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REINSTATEMENT – DO REGULATIONS NEED TO CHANGE?

1. INTRODUCTORY COMMENTS

Reinstatement is commonly perceived as the basic claim following a defective termination of a permanent employment contract with or without notice. For many years no-one has questioned the need for the reinstatement claim; likewise its dominant role among claims following a defective termination of employment has remained unchallenged. However, over the last few years, the milieus of researchers and practitioners put forth many proposals to change this instrument. Among the proposed solutions is giving an employer the option to “be released” from the obligation to reinstate an employee against a “price”, namely sufficiently generous compensation¹, exclusion of reinstatement claims with respect to small employers², limiting reinstatement only to the cases of causeless termination of employment contracts with or without notice³, and even abandoning the claim in exchange for sufficient compensation⁴. There is no doubt that such proposals result from practical difficulties in enforcing reinstatement, and in particular – the inconvenience caused by such claims to employers. Lengthy court proceedings often mean that reinstatement ruled after a long time becomes meaningless to the employee, while the obligation to execute it is a source of much trouble for the employer. The proposals in question need to be assessed – not only from the perspective of both sides’ interest, but also with respect to constitutional values – in particular, the principle of free choice of employment. This article aims to

¹ The codification committee proposal of 2002.

² Ł. Pisarczyk, *Naprawienie szkody poniesionej przez pracownika wskutek wadliwego rozwiązania umowy o pracę przez pracodawcę*, (in:) L. Florek (ed.), *Prawo pracy a bezrobocie*, Warszawa 2003; M. Latos-Miłkowska, *Ochrona trwałości stosunku pracy u małych pracodawców*, (in:) G. Goździewicz (ed.), *Stosunki pracy u małych pracodawców*, Warszawa 2013, s. 196.

³ A. Leszczyńska, *Realizacja wyroku przywrócenia do pracy*, (in:) L. Florek (ed.), *Prawo pracy a bezrobocie*, Warszawa 2003.

⁴ W. Gujski, *Kodeks pracy – nagląca potrzeba zmian*, “Palestra” 2014, No. 9, p. 251.

offer a critical analysis of reinstatement. Its goal is to answer questions about the validity and form of further applications of this claim.

2. THE POSITION OF REINSTATEMENT FOLLOWING A DEFECTIVE TERMINATION OF AN EMPLOYMENT CONTRACT WITH OR WITHOUT NOTICE IN THE CLAIM SYSTEM

For a long time, from the moment the labour code came into effect, reinstatement was the most important form of claim – in addition to being the legislator's preferred solution – with respect to a defective termination of employment. Initially, recognising termination with notice as ineffective or reinstatement (if a contract has already been terminated) was the only claim type offered in the case of a defective termination of a permanent employment contract with notice. Pursuant to the original wording of art. 45 of the labour code, if it was established that termination of a permanent employment contract with notice was causeless, the labour appeal committee deemed it ineffective, and if an employment contract had already been terminated, the committee ordered reinstatement. Awarding damages was possible only in the case of defective termination of fixed-term employment contracts with notice. Since in those days permanent employment contracts were the dominant form, it is fair to say that the basic claim following a defective termination of an employment contract with notice was reinstatement under the previous conditions. Moreover, as the employee was awarded reinstatement, he or she often received a kind of financial compensation, namely salaries for the period of being deprived of employment. Only in the case of employment termination without notice did the legislator provide for the possibility to seek damages as an alternative to reinstatement. Its introduction – as a deviation from the rule of employment reinstatement – was motivated by the existence of a potential conflict between the two sides of dispute, due to which the employee would not be interested in coming back to work⁵. The choice of claim was up to the employee with court having the obligation to concede. And so, as far as that period was concerned, it is fair to suggest the dominant position of reinstatement claims following a defective termination of an employment contract with or without notice. According to specialist literature, no attempts were made when the labour code came into effect to modify the well-established principle of awarding

⁵ G. Bieniek, J. Brol, A. Krajewski, W. Masewicz, J. Szczerski, (in:) J. Jończyk (ed.), *Kodeks pracy. Komentarz*, Warszawa 1977, p. 228.

the employee his/her former job following defective termination of employment contract by the employer⁶.

It was not until the political and economic system changed that the status in question began to evolve. The legislator had to consider on a broader scale the interest of employers operating on an open, competitive market. In the amendment to the labour code of 1989, an alternative solution, namely compensation under art. 47¹ of the labour code, was added to reinstatement claims. Currently, in the context of defective termination of employment with notice and resultant claims, compensation is just as important as reinstatement. Moreover, reinstatement claims are only linked to defective termination of a permanent employment contract with notice, whereas unfair termination of fixed-term employment contracts with notice only leads to compensation claims. Also in the case of termination involving a breach of provisions of an employment contract without notice, the employee may choose between alternative claims: reinstatement and compensation. Should, however, employment for a definite period be terminated involving a breach of provisions of an employment contract termination without notice, the employee is only entitled to compensation if the date until which the contract was to remain in force passed, or if reinstatement was inadvisable due to the short time remaining until that date. Under some circumstances, the labour court has the capacity to change a reinstatement claim into a compensation claim, which also suggests legislator's specific preferences. In the current legal context, one may no longer talk about undisputed dominance of reinstatement claims⁷. On the contrary, it would seem that the current legislator somehow prefers compensation over reinstatement⁸.

3. GROUNDS FOR REINSTATEMENT CLAIMS

Reinstatement is quite problematic for employers and it involves a fairly significant risk of failure, hence some theoreticians and practitioners suggest further limitation, if not complete eradication, thereof. There are, however, strong arguments opposing this direction of changes in legislation. A point in favour of maintaining reinstatement claims is the principle of actual performance of obligations⁹. Labour law scholars also point to the fact that reinstatement contributes to pro-

⁶ A. Rycak, *Roszczenia restytucyjne czy odszkodowawcze przysługujące w związku z nieuzasadnionym lub niezgodnym z prawem rozwiązaniem umowy o pracę*, (in:) G. Goździewicz (ed.), *Ochrona trwałości stosunku pracy w społecznej gospodarce rynkowej*, Warszawa 2010, p. 278.

⁷ See A. Rycak, *Roszczenia restytucyjne...*, (in:) G. Goździewicz (ed.), *Ochrona...*, p. 280.

⁸ Ł. Pisarczyk, *Naprawienie szkody...*, (in:) L. Florek (ed.), *Prawo pracy...*, p. 179, 205.

⁹ *Ibidem*.

protecting dignity of employees hurt through unlawful termination of an employment contract¹⁰. One should also mention that the civil law suggests restoration of the previous status as one of damage-mitigating solutions, which is an alternative to compensation claims. Undoubtedly these are all important aspects. However, it is my opinion that the constitutional principle of free choice of employment is fundamental¹¹ along with the basic principle of the labour law specified in art. 10 of the labour code: the right to choose their work freely. The implementation of the constitutional principle of free choice of employment creates an obligation for an employee unlawfully deprived of his/her job to be given it back. Clearly, the principle of free choice of employment is subject to numerous limitations due to protection of other interests, e.g. due to the employer's freedom of economic activity, which means that the employer has the right to select employees and finish employment compliant with legal regulations. Unlawful actions of employer should not, however, justify introducing limitations to the constitutional principle of free choice of employment. In other words, the reinstatement claim is part of implementation of this principle¹². Therefore, reinstatement must remain present in the Polish legal system and any exceptions to one's right to be reinstated must be well-justified and limited in nature. For the same reason, any motions for abolishing reinstatement should not be endorsed. Along similar lines, equally dubious are postulates to give employers freedom to unilaterally "obtain exemption" from reinstatement by paying high enough compensation. This is because also in this case, as I would argue, one would witness groundless limitation of an employee's right to freely decide about his or her employment. At this point, one should realise that from an employee's perspective employment is important not only for financial reasons (being the source of income), but also for social, development-related or even prestige reasons. Because of this, compensation – even if substantial – will not be sufficient reimbursement for damage suffered by the employee in various areas of his/her life. It is, however, permitted, to establish – in addition to the reinstatement claim – a compensation claim an employee could opt for instead of getting his or her job back. In such case, an employee can decide not to exercise his/her right to reinstatement – as there are no obstacles for him or her to freely use it. With this in mind, one should conclude that the basic elements of the Polish claim system resulting from defective termination of employment, with or without notice, are subject to adequate regulation. Employees may choose between two equivalent claims, and it is basically up to them to choose whether they prefer reinstatement or compensation. Even so, a number of problems come to attention. Somewhat dubious is eliminating the possibility to seek reinstatement due to defective termination of employment with notice when it comes to employ-

¹⁰ About axiological reasons see more A. Rycak, *Roszczenia restytucyjne...*, (in:) G. Goździewicz (ed.), *Ochrona...*, s. 282–285.

¹¹ On this aspect see A. Sobczyk, *Wolność pracy a władza*, Warszawa 2015, s. 188.

¹² *Ibidem*.

ees with employment contracts signed for a definite period of time¹³. Limitation of reinstatement claims based on defective termination (with notice) of a fixed-term contract may be justified with the intention of both sides to establish a relation of employment limited in time. This view was highly debatable, especially as regards the legal status prior to the amendments of fixed-term contracts in 2015¹⁴, when a commonplace practice was employment based on very long-lasting fixed-term contracts. In the light of the new limitations introduced by the legislator with the aim of curbing excessive application of fixed-term employment contracts (which have a real potential for accomplishing that goal), the arguments referring to parties' will and the specificity of fixed-term employment become more significant. However, specialist literature points to the doubts concerning compliance of these solutions with Directive 99/70¹⁵ and the ban on discrimination due to the fixed employment period¹⁶. At this point, one should mention the ruling in the case of Ms Małgorzata Nierodzik¹⁷, when the Court of Justice challenged a different notice period for fixed-term employment contracts. In its Decision, the Court contested the different treatment of employees recruited for a fixed-term boasting the same job history as the employees with whom permanent contracts were signed. There are reasons to believe the Court would find depriving employees with fixed-term contracts of their right to seek reinstatement to be a case of negative discrimination if an equally competent employee working under a permanent contract for the same employer had such rights. An equally competent employee in this case could also be any employee recruited for an indefinite period of time with comparable job history with the company. A solution to this problem could be granting such employees the right to make reinstatement claims. The specificity of fixed-term employment could be taken into account by introducing a reservation that reinstatement cannot be ordered if the period to which the contract applied has ended or if very little time is left until the contract expiration¹⁸.

What also needs to be considered is if the exclusion of reinstatement claims applying to small employers, as advocated in the doctrine, is justified and whether such limitation is compliant with the principle of proportionality. The grounds for reinstatement at small enterprises are particularly controversial. It is quite common to believe that in such cases the chances of failure are particularly strong.

¹³ L. Pisarczyk, *Nowy model zatrudnienia terminowego w prawie pracy – część 2*, "Monitor Prawa Pracy" 2016, No. 5, p. 236.

¹⁴ Ustawa z dnia 25 czerwca 2015 r. o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw, Dz.U. z 2015 r., poz. 1220.

¹⁵ Dyrektywa 99/70 z 28 czerwca 1999 r. w sprawie Porozumienia Ramowego dotyczącego pracy na czas określony zawarta przez UNICE, CEEP oraz ETUC (OJ L 175, July 10, 1999, p. 43).

¹⁶ A. Sobczyk, *Wolność pracy...*

¹⁷ Wyrok Trybunału z 13 marca 2014 r. w sprawie C-38/13 Małgorzata Nierodzik v Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczy.

¹⁸ L. Pisarczyk, *Nowy model zatrudnienia...*, p. 236.

After a court trial, the sides tend to be in conflict and in small businesses such hostility – between the reinstated employee and the employer – is likely to be direct and personal. Many voices point out that small employers will find reinstatement to be the most problematic, though in this context one should keep in mind that small enterprises are not subject to the act of March 13, 2003 on special principles of termination of employment for reasons not related to employees¹⁹; therefore, if employment is terminated for reasons not related to employees, no severance pay will have to be paid. A burden for small employers may also be the necessity to pay compensation for the out-of-job period. When reinstatement is enforced at small enterprises, one witnesses a particularly obvious conflict between two values – freedom of employment on the employee's side and freedom of economic activity on the side of the employer. An interesting point to consider is a similar solution known to legal systems in some European countries. For instance, in the German law, reinstatement claims are excluded in the case of employers with personnel of up to five. Taking into account the aforementioned arguments, exclusion of reinstatement with respect to the smallest employers seems reasonable. On the other hand, one should bear in mind that on the Polish labour market small and very small employers are the largest group. If the possibility to lodge reinstatement claims is excluded with respect to them, it will mean that a very large group of employees will be deprived of such right and that the claim would, in fact, have a very narrow application. It would seem that the aforementioned drawbacks could be partially limited using already binding legal instruments, especially art. 45 § 2 of the labour code. On the other hand, there is no controversy with regard to validity of reinstatement exclusion with employers offering employment in their households. In this case, the freedom to choose employment should remain inferior to the right to privacy, domestic peace and protecting dignity of the employer offering employment in his/her own household.

4. LEGAL NATURE OF REINSTATEMENT CLAIMS

Despite its long history in the Polish labour code (basically since 1975 in an unchanged form), the legal nature of reinstatement remains hugely controversial. In the general sense, reinstatement leads to restoration of the previous condition, namely re-establishing of the defectively terminated employment under the previous terms. The essence of reinstatement is to form a legal situation in a specific way – it is, therefore, a modification claim. Based on a commonly adopted principle in the labour law, a legal action aimed at employment termination, even if defective, leads to employment termination. Reinstatement does not boil down to

¹⁹ Dz.U. z 2003 r., Nr 90, poz. 844, z późn. zm.

invalidating a defective legal action of job termination since it *did* lead to employment termination. Therefore, what we are not dealing in this case with eradicating the effect of a defective legal action, which is the main difference between reinstatement and deeming termination ineffective. Ordering reinstatement produces the effect of establishing employment relation that is identical to the previous one; it does not restore the terminated employment and the underlying contract²⁰. This effect occurs when an employee reports for duty (which should happen within 7 days of the reinstatement ruling becoming valid). And so, the reinstatement order operates *ex nunc*, with a future effect²¹. As a result, the period between the defective termination of employment and recommencing work by an employee following reinstatement is not part of the employment period, though in some respects the legislator treats it the same way as the employment period²².

A reinstatement ruling substitutes a statement of will. As a result of it, employment is established with one condition precedent – the employee needs to declare readiness to immediately commence work²³. A question is posed, however, if a ruling is only a substitute for the employer's will to establish employment while an employee expresses his/her will to do the same by declaring readiness for work²⁴. or if reporting oneself for duty does not constitute employment, but only adds to substantive validity of the verdict. Such was the opinion of the Supreme Court in the Act of May 28, 1976 V PZP 12/75, OSNCP No. 9/1976, item 187. On a side note, one should notice that introduction of the obligation for an employee to declare readiness for work is seen by experts as a form of protection of the employer's interest²⁵. But one can also perceive it as a guarantee of freedom of employment and starting employment, which nowadays – considering how lengthy court proceedings are – becomes increasingly important. An employee who requested reinstatement may no longer be interested in it when the order is finally issued. At the same time, an employee's inactivity releases an employer from the reinstatement obligation.

Reinstatement is awarded on the same terms as those that the employee was bound by prior to employment termination. The labour court may not act instead of parties involved in forming the essence of employment; what it can do is mitigate the effect of employer's illegal actions. For this reason – when the claim is thus formed – reinstatement must be performed under the previous terms. This,

²⁰ M. Gersdorf, *Charakter prawny i skutki orzeczeń o bezskuteczności wypowiedzenia i przywróceniu do pracy*, "Państwo i Prawo" 1978, No. 4; R. Borek-Buchalczyk, M. Uliasz, *Charakter prawny i wykonanie wyroku przywracającego do pracy*, "Monitor Prawa Pracy" 2009, No. 1, p. 14.

²¹ *Ibidem*.

²² Por. art. 51 k.p. A. Sobczyk, *Wolność pracy...*, p. 188.

²³ G. Bieniek, J. Broł, A. Krajewski, W. Masewicz, J. Szczerski, (in:) J. Jończyk (ed.), *Kodeks pracy...*, p. 166.

²⁴ K. Kolański, *Bezskuteczność rozwiązania umowy o pracę według kodeksu pracy*, "Państwo i Prawo" 1975, No. 23, p. 67.

²⁵ A. Leszczyńska, *Realizacja wyroku...*

in turn, eliminates the possibility to enhance flexibility of this institution by, for instance, reinstating an employee on similar or equivalent terms.

The most controversial part of the doctrine is enforceability of reinstatement orders. Its source is the division of claims into declarative and constitutive ones. The declarative or constitutive nature of a reinstatement order directly affects its enforceability. Under the binding law, one may only enforce declarative orders, whereas the constitutive ones, as a rule, do not exhibit enforceability features²⁶. Some doctrine experts argue that a reinstatement order is a constitutive one, which means it is not implemented through court enforcement²⁷. If the reinstatement order is not implemented by an employer, an employee will have to take a new legal action demanding to be permitted to work²⁸. Other doctrine researches believe that the reinstatement decision implicitly contains an order to recruit an employee by an employer, while the performance of such decision may be sought by means of enforcement²⁹. The Supreme Court took a middle ground: it declared that the reinstatement decision is both constitutive and declarative in nature, which makes it subject to enforcement³⁰. And yet, the most recent specialist literature, through analyses of the current legal provisions (the code of civil procedure in particular), would point to the constitutive nature of reinstatement claims³¹.

5. REINSTATEMENT IMPLEMENTATION

Satisfaction of reinstatement claims occurs through employing an employee under the previous terms. The previous terms in this case are the conditions specified in the employment contract binding the parties prior to defective termination of employment by an employer. As indicated above, the court adjudicating reinstatement may not interfere with the contents of employment relations even if reinstatement under different conditions would be more conducive to contin-

²⁶ R. Borek-Buchajczuk, M. Uliasz, *Charakter prawny i wykonanie wyroku przywracającego do pracy*, "Monitor Prawa Pracy" 2009, No. 1, p. 13 i powołana tam literatura.

²⁷ W. Broniewicz, *Z problematyki przywrócenia do pracy*, "Nowe Prawo" 1959, No. 1, p. 58 i n.; M. Święcicki, *Prawo pracy*, Warszawa 1968, s. 302 i n.; T. Liszcz, *Sankcje prawne wadliwego rozwiązania stosunku pracy przez podmiot zatrudniający*, "Nowe Prawo" 1976, No. 2, p. 171 i 176; M. Gersdorf, *Charakter prawny...*, p. 41 i 50.

²⁸ R. Borek-Buchajczuk, M. Uliasz, *Charakter prawny...*, p. 15.

²⁹ Por. K. Korzan, *Wykonanie orzeczeń w sprawach o roszczenia pracowników ze stosunku pracy*, Katowice 1985, p. 75.

³⁰ Uchwała z dnia 26 maja 1976 r., V PZP 12/75, OSNC 1976, No. 9, item 187, wpisana do księgi zasad prawnych.

³¹ R. Borek-Buchajczuk, M. Uliasz, *Charakter prawny...*, p. 17.

ued employment. Reinstatement under previous terms does not necessarily mean being reassigned to the same position as before. This will depend on the way the job type is specified in the employment contract. If the job type was narrowly defined, e.g. through indicating a specific position, then the employer must assign the employee to the position he/she held before. But if the job type has a broader definition, the employer may – by exercising his right within directive competences – reinstate the employee by offering him/her a job that is compatible with the job type specified in the employment contract, but the actual position does not need to be the same as before³².

In practical terms, reinstatement often encounters numerous difficulties. One of the main causes of that is the lengthy nature of court proceedings. Once the court trial is over, which frequently takes 2 or 3 years, reinstatement of an employee may be problematic for both herself/himself and an employer. At this point, the company usually has another employee doing that job and it is confident there are no more vacancies to fill by the returning employee. On the other hand, the employee comes back to a place that is likely to have changed, often suffering from reduced competences due to long-term absence. Hence reinstatement faces a considerable risk of failure. Decisions of the Supreme Court suggest it is aware of such difficulties, especially affecting the employer.

The employer has the right to use lawful means of changing the content of employment, or even to terminate it. And so, immediately after the employee has reported for duty, the employer may reassign him/her to a different position for a period of 3 months – such solution is accepted by the Supreme Court, in case if performance of work on the previous position is impossible because of organisational reasons³³. The employer may rescind the binding employment and payment terms or terminate the contract with notice on general terms. In most cases, as it seems, termination of an employment contract with notice occurs in the mode specified in the Act on special rules for termination of employment for reasons not attributable to employees. In such case, when a decision needs to be made about dismissing either the reinstated person or the person who took over his/her position, the employer should apply fair criteria of choice. It should be noticed that this involves additional costs for the employer, who needs to pay remuneration for the notice period (even if the company released the employee from the obligation to perform work) and the severance pay (if its workforce is more than 20 employees). Less probable seems termination for reasons attributable to the employee – the cause of termination may not be the same cause that justified the previous, defective termination of an employment contract, while new causes usually have not yet occurred. The practice of the Supreme Court exhibits a reasonable attitude, namely enforcement of a valid ruling on reinstatement

³² Por. M. Gersdorf, *Charakter prawny...*, p. 48.

³³ Wyrok Sądu Najwyższego z dnia 18 kwietnia 2000 r., I PKN 602/99, LEX No. 165879.

under the previous terms of employment and payments may not be subject to further termination of the reinstated employment based on a cause that the employer was aware of prior to the binding reinstatement, which could and should have been indicated by the employer as a circumstance working against the possibility or viability of reinstatement in the prior, effectively adjudicated case concerning reinstatement (art. 366 of code of civil procedure)³⁴.

The actions above are acceptable, even if they reduce the effectiveness of reinstatement. A reinstated employee does not benefit from any privileges based on employment duration or content. Therefore, the employer may use generally accessible means of changing the content of employment relation in question or of its termination.

6. COMPENSATION INSTEAD OF REINSTATEMENT

In some circumstances, the labour court may award compensation rather than reinstatement. Such circumstances include impossibility or futility of reinstatement, or its being contradictory to the principles of social coexistence. Awarding compensation instead of reinstatement limits an employee's right to choose employment freely, which suggests that courts should remain very careful when they apply this solution. Compensation instead of reinstatement should be an exception to the rule whenever a court is bound by a reinstatement claim, and as such it should have a strict interpretation³⁵. At the same time, the provision in question provides crucial flexibility and opens the window for taking into account specific circumstances of a case. The Supreme Court highlights the need to analyse and determine such circumstances on a case by case basis³⁶. In its ruling of 29 Oct. 2014, ref. No. I PK 65/14, the Supreme Court concluded that "the criteria used to assess impossibility or futility of recognising a reinstatement claim should be looked for by labour courts in, most of all, actual findings concerning the case. Only assessments based on the actual situation may counterbalance the arguments supporting viability of a reinstatement claim with respect to one's old position".

A circumstance that undoubtedly supports awarding compensation instead of reinstatement is the impossibility to re-engage. If, for objective reasons, it is impossible to recognise a reinstatement claim, compensation seems like a reasonable substitute. Reinstatement is impossible when, for instance, one's former com-

³⁴ Wyrok Sądu Najwyższego z dnia 9 maja 2013 r., II PK 245/12, LEX No. 1331288.

³⁵ Wyrok Sądu Najwyższego z dnia 24 lutego 2016 r., III PK 69/15, LEX No. 2012112.

³⁶ Wyrok Sądu Najwyższego z dnia 11 marca 2015 r., III PK 115/14, LEX No. 1683410; wyrok Sądu Najwyższego z dnia 29 października 2014 r., I PK 65/14, LEX No. 1545028.

pany no longer exists due to bankruptcy or liquidation proceedings. An important point is that the Supreme Court does not rule out *a priori* reinstatement during the period of bankruptcy or liquidation proceedings³⁷. Also in this case formal recognition of impossibility to enforce reinstatement calls for an analysis of the actual situation and determination if such impossibility is really the case.

More assessable and broader reasons for awarding compensation instead of reinstatement include its futility. The legislator once again relies on a general clause that the Supreme Court's judicial practice fills in. Many aspects of the Supreme Court's rulings in this case are praiseworthy. Very reasonable is its position, according to which one may not refuse reinstatement, if the termination of the employment contract, with or without notice, was causeless, namely having no material basis³⁸. In such cases, only very special circumstances (such as becoming incapable of performing one's obligations) may justify taking away an employee's right to reinstatement claims. Generally speaking, an employee's inability to perform the agreed job is a circumstance substantiating the decision on futility of reinstatement³⁹. A serious conflict between parties, being to an extent an employee's fault, existing before the employment termination, may also act as a circumstance in favour of recognising reinstatement as futile if there are no grounds to assume adequate cooperation between the parties following the reinstatement⁴⁰. More dubious is the refusal to reinstate an employee due to the need to recruit a more competent one⁴¹. In such case, one should consider if lack of qualifications was the cause of job termination, or if the new expectations as regards employee's competences occurred after the termination. Also, what needs to be checked is if the decrease in competences or lack of skills expected by an employer was not the outcome of a defective termination of employment. Deterioration of qualifications may be a direct result of having no job, being unable to participate in trainings or improve one's skillset at work, especially if the employer organised training for the personnel. It would be unreasonable to push all the negative consequences of such circumstances onto the employee. Equally controversial is adjudicating compensation instead of reinstatement on account of hiring a new, efficient worker⁴². It should be borne in mind that – considering the lengthiness of court proceedings – an employer does not usually wait until the procedure is over, but opts for filling out the vacancy with a new employee.

³⁷ Uchwała Sądu Najwyższego z dnia 5 lipca 2002 r., III PZP 5/02, OSNP 2003, No. 3, item 58.

³⁸ Wyrok Sądu Najwyższego z dnia 18 stycznia 2012 r., II PK 129/11, LEX No. 1135995.

³⁹ Wyrok Sądu Najwyższego z dnia 13 lipca 2011 r., I PK 8/11, "Monitor Prawa Pracy" 2011, No. 10, p. 506.

⁴⁰ Wyrok Sądu Najwyższego z dnia 2 października 2012 r., II PK 54/12, "Monitor Prawa Pracy" 2013, No. 5, pp. 253–255; wyrok Sądu Najwyższego z dnia 5 lipca 2011 r., I PK 21/11, LEX No. 1001274.

⁴¹ Wyrok Sądu Najwyższego z dnia 9 lutego 1999 r., I PKN 565/98, OSNP 2000, No. 6, item 225.

⁴² Such a possibility provides judgment of August 24, 2010, I PK 43/10, LEX No. 1217622, contrary judgment of February 17, 1998, I PKN 572/97, OSNAPiUS 1999, No. 3, item 83.

It also seems obvious that in most cases the employer would rather retain the new worker, for instance because there is no labour dispute between them. And it should be assumed that hiring another employee in place of the dismissed one should not hinder reinstatement unless there are other additional grounds for it. One of them could be substantive justification of the dismissal, especially if it was triggered by a serious event attributable to the employee. In this context, one should assume that the new employee deserves more to keep the job. However, if no such circumstances exist, the employee should be reinstated, and the employer – if needed – should make redundancies on general terms, applying fair criteria of selection for dismissal. The simple fact of being reluctant to re-hire a given employee may not constitute the basis for futility of reinstatement⁴³. The jurisprudence also seems to propose a more further-reaching guideline that adjudicating compensation instead of reinstatement is, in general, acceptable in situations where termination of an employment contract, with or without notice, was well-grounded, but the employer failed to meet formal obligations⁴⁴. It would seem, however, that much circumspection is needed when one studies the circumstances of a given matter, and in particular the importance of the cause that led to an employee's dismissal, if it really was his/her fault, and if reinstatement in this situation would not have an adverse effect on other members of the personnel. It seems, however, that the basis for compensation instead of reinstatement may be the actual elimination of a given position⁴⁵, with a very narrow definition. In this case reinstatement would entail rehiring someone to do a job that no longer exists, which would impose the obligation to re-create it. In such case, the employer's freedom of economic activity should be given priority. One should be just as careful with redundancies if an employer used adequately objective and justified selection criteria for dismissal, and the personnel reduction was genuine as well as covered the professional group an employee was part of. And yet, it should be concluded that the lengthiness of proceedings and the passage of time since employment termination should not constitute grounds for awarding compensation instead of reinstatement. This is because employees should not bear the consequences of lengthy court proceedings.

In general, it should be observed that courts fairly often rely on the possibility created under art. 45 § 2, though in most cases – in a justified way. One should perhaps consider if awarding compensation instead of reinstatement should not

⁴³ Por. wyrok Sądu Najwyższego z dnia 2 października 2012 r., II PK 54/12, LEX No. 1314074; "Monitor Prawa Pracy" 2013, No. 5, pp. 253–255.

⁴⁴ Wyrok Sądu Najwyższego z dnia 19 listopada 1997 r., I PKN 374/97, OSNAPiUS 1998, No. 17, item 508; wyrok Sądu Najwyższego z dnia 5 sierpnia 2014 r., I PKN 374/97, LEX No. 1217622; wyrok Sądu Najwyższego z dnia 24 sierpnia 2010 r., I PK 43/10, LEX No. 1217622.

⁴⁵ Wyrok Sądu Najwyższego z dnia 14 maja 1999 r., I PKN 57/99, OSNAPiUS 2000, No. 15, item 576, odmienne stanowisko przedstawił Sąd Najwyższy w wyroku z dnia 25 lipca 2006 r., PK 56/06, "Monitor Prawniczy" 2007, No. 4, item 206.

be applied more often in the case of small enterprises. Due to direct interactions between the sides, any potential dispute will be more significant there than at large enterprises. Reinstatement at small businesses may cause greater organisational perturbations than at large ones. The proposal that an enterprise size itself should constitute grounds for awarding compensation instead of reinstatement may be too far-reaching, but such circumstances should be taken into account when the court analyses a given case. Such approach is absent from the current jurisdiction.

In some case, an intrinsic reason for court's rejection of reinstatement and replacing it with compensation is non-compliance with the principles of social coexistence. It usually becomes part of the reinstatement "futility" argument. But at times it is applied, especially in cases when the court may not deem reinstatement futile, namely with respect to employees subject to special protection. A good example of that is the Supreme Court's ruling on trade union officers subject to protection under art. 32 of the Act on trade unions.

In the light of this, it is important to know that should compensation be awarded (as per art. 45 § 2 and 56 § 2 of the labour code), its amount is not increased. Compensation – both in the case of defective termination of an employment contract with and without notice – seems to be a less advantageous solution than reinstatement⁴⁶. If reinstatement is awarded, not only does the employee get back the position he/she was unlawfully deprived of, but also the remuneration for the period of being out of job, which is compensation in itself. Should the court award compensation instead of reinstatement, the employee loses the more advantageous claim – as indicated above, without receiving any additional reimbursement. A question should be posed then: shouldn't the court have the option of awarding greater compensation?

7. CONCLUSIONS

1. For a number of reasons, with the most important one, from the author's point of view, being the constitutional principle of freedom of employment, reinstatement is an important component in the system of claims related to a defective termination of an employment contract with or without notice.

2. The main assumption of the Polish claims system related to defective termination of employment with or without notice, based on the freedom of choice of claim (reinstatement or compensation), is correct. Giving up by the employee

⁴⁶ See also Ł. Pisarczyk, *Naprawienie szkody...*, p. 180 oraz A. Rycak, *Roszczenia restytucyjne...*, (in:) G. Goździewicz (ed.), *Ochrona...*, p. 285.

on the reinstatement claim and opting for compensation does not breach the employee's freedom to choose employment and personal rights.

3. Somewhat dubious – from the perspective of ban on discrimination due to the fixed-term employment – is eliminating the ability to seek reinstatement due to defective termination with notice in the case of employees who signed such contracts. There are reasons to claim that – *de lege ferenda* – it would be reasonable to give such employee the right to seek reinstatement claims. The specificity of fixed-term employment could be taken into account by introducing a reservation that reinstatement cannot be adjudicated if the period to which the contract applied has ended, or if very little time has left until the contract expiration.

4. The option of awarding compensation instead of reinstatement guarantees that the regulation would be flexible enough. Generally, the rulings by the Supreme Court quite rightly identify circumstances that justify awarding compensation instead of reinstatement.

5. The issues often brought about by reinstatement claims are more factual than legal in nature. They are usually caused by lengthy court proceedings. And yet, employees should not be burdened with negative consequences of lengthy court procedures.

6. Despite its long functioning in the Polish legal system, basically in an unchanged form, the legal nature of reinstatement remains a controversial issue. Particularly important for employees is the problem of enforceability of the decision on reinstatement. Untangling it may involve a legislator's intervention.

7. It would seem the regulations applying to reinstatement are adequate and based on sound premises. Therefore, just to answer the question that was posed earlier on, no fundamental change is required in this respect. However, *de lege ferenda*, one should consider the possibility to award greater compensation when one is adjudicated instead of reinstatement, explore the issue of enforceability of ordered reinstatement, and award – even to a limited extent – the reinstatement right to employees working based on fixed-term contracts.

REINSTATEMENT – DO REGULATIONS NEED TO CHANGE?

Summary

The article “Reinstatement – do regulations need to change?” contains profound analysis of claim for reinstatement of employment relationship. The Author deal with the axiological background of the reinstatement of employment relationship, its constitutional context, the place of reinstatement in the system of claims related to defective termination of employment contract and its legal nature. The Author also discusses the proposals

of flexibilisation or even withdrawal of reinstatement from Polish legal system. Finally, the Author try to find if the change of regulations of reinstatement is necessary.

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KEYWORDS

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SŁOWA KLUCZOWE

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