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## The case-law from the ECHR regarding the compensation of moral damage to the employee

### Практика ЄСПЛ щодо відшкодування моральної шкоди, заподіяної працівнику

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#### Abstract

The purpose of the article is to study the practice by the ECHR regarding reimbursement for moral harm caused to the employee. The subject matter of research is moral damage. Methodology. The methodological bases for the Article are: general scientific, systematic methods, method of descent from the abstract to the concrete, sociological and legal research method, method of generalizing judicial practice, etc. Research results. The judgments by the ECHR on compensation for moral damage to employees, which was caused as a result of discrimination, dismissal due to a strike, because of the statement in the media, political beliefs, based on gender and due to illness, were considered. Practical meaning. It was proven that since the rights of the second generation (which include labor rights) are not reflected in the Convention, a person has no right to apply for their protection to the Court. This is possible only if other fundamental rights were affected during the violation of labor rights. Value/originality. The use of case-law from the ECHR in the process of researching the institution of compensation for moral damage to an employee will contribute to the development of its use in law enforcement activities and the dissemination of the experience of equitable reimbursement as a way to protect the violated rights and legitimate interests of workers in Ukrainian realities.

**Keywords:** ECHR, Convention, case-law, discrimination, dismissal, labor rights.

#### Анотація

Метою статті є дослідження практики ЄСПЛ щодо компенсації моральної шкоди, заподіяної працівнику. Предметом дослідження є моральна шкода. Методологія. Методологічною основою статті є: загальнонауковий, системний методи, метод сходження від абстрактного до конкретного, соціолого-правовий метод дослідження, метод узагальнення судової практики тощо. Результати дослідження. Розглянуто рішення ЄСПЛ щодо відшкодування моральної шкоди працівникам, яка була завдана внаслідок дискримінації, звільнення у зв'язку з участю у страйку, висловлюванням у ЗМІ, через політичні переконання, на підставі статі та у зв'язку з хворобою. Практичне значення. Доведено, що оскільки права другого покоління (до яких належать і трудові права) у Конвенції не відображені, звернутися за їх захистом до ЄСПЛ особа не вправі. Це можливо лише у разі, коли при порушенні трудових прав зачіпалися інші – фундаментальні права особи. Цінність/оригінальність. Використання прецедентної практики ЄСПЛ у процесі дослідження інституту відшкодування моральної шкоди працівнику сприятиме розвитку його використання у правозастосовній діяльності та поширенню досвіду справедливої компенсації як способу захисту порушених прав та законних інтересів працівників в українських реаліях.

**Ключові слова:** ЄСПЛ, Конвенція, прецедентна практика, дискримінація, звільнення, трудові права.

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## Introduction

The European Court of Human Rights is an international body that, under the conditions defined by the Convention for the Protection of Human Rights and Fundamental Freedoms, can consider applications submitted by the persons complaining of violations of their rights. The Convention is an international treaty, on the basis of which the majority of European States undertook to observe human laws and fundamental freedoms. These rights are guaranteed both by the Convention itself and by the protocols to it (Council of Europe, 1950), the consent of which is binding on States Parties to the Convention.

Many people who could not achieve the restoration of their legal interests in the area of labor relations in Ukrainian courts, ask themselves: is it possible to apply for their protection to the European Court of Human Rights? The answer to this question is both yes and no.

The fact is that the jurisdiction of the ECHR extends to all issues of interpretation and application of the Convention and its protocols (Article 32 of the Convention); the latter enshrines the fundamental freedoms, establishing the foundations for justice and peace in the whole world, such as: the right to life, the prohibition of torture, the right to freedom and personal integrity, etc.

Labor rights belong to the second generation of human rights, which includes social, economic and cultural rights. Although they are not the main ones, they allow ensuring a decent standard of living of an individual, his (her) well-being and comprehensive development.

Accordingly, the rights of the second generation are not reflected in the Convention, therefore a person cannot apply for their protection to the ECHR. This is possible only if other fundamental rights of a person were affected during the violation of labor laws.

Thus, the aim of the article is to study the practice by the ECHR regarding reimbursement for moral caused to the employee.

## Methodology

The methodological bases for the Article are: general scientific, group and special scientific research approaches, methods and techniques.

The philosophical and methodological framework for the study is the dialectical general scientific approach, which is applied, in particular, to clarifying the genesis of the institution of compensation for moral damage to the employee, to study the dynamics of the Court's legal views on this issue.

Among the general scientific methods, the systematic one played an important role, with the help of which, the analysis of the provisions of the Convention and the examination of the decisions of the Court is carried out. Method of descent from the abstract to the concrete serves to clarify the concretization of the provisions of the ECHR and the use of the legal positions of the Court in its decisions.

The sociological and legal group research method makes it possible to identify the rights, which are under protection of the Convention, for the breach of which the employee acquires the right to demand compensation for moral harm. Special scientific methods obtain special importance when interpreting the legal norms of Ukrainian legal instruments and the content of the Convention. The method of generalizing judicial practice helps to summarize the case law of the ECHR on the issue under investigation.

Clarification of the conceptual apparatus of the research ("moral damage", "discrimination", "second-generation rights", etc.) required the use of a number of formal and logical general scientific techniques – induction, deduction, analysis, synthesis.

## Literature Review

According to the law of Ukraine No. 3477-IV (2006) the courts apply the Convention and the case law of the Court as a source of law in their proceedings. In this regard, the well-known Ukrainian scientist Shevchuk (2011) emphasizes that the main feature of the precedent nature of ECHR decisions is the "immutability of judicial practice" (relative stability), which allows individuals to regulate their behavior in accordance with it. Therefore, one court decision of the ECHR, in the opinion of the scientist, cannot be a precedent, since it is not repeatable.

Metlova (2007) concludes that by implementing the interpretation of the Convention in a particular case, the Court also expresses its own legal view. The presence of such a circumstance

makes it possible to consider the decisions of the ECHR as the source of law.

According to professors Lushnikov and Lushnikova (2009), the acts of the Court occupy an independent place in the system of sources of law, as sources of law of a special kind (*sui generis*); they have complex legal nature, combining the properties of a legal instrument and a judicial precedent.

Fikfak (2020) analyzes the 13 years' practice of the ECHR to understand whether it awards equitable compensation for moral harm for the breach of fundamental rights, enshrined in the Convention.

Solomou (2014) investigated the issue whether the Court has contributed to the custom of just satisfaction in the Member States. She divided her research into 3 parts: 1) historical evolution of the international rule on just satisfaction; 2) forms of satisfaction; 3) compensation for moral damage.

Nowlin (2002) states that the ECHR is protecting morality and the individuals' right to compensation for moral damage despite the fact that there is no uniform approach to this concept in the States-signatories to the European Convention.

## Results and Discussion

### Discrimination

Most often, the fundamental right that is violated in the context of the problem under investigation is the prohibition of discrimination, enshrined in Art. 14 of the Convention. Discrimination is the most common violation of human rights, which results in neglect of people belonging to a particular group, intolerant treatment of a person as the highest social value, and some other violations.

According to the Law of Ukraine "On the Principles of Preventing and Combating Discrimination in Ukraine" (Law of Ukraine No. 5207-VI, 2012), discrimination is the situation in which an individual and/or a group of individuals suffers from the restriction on the recognition, exercise or enjoyment of rights and freedoms in any form established in this Law on the grounds of their race, skin color, political, religious and other beliefs, sex, age, disability, ethnic or social origin, nationality, marital and property status, place of residence, linguistic or on other grounds that have been, are or may be

actual or alleged (hereinafter – particular grounds), except for cases when such restriction has a legitimate, reasonably justified aim, which is achievable in an appropriate and necessary way.

According to the above-mentioned Convention, “*the exercise of rights and freedoms enshrined in this Convention must be ensured without discrimination on any basis – sex, race, color, language, religion, political or other beliefs, national or social origin, belonging to national minorities, property status, birth, or on other grounds*”.

As one can see, in order to prove the fact of discrimination, the victim should not only provide incontrovertible data and evidence of unlawful actions against him (her), but also the fact of the violation of another fundamental human right enshrined in the Convention.

### Dismissal due to a strike

Thus, for example, in the decision of the European Court of Human Rights in the case No. 44873/09 "Ognevenko v Russia" (2018), a violation of Article 11 of the Convention was established in connection with the dismissal of the applicant after participating in a strike organized by a trade union, which, in the opinion of the Court, was a disproportionate restriction of the applicant's right to freedom of association. First of all, the ECHR drew attention to the fact that Paragraph 1, Article 11 of the Convention provides for the freedom to establish trade unions as one of the forms or a separate type of freedom of association.

The Court also emphasized that “the right to strike is one of the ways in which a union can act to be heard; collective bargaining to protect workers' interests and strikes are protected by Article 11 of the Convention”.

The ECHR noted that when the applicant contested his dismissal in the national courts, the latter had to observe formal compliance with the relevant Russian laws in their analysis, and accordingly, they could not maintain a balance between the applicant's freedom of association and competing public interests (Paragraph 82 of the Resolution).

The Court concluded that the applicant's participation in the strike was perceived as a breach of discipline, which, along with the previous offence, resulted in the most severe punishment – dismissal. The ECHR has

previously emphasized that such sanctions inevitably have a "deterrent effect" on trade union members who take part in industrial actions (such as strikes), to protect their professional interests (paragraph 83 of the Judgment).

The Court summarized that the dismissal of the applicant after participating in a strike organized by the trade union, which, due to the legal ban on his participation in strikes (as he was a machinist) resulted in failure to perform his work duties, is a disproportionate restriction of the claimant's right to freedom of association. Therefore, in the opinion of the Court, there was a violation of Article 11 of the Convention.

The claimant sought EUR 2,000 and EUR 6,000 for pecuniary damage (wages for the period of forced absenteeism) and moral damages, respectively.

The Court believes that the applicant's claims for compensation for material and moral damages are well-founded, reasonable and related to the detected violation of the Convention. Based on considerations of justice, the Court decided that the applicant should be paid EUR 2,000 as compensation for material damages and EUR 6,000 – for moral damage, as well as any taxes that may be taxed these amounts.

### **Dismissal due to statement**

In the case of *Marunic v. Croatia* (2012), the applicant, Mirela Marunic, who is a citizen of Croatia, complained that she was fired because of the statements she made in the media, in violation of her right to freedom of expression.

During the period from 2003 to October 2007, Marunich was the director of the municipal utility company, which belonged to the municipality of Kostrena. In September 2007, the daily newspaper *Novi list* published the article with public criticism of the way Marunich performed her job, which was made by the mayor of the municipality of Kostrena, M.U. Eight days later, Marunich responded to the criticism in another article in the newspaper *Novi list*. She complained that the problems with the company's operations were caused by the municipality's legal department, which allegedly required the public utility to act illegally. She demanded an audit of the company. Marunich was summarily dismissed by the decision of the company's general meeting of shareholders (chaired by M.U.) on the grounds that her public statements harmed the company's reputation.

Marunich filed a civil lawsuit for illegal dismissal. Although he was successful at trial, the Supreme Court rejected the claim, finding that her dismissal was based on her public statements. Her appeal to the Constitutional Court was also struck down.

Marunich complained that her statements in the mass media were made only to deny the unjust accusations against her, and that her firing was a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

Having considered all the circumstances of the case, the Court came to the conclusion that the applicant's articles in response to the acts by M.U. were not disproportionate and did not go beyond acceptable criticism. Accordingly, the Court considers that the intervention in the claimant's activities in the form of termination was not "necessary in democratic society" to protect the business reputation and rights of the company she headed.

Such a conclusion eliminates the need for further consideration of the nature and severity of the sanction imposed, namely the dismissal of the applicant, as factors to be taken into account in assessing the proportionality of the intervention.

Besides, it was proved that in this case there was indeed a violation of Article 10 of the Convention (the right to freedom of expression).

For the material and moral damage caused, the applicant demanded EUR 104,789.31 as compensation for pecuniary damage and EUR 57,320 – as compensation for moral damage, respectively.

Considering the nature of the applicant's complaint regarding the violation of Art. 10 of the Convention and the reasons, for which violations of this article were established, the Court decided that the most reasonable way to eliminate the consequences of this violation in this case would be reopening the proceedings. Since domestic law allows for such compensation, the ECHR considers that there is no reason to award the claimant any amount of compensation for material harm. Therefore, it rejected this request.

On the other hand, the Court came to the conclusion that moral damage was caused to the applicant. In the interests of fairness, the Court awards it €1,500 under this item.

### Dismissal due to political beliefs

The next case concerns the dismissal of a person due to his political beliefs (*Redfearn v. the United Kingdom*, 2012). The applicant, Arthur Collins Redfearn, who is a British national, was employed as a driver by a private company, Serco Limited, from 05 December 2003 until his dismissal on 30 June 2004, transporting children and adults with physical and/or mental disabilities in the Bradford area. Most of its passengers were of Asian origin.

During Redfearn's tenure, there were no complaints about its implementation, nor about the latter's behavior.

His boss, also of Asian, promoted Redfearn to the rank of "first class employee". However, following the publication of data in a local newspaper regarding the driver's political affiliation, a number of trade unions and employees raised the question of the possibility of continuing his work in the Serco Limited company. When, in June 2004, Redfearn was elected local councilor from the British National Party (BNP), he was immediately dismissed.

In August 2004 he brought a race discrimination claim to the Employment Tribunal under the Race Relations Act 1976. The Employment Tribunal dismissed the claim on the grounds that any discrimination against him was motivated by the need to ensure the health and safety of its passengers and accompanying persons, as there was a risk that Serco vehicles might be attacked by opponents of the BNP. In July 2005 the Employment Appeal Tribunal granted his appeal, including on the ground that the management had not considered any other alternatives to dismissal.

Having examined all the circumstances of the case, the ECHR came to the conclusion that in this case there was a violation of Art. 11 of the Convention (right to freedom of assembly and association). Firstly, the Court referred to its well-established case law that in a healthy democratic and pluralistic society the right to freedom of association should extend not only to individuals or associations, whose views are received positively or are considered correct, but also those whose views that do not correspond to generally accepted ideas about morality. Secondly, the Court noted that Redfearn was released at the age of 56, meaning he might have trouble finding a new job. In addition, the fact that there were no complaints from customers or

colleagues on the work of the driver; he was considered a "first-class employee".

The Court considers that the most appropriate domestic remedy for a person in Mr. Redfearn's position, dismissed on the basis of political beliefs or affiliation, is a wrongful dismissal claim under the 1996 Act. However, he was unable to avail himself of this remedy, having worked less than a year.

Such persons have the right to bring a claim to the Employment Tribunal for discrimination on grounds of race, sex or religion, but not on grounds of political affiliation or belief. With no other remedy available to Redfearn, he was forced to bring a race discrimination claim under the 1976 Act, which, however, does not regulate relationships in this situation. The UK was therefore required to take reasonable and appropriate measures to protect workers, including those with less than a year's service, from being dismissed on grounds of political opinion or affiliation, or by providing an additional exclusion from the one-year qualifying period under the 1996 Act year or by filing a separate lawsuit in connection with illegal discrimination based on political beliefs or affiliation. A legal system that allows dismissal solely based on the employee's political party membership is open to abuse and therefore imperfect.

According to Art. 41 of the Convention, if the Court recognizes the fact of violation of the Convention or protocols thereto and if the domestic law of the relevant Party provides for only partial compensation, the Court, if necessary, provides just satisfaction to the injured party. However, in the situation under consideration, the applicant did not submit any claim for compensation.

### Dismissal based on gender

According to the materials of the case "*Emel Boyraz v. Turkey* (2014) the applicant, Emel Boyraz, who is a citizen of Turkey, successfully passed the civil service examination in 1999 and was appointed as a security officer at a branch of the State Energy Company (TEDAŞ). On July 05, 2000, she was informed that she could not be officially employed, because she did not meet the requirements of "being a man" and "having completed military service". Emel Boyraz appealed this decision on September 18, 2000. On February 27, 2001, the Ankara Administrative Court ruled in favor of Ms. Boyraz, and TEDAŞ offered her a contract.

However, the company filed an appeal against this decision; on March 31, 2003, the Twelfth Chamber of the High Administrative Court found that the administration's decision was in accordance with the law, since the requirements for the post indicated that it was for men only, which was in accordance with its nature and public interest. On March 17, 2004, Ms. Boyraz was dismissed from her position and her case was closed.

The ECHR established that the Turkish courts did not see a violation neither Art. 8, nor Art. 14 of the Convention in this case, as they relate to a right not enshrined in this international instrument, namely the right to employment as a civil servant. The Court emphasized that Ms. Boyraz was appointed as a security officer on a contractual basis and was dismissed because of her gender. Such a radical measure as dismissal only because of gender has negatively affected the identity, self-perception and self-esteem of the person, and as a result, - on her private life. Therefore, the Court decided that the dismissal of Ms. Boyraz was a violation of her right to respect for her private life, as it also had consequences for her family and the possibility of having a profession that corresponds to her qualifications. The ECHR concluded that in this case there was a violation of Art. 8 and Art. 14 of the Convention.

For the violation of her legal rights, the applicant demanded 200,000 euros (EUR) and 50,000 euros as compensation for material and moral damage, respectively.

At the same time, the ECHR noted that Boyraz did not provide any documents in support of her claim for compensation for pecuniary damage, therefore the Court left this claim unsatisfied. However, it believes that the victim suffered pain and suffering, which cannot be compensated by confirming the fact that her rights were violated. Considering the nature of the established violations, the Court considers it appropriate to award her 10,000 euros as compensation for moral damage.

### **Dismissal due to illness**

According to the materials of the case "I.B. v Greece" (2013), the claimant has worked for a jewellery company since 2001. In January 2005, he told three of his colleagues that he feared he had contracted the human immunodeficiency virus (HIV); this was later confirmed by the relevant test. Shortly thereafter, his employer received a letter from these three

persons, in which they claimed that the applicant had AIDS and that the company should fire him. Information about the applicant's health began to spread throughout the enterprise, where 70 people worked. The staff demanded his dismissal. The employer invited an occupational health doctor to communicate with employees; he tried to calm them down by explaining the ways of transmitting the disease. On February 21, 2005, 33 company employees sent a letter to the director demanding the dismissal of I.B. with the aim of "preserving their health and the right to work". On 23 February 2005, the employer dismissed the applicant, paying him severance pay under Greek law. Shortly thereafter, the applicant was employed by another company. He appealed to the court of first instance of Athens. On June 13, 2006, the court found that the dismissal was illegal. It was established that termination of the employment contract is reasonably excluded due to the applicant's state of health, and such actions on the part of the employer are an abuse of his authority. In addition, the court ruled that it was not necessary to order the applicant to resume work, as he had found a new one during that period.

The employer and the applicant filed an appeal against this decision. On January 29, 2008, the appellate court recognized that, by dismissing the applicant, the employer yielded to pressure from the employees in order to preserve healthy working relations in the team. At the same time, it was stated that the fears of the company's employees were unfounded, as the occupational health doctor explained to them. The appellate court emphasized that if the employee's illness did not have a negative impact on labor relations or the smooth functioning of the enterprise, then it cannot serve as an objective reason for terminating the employment contract. However, the complainant has not yet been absent from work, and his absence due to illness could not be foreseen in the near future.

This decision was also appealed; I.B. emphasized that the Court of Appeal wrongfully dismissed his application for reinstatement to his former post in the company. By the decision of March 17, 2009, the Court of Cassation overruled the decision of the court of appeal and recognized that the termination of the employment contract with the applicant was not illegal, as it was justified by the need to restore harmonious cooperation between employees and the smooth functioning of the company.

According to the established precedent practice of the Court, discrimination is different from the

usual treatment of a person in similar or comparable situations without an objective and reasonable justification. The court considers that, under these circumstances, the applicant was treated with hostility because he was HIV-positive, although his diagnosis did not have a negative impact on labor relations and therefore cannot be considered an objective reason for terminating the contract. The employee's interests had to be protected in the same way as the interests of the company, especially given his HIV-positive status.

Commenting on the decision of the Court of Cassation in this case, the ECHR noted that the former did not provide an adequate explanation as to why the interests of the employer prevailed over the interests of the applicant, and could not find the correct balance between the rights of two parties. The applicant was the victim of discrimination on grounds of health, in breach of Article 8 in conjunction with Article 14 of the Convention.

The Court ruled that Greece should pay the applicant 6,339.18 Euros as compensation for pecuniary damages and 8,000 Euros for moral harm.

### Conclusion

Article 9 of the Constitution of Ukraine (Law of Ukraine No. 254k/96-VR, 1996) stipulates that international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.

The Convention on the Protection of Human Rights and Fundamental Freedoms, ratified by the legislator of Ukraine, is among them. This legal instrument establishes that the European Court of Human Rights is established to ensure compliance by the Contracting Parties with their obligations under the Convention and its Protocols.

The Court is a supranational international judicial institution, which considers complaints by individuals alleging violations of their rights by States parties to the Convention.

The jurisdiction of the ECHR extends to all matters related to the interpretation and application of the Convention and Protocols thereto. Accordingly, the Court does not perform the functions of a national court and does not have the power to overrule or modify the decisions of national courts.

The Court accepts applications for consideration only after all domestic legal remedies have been exhausted; therefore before bringing an action before the Court, a person should use all judicial remedies in the State, against which the application is directed; otherwise, you must prove that such means are ineffective.

According to Art. Article 41 of the international treaty, if the Court recognizes the fact that there has been a breach of the European Convention or the Protocols to it, and the domestic law of a Contracting Party allows only partial reimbursement, the Court, if necessary, provides the injured party with fair compensation. It should be noted that the European Convention does not reveal the essence of the concept of "fair compensation", enabling the ECHR, by virtue of its competence, to interpret the concept independently.

The use of case-law from the ECHR in the process of researching the institution of compensation for moral damage to an employee, its elements, criteria for determining the amount of just satisfaction will contribute to the development of its use in law enforcement activities and the dissemination of the experience of equitable reimbursement as a way to protect the violated rights and legitimate interests of workers in Ukrainian realities.

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