AGORA International Journal of Juridical Sciences, www.juridicaljournal.univagora.ro
ISSN 1843-570X, E-ISSN 2067-7677
No. 3 (2013), pp. 60-71

THE ISSUE OF LIABILITY FOR NON-PATRIMONIAL PREJUDICE WITHIN THE LEGAL LABOR RELATIONS

R. Gh. Florian

Radu-Gheorghe Florian
Law and Economics Faculty, Social Sciences Department
Agora University of Oradea, Oradea, Romania
*Correspondence: Radu Gheorghe Florian, Agora University of Oradea,
8 Piața Tineretului St., Oradea, Romania
E-mail: raduflorian@rdslink.ro

Abstract

This study aims to examine the extent to which legal liability for non-material prejudices and moral prejudices is allowable in the field of legal labour relations, in the context of contest for regulations governing non-patrimonial prejudices in Romanian legislation.

Keywords: *material prejudice, non-patrimonial and moral prejudice, patrimonial liability, civil liability, delictual liability, contractual liability.*

Introduction

Prejudice means damaging results of patrimonial or non-patrimonial nature, effects of violations the subjective rights and interests of a person. [1]

Economic prejudices are those that have economic content, which may be assessed pecuniary, such as the destruction or degradation of property, theft of property, killing an animal, injuring a person's health followed by reduction or loss of labour capacity and regular earnings: loss, in whole or in part, of a property right, such as, for example, the right to maintenance, etc.[2]

Non-patrimonial prejudices or material damages are harmful consequences that can not be monetised and result from violations of personal rights, with no economic content. Extra-patrimonial rights define the individual human personality. Such harmful consequences are death, physical and mental pain, injuries that affect physical harmony and a person's appearance, injuries to reputation, honor, dignity, prestige or reputation of a person, restricting the possibilities of the human being to enjoy the satisfactions and pleasures of life etc.[3]

1. Term of moral prejudice

Unlike the old Civil Code that contained no provision for moral prejudice, the new Civil Code that came into force on October 1, 2011, regulates the repairing of non-patrimonial prejudice in several articles grouped in the field of civil liability (delictual and contractual) and in the field of protection of non-patrimonial rights (art. 253-256).

It is noted the terminology adopted by the legislature, of "non-patrimonial prejudice" towards other regulations that refer to "moral prejudices", such as administrative contentious law, the law of combating unfair competition.

---

[1] I. Albu, V. Ursa. *Răspunderea civilă pentru daunele morale*, Dacia Publishing House, Cluj-Napoca, 1979, p.29.
[2] L. Pop, *Drept civil. Teoria generală a obligațiilor*, "Lumina Lex" Publishing House, 2000.
[3] C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligațiilor*, "Hamangiu" Publishing House, 9th Edition, 2008, p. 148.

Without going into details, we mention that in the doctrine was proposed, as the most accurate and meaningful notion, the one of moral prejudice, that comes from the Latin Dominum, which means loss, damage, because it evokes the reality to which it refers, namely affecting moral values that make up human personality.[4]

Other authors, arguing that the notion of moral prejudices only evokes moral effects, unchallenged not object of a probation, understand that the concept that would cover physical effects is the "moral damage" which means injury, an effect that can be found both physical (like body injuries), and felt, and therefore presumed, such as pain or illness.[5]

The solution adopted by the Civil Code appears as the most suitable, being meant to emphasize the distinction between patrimonial prejudice and prejudice that can not be measured in money, and the distinction between patrimonial and non-patrimonial rights, expressly stipulated in the text of art. 253-256 of Civil Code, although this solution has been criticized in terms of logical existance, claiming that a notion should be defined by what it is and not by what it is not.[6]

2. The issue of employee's liability for prejudices caused to the employer.

A. Employee's liability for repairing the prejudice in accordance to Labour Code

Material nature of employees' patrimonial liability arises from the content of art. 254 paragraph 1 of the Labour Code, which (unlike the art. 253 paragraph 1) expressly provides that employees respond patrimonially for "material damages produced to the epmloyer because and in connection with their work." Obviously, according to the rules and principles of civil liability, the damage will be fully covered, i.e. not only the actual damage produced (*damnum emergens*) but also loss of profit (*lucrum cessans*)

Judiciously, it was noted that the rule from common law does not operate, accordin to which compensation must be made, whenever possible, in nature, and only when it is no longer possible, the equivalent (by calculation and payment of compensation money). This is because there are regulations contained in article. 273 paragraphs 1 and 2 of the Labor Code, relating to deductions from wages, establishing thus, compared to the common law, a measure of protection for employees. According to this legal text, "the fixed amount for claims" is deducted "in monthly rates from the salaries that are due to" guilty employee.[7]

From the formulation of the mentioned text, results unequivocally that expressly, legislature intended, in principle, to limit the employees' civil-contractual financial liability, for the prejudices caused to employers in connection with their employment, except for material prejudices and not to the moral ones.

In fact, by this code was regulated a patrimonial liability that "also includes some exceptions to the common law of classic contractual liability (set by the Civil Code), exceptions that constitute particularities in relation to the latter, appointed in considering the multilateral social protection of employees, based on art. 41 paragraph 2 of the Romanian Constitution".[8]

It was correctly appreciated that the patrimonial responsibility was taken the rule from the legal status of contractual liability according to which moral prejudices are due only exceptionally, or if there is a statutory provision or an express contractual stipulation, or even in limited areas of the contract of transport of persons, relating to copyright, or the ones including implicite obligations for the protection of individuals.[9]

---

[4] I. Adam, *Drept civil. Obligațiile. Faptul juridic*, "C.H. Beck" Publishing House, 2013, p. 224.
[5] M. Eliescu, *Răspunderea civilă delictuală*, "Editura Academiei" Publishing House, 1972, pp. 105-110.
[6] I. Adam, *op. cit*., p. 225.
[7] I. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, 2nd Edition, "Universul Juridic" Publishing House, 2012, p. 782.
[8] I. T. Ştefănescu, Ş. Beligrădeanu, Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii, in "Dreptul" Review, no. 4/2003, p. 78.
[9] I. Albu, V. Ursa, *op. cit*., p. 29.

It was rightly appreciated in the doctrine[10] that it is inadmissible to insert a stipulation in the collective labour agreement or in the job description, since according to Art. 132 of Law no. 62/2011 on social dialogue, the collective labour agreement can not include clauses that to create a more unfavorable situation for the employee in relation to the law.

Also, neither in the individual employment contract (including the "job description", which is an annex to the contract) would not be legally permissible a clause whereby the employee to assume responsibility for moral prejudices – even if in only strictly limited certain assumptions - as such stipulations are null and void, according to art. 38 of the Labour Code. According to art. 38 of Labor Code employees can not waive their rights that are recognized by law. Any transaction that seeks waiver of rights recognized by law or limit those rights is void.

B. Statements contained in other legislation where the employee is responsible for non-patrimonial prejudices

From the provision stated in art. 254 paragraph 1 of the Labour Code there are established, by special legal rules, and some exceptions, judiciously reported in the doctrine.[11]
1) As shown in the civil liability field, it is inadmissible the cumulation of contractual liability and delictual liability. Thus, in case of prejudices - of any kind - caused by failure or improper performance of a contract (civil, commercial, etc.), the injured party has a choice between request for damages either according to contractual liability or according to delictual civil liability of its contractual partner, but injured creditor can only act based on the rules and principles of contractual liability.

On the other hand, the incidence of civil liability for moral prejudices, though more commonly invoked in delictual liability cases, now it is permitted, firm and within contractual civil liability, but only to the extent that there were no express provisions to the contrary, as contained in the regulation of the content of art. 270 paragraph 1 of the Labour Code.

We are reffering to the situation in which the prejudice caused by the employee to the employer, from his fault and in connection with his work, is the result of a crime, when we are in the presence of exceptions to the rule of art. 270 paragraph 1 of the Labour Code, and also to the principle of inadmissibility choice between contractual liability and delictual liability, since if the employer became a civil party, he has the right, where appropriate, to require the defendant-employee compensation and "compensation for moral prejudices, according to civil law" as expressly provided art. 14 paragraph 5 from Criminal Procedure Code, amended by Law no. 281/2003).

2) Law no. 11/1991 regarding unfair competition, by art. 4 and art. 5, as amended by Law no. 298/2001, regulates a number of contraventions and crimes, some of these contraventions being able to be committed only by an employee, causing damage to his employer (for example, "providing services by an employee of a merchant to a competitor or accepting such an offer).

Therefore, the employee not only violates his obligation of loyalty to his employer, but at the same time, committing the offense in question, is the provisions of art. 9 paragraph 1 of Law no. 11/1991, acoording to which "If any of the acts referred to in art. 4 or art. 5 cause patrimonial or moral prejudice, the injured is entitled to apply to the competent court with appropriate civil liability action".

We mention that the provisions of art. 9 paragraph 1 of Law no. 11/1991, on the one hand, are applicable even if in the employment contract of the employee-offender is inserted a non-competition clause under Art. 21-24 of the Labour Code, clause that works maximum 1 year only after termination of mentioned contract (art. 22 of the Labour Code).

In conclusion, art. 9 paragraph. 1 of Law no. 11/1991 constitutes a derogation from art. 270 paragraph 1 of the Labour Code, by the fact that, in the situation mentioned in the

[10] I.T. Ștefănescu, *op. cit.*., p. 490; Ș. Beligrădeanu, *Studii de drept al muncii*, "C.H. Beck" Publishing House, 2007, p. 315.
[11] A. Țiclea, *Tratat de dreptul muncii*, "Universul Juridic" Publishing House, 2007, p. 803.

text, even the employee who is not a criminal, but only offender – is responsible, during the performance of his individual employment contract, restorative (patrimonial), under the rules and principles of civil liability, not just for material prejudices as stipulated in art. 270 paragraph 1 of the Labour Code, but also for moral prejudices produced to his employer.[12]

3) In accordance with art. 148, paragraph 1, in conjunction with Art. 72 of Law no. 31/1990 on commercial companies, managers of such companies "are responsible for fulfilling all obligations according to Art. 72 and art. 73 ", art. 72 stipulating that 'duties and liabilities of administrators are governed by the provisions on the mandate and specifically provided in this Law"

As reproduced texts do not distinguish, results that they are applicable to both administraors -employees of the companies, and administrators who do not have this quality, and on the other hand, both rules aim, firstly, the responsibility restorative (patrimonial).

Similarly, Article 152 paragraph 3 of Law no. 31/1990 stipulates that executives of companies "shall be liable to the company and third parties for non-fulfilment of their duties, in accordance with art. 148, even if there is an agreement to the contrary ".

Thus, the restorative responsibility (patrimonial) in the assumptions given, being governed by the legal provisions regarding the mandate contract, obviously the trade (and not those of the individual employment contract), the consequence is that we are in the presence of specific rules (art. 148. 1, Art. 152 par. 3 in conjunction with art. 72 of Law no. 31/1990, republished on 17 November 2004), which derogate from the general law in the field(art. 270 par. 1 of the Labour Code).

Therefore, this latter text does not apply and, on the other hand, liability for moral prejudices, de plano, is not incompatible with the contractual civil liability (or commercial, art. 1 Commercial code), is inferred, without possibility of doubt, that the managers-employees of companies (including the chairman of the board if an employee) may be materially liable for damages (even if they were not caused by a criminal offense), of course if the conditions for granting of such damages.

But of course, remain the provisions of art. 270 par. 1 of the Labour Code, where commercial "company's clerks" (other than directors, employees and executives) as art. 144 par. 1 of Law no. 31/1990 does not address their patrimonial liability.

On the other hand, if individuals - in the company - having double standards (of administrators as part of the Board) and the employee in another position (economist, engineer etc.), in case of injuring the company, their patrimonial liability is governed, as appropriate, of art. 72 of Law no. 31/1990 (republished) or art. 270 par. 1 of the Labor Code, as prejudice was caused in the exercise director, respectively, in the performance of the other function (economists, engineers, etc.).[13]

According to another author, it is considered that the liability of directors also for moral prejudice is not an exception to the rule established by art. 270 par. 1 of Labour code because their liability is governed by the rules of commercial mandate, even when the state has a majority share of those companies.

It was said that we are in the presence of other responsibilities, contractual common law, which has no connection to the patrimonial liability regulated by the Labour Code[14]

4) In the strike declared illegal or continued, shall be liable strike organizers, under civil-delictual liability (art. 998 et seq. Civil Code.) , ss between them (unions or, if applicable, employee representatives) and employer there is not a legally binding contract with the employer, and employee representatives hold strike under the law mentioned, not exercising their rights and their duties according to their individual employment contract.

Thus, being in the presence of civil and delictual liability, it is clear that those involved (organizers of the strike, where appropriate, unions or employee representatives),

[12] A. Țiclea, *op. cit.*, p. 491; Ș. Beligrădeanu, *op. cit.*, p. 321.
[13] Ș. Beligrădeanu, *op. cit.*, p. 323; A. Țiclea, *op. cit.*, p. 803.
[14] I. T. Ștefănescu, *op. cit.*, p. 491.

particularly their delictual liability for material prejudices caused to employer by a strike (ilegally declared or continued, against the law, a strike which, from a certain point, it became illegal) can answer - when appropriate – also for moral prejudices (damages) due to non-patrimonial damages as stated to the employer concerned.

As for employees who participate in a spontaneous strike (unorganized), by definition illegal, they respond patrimonially, according to common law shaped by art. 270 et seq. From the Labour Code, but only to the extent that it is not a crime.

Therefore, in case of a a spontaneous strike, employees respond patrimonially exclusive for material injuries caused to employers, and not for moral damages, except when their deed is offense.[15]

5) it was correctly appreciated that public officials respond for moral damages even if art. 72 letter a) of Law no. 188/1999 (republished) not expressly state that the liability of public servants also concerns moral damages. But such a conclusion is drawn, no doubt, for a double reason, because of its formulation.

Thus, on the one hand, the text does not contain limitations or exceptions for moral prejudices; thus, since the text does not distinguish, neither the interpreter can not perform as such.

On the other hand, this provision establishes that the liability of public officials undertakes "for damages produced... to patrimony (sn - Ş.B.) of the authority or institution in which he works.

6) The literature has identified a particular case from among the civil servants whose liability includes liability for damages.

It is the regulation included in art. 25 par. 2 of Customs Staff Statute that stipulates that "the damage caused in the control as a result of failure or poor performance of the duties of control, to the extent that conditions for attracting criminal liability are not fulfilled, customs staff with management or executive jobs respond according to art. 998 from Civil Code.[16]

Therefore, customs personnel in the event of an exception provided by art. 25 par. 2 of the Statute of the customs staff, their civil and delictual liability, under art. 998 of Civil Code, may include their responsibility for moral prejudice caused to the National Customs Authority, and not just for material prejudice produced.

3. The issue of employer liability for prejudices caused to employee

A. Employer's liability to employees for non-patrimonial prejudices governed by the Labour Code

A1. Employer's liability prior to Law no. 237/2007.

In the stipulations prior to law no. 237/2007, the provisions of former Art. 269 (now 253 par. 1) from The Labour Code provides that "the employer is required, under the rules and principles of contractual liability, to indemnify the employee in case he has suffered prejudice due to the fault of the employer during service obligations or in connection with the service.

Accordingly, and in connection with the partimonial liability of the employer, shall require the same conclusion: the inadmissibility - usually - to compel the employer to pay compensation for the moral prejudice produced to employees in the process of working (individual employment contract execution).

Therefore, are flagrantly illegal all judgments by which, canceling the measure ordered by the employer to terminate the individual employment contract as illegal and / or unfounded and, according to art. 78 par. 1 and 2 of the Labor Code, compelling therefore the employer to pay money damages and, at the request of the employee, its reintegration into service, the employer, in addition, the employer is compelled to pay for the patrimonial

[15] Ş. Beligrădeanu, *op. cit.*, page 326-327.
[16] Ş. Beligrădeanu, *op. cit.*, page 102.

damage (moral damages) suffered by the employee as a result of unfair and abussive dismissal.[17]

This conclusion can be drawn without any possibility of doubt not only from the text of former art 269 par. 1 of the Labour Code (now Art. 253 par. 1 from Labour Code republished in 2011) that refers only to "material damage" suffered by the employee from the employer's fault, but also from art. 78 par. 1 of the same Code according to which "if the dismissal was effected on a groundless base or illegal, the court will cancel it and requires the employer to pay compensation equal to the wages indexed increased and updated and other rights that the employee would have received."

In connection with this legal text, there were properly observed limits on who can receive compensation when the employee obtain in Court the dissolution of decision to dismiss:[18]

- employee will receive only those wages and other rights to which he would have benefited from the entry into force of the decision to dismiss until the judgment of the court is final or until the occurrence of any cause for legal termination of the individual labor contract law;
- to calculation of damages will be also considered Christmas, Easter or "thirteenth month" bonuses, if provided for in the applicable collective agreement or individual employment contract;
- in the amount of damages, although it is not prohibited, may not be covered moral damage caused to employee by solid or illegal dismissal, because the employer's liability is governed by the rules of contractual liability, which in principle excludes liability for moral damages except where there is a clause of aggravation of liability as a result of the parties' undoubtedly agreement. Therefore, compensation for moral damages may be awarded only if in the applicable collective agreement or individual employment contract there is a provision to this effect.

In conclusion if in the case of partimonial liability of the employee to the employer is inadmissible (by the individual or by the collective contract), assuming an obligation for paying the employer for the moral damages suffered, as would clearly violate Art. 38 of the Labour Code, respectively (when the collective labor contract), the provisions of Law 132. 62/2011 regarding the dialogue, in theory, by mentioned employment contracts, the employer could assume the obligation to compensate the employee cash also for non-material prejudices suffered beccccause of his fault (the employer's), or in general, only in certain circumstances (for instance, where ordered ilegally or groundless the termination, modification or suspension of the employee's individual employment contract), whereas the rules of art. 38 of the Labour Code and the provisions of art. 132 of Law no. 62/2011 exclusively protect employees and never the employers.[19]

The correct orientation of the doctrine was confirmed by decision no. XL (40) on 07 May 2007 in the appeal in interest of the law issued by the High Court of Cassation and Justice.[20]

The supreme court stated compulsory for the future that the provisions of former Art. 269 from Labour Code (now 253 of Labour Code republished) is to be interpreted as meaning that the employer may be ordered to pay damages only if there is an express clause to this effect in the applicable collective agreement or even in the individual employment contract.

The court took into account the following considerations:

[17] A. Athanasiu, Luminița Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2005, p. 161.
[18] *Ibidem*
[19] Ș. Beligrădeanu, *op. cit.*, p. 325; I.T. Ștefănescu,, *op. cit.*, p. 490.
[20] Published in the Official Gazette of Romania, no. 763 from November 12th 2007.

"Throughout chapter III of Title XI of the Labour Code is regulated patrimonial liability of the employer and employees, establishing both principles that generate it and the concrete ways for recovering the prejudices.

This regulatory framework through art. 269 par. (1) of the Labour Code provided that "the employer is obliged under the rules and principles of contractual liability to indemnify the employee in a situation where it has suffered material prejudice during the performance of his work by employer's fault, or related to his job obligations".

Correspondingly, by art. 270 par. (1) of the Code, in which is ruled the patrimonial liability of the employees, it was provided that "employees are patrimonially liable under the rules and principles of contractual liability, for material damages caused to employer by their fault and in connection with their work."

Therefore, the provisions of the two pieces of legislation set clear the unequivocal legislature's will, as patrimonial liability of the employer and employees should not be established solely for the material prejudices and not for moral prejudices.

It is true that art. 295 par. (1) of the Labour Code provides that "the provisions of this Code shall be complete with the other provisions of the labor law and, to the extent they are not inconsistent with the type of labour relations provided by this Code, with the provisions of civil law."

But, in order to be complemented the specific provisions of the Labor Code with the Civil Code, is required, as shown in the mentioned text, that the particular situation not to be covered by a provision of the Labour Code and not to be an incompatibility determined by the nature of the work relations, as long as they are based on collective or individual employment contract.

However, these two conditions can not be considered to be met in order to justify the application of Art. 269 par. (1) of the Labour Code in conjunction with art. 998 and 999 of the Civil Code, as a legal basis for reparation of the moral prejudice within the legal labour relations, as long as mutual patrimonial liability of the parties of such a report may arise only from the employment contract, based on the principles of contractual liability.

As long as the juridical nature of patrimonial liability, regulated by the Labour Code, it is a variety of contractual liability, with certain features imprinted by the character of labour relations, including the one derogatory established by art. 269 par. (1) and Art. 270 par. (1), that covers only the reparation of the material damage, it is obvious that under such liability can not be granted moral damages, and these may be claimed under art. 998 and 999 of the Civil Code, only in delictual liability.

Or, in report with its own rule of the common law in the field of contractual liability, according to which moral damages for patrimonial prejudice can not be established, except for the case where such a liability is an exception, it means that their grant is only possible if the there is a legal provision that requires them or was expressly stipulated in the contract.

Thus, it must be considered that the patrimonial liability of the employer, as regulated in Art. 269 par. (1) of the Labour Code, employees may be granted damages only if the law requires it or have been integrated into the collective agreement or individual employment contract clauses relating to the employer's liability for such damages. "

To be noted that the entire argument of the Supreme Court to justify the applicability rules of reparation of non patrimonial prejudice is based on patrimonial liability as a variety of contractual liability, which admits only exceptionally the reparation of non- patrimonial prejudices.

In these circumstances arises the question to what extent this argument is valid under the new provisions of the Civil Code which admit as a principle the possibility that a creditor can obtain compensation for non patrimonial damages suffered, according to art. 1531 par. 3 Civil Code.

A2. The situation created by the emergence of law no. 237/200

By law no. 237/2007[21] art. 269 par. 1 was stipulated: "The employer is obliged under the rules and principles of contractual liability, to compensate the employee in situation that he suffered a material or moral prejudice by employer's fault while performing his duty obligations or related with his duties. "

Therefore, common law in the field of patrimonial liability presumes that the employer takes responsibility also for the moral damages incurred and proved by his employee.

In this context, the provisions of the Act regulating the common law liability of employers involve their responsibility and therefore moral prejudices suffered by employees, leaving pointless the distinction that exists between the patrimonial liability for discrimination having the criteria sex and other forms of discrimination.

However, the new regulation itself is discriminatory, since it leaves unchanged art. 270 par. 1 of Labour Code regarding the limits of employees' patrimonial liability, who will remain responsible only for the material prejudice caused directly by their deed. Thus, it is created a break of the balance between the contracting parties based on the principle of the protection of employees' labor law rules.

Therefore it was judiciously proposed in the law doctrine, either removing law amendments of art. 269 paragraph 1 of Law no. 237/2007, or to be amended accordingly also art. 270 of Labour Code.[22]

B. Employer's liability for non-material prejudices caused to its employees regulated by other legislation

According to art. 43 par. 6 of Law no. 202/2002 on equality between women and men, text under which "employees" who consider themselves discriminated based on sex could request (including at the court competent to resolve labor disputes of rights) "compensation for material and / or moral and / or to eliminate the consequences of discriminatory acts the person has committed. "Today this article was repealed by Law no. 340/2006, which amended accordingly the article 46 par. 2, in the sense that damages will be awarded by the court according to law.

Therefore, between the entry into force of Law no. 340/2006 and the entry into force of Law no. 237/2007, persons who notified the court for discrimination based on sex could not get any compensation for moral damages, since the common law, meaning "the law" applicable to the employment, forbade it, in accordance to art. 269 from Labor code.[23]

We also appreciate this conclusion as being the correct one, by analyzing the legal text that refers to "fixing the compensation in accordance to law" as opposed to the previous regulation which referred to "common law". So in the period between the entry into force of Law no. 340/2006 and the advent of Law no. 237/2007, the employer was not liable for moral prejudices caused by acts based on discriminatory criterion of sex, because in labor relations "law", especially Labor Code, only allowed under the former art. 269 the liability for material prejudice.

However, to note that the law no. 340/2006 amended by art. 44 of law no. 202/2002 in the sense that a person considered to be the victim of discrimination on grounds of sex, in areas other than labor, has the right to apply to the competent institution or to the request by the court, according to common law, and to seek materials and/or moral compensation and/or to be eliminated the consequences of discriminatory acts from the person that committed them.

This is possible because in other legal relationships outside the scope of labor law, the law governing the liability for prejudices is common law, meaning the Civil Code, namely

[21] Published in the Official Gazette of Romania, no. 497 from July 25th, 2007.
[22] Ş. Beligrădeanu, *op. cit.*, p. 331.
[23] I. T. Ştefănescu, *op. cit.*, p. 530.

delictual liability that allows the liability of the author of illegal deed for non-patrimonial prejudices.

To be noted that similar legislation is contained in art. 27 par. 1 of G.O. No. 137/2000 on preventing and sanctioning all forms of discrimination, republished on 1st of March 2007, which provides: "A person who feels discriminated may formulate, in the court of law, a claim for damages and restoring the situation previous of discrimination, or cancellation of current situation created by discrimination, according to common law. The application is exempt from judicial taxes and is not subject to referral to the Council"[24].

Since in this legal text refers to common law, in doctrine[25] was wisely concluded that it is possible to solicit moral damages since the text does not distinguish. In this way it becomes inexplicable how, for all other forms of discrimination, victim can claim moral compensation and the reparation of moral damages and for discrimination on grounds of sex which has a special regulation moral damage repair is not possible.

Notably, the object of this regulation concerns any form of discrimination consisting of: "distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, contagious chronic disease, HIV infection, belonging to a disadvantaged category, and any other criteria that has the purpose or effect the restriction, prevention recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms of legal rights in the political, economic, social, cultural or any other field of public life".

The term "common law" referred to in the text of art. 21 (the numbering previous to republication, currently 27 paragraph 1.) is represented by the provisions of art. 998-999 Civil Code and the matters of legal labor relations.

Thus, faced with the exception of unconstitutionality of art. 21 par. 1 in conjunction with the former art. 269 from Labor Code, Constitutional Court concluded as follows:[26]

According to art. 269 of the Labour Code, employees who have suffered material prejudice due to the fault of the employer in the performance of duty obligations or in connection with the duties have the opportunity to address the court, pursuant to the rules and principles of contractual liability for patrimonial prejudices suffered.

Or, the Court noted that criticized legislation applies to all persons in the situation stipulated b the hypothesis of the norm, without any distinction or considering other criteria, namely that to all individuals with the status of employee and that suffered material prejudice by employer's fault.

On the other hand, the Court finds that art. 269 of the Labor Code is not an impediment for the employees who consider themselves discriminated against in the workplace to address the court, by the mean of common law, to seek compensation for moral or non-patrimonial prejudices, incurred in connection with the duty, as stipulated by art. 21 par. (1) of Government Ordinance no. 137/2000. Thus, art. 1 paragraph. (2). letter e), point (i) of the Ordinance provides that "the principle of equality between citizens, exclusion of privileges and discrimination are guaranteed especially in exercise of the following rights: [...] e) economic, social and cultural rights, in particular: (i) right to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration". "In applying these provisions, the court is asked to determine whether issues probated by an employee are connected to discrimination and, if so, to pay compensation to the person discriminated against and to restore the situation previous to discrimination or cancellation of the situation created by discrimination.

---

[24] For details see Lavinia Onica Chipea, *The legal regime of individual labour conflicts*, "Universul Juridic" Publishing House, Bucharest, 2011, p.190.

[25] Ș. Beligrădeanu, *op. cit.*, page 329.

[26] Decision no. 721/2006 published in the Official Gazette of Romania, no. 962/30.11.2006.

To interpret the criticized legal texts in the sense of limiting the damages owed to a discriminated person who is an employee, the amount of material prejudice caused by the employer, equals to a restriction of the right to full compensation for the prejudice suffered. Or, it is precisely this circumstance that could trigger the application of a different treatment, thus discriminatory, to persons in the same legal situation generally regulated by Government Ordinance no. 137/2000, which by the very title proposes preventing and sanctioning all forms of discrimination. That is, since that order makes no distinction on the issues addressed by or forms of discrimination and the principle of "ubi lex non distiguit, nec nos distinguere debemus", the quality of employee does not put the discriminated person in a situation to justify the application of a different legal treatment. Therefore, the employee is entitled to compensation for moral prejudices, according to art. 21 par. (1) of Government Ordinance no. 137/2000, under the rules and principles of delictual liability contained in art. 998 and 999 of the Civil Code".

Accordingly, according to the concept of the Constitutional Court, patrimonial liability does not apply to all prejudicial acts caused to employees. Thus, in case of discrimination criteria, except sex, according to GO No. 137/2000 on the theme, employer will be responsible for delictual liability involving both material and moral prejudices.

An exception regulation regarding the possibility of repairing the moral prejudices is contained in Civil Servants Statute under which, in case of cancellation of illegal termination of service, public authority or institution may be required to payment of moral damages, provision also supported by provisions of art. 18 par. 3 of the Law no. 554/2004.

In this respect is also Decision. 2037/29.03.2005 of High Court of Cassation and Justice, which found the following:[27]

According to art 998 (of old - Ed) Civil Code: "Every deed of man that causes prejudice to another, obliges the one by whose fault it was produced to repair it". The basic rules governing liability are: the principle of full compensation for the damage and the repair of the damages principle. Full compensation prejudice involves removing all the harmful consequences of an illegal and culpable act, whether patrimonial or non-patrimonial, in order to restore the previous situation of the victim, according to the principle of law *restitutio in integrum*.

According to the provisions of Article 11 paragraph 2 of Law nr.29/1990 (now art. 18 par. 3 of Law no. 554/2004 - Ed) in case of the acceptance of the the request for annulment of the administrative act or acknowledgment of violated law the court will decide on the damages.

In the literature, moral damages are assessed as being a breach of a person's physical existence, limb and health, honor, dignity and honor, professional reputation, etc.

According to provisions of art.1169 (of the old - Ed) Civil Code, the burden of proof in the application for granting the moral damages lie to the claimant, according to the principle of law *actors incumbit onus probandi*. According to the rules of the common law, the claimant must prove the existence of attempted non-patrimonial prejudice and the illegal nature of the offense, ans the casual report between the prejudice and defendant's act.

In this case, by the abusive and illegal behavior, respondent-defendant seriously injured appellant-claimant's fundamental right - the right to work, causing harm and moral prejudices, by affecting the honor, prestige and dignity protected by law.

The attitude of the defendant has seriously affected appellant-claimant's health, fact that that led to the suspension of the service's report, worsening cardiovascular diseases he is suffering.

Regarding the determination of the amount of moral damages, the court will consider it to have countervailing effects, not being allowed to decide neither excessive fines for damage nor undue revenue for their victims.

[27]Decision published on www.scj.ro (site visited on 11.12.2012).

Unlike other civil damages that require a sample holder in respect of moral damages, can not call the material evidence, the judge being the one who, in relation to the consequences suffered by the injured party, will appreciate a certain lump sum to compensate for non-patrimonial prejudice caused, reason for which the court allowed the claim for moral damages granting. "

There is another situation where the employer, under special laws, is also responding for moral damages. It is the provisions of art. 44 of law no. 319/2006.

Thus, according to art. 44 of law no. 319/2006 "Employers are patrimonial liable, according to civil law, for prejudices caused to victims of accidents or occupational diseases, to the extent that damages are not fully covered by social security benefits."

Since the legislature uses the notion of "civil law", we think it refers to delictual law, that is common law in the field of delictual liability, which, as we know, includes liability for moral prejudices. In this respect, it was concluded that the person concerned has the opportunity to apply under this text, as compensation for patrimonial prejudices, and compensation for non-material prejudices, because, according to the rules of the common law in the field of delictual liability, the author of illegal act is liable for all prejudices he has caused. It is about the actual damage and the loss of earning, by non-patrimonial prejudices, all to the extent that they are not the direct and indirect consequences of the illicit fact.[28]

Therefore we can not agree with the authors[29] who state that the provisions of art. 44 of Law no. 319/2006 form a whole with art. 269 paragraph 1 of the Labour Code, which is why it appears that the employer will be liable only under patrimonial liability, excluding moral damages.

Conclusions

From the analysis presented it has been observed that under current law, the employer is responsible also for moral damages, while the employee is liable only for material damages.

We appreciate that the lex ferenda requires the statements of employees' liability also for non-patrimonial prejudices produced to employers by an illegal act connected to his work. employees cover liability for non-material damage caused to the employer by an unlawful act that has to do with work.

An argument is the new vision of moral prejudices resulting from the economy of the provisions of the Civil Code that came into force on October 1st, 2011. Thus it not only regulates the legal person's calling for the repair of the non-material prejudices, but elevates to rule the compensation by the debtor also for non-patrimonial prejudices suffered by the creditor on the occasion of non-executing *lato sensu* the contract (Art. 1531 par. 3 of Civil Code).

Or, as patrimonial liability of the employee is a variety of contractual liability, and on the other hand the employer responds already, under art. 253 par. 1 of Labour Code, also for moral prejudices, we consider that an intervention of the legislature is needed in order to establish vocation employer's to repairing the non-patrimonial prejudices caused by an employee by his or her illicit act, in relation with his work.

Bibliography

I. Adam, *Drept civil. Obligaţiile. Faptul juridic*, "C.H. Beck" Publishing House, 2013;

I. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, 2nd Edition, "Universul Juridic" Publishing House, 2012;

Lavinia Onica Chipea, *The legal regime of individual labour conflicts*, "Universul Juridic" Publishing House, Bucharest, 2011;

[28] O.P. Musta, *Consideraţii privitoare la particularităţile răspunderii civile consacrate de art. 4 alin. 2 din Legea nr. 346/2002*, in "Revista de dreptul muncii" Review, no. 3/2007, p. 52.

[29] I. T. Ştefănescu, *op. cit.*, p. 652.

C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligațiilor*, "Hamangiu" Publishing House, 9th Edition, 2008;

Ș. Beligrădeanu, *Studii de drept al muncii*, "C.H. Beck" Publishing House, 2007;

O. P. Musta, *Considerații privitoare la particularitățile răspunderii civile consacrate de art. 4, alin. 2 din Legea nr. 346/2002*, in "Revista de dreptul muncii" Review, no. 3/2007;

A. Țiclea, *Tratat de dreptul muncii*, "Universul Juridic" Publishing House, 2007;

A. Athanasiu, Luminița Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2005;

I. T. Ştefănescu, Ş. Beligrădeanu, *Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii*, in "Dreptul" Review, no. 4/2003;

L. Pop, *Drept civil. Teoria generală a obligațiilor*, "Lumina Lex" Publishing House, 2000;

I. Albu, V. Ursa, *Răspunderea civilă pentru daunele morale*, "Dacia" Publishing House, Cluj-Napoca, 1979;

M. Eliescu, *Răspunderea civilă delictuală*, "Editura Academiei" Publishing House, 1972.