articles 45 and 56 of the Polish Labour Code and Article 477<sup>2</sup> of the Polish Code of Civil Procedure, as well as the current practice of their application, do not provide whistleblowers with sufficient guarantees of procedural protection. Currently, in the Polish legal system, the issue of protection of persons reporting such violations is not yet comprehensively regulated.

## REFERENCES

Baran B., *Środki ochrony sygnalistów na podstawie dyrektywy 2019/1937 (tzw. dyrektywy o ochronie sygnalistów)*, in: Baran B., Ożóg M. (eds.), *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości*, Wolters Kluwer: Warsaw 2021, Lex/el.

Jaśkowski K., Maniewska E., *Tymczasowe przywrócenie pracownika do pracy (art. 477<sup>2</sup> § 2 k.p.c.)*, *Praca i Zabezpieczenie Społeczne* 2020/9.

Kłósowski P., *Status osób ujawniających nieprawidłowości w Republice Słowackiej z perspektywy przepisów nowej ustawy z 1.03.2019 r.*, in: Baran B., Ożóg M. (eds.), *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości*, Wolters Kluwer: Warsaw 2021, Lex/el.

Kobroń Ł., *Interes publiczny jako element podstawowy funkcji ochronnej prawa pracy - w kontekście ochrony sygnalistów*, *Humanitas, Roczniki Administracji i Prawa* 2019/1/XIX.

Kobroń-Gąsiorowska Ł., *Whistleblowing – nowa instytucja prawa pracy – perspektywa międzynarodowa*, *Palestra*, 2019/9, <https://palestra.pl/pl/czasopismo/wydanie/9-2019/artykul/whistleblowing-nowa-instytucja-prawa-pracy-perspektywa-miedzynarodowa> (access: 2.05.2021).

Kobroń-Gąsiorowska Ł., *Whistleblower – strażnik wartości czy donosiciel?*, *Palestra* 2013/11-12, <https://palestra.pl/pl/czasopismo/wydanie/11-12-2013/artykul/whistleblower-straznik-wartosci-czy-donosiciel> (access: 2.05.2021).

Kobroń-Gąsiorowska Ł., *Whistleblower w prawie europejskim - ochrona whistleblowera czy informacji*, *Humanitas, Roczniki Administracji i Prawa* 2018/2/XVIII.

Kozak-Maśnicka M., *Dyrektywa w sprawie ochrony osób zgłaszających naruszenia prawa Unii jako wyzwanie dla polskiego ustawodawcy*, *Monitor Prawa Pracy* 2020/4.

Makowski G., Waszak M., *Ustawa o ochronie sygnalistów w Polsce – o potrzebie i perspektywach jej wprowadzenia*, in: Makowski G., Waszak M. (eds.), *Sygnaliści w Polsce okiem pracodawców i związków zawodowych*, Warszawa 2016.

May J., *Proceedings in matters of labour law after the amendment to the Polish Code of Civil Procedure*, *Praca i Zabezpieczenie Społeczne* 2020/3.

Mędrala M., *Funkcja ochronna cywilnego postępowania sądowego w sprawach z zakresu prawa pracy*, Wolters Kluwer: Warszawa 2011.

Mędrala M., *Zasada szybkości postępowania w sprawach z zakresu prawa pracy po nowelizacji k.p.c.* *Acta Universitatis Wratislaviensis*, no 4049, *Przegląd Prawa i Administracji*, CXXIV, Wrocław 2021, <https://doi.org/10.19195/0137-1134.124.7A>.

Statement of the Ministry of Labour and Social Policy of 29 April 2009 formulated in a response to the Ombudsman letter of 30 March 2009: DPR-I-0712-11/JS/BL/MP/09, source: <http://www.sygnalista.pl/prawo-i-orzecznictwo/prawo-w-polsce/> (access: 24.04.2021).

Szewczyk H., *Whistleblowing w zakładzie pracy w świetle nowej dyrektywy 2019/1937 Parlamentu Europejskiego i Rady (UE) w sprawie ochrony osób zgłaszających*

*naruszenia prawa Unii*, Praca i Zabezpieczenie Społeczne 2020/2, DOI 10.33226/0032-6186.2020.2.1.

Szewczyk H., *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia*, Scholar: Warsaw 2020.

Świątkowski A.M., *Swoboda przepływu „pracy”: pracowników czy zatrudnionych wewnątrz Unii Europejskiej*, Roczniki Administracji i Prawa 2014/14/2.

*Whistleblowing in Europe legal protections for whistleblowers in the EU*, Transparency International, 2013, downloaded: 2.05.2021: [https://images.transparencycdn.org/images/2013\\_WhistleblowingInEurope\\_EN.pdf](https://images.transparencycdn.org/images/2013_WhistleblowingInEurope_EN.pdf).

Wojciechowska-Nowak A., *Skuteczna ochrona prawna sygnalistów. Perspektywa pracodawców, związków zawodowych oraz przedstawicieli środowisk prawniczych*, Warsaw, March 2014, the Batory Foundation (downloaded from: [http://www.sygnalista.pl/wp-content/uploads/2016/10/Skuteczna-ochrona-prawna-sygnalistow\\_PP.pdf](http://www.sygnalista.pl/wp-content/uploads/2016/10/Skuteczna-ochrona-prawna-sygnalistow_PP.pdf), 3.05.2021).

Wujczyk M., *Podstawy whistleblowingu w polskim prawie pracy*, Przegląd Sądowy, June 2014.

#### **Legal acts and drafts legal acts:**

Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons reporting breaches of EU law, Official Journal of the European Union L 305, 26.11.2019, p. 17–56.

Protected Disclosures Act 2014, sec. 11, downloaded from: <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/print.html> (access: 2.05.2021 r.).

The draft law developed by the Batory Foundation, the Helsinki Foundation for Human Rights, Trade Union Forum and Institute of Public Affairs, <http://www.sygnalista.pl/projekt-ustawy/> (access: 3.05.2021).

The draft of 14th of October 2021 of the Act on the protection of whistleblowers, <https://legislacja.rcl.gov.pl/projekt/12352401/katalog/12822845#12822845> (access: 21.01.2022).

Protected Disclosures Act 2014, downloaded from: <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/print.html> (access: 2.05.2021).

Public Interest Disclosure Act 1998, <https://www.legislation.gov.uk/ukpga/1998/23/contents> (access: 2.05.2021 r.).

The European Parliament Resolution of 24 October 2017 on legitimate measures to protect whistleblowers acting in the public interest when disclosing confidential information held by companies and public authorities (2016/2224(INI)), [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0402\\_PL.html](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0402_PL.html) (access: 2.05.2021 r.).

The British Public Interest Disclosure Act, 1998, <https://www.legislation.gov.uk/ukpga/1998/23/contents> (access: 2.05.2021).

The Council of Europe Resolution 1729 of 2010 on the protection of whistleblowers, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en> (access: 3.05.2021 r.).

The government draft law on the Openess of Public Life of 8.1.2018, KRM-10-3-18 UD 314, <https://www.rpo.gov.pl/sites/default/files/ustawa-o-jawnosci-zycia-publicznego-projekt-z%208-stycznia-2018.pdf> (access: 1.05.2021 r.).

Treaty on the Functioning of the European Union, EU Journal of Laws 2010, C 83/01.

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