
PROTECTION AGAINST VICTIMIZATION IN POLISH AND FRENCH LABOR LAW

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1. Introduction

Protection against victimization includes the prohibition of any act which would make worse the situation of an employee exercising his/her rights due to a violation of the principle of equal treatment.

Under French law, for victimization to exist, there must be a link between the adverse treatment and the exercise of the equal treatment rights. It is not required that it be the sole cause of the adverse treatment, but it must be a significant cause. This view is also valid under Polish regulations.

French regulations also protect against victimisation of persons who did not provide assistance to a person exercising their rights in virtue of infringement of the principle of equal treatment, but only participated in proceedings concerning the charge of discrimination (e.g. gave testimony unfavourable to the complainant). In this way, victimization also protects against a worsening of the situation of such a person due to the ostracism of colleagues.

Under the *Loi sur l'égalité* – Leg 1996, an employee is not entitled to protection against adverse treatment under the prohibition of victimization if he or she makes allegations or provides information that is false and given in bad faith. The introduction of such an exception should be postulated also on the grounds of Polish regulations. It eliminates protection in cases where the purpose of the employee is not to eliminate the discriminatory act, but – most often – to harm another person.

2. Poland

Article 183e of the Labour Code should be regarded as a provision protecting against victimisation of employees hired under Polish regulations. This provision stip-

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ulates that an employee's exercise of his/her rights due to a breach of the principle of equal treatment in employment cannot be the basis for unfavourable treatment of the employee, nor can it cause any negative consequences towards the employee, in particular it cannot constitute a reason justifying termination of the employment relationship by the employer or its termination without notice. Such protection is also afforded to an employee who provided support in any form to an employee exercising his/her rights due to a breach of the principle of equal treatment in employment².

Against the background of the abovementioned regulations, the Supreme Court took the position that the employee's exercise of his/her rights due to infringement of the principle of equal treatment in employment, including striving to explain or provide any form of support to other employees aimed at counteracting wage discrimination by the employer, cannot constitute a reason justifying termination of the employment contract without notice due to the employee.

It is also worth noting Article 183a § 7 of the Labour Code, according to which taking action by the employee against harassment or sexual harassment may not result in any negative consequences for the employee³.

The activities covered by the prohibition on retaliation include, among others, acting as a witness for an employee who has been discriminated against in proceedings brought by that employee or actively opposing discrimination by intervening with the employer.

Both Article 183e § 1 and Article 183e § 7 of the Labour Code grant protection to the employee. This means that it cannot be used by a candidate for an employee. Such a regulation should be viewed critically. There is no argument that job applicants, who are covered by the prohibition of discrimination, should be deprived of protection if they exercise their rights as a discriminated or harassed person⁴.

3. France

Under L. 5424-29 of the Code du travail, person A engages in unlawful reprisals against another person B if it produces adverse consequences for B because of⁵:

- B's undertaking a protected activity,
- A's belief that B has undertaken or will undertake a protected activity.

Under French law, victimisation is not considered as one of the forms of discrimination. An employee claiming to be a victim of victimisation does not have to prove that the unfavourable treatment is connected with one of the prohibited criteria of differentiation. A similar solution has not been introduced by the Polish legislator.

Loi sur l'égalité – Leg 1996 recognizes the following cases as covered by protection against victimization (as protected acts): instituting proceedings in accordance with Loi sur l'égalité – Leg 1996 providing evidence or information related to proceed-

² Ustawa z dnia 14 listopada 2003 r. o zmianie ustawy – Kodeks pracy oraz o zmianie niektórych innych ustaw (Dz.U., nr 213, poz. 2081, ze zm.).

³ Ibid.

⁴ Ibid.

⁵ L. 5424-29 Modifié le 2022-02-15 par LOI n°2022-172 du 14 février 2022 – art. 11 (V), Code du travail, LÉGIS LATION: Mémorial A – 45 du 22 janvier 2021 PRISE D'EFFET: 26 janvier 2021.

ings instituted in accordance with *Loi sur l'égalité – Leg 1996*, taking any action other than those previously mentioned for the purpose of carrying out or in connection with *Loi sur l'égalité – Leg 1996*, making an allegation (whether expressed or not explicitly) that an employer or any other person has acted contrary to the provisions of *Loi sur l'égalité – Leg 1996*⁶.

The *Loi sur l'égalité – Leg 1996* also considers as a protected act: taking action that would have the effect of materially disclosing a pay rule, making a material disclosure of a pay rule, receiving information disclosed in connection with a material disclosure of a pay rule. A material disclosure of a pay rule is a disclosure that is made to enable the person who is making the disclosure or for whose purposes the information is being disclosed to determine whether the amount of pay he or she is receiving is related, and if so, to what extent, to the criterion of unlawful differentiation.

Case law provides examples of protected activities. In the case of *Service National de Probation Pour la France contre Kirby*.

a female employee of Asian descent indicated in her complaint that she had a conflict with a white coworker. However, Kirby, interviewed as a witness on the filed complaint, indicated that she was not aware of the existing conflict between the two women. Other co-workers resented her for her statements and when Kirby got into an altercation with one of the hostel guests, none of the co-workers wanted to help her. The court found that this action was the result of victimization. It indicated that her testimony was in the nature of a protected act and that the lack of assistance from her co-workers was due to the performance of that act⁷.

It should be noted that the French regulations protect more broadly the persons undertaking actions in connection with discriminatory proceedings than the regulations in force in Poland. Polish regulations protect only those persons who provided support in any form to an employee exercising his/her rights due to a breach of the principle of equal treatment in employment. Protection introduced by regulations in France also covers employees who undertook certain actions as part of discrimination proceedings, but either were unable to provide support, or their testimony was unfavourable to the complainant. Such a solution should be regarded as expedient and fairer. It does not differentiate protection depending on whether or not a person had information about the circumstances on which an employee bases a charge of violation of the principle of equal treatment. It is appropriate to amend the Polish legislation so that protection is not limited only to those who act for the benefit of the complaining employee.

Under French law, protection is also available in those cases where an employer treats an employee unfavourably because of a mistaken belief that the employee has performed a protected act. Protection is also available if the employer performs an unlawful act on the suspicion that the employee may or intends to perform a legally protected act in the future.

Under the *Loi sur l'égalité – Leg 1996*, an employee is not entitled to protection against adverse treatment if he or she makes an allegation or provides information that

⁶ The Equality Act (*Loi sur l'égalité – LEg*) came into force on 1 July 1996. It is an important instrument for promoting effective equality between men and women.

⁷ A. Frickey, J. L. Primon, N. Marchal : *Les inégalités d'origine dans la transition des études supérieures à l'emploi*, in: *Huitièmes Journées de Sociologie du Travail*, Aix-en-Provence, juin 2001.

is false and presented in bad faith. The employer must prove that the employee's action was characterized by both of these elements. Consequently, if the information provided by the employee is false but the employee acts in good faith, the employee will be protected. Similarly, the employee will be protected if the information is true even though it was made in bad faith (e.g., in the belief that it would harm the employee)⁸.

This type of exception to protection is not expressly provided for under Polish law. According to the Labor Code, regardless of the way in which the support was provided, the employee should not bear negative consequences on this account. However, it seems that invoking special protection in this type of situation should be considered an abuse of the right within the meaning of Article 8 of the Labour Code. As a consequence, under Polish law an employee who knowingly gives false information in a discrimination procedure is not protected against the negative consequences that can be drawn by the employer.

French legislation does not specify what negative consequences the employee is protected from. As indicated by the Code du travail, negative consequences should be understood as any action that may materially adversely affect the position of the employee or place him in a difficult situation. In particular, it may be the rejection of an application for promotion, refusal to represent the employer, exclusion or restriction of the possibility to participate in training, omission in the award of discretionary benefits or bonuses dependent on the achievement of objectives. Unfavorable treatment can also manifest itself in the issuance of threats against an employee. Dismissal may also be an action that is protected by the rules governing proceedings in connection with allegations of discrimination.

In *Commissaire de police d'Auxerre contre Lucas*, it was held that unfavourable treatment can also consist of a failure to perform a certain act. In this particular case it was the issuing of a reference at the request of the employee⁹.

In order for there to be liability of the employer for victimization between the protected act and the adverse consequences suffered by the employee, there must be a link. Even if the protected act is only one of the causes of the adverse treatment of the employee, according to the principles established in French law, the employee will also in this case be entitled to claim protection on the grounds that he or she has been the object of victimization. In this type of situation, however, it is presumed that the protected act should significantly influence the adverse treatment of the employee or be a substantial cause of the adverse consequences suffered by the employee¹⁰.

Against the background of the causal connection between the protected act and the adverse consequences, cases in which the manner in which the employee performs the protected act provides an independent basis for the consequences against him or her should be approached with particular caution. For example, an employee alleging discrimination against a supervisor makes a complaint in an extremely loud and aggressive manner in front of the employer's customers. The employer may want to

⁸ Journal officiel électronique authentifié n° 0083 du 08/04/2016.

⁹ L. 1262-2-2 LOI n°2015-990 du 6 août 2015 – art. 283, Code du travail, LÉGISLATION : Mémorial A – 45 du 22 janvier 2021 PRISE D'EFFET: 26 janvier 2021.

¹⁰ www.sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/t-1-12-republika-francuska [01.07.2021].

discipline the employee for violating the company's good image. Drawing disciplinary consequences for doing so may be perceived by the employee as unfavorable treatment because of the complaint. In such situations, the court should consider whether the real basis for the employer's action was the protected activity or whether the sole reason was the breach of the employee's duties through the improper form in which the activity was performed.

4. Conclusion

French law does not impose a limit on the maximum amount of time that can elapse between the protected act and the adverse treatment of the employee in order to speak of victimization. Even a significant lapse of time does not deprive the employee of protection. It should be assumed that under Polish law, too, the lapse of time does not result in a loss of protection under anti-discrimination law.

French law is ambiguous about the possibility of invoking protection against victimization after termination of the employment relationship. At first, the courts interpreted *Loi sur l'égalité – Leg 1996* as precluding such protection. This interpretation was challenged by the CJEU on the grounds that it was contrary to Community legislation, specifically *Directive 76/207/EEC*.

In one case before the *Cour d'appel*, it was held that it was necessary to interpret national legislation in such a way that it complied with EU regulations. As a result, the court held that an employee may invoke protection against victimization by indicating that his or her adverse treatment at a subsequent employer resulted from a protected act performed at the previous employer.

Under Polish law, it is not clear whether an employee may also invoke the protection guaranteed by Article 183e of the Labor Code with a future employer. The use of the word "employee" might suggest that it refers only to the employer with whom the employee exercised his or her rights due to a breach of the principle of equal treatment in employment (or, alternatively, who provided support to such an employee). However, a different interpretation extending the protection to the period after termination of the employment relationship cannot be excluded either. In view of the need for a pro-European interpretation of the regulations, this is the solution to be adopted¹¹.

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¹¹ Ustawa z dnia 26 czerwca 1974 roku Kodeks pracy (Dz. U. z 1998 r. Nr 21, poz. 94, z zm.).

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Summary: The article attempts to analyze the phenomenon of victimization on the basis of selected legal regulations in Polish and French labour law. It was verified whether the discussed legal regulations in fact protect the victims of victimization and whether they adequately contribute to the protection of wronged employees.

Keywords: labour law, employee, discrimination, protection, victimization.