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Role of Courts in Whistleblowers Protection in the Czech Republic

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Abstract: *DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2019 on the protection of persons who report breaches of the Union was implemented in the Czech Republic by the law no. 171/2023 Coll. effective from 1st August 2023. So far there is a modest related court practice concerning the abovementioned Directive from the Czech Republic. The aim of this paper is to evaluate and analyse existing court decisions in this way. The author of this paper as a whistleblower managed to initiate these proceedings as a plaintiff and he is not aware of similar proceedings in this way in the Czech Republic until now. Even delays in proceedings were qualified as retaliatory measures.*

1. INTRODUCTION

The last decade has been marked not only by the biggest financial crisis we have witnessed since the Wall Street Crash in 1929 but also by notorious whistleblowing acts conducted against governments, security services, sporting and doping agencies (UEFA, the Olympics Committee), and major financial institutions (eg, UBS, HSBC, SwissLeaks, LuxLeaks, the Panama Papers, and EULUX Leaks). We have also witnessed whistleblowers facing real professional and personal risks, including retribution, reprisals, intimidation and criminalisation, whereby their lives and careers have been irreparably damaged as a direct result of retaliation against whistleblowers (Turksen, 2018).

Law-breaking activities within firms are widespread but difficult to uncover, making whistleblowing by employees desirable (Butler et al., 2020).

DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2019 on the protection of persons who report breaches of Union law (Directive (EU) 2019/1937) defines whistleblower as persons working in the private or public sector who acquired information on breaches in a work-related context or persons in a work-based relationship which has since ended or persons whose work-based relationship is yet to begin in cases where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations. Besides other things definition of whistleblower is fulfilled while reporting breaches against EU financial interests.

The new Directive will require Member States to create rules for organizations with more than 50 workers, will mandate such organizations to implement whistleblowing hotlines for reporting a broad range of EU law violations, and will contain minimum standards on how to respond to and handle any concerns raised by whistleblowers (De Zwart, 2020).

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Retaliation against whistleblowers is defined by the mentioned Directive in the following forms (given in a demonstrative way):

a) suspension, lay-off, dismissal or equivalent measures;
b) demotion or withholding of promotion;
c) transfer of duties, change of location of place of work, reduction in wages, change in working hours;
d) withholding of training;
e) a negative performance assessment or employment reference;
f) imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;
g) coercion, intimidation, harassment, or ostracism;
h) discrimination, disadvantageous or unfair treatment;
i) failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment;
j) failure to renew, or early termination of, a temporary employment contract;
k) harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;
l) blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;
m) early termination or cancellation of a contract for goods or services; (n) cancellation of a licence or permit;
n) psychiatric or medical referrals (Directive (EU) 2019/1937).

Although whistleblowing serves the public interest, too often the individuals behind these disclosures are delegitimized and experience harassment and retaliation (Abazi, 2020).

2. DELAYS IN PROCEEDINGS AS RETALIATION AGAINST WHISTLEBLOWERS

The author of this paper as a whistleblower and a plaintiff against one ministry managed to take part in the Czech Republic court decision No. 12 C 211/2021-168 from 1. July 2023:

> *"The plaintiff initially demanded payment of the sum of CZK 280,899 from the defendant with accessories in the form of default interest in the amount of 10% per annum from 15/12/2019 and the costs of proceedings claiming that it is non-pecuniary damage that should have resulted from the disproportionately long proceedings conducted by the defendant about his request for payment of compensation for his participation in the mission of national experts in the amount of CZK 280,899, when the defendant, following the decision of the District Court for Prague 7 in case 4 C 27/2019 first decided only on 22/03/2021 and subsequently on the appeal on 8/07/2021, thereby deliberately prolonging the proceedings, whereas against the last decision he filed an administrative action led by the Municipal Court in Prague under sp. stamp 14 Ad 17/2021...*
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> *The plaintiff subsequently added that the proceedings were burdened by delays in the proceedings before the administrative court (sp 14 Ad 17/2021) and overall, reaching 4 years, is disproportionately long. By filing dated 22/05/2023 then extended the claim for the payment of the amount of CZK 15,437 with default interest of 15% per annum on this amount from 1/6/2023 until payment. He justified the extension of the lawsuit by the fact that this (compensation) proceeding is also disproportionately long while pointing to ECtHR*

jurisprudence, according to which compensation proceedings can be carried out an eligible remedy unless it is itself unreasonably long, and if it is, it is the reason for increasing the compensation. He added that the proceedings were started on 19/10/2021, lasted a year and 7 months and it's not over yet. At the same time, he pointed to the jurisprudence of the ECtHR in the case of Žirovnický vs. the Czech Republic according to which proceedings in one level of the judicial system should not exceed 1 year and 6 months and in two degrees then 2 years. The procedure is not complicated in terms of legal or procedural aspects. He pointed out that delays arising from repeated decision-making, after the annulment of the first-instance decision by the appeals court, must be added to the burden of the courts. Regarding the amount of damages for unreasonable length of time (compensation proceedings) came out of the basic amount of CZK 15,000 for the first two years of management, which he increased by 10%. With regard to the importance of the subject of the proceedings for the plaintiff, as the amount sued is high) and by another 20% for the reason of the slow progress of the court. In conclusion, he added that there should have been delays in the evidence at every stage of the process.....In proceedings before the administrative body then failed to comply with the deadlines for issuing a decision, and thus were unjustified delays of 9 months. The previous proceedings were also burdened by unjustified delays of 14 months in administrative court. He pointed out that the mere finding of a violation of the law is not a sufficient means of correction. He pointed to the higher importance of the case for the plaintiff, saying that it was about labor law remuneration...

It was undisputed between the participants (§ 120 para. 3 o. s. ř.), the plaintiff filed a criminal complaint for misuse of European Union funds in 2018, which he subsequently expanded in April 2019 to include a criminal complaint for sabotage of migration quotas and also filed a criminal complaint against his leader...

The court assessed the proceedings as a whole from the beginning - by filing a lawsuit at the District Court for Prague 7 on 29/05/2019, with the fact that as of 01/06/2023 (announcement of the decision on this matter), it has not yet been completed and the total duration of the proceedings thus (so far) amounts to 4 years and 2 days...

This basic amount was subsequently increased by the court, taking into account the procedure of the state authorities for the reasons above for the specified delays (+10%). He increased the basic amount further (+5%) ***considering that delays in administrative proceedings must be presumed to be prohibited retaliatory measures in the sense of Article 21, paragraph 5 directive of the European Parliament and the Council (EU) of 23 October 2019 on the protection of whistleblowers reporting breach of Union law PE/78/2019/REV1/1. Here the court adds that it was undisputed between the parties, that the plaintiff filed a criminal complaint for misuse of European Union funds in 2018 in connection with the payment of expenses, which he claimed in the considered proceedings. Defendant to court summons did not offer any other justification for the delays in the administrative proceedings (see the minutes of the meeting on 6/1/2023 page 2)****..."*

Czech Court pointed to Article 21, paragraph 5 of the mentioned EU Directive:

"*In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment,* ***it shall be presumed that the detriment was***

> ***made in retaliation for the report or the public disclosure**. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds* (Directive (EU) 2019/1937)*."*

According to the authors' opinion, this mentioned presumption is so-called ***prima facie*** **proof which is different from the reversal of the burden of proof which is typical for anti-discriminatory law. However, this author's opinion is questionable as mentioned in the following text of this paper.**

3. THE PROBLEM WITH THE TEMPORAL AND SUBSTANTIVE SCOPE OF THE MENTIONED EU DIRECTIVE IN WHISTLEBLOWER PROTECTION

The author of this paper as a ("alleged") whistleblower and a plaintiff against one ministry managed to take part in the Czech Republic court decisions about his lay-off from public service. These decisions happened in the time before the Court decision described in chapter 2 of this paper.

> "*... According to the city court, the dismissal from employment corresponded mainly to the fact that the complainant did not start his new job even three working weeks after his transfer, although he was invited to do so...*
>
> *... The Supreme Administrative Court dismissed the subsequent cassation complaint as unfounded and decided to reimburse the costs of the proceedings. In the justification, he particularly emphasized that the municipal court could not deal with a large part of the applicant's argumentation against the decisions of the administrative authorities at all, taking into account the* ***concentration of proceedings limiting the space to define the points of action, which can be expanded and supplemented only within the period for filing the action itself.*** *Only from this point of view could the Supreme Administrative Court assess the correctness of the municipal court's decision, because even in cassation appeal proceedings it is not permissible to apply new reasons or facts. According to the Supreme Administrative Court, for example, the complainant's objection that the city court did not deal with the violation of the principle of prohibition of double punishment and the impediment of res judicata was inadmissible, namely that the complainant was punished twice for the same act, when he was not paid for his absence from work and at the same time for this reason, the employment relationship was also terminated....* (RESOLUTION of the Constitutional Court No. IV. ÚS 2401/22 from 4. October 2022).
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> *...* ***According to the Supreme Administrative Court, the complainant was also not even hinted at being penalized for reporting a violation of legal regulations at the workplace****, while the credibility of this alleged connection is not enhanced by the fact that the circumstances of the illegal conduct that should have occurred at his workplace were changed by the complainant during the proceedings before the administrative courts ..."* (RESOLUTION of the Constitutional Court No. IV. ÚS 2401/22 from 4. October 2022).
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> *...* ***Regarding the complainant's objection regarding the violation of the right to a fair trial (sc. to judicial protection) by the fact that the burden of proof was not reversed in his case, the Constitutional Court states, in particular in accordance with the decision of the Supreme Administrative Court, that even in its opinion the case under consideration does not involve a situation in which the complainant would be in the position of***

> ***a person reporting a violation of rights at the workplace, therefore the Directive of the European Parliament and the Council (EU) 2019/1937 on the protection of persons reporting a violation of Union law, or Regulation No. 145/2015 Coll. , when neither the said directive nor this regulation was applied in his case at all….”*** (RESOLUTION of the Constitutional Court No. IV. ÚS 2401/22 from 4. October 2022).

The Constitutional Court reached a different conclusion than the Court in the case described in the second chapter of this article. I.e. The Constitutional Court (based on previous decisions of administrative courts) did not in principle recognize the plaintiff as a whistleblower. In the opinion of the author of this article, this consideration of the Constitutional Court is questionable, but while maintaining objectivity, the author must state that this opinion apparently has its objective reasons and, in the opinion of the author, it is an issue of the temporal validity of the mentioned EU directive on the protection of whistleblowers. Explained will be later in this paper.

The previous decision to this mentioned case was done by the judgment of the Supreme Administrative Court of June 28, 2022 No. 4 Ads 440/2021-105 **which was probably the first court trial where is mentioned Directive in the Czech Republic:**

> ***“… The Supreme Administrative Court states that it fully respects the necessity of protecting whistleblowers of illegal behavior according to the Directive of the European Parliament and the Council (EU) 2019/1937 of 23 October 2019 on the protection of persons who report violations of Union law. However, in the case under consideration, it does not appear from the file that the complainant was penalized for the notification regarding legal violations regulations (after all, the complainant also changed the alleged cause of his penalty: while in the proceedings before the city court, he argued the wrongdoing regarding the payment of compensation to the posted persons to the Union authorities, in the cassation complaint proceedings, claims the notification of malpractices regarding implementation of relocation measures, thereby discrediting his argument himself). Substantially is that the complainant's actually found disciplinary offense could practically not have had a different result, than his dismissal from employment. Therefore, the Supreme Administrative Court considers that the defendant proved that the measure (here dismissal from employment) is based on properly justified objective facts in the sense of Article 21 paragraph 5 of the cited directive…”*** (RESOLUTION of the Supreme Administrative Court No. 4 Ads 440/2021 – 105).

Supreme Administrative Court simply claimed that *prima facie* proof about retaliation against whistleblower was refuted. However, according to the author of this paper the question if courts took reality into account *prima facie* proof and also potentially reversal of the burden of proof. Directive writes:

> *(93) Retaliation is likely to be presented as being justified on grounds other than the reporting and it can be very difficult for reporting persons to prove the link between the reporting and the retaliation, whilst the perpetrators of retaliation may have greater power and resources to document the action taken and the reasoning. Therefore, once the reporting person demonstrates* ***prima facie*** *that he or she reported breaches or made a public disclosure in accordance with this Directive and suffered a detriment,* ***the burden of proof should shift to the person who took the detrimental action****, who should then be required to demonstrate that the action taken was not linked in any way to the reporting or the public disclosure* (Directive (EU) 2019/1937).

According to the author, this Directive statement should be subjected to further clarification. In the first instance, the abovementioned dispute was resolved by the judgment of the Municipal Court in Prague No. 10 Ad 10/2020 – 102 **from 25 November 2021** (RESOLUTION of the Municipal Court in Prague No. 10 Ad 10/2020 – 102).

According to the author's opinion, he was not protected by the Directive on 25 November 2023 since the Czech Republic's obligation to implement this materia into national law was given to the 17. December 2023. After such date can whistloblowers enjoy protection by Direction in the Czech Republic. It means procedural protection, even if their whistleblowing notification took place before this date. **The Directive is not even mentioned in this Court resolution.**

In the author's opinion Municipal Court in Prague in case No. 10 Ad 10/2020 – 102 did not shift the burden of proof. New Directive could not be used and it is a question of how it is meant in the given directive with the question of reversal of the burden of proof, which in theory is something different from prima facie evidence.

However, a possible question is whether the Court of Cassation and the Constitutional Court correctly evaluated all the requirements of the directive and, if not, whether and what practical significance this could have.

4. FUTURE RESEARCH DIRECTIONS

A deep analysis of the following Directive statement is needed:

> *(93) Retaliation is likely to be presented as being justified on grounds other than the reporting and it can be very difficult for reporting persons to prove the link between the reporting and the retaliation, whilst the perpetrators of retaliation may have greater power and resources to document the action taken and the reasoning. Therefore, once the reporting person demonstrates* ***prima facie*** *that he or she reported breaches or made a public disclosure in accordance with this Directive and suffered a detriment,* ***the burden of proof should shift to the person who took the detrimental action****, who should then be required to demonstrate that the action taken was not linked in any way to the reporting or the public disclosure* (Directive (EU) 2019/1937).

5. CONCLUSION

Based on the knowledge gained from the available EU legislation on whistleblower protection and mentioned court case studies, it can be concluded that more court cases are needed in this way to spread debates about the real meaning of some of the provisions of the given Directive and how they can help whistleblowers in the case of legal disputes in practice. Especially the question of *prima facie* proof and shifting burden of proof. The question is if shifting burden of proof is meant in general (as in EU anti-discriminatory legislation) or just only in relation to *prima facie* proof.

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