

## EXPERT Labor code

# EMPLOYEES' RIGHTS REVISITED

## There are new grounds for claiming employment discrimination and an extended catalogue of mobbing claims

An amendment to the Polish Labor Code entered into force on September 7, 2019, involving provisions on mobbing and equal employment practices. The aim of the changes is to create an entirely open catalogue of grounds for discrimination and to make it easier for employees to seek damages for mobbing, regardless of whether they are still employed.

### UNEQUAL TREATMENT

The principle of equal treatment of employees is enshrined in Art. 11<sup>2</sup> of the Labor Code, under which employees are entitled to the same rights for performing the same duties. Prior to the amendment, Art. 11<sup>2</sup> of the code further provided that any direct or indirect discrimination in employment, in particular due to sex, age, disability, race, religion, nationality, political beliefs, union membership, ethnic origin, faith, sexual orientation, or employment for a definite or indefinite period, full-time or part-time, is prohibited. This principle is amplified by Art. 18<sup>3a</sup> §1 of the Labor Code. Under the prior wording, based on the same criteria, this provision required equal treatment in the formation and dissolution of employment relationships, conditions of employment, advancement, and access to training to raise employees' professional qualifications. The wording and allocation of these provisions to different chapters of the Labor Code generated many problems in interpretation, which were re-

flected in the rulings of the labor courts. The doubts involved primarily whether under the Labor Code unequal treatment is the same as discrimination, or are unequal treatment and discrimination two separate phenomena, each carrying different legal consequences for the employer and the employee.

Based on the case law of the Supreme Court of Poland, the view was ultimately developed prior to the amendment that the Labor Code distinguished two types of unequal treatment in employment: "ordinary" unequal treatment and the aggravated form thereof, i.e. discrimination. Not every behavior on the part of an employer involving unequal treatment of employees qualified as discrimination, which unlike "ordinary" unequal treatment meant worse treatment of an employee due to a characteristic of the employee identified in the Labor Code as a ground for discrimination. Consequently, an employee accusing the employer of violating the regulations prohibiting discrimination in employment had to state the basis on which he or she was discriminated against. Thus, unequal treatment based on grounds not regarded as discriminatory did not qualify as discrimination for purposes of the Labor Code, even if the employer could be found to have violated the principle of equal treatment of employees set forth in Art. 11<sup>2</sup> of the code. This distinction between infringements by employers was reflected in



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the different scope of employees' entitlements, depending on whether the employer was guilty of "ordinary" unequal treatment or the aggravated form thereof, i.e. discrimination.

An employee who was the victim of discrimination by the employer was entitled to seek damages as well as replacement of the discriminatory conditions of employment with non-discriminatory conditions. Moreover, in the case of discrimination, in litigation with the employer the employee only had to make a prima facie case for discrimination, and the employer then had the burden of proving that discrimination did not occur. In the case of "ordinary" unequal treatment, under the Labor Code the employee was entitled only to seek to establish employment conditions which would not treat the employee unequally.

In order to eliminate the differences between "ordinary" unequal treatment and discrimination which had previously functioned under Polish labor law, Art. 11<sup>2</sup> and 18<sup>3a</sup> of the Labor Code were amended to create an open catalogue of grounds for discrimination. This change consisted of removing from the provisions the phrase "and also without regard to..." and consequently any unequal treatment of employees not justified by objective grounds will be regarded as discrimination. The primary effect of this change will be to finally clear up the existing doubts in interpretation, which will probably also lead to an increase in the number of claims by employees based on allegations of discrimination.

### MOBBING CLAIMS

Another significant change in the Labor Code which entered into force on September 7, is an expansion of the claims that can be pursued by employees for mobbing. Under Polish law, mobbing is defined in Art. 94<sup>3</sup> §2 of the Labor Code, which provides that mobbing is action or behavior affecting an employee or directed against an employee, consisting of persistent and long-lasting persecu-

tion or intimidation of the employee, evoking in the employee a lesser sense of professional worth, causing or intended to cause the employee's humiliation, ridicule, isolation, or exclusion from the team of coworkers. Under the Labor Code, an employee who is the victim of mobbing is generally entitled to pursue two claims, for compensation for moral injury and monetary damages. Under Art. 94<sup>3</sup> §3, an employee who has suffered health consequences from mobbing may seek an appropriate sum from the employer as compensation. But prior to the recent amendment, damages for mobbing could be sought only by an employee who has terminated his or her employment contract due to mobbing. Thus a condition for an employee to seek damages for mobbing was for the employee first to terminate his or her employment. If the employee did not terminate his or her employment contract on the grounds of mobbing, the employee had no right to seek damages under the Labor Code.

Conditioning the pursuit of damages for mobbing on a need for the employee to first terminate his or her employment was frequently criticized. Commentators criticized the fact that an employee who suffered mobbing also could not seek damages when the employment was terminated by the employer, who could thus fire the employee as a way to avoid liability for damages.

So to provide better protection to victims of mobbing, Labor Code Art. 94<sup>3</sup> §4 was amended by adding the possibility to seek damages also in a situation where the employee has not terminated the employment relationship, but has suffered a concrete loss as a result of mobbing practices. Consequently, an employee may now seek damages for mobbing in two instances: when the employee has terminated the employment contract due to mobbing, and when the employee has suffered a loss due to mobbing, regardless of whether the employment relationship continues or has been terminated by the employer.