STATUTORY LIMITS TO PENALTY FOR MISDEMEANOURS AGAINST THE PROVISIONS OF THE ACT ON EMPLOYMENT PROMOTION AND LABOUR MARKET INSTITUTIONS

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1. INTRODUCTION

The provisions of the Act of 20 July 2017 amending the Act on employment promotion and labour market institutions and some other acts[1] entered into force on 1 January 2018. These are substantive[2] as well as procedural[3] provisions concerning penalties for misdemeanours connected with employment. They undoubtedly have considerable influence on the practice of law application by courts, the National Labour Inspectorate and the Border Guard.

A cursory examination of the provisions of Articles 119–123 of the Act on employment promotion and labour market institutions[4] confirms that penalties for misdemeanours classified there are extremely severe and it is hard to find a reason that made the legislator determine the limits to penalties for the above-mentioned misdemeanours. However, the statutory penalty, beside the scope of penalisation, the system of sanctions and the judicial imposition of a penalty, is one of the most important determinants of the level of repressiveness of a given branch of

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1 Journal of Laws [Dz.U.] of 2017, item 1543; hereinafter also: AAAEP.

2 Article 1(22) AAAEP.

3 Article 3 AAAEP.

4 Act of 20 April 2004 on employment promotion and labour market institutions, uniform text, Journal of Laws [Dz.U.] of 2017, item 1065, as amended; hereinafter also: AEPLMI.

law.[5] On the other hand, a deepened analysis of the provisions, as far as penal sanctions are concerned, clearly confirms the indicated drawbacks and, in addition, results in negative assessment of too narrowly treated limits to some sanctions and incoherence of some of them with the regulations concerning misdemeanours against employees' rights and misdemeanours connected with the infringements of the provisions concerning other institutions of social support than the Labour Fund.

It should be added that the importance of this analysis of statutory limits to penalties for misdemeanours classified in the Act on employment promotion and labour market institutions should not be limited only to the issue of the practice of applying those provisions or to indication of the direction of desired legislative changes. Undoubtedly, it can also contribute to consideration whether and to what extent the model of sanctions for misdemeanours against the provisions of statute should be maintained, especially if the infringements concern the activities of employment agencies placing people in a company.[6] Due to the subject matter and the scope of the article, the issue may only be signalled.

2. MISDEMEANOURS LAID DOWN IN THE ACT ON EMPLOYMENT PROMOTION AND LABOUR MARKET INSTITUTIONS

Chapter 20 entitled "Liability for misdemeanours against the statutory provisions" of the Act on employment promotion and labour market institutions classifies 27 types of misdemeanours:[7]

1) failure to notify employment authorities about earning a wage (Article 119 para. 2 AEPLMI),
2) employing a foreigner without a work permit (Article 120 para. 1 AEPLMI),
3) a foreigner's illegal work (Article 120 para. 2 AEPLMI),
4) making a foreigner work illegally (Article 120 para. 3 AEPLMI),
5) demanding financial gains for helping to obtain a work permit (Article 120 para. 4 AEPLMI),
6) making another person employ a foreigner illegally (Article 120 para. 5 AEPLMI),

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[5] J. Jakubowska-Hara, *Ustawowy wymiar kary w części szczególnej prawa wykroczeń (kary zasadnicze)*, Przegląd Prawa Karnego No. 1, 1990, p. 57.

[6] In literature, there have been lively discussions recently concerning the relations between prohibited acts and penal sanctions for crimes and misdemeanours and fines imposed on entities that are subject to administrative law for infringements of that law; for more on this issue, see e.g. articles in a monograph by M. Kolendowska-Matejczuk, V. Vachev (ed.), *Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?*, Warsaw 2016. In this context, from the point of view of the hardship related to a sanction, it is indicated that, on the one hand, the role of an administrative sanction is growing and often reaches amounts exceeding fines imposed for crimes and, on the other hand, it is rightly emphasised that the limits to a fine for misdemeanours determined many years ago are often inadequate to current requirements of appropriate punishment; compare, e.g. W. Radecki, [in:] M. Bojarski, W. Radecki, *Kodeks wykroczeń. Komentarz*, Warsaw 2016, p. 274; T. Grzegorczyk, *Kodeks wykroczeń. Komentarz*, Warsaw 2013, p. 25.

[7] Compare, Article 125 para. 1 AEPLMI.

7) an employer's failure to fulfil informative obligations concerning the employment of a foreigner (Article 120 para. 6 AEPLMI),
8) employing a foreigner recommended for employment by an entity that is not an employment agency (Article 120 para. 7 AEPLMI),
9) failure to fulfil an obligation to notify a head of a county authorities (*starosta*) about circumstances connected with the employment of a foreigner possessing a seasonal work permit to do another job not requiring obtaining a new work permit (Article 120 para. 8 AEPLMI),
10) failure to fulfil an obligation to obtain a work permit (Article 120 para. 9 AEPLMI),
11) failure to fulfil an obligation to notify competent county employment authorities about the circumstances concerning a declaration that entered a registry or referring false information about starting work, failure to start work or finishing work by a foreigner based on a declaration of employing a foreigner (Article 120 para. 10 AEPLMI),
12) failure to fulfil an obligation to conclude a written employment contract with a foreigner who is exempt from the obligation to have a work permit or failure to present a foreigner with a copy of that contract translated into a language understandable to him before its conclusion (Article 120 para. 11 AEPLMI),
13) running an employment agency without a licence (Article 121 para. 1 AEPLMI),
14) running a foreign company without a required notification (Article 121 para. 1a AEPLMI),
15) charging an unemployed with fees that are not statutory (Article 121 para. 2 AEPLMI),
16) violating a ban on discrimination when running a business regulated in statute (Article 121 para. 3 AEPLMI),
17) a foreign entrepreneur's failure to inform about the change of data connected with doing business in the territory of the Republic of Poland (Article 121 para. 3a AEPLMI),
18) an employment agency's failure to conclude a contract with a person sent to work abroad for a foreign employer (Article 121 para. 6 AEPLMI),
19) failure to conclude a contract with a foreign employer (Article 121 para. 7 AEPLMI),
20) failure to send a foreigner directly to entities doing business in the territory of the Republic of Poland against an obligation or with the infringement of obligations concerned (Article 121 para. 8 AEPLMI),
21) charging students and graduates with fees connected with their internship or job placement that are not statutory (Article 121a AEPLMI),
22) failure to conclude a statutory contract with a person sent abroad to a foreign entity in order to acquire practical skills (Article 121b AEPLMI),
23) failure to present adequate information to a person undertaking employment abroad, temporary employment and a person sent abroad to acquire practical skills (Article 121c AEPLMI),
24) failure to pay a contribution to the Labour Fund (Article 122 para. 1(1) AEPLMI),

25) failure to report required data having impact on the calculation of the contribution to the Labour Fund (Article 122 para. 1(2) AEPLMI),
26) refusal to provide or providing false explanation concerning data having impact on the calculation of the contribution to the Labour Fund (Article 122 para. 1(2) AEPLMI),
27) refusal to employ a candidate for a vacancy resulting from the infringement of the ban on discrimination (Article 123 AEPLMI).

The interpretation of the features of the above-listed misdemeanours and the application of the provisions of Chapter 20 AEPLMI is often a hard task. The misdemeanours indicated above do not include conduct that even a person without adequate legal knowledge can notice, select and describe as deserving condemnation. In the majority of cases, a perpetrator's conduct results from various circumstances or a decision taken in the course of his business activities, however, beside many others of much more importance than the one which leads to matching the statutory features of a prohibited act. Moreover, avoiding the commission of many of those above-presented types of misdemeanours requires that persons involved in the employment of foreigners or employment promotion have very good knowledge of the provisions of law, not only those listed in the Act on employment promotion and labour market institutions. On the other hand, the recognition of many of the misdemeanours classified in the discussed Act requires that bodies proceeding in cases of misdemeanours should have extraordinary knowledge of broadly understood labour law.

The pattern of sanctions for misdemeanours classified in the Act of employment promotion and labour market institutions is uniform: it is a simple sanction of a fine.[8] In the doctrine and case law, a fine is recognised to be the most appropriate instrument in the fight of relatively petty infringements of law such as misdemeanours.[9]

What is typical of the above-mentioned misdemeanours is extremely severe statutory penalty for some of them. For example, running an employment agency without entry into the registry of employment agencies and providing services in the field of temporary employment or sending a person to work abroad for a foreign employer is a misdemeanour carrying a penalty of a fine of PLN 3,000 to PLN 100,000,[10] and a misdemeanour of failure to pay a contribution to the Labour Fund the value of which sometimes accounts for just a few dozen zlotys carries a penalty of a fine of PLN 3,000 to PLN 5,000.[11]

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[8] O. Włodkowski, *Przepisy karne ustawy o promocji zatrudnienia i instytucjach rynku pracy – uwagi „de lege lata" i propozycje „de lege ferenda"*, Monitor Prawa Pracy No. 2, 2014, p. 79.

[9] J. Jakubowska-Hara, [in:] P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2016, LEX/el., thesis no. 1 to Article 24.

[10] Article 121 para. 1(2) AEPLMI.

[11] Article 122 para. 1(1) AEPLMI in conjunction with Article 24 §1 Misdemeanour Code (henceforth also: MC). For more, see S. Kowalski, *Wykroczenie nieterminowego opłacania składek*, Służba Pracownicza No. 3, 2009, p. 5.

3. PENALTIES FOR MISDEMEANOURS AGAINST AEPLMI PROVISIONS IN RELATION TO LIMITS TO A FINE UNDER THE MISDEMEANOUR CODE

All misdemeanours against the provisions of the Act on employment promotion and labour market institutions carry a penalty of a fine. The Misdemeanour Code lays down a principle that a fine should account for PLN 20 to PLN 5,000. The legislator signals the possibility of some exceptions to the rule in Article 24 §1 MC. They are also laid down in the Misdemeanour Code where the legislator lowered the statutory maximum fine[12] or increased the statutory minimum fine[13]. However, the legislator did not lower the minimum fine for any misdemeanours below PLN 20 and did not increase the maximum fine over PLN 5,000.[14] Such statutory regulation of the limits to the penalties of a fine for misdemeanours classified in the Misdemeanour Code corresponds to the regulation laid down in Article 7 §3 Criminal Code (hereinafter also: CC), in which a prohibited act carrying a penalty of a fine of over 30 daily rates or over PLN 5,000[15] is classified as a crime.

The legislator eagerly used the possibility of autonomous regulation of statutory limits to a penalty of a fine for misdemeanours that are not classified in the Misdemeanour Code in the Act on employment promotion and labour market institutions, applying a mechanism of special determination of statutory limits to a fine for all misdemeanours indicated above with the exception of one of them: the misdemeanour under Article 120 para. 10 AEPLMI. It is worth adding that the legislator unambiguously determined that prohibited acts classified in Articles 119–123 AEPLMI are really misdemeanours and stipulated in Article 125 para. 1 AEPLMI that adjudicating in cases concerning such acts shall be based on the Misdemeanour Procedure Code (hereinafter: MPC).[16] Such a legislative solution matches the stipulation in the provision of §81 Annex to the Regulation of the President of the Council of Ministers of 20 June 2002 concerning "Rules of legislative technique".[17]

The differentiation of the statutory limits to penalties for particular misdemeanours in AEPLMI in relation to the principle laid down in Article 24 §1 MC may be divided into three groups including sanctions characterised by:

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[12] See, e.g. Articles: 78, 79 §1, 81 or 95 MC.

[13] See, Articles: 50a §1 and 87 §1 MC.

[14] See, the Supreme Court judgement of 8 February 2012, V KK 294/11, OSNKW 2012, No. 6, item 59.

[15] This does not mean, however, that all prohibited acts carrying a fine exceeding PLN 5,000 are crimes.

[16] See, the Supreme Court ruling of 24 February 2006, I KZP 52/05, OSNKW 2006, No. 3, item 23.

[17] Journal of Laws [Dz.U.] of 2016, item 283. It is worth adding that, e.g. in the Labour Code (henceforth also: LC), there is a lack of a similar regulation with regard to misdemeanours listed in Section Thirteen of the Act, although a penalty of a fine for the listed acts considerably exceeds the limits determined in Article 24 §1 MC. What decides that the indicated acts are misdemeanours is the title of the above-mentioned Section and the contents of the provisions in the Misdemeanour Procedure Code: Articles 17 §2 and 96 §1b MPC.

1) the increased minimum statutory limit to penalties for misdemeanours classified in Article 119 para. 2, Article 120 paras. 2 and 6–7, Article 121 paras. 2–8, Article 121a–123,
2) the increased minimum and maximum limits to statutory penalties for misdemeanours classified in Article 120 paras. 1, 3–5, Article 121 para. 1,
3) the increased minimum and lowered maximum limits to penalties for misdemeanours classified in Article 120 paras. 8–9 and 11.

The legislator laid down the most severe penalty of up to PLN 100,000 for a misdemeanour of running an employment agency without a licence combined with the provision of services in the field of temporary employment or sending a person to work abroad for foreign employers (Article 121 para. 1(2) AEPLMI) and for a misdemeanour of running a foreign company involved in the same type of business without a notification[18] of the Marshal of the Voivodeship (Article 121 para. 1a in conjunction with Article 121 para. 1(2) AEPLMI). The statutory limits to the penalty for the indicated misdemeanours are really broad because the minimum limit accounts for PLN 3,000.

The very severe penalties stipulated for the above-mentioned misdemeanours must raise controversies. Not only does the maximum limit to a penalty for those misdemeanours exceed a thousand times the value of the highest fine imposed with the application of the daily rate system[19] but it is also higher than the maximum limit to a fine for a crime classified in Article 81 of the Act of 5 July 1996 on tax consultancy.[20] At the same time, comparing the provisions of Article 1 §2 CC and Article 1 MC, one can draw a conclusion that the legislator's assumption is that the difference between a crime and a misdemeanour should be perceived in terms of quantity, regardless of the fact that misdemeanour law is not homogenous and covers misdemeanours of administrative origin (misdemeanours get the negative social weight from the infringement of administrative obligations and bans or because, assessed not on a single but a massive scale, they lead to the increase in undesired social phenomena or can generate serious negative effects because of the change of human conduct).[21]

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[18] It concerns a notification submitted to the Marshal of the Voivodeship having jurisdiction over the place where a company provides services before it starts operating as an employment, personal counselling or professional advice agency in the territory of the Republic of Poland, containing the following data: (1) the name of an entrepreneur's state of origin, (2) an entrepreneur identification and head office, (3) planned place and period of service provision as well as types of services provided in the territory of the Republic of Poland (Article 19i para. 1 AEPLMI).

[19] See, Article 33 §§1 and 3 CC.

[20] Journal of Laws [Dz.U.] of 2016, item 794, as amended; hereinafter: ATC. Compare, the judgement of the District Court in Gliwice of 18 April 2014, VI Ka 1224/13, Legalis No. 1501709 with a gloss by R. Bernat, *Wykonywanie czynności doradztwa podatkowego bez uprawnień*, Monitor Podatkowy No. 9, 2016.

[21] T. Bojarski, [in:] A. Korobowicz, L. Leszczyński, A. Pieniążek (ed.), *Państwo. Prawo. Myśl prawnicza. Prace dedykowane Profesorowi Grzegorzowi Leopoldowi Seidlerowi w dziewięćdziesiątą rocznicę urodzin*, Lublin 2003, pp. 49–51; W. Kozielewicz, *Wykroczenia z ustawy z dnia 27 września 1990 r. o wyborze Prezydenta Rzeczypospolitej Polskiej – kwestie sporne oraz propozycje zmian*, [in:] A. Michalska-Warias, I. Nowikowski, J. Piórkowska-Flieger (ed.), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, Lublin 2011, p. 645.

It must be emphasised that misdemeanours classified in Article 121 para. 1(2) AEPLMI and Article 121 para. 1a in conjunction with Article 121 para. 1(2) AEPLMI are formal misdemeanours that can be committed unintentionally. The justification for the Bill introducing such severe penalties for misdemeanours classified in the above-mentioned provisions does not provide grounds for this solution and does not discuss the amendments but only signals that their introduction is fully deliberate.[22]

The most lenient penalties are laid down for misdemeanours introduced to the Act on employment promotion and labour market institutions on 1 January 2018: failure to fulfil an obligation to notify a *starosta* about the circumstances connected with the employment of a foreigner possessing a seasonal work permit to do another job not requiring obtaining a new work permit (Article 120 para. 8 AEPLMI), failure to obtain a work permit (Article 120 para. 9 AEPLMI) and failure to fulfil an obligation to conclude a written employment contract with a foreigner who is exempt from the obligation to have a work permit or failure to present a foreigner with a copy of that contract translated into a language understandable to him before its conclusion (Article 120 para. 11 AEPLMI). The above misdemeanours carry a penalty of a fine from PLN 200 to PLN 2,000.

The extremely high, from the perspective of Article 24 §1 MC, minimum limit to a penalty for most misdemeanours classified in AEPLMI raises doubts about abandoning prosecution of misdemeanours with a minimum level of social harmfulness. As everyone knows, the principle of legalism does not have to be applied in the misdemeanour proceedings.[23] It is strictly connected with the belief that in misdemeanour cases there is no need to demand negative penal consequences in case of every infringement of the binding norms but the opinion that it is necessary and purposeful to punish a perpetrator is decisive.[24] That is why, as a result, Article 41 MC makes it possible to use non-penal measures towards perpetrators of misdemeanours, regardless of the type of a misdemeanour committed, if a body authorised to detect misdemeanours and file motions to punish decides that this type of response will not play its educative role.[25] Obviously, a question must arise whether the legislator, who lays down a penalty of a minimum fine of PLN 3,000, really assumes the possibility of applying Article 41 MC. Although determination of the minimum fine for a misdemeanour at this level does not exclude the application of the solution included in the above-mentioned provision, it seems that it can be interpreted as a signal that, because a misdemeanour carries the lowest fine of as much as PLN 3,000, the legislator assumes its commission is so blameworthy that every instance deserves punishment.

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[22] Sejm of the Republic of Poland – 8th term, paper no. 1274.

[23] The conclusion should be drawn from the fact that the provision of Article 8 MPC evidently does not adopt the regulation laid down in Article 10 §1 CPC on the ground of misdemeanour procedure.

[24] See, J. Bafia, D. Egierska, I. Śmietanka, *Kodeks wykroczeń. Komentarz*, Warsaw 1980, pp. 99–101; J. Skupiński, *Kierunki doskonalenia polskiego prawa wykroczeń*, Studia Prawnicze No. 4, 1981, p. 3; T. Grzegorczyk, A. Gubiński, *Prawo wykroczeń*, Warsaw 1995, pp. 263–264.

[25] V. Konarska-Wrzosek, *Dyrektywy wymiaru kary w polskim ustawodawstwie karnym*, Toruń 2002, pp. 194–195.

4. STATUTORY PENALTIES FOR SOME MISDEMEANOURS LAID DOWN IN AEPLMI IN RELATION TO PENALTIES UNDER THE LABOUR CODE

The maximum limit to a fine was determined at the level of PLN 30,000 for the following misdemeanours: employment of a foreigner illegally (Article 120 para. 1 AEPLMI), making a foreigner work illegally (Article 120 para. 3 AEPLMI), demanding financial gains for helping to obtain a work permit (Article 120 para. 4 AEPLMI) and making another person employ a foreigner illegally (Article 120 para. 5 AEPLMI). The increase in the maximum limit to a statutory penalty for the above-mentioned misdemeanours is based on the provisions of the Act of 20 July 2017 amending the Act on employment promotion and labour market institutions and some other acts. However, it is hard to find the reasons for the increase in the limit to fines and the level of PLN 30,000 in the justification for the amendment.

The regulation stipulating the maximum limit to a fine for the above-mentioned misdemeanours matches the regulation laying down the statutory limit to fines for misdemeanours against employees' rights (Articles 281–283 LC). In the past, the increase in the limit to penalties for misdemeanours classified in the Labour Code was introduced in the Act of 13 April 2007 on the National Labour Inspectorate.[26] The content of the justification for the Bill suggested that the reason for the increase was the observed practical economic profit obtained from the infringement of employees' rights. It means that it was "profitable" to pay a fine because its amount was lower than the "gains" obtained from the infringement of the rights.[27] It seems that the determination of the maximum level of a fine laid down in Article 120 para. 1 and Article 120 paras. 3–5 AEPLMI may be justified in the same way. However, one can imagine that obtaining gains from illegal employment of a foreigner may provide such high profits that, *in concreto*, it would be profitable to risk such employment if this misdemeanour carried a maximum penalty of a fine laid down in Article 24 §1 MC or even up to PLN 10,000,[28] as it was stipulated before the changes introduced by AAAEP of 20 July 2017. Employing a foreigner illegally, making a foreigner work illegally, demanding financial gains for helping to obtain a work permit or making another person employ a foreigner illegally consists in an employee's work and an increase in an employer's property, and thus, incompliance with the provisions regulating the provision of labour. In this sense, the nature of these misdemeanours is similar to misdemeanours classified in the Labour Code.

The legislator treats misdemeanours against employees' rights laid down in the Labour Code and misdemeanours laid down in AEPLMI in a similar way and it is already noticed in court proceedings. The legislator decided that a labour inspector (Article 17 §2 MPC) must be a public prosecutor in those misdemeanour cases and, in addition, laid down uniform possibilities of punishing a perpetrator in a fine

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[26] Journal of Laws [Dz.U.] of 2017, item 786, as amended.

[27] Compare, the justification for the Bill on the National Labour Inspectorate, Sejm of the Republic of Poland, 5th term, paper no. 712.

[28] Especially, in the context of the provision of Article 9 MC.

imposing proceedings for those misdemeanours to a larger extent than in case of other misdemeanours (Article 96 §1a(1) MPC).[29]

However, looking for the justification for the maximum limit to a fine for misdemeanours classified in AEPLMI determined at the amount of PLN 30,000 in their certain similarity to misdemeanours classified in the Labour Code, one should critically assess the minimum limit to a fine for misdemeanours of making a foreigner work illegally (Article 120 para. 3 AEPLMI), demanding financial gains for helping to obtain a work permit (Article 120 para. 4 AEPLMI), and making another person employ a foreigner illegally (Article 120 para. 5 AEPLMI) at the level of PLN 3,000. In my opinion, the minimum level of a penalty determined in this way does not find justification. Indeed, it is hard to understand why Polish misdemeanour law stipulates that just demanding financial gains for helping to obtain a work permit (Article 120 para. 4 AEPLMI) carries a fine of at least PLN 3,000 and making groundless deductions from the remuneration of a Polish employee having an employment contract carries a penalty of a fine of at least PLN 1,000 (Article 282 §1(1) LC).[30] There are many similar examples.

The justification for such a high minimum limit to a fine reaching PLN 3,000 can be found in other similar regulations laid down in the same the Act and determining the minimum limit to a fine at the same level. However, the point is that it is hard to find relevant grounds for those regulations,[31] and the legislator did not indicate them in the justification for the bills introducing such minimum statutory limits to penalties for some misdemeanours laid down in AEPLMI.

5. TOO NARROW LIMITS TO PENAL SANCTIONS

Even a cursory analysis of the limits to the statutory penalty for misdemeanours classified in Chapter 20 AEPLMI leads to a conclusion that the limits to penalties for quite a big number of misdemeanours were shaped in such a way that the scope of adjudication on a penalty for those misdemeanours within the statutory limits is very narrow. It concerns misdemeanours carrying a fine from PLN 3,000 to PLN 5,000[32] and from PLN 4,000 to PLN 5,000[33].

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[29] Only with regard to the special regulation concerning the maximum limit to a fine in a fine imposing proceedings laid down in Article 96 §1b MPC, the legislator admits labour inspectors' extraordinary rights exclusively in case of imposing penalties for misdemeanours against employees' rights classified in Articles 281–283 LC. Moreover, it is worth adding that the legislator noticed some misdemeanours classified in AEPLMI are also subject to prosecution by the officers of the Border Guard and, in the scope concerning those officers, included a special regulation in Article 96 §1a(3) MPC making it possible to impose punishment for the listed misdemeanours within a fine imposing proceedings as they take place in case of misdemeanours against an employee's rights.

[30] The maximum statutory limit to a penalty for the indicated misdemeanours is the same and reaches PLN 30,000.

[31] Compare, comments in the next part of the article.

[32] See, Articles: 120 para. 7, 121 paras. 2–3a, 121a, 121c, 122 para. 1, and 123 AEPLMI.

[33] See, Articles: 121 paras. 6–8 and 121b AEPLMI.

The Act on employment promotion and labour market institutions does not indicate circumstances that have to be taken into account for the imposition of a penalty. They are indicated in the Misdemeanour Code. The directives for the imposition of penalties for misdemeanours are laid down in the provisions of Article 33 MC. General rules are very close to the rules of imposing penalties for crimes: an adjudicating body imposes a penalty at its discretion but within the limits laid down in statute for a given misdemeanour, having assessed the level of social harmfulness of an act and having taken into account the aims of a penalty within the scope of social impact and preventive and educative objectives which are to be achieved in relation to the punished person.[34] What draws special attention is the content of the provisions of Article 33 §3 MC containing an open catalogue of extenuating circumstances and Article 33 §4 MC, which contains an open catalogue of aggravating circumstances to be taken into account when imposing a penalty.

If we consider just the fact that misdemeanours laid down in AEPLMI were classified as non-consecutive acts and, as a rule, misdemeanours may be committed intentionally as well as unintentionally (Article 5 MC), it comes to mind *prima vista* that the indicated types of misdemeanours may cover many types of conduct at a different level of social harmfulness of an act and guilt. For example, the conduct of a person who sends another person abroad to a foreign entity in order to acquire practical skills, which is not employment or another type of work for remuneration, and does not conclude a contract referred to in Article 85 para. 2 AEPLMI, if such conduct results from negligence at the stage of implementing a bigger project within which several people are sent abroad to serve apprenticeship, should be assessed in a different way than the conduct that results from cooperation and in agreement with other people for the purpose of obtaining gains and the person has the knowledge that the trip is badly organised and the probability of acquiring expected knowledge and skills abroad is scarce. Each type of such conduct matches the features of a prohibited act under Article 121b AEPLMI but some exemplary circumstances indicated above give grounds for a different assessment of social harmfulness and a perpetrator's guilt. However, the legislator laid down a penalty of a fine from PLN 4,000 to PLN 5,000 for the indicated misdemeanours. The example shows that the difference between the minimum and maximum limit to a statutory penalty is inadequate to circumstances that may be covered by the assessment of culpability of a given act, the level of a perpetrator's guilt and other circumstances listed in Article 33 §1 MC, which a court must, not only can, take into account when it imposes a penalty for a misdemeanour. Based on the provisions of Article 33 MC, it is downright obvious that adjudicating on a penalty of a fine for a misdemeanour cannot result from a simplified pattern but requires a thorough analysis of an act's nature and circumstances, the scale of negative consequences of a misdemeanour, a perpetrator's financial conditions and possibilities as well as social effects of a penalty.[35]

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[34] W. Marek emphasised that the legislator by analogy determined the principles and directives on imposing penalties for crimes and misdemeanours, see [in:] *Prawo wykroczeń (materialne i procesowe)*, Warsaw 2012, p. 77.

[35] *Ibid.*, p. 84.

The legislator, determining penalties in the provisions classifying misdemeanours, indicates the minimum and maximum penalty for a given misdemeanour and a court imposes a penalty within those limits taking into account the directives for a penalty imposition, which are formulated in the way making it possible to fulfil the aims of a penalty determined by the legislator: just punishment, impact on a perpetrator and social effects of a penalty.[36] If a legislator determines in AEPLMI the limits to the statutory penalty in such a way that the difference between them accounts for PLN 2,000 and the minimum limit to a penalty is higher by half, it is hard to assume that a court has possibilities of following those directives within those limits in every case. It is even more difficult to follow the directives in case of imposing a penalty for misdemeanours when the difference between the minimum and maximum limits to the statutory penalty is PLN 1,000 and the minimum limit to a penalty is four times more. In my opinion, in both cases it can be assumed that it is simply impossible in relation to misdemeanours classified in AEPLMI, which are generally characterised by a big number of circumstances of a given act commission that determine the assessment of the degree of social harmfulness of an act and guilt.

6. PENAL SANCTION FOR MISDEMEANOURS INFRINGING PROVISIONS ON THE LABOUR FUND IN RELATION TO STATUTORY SANCTIONS FOR MISDEMEANOURS AGAINST PROVISIONS ON SOCIAL INSURANCE

The AEPLMI provisions contain, inter alia, those regulating the status and financing of the Labour Fund.[37] Obligatory contributions to the Labour Fund are of critical importance for the income of that Fund;[38] that is why, the legislator decided to ensure the fulfilment of this obligation with the use of penal provisions. Since the Act on employment promotion and labour market institutions entered into force, its Article 122 para. 1(1) classifying a misdemeanour of failure to pay contributions in due time has been binding, although the introduction of this provision was unnecessary because of the content of Article 98 para. 2 of the Act of 13 October 1998 on social insurance system,[39] which was binding on the date that Act entered into force.[40]

Apart from social insurance, health insurance and the Guaranteed Employee Benefits Fund contributions, the contributions to the Labour Fund belong to the most common charges paid by contribution-payers to support social insurance institutions, for the collection of which the Social Insurance Institution (ZUS) is

[36] *Ibid.*, p. 95. This author rightly indicates that the directives on imposing a penalty constitute a normative instrument of fulfilling the aims of punishment.

[37] Article 103 and the following AEPLMI.

[38] Compare, Article 106 para. 1 AEPLMI.

[39] Journal of Laws [Dz.U.] of 1998, No. 137, item 887, as amended; hereinafter also: ASIS.

[40] The provision had an identical wording as the currently binding provision of Article 98 para. 3 ASIS.

authorised.[41] Introducing the Act on the social insurance system, the legislator undoubtedly wanted to entirely regulate liability for misdemeanours of failure to pay contributions for the above-mentioned forms of social insurance because the then Article 98 para. 1(1) ASIS, constituting an equivalent of the presently binding Article 98 para. 1(1a) ASIS,[42] determined liability of the contribution-payers or persons obliged to act on their behalf for failure to pay social insurance contributions,[43] and the still binding Article 98 para. 3 ASIS specifies the type of misdemeanour of failure to pay contributions for other purposes than social insurance, which ZUS is authorised to collect. The provisions of Article 98 para. 1(1a) ASIS and Article 98 para. 3 ASIS lay down a penal sanction for misdemeanours classified therein within the range from PLN 1 to PLN 5,000.[44]

At the time when the indicated provisions were in force, introducing new acts regulating the operation of the Labour Fund and health insurance, the legislator first separately, in Article 122 para. 1(1) AEPLMI, classified a misdemeanour of failure to pay contributions to the Labour Fund carrying a penalty of a fine from PLN 3,000 to PLN 5,000, and then, in Article 193 para. 3 of the Act of 27 August 2004 on the provision of healthcare services financed from public funds,[45] a misdemeanour of failure to pay health insurance contributions carrying a penalty of a fine from PLN 20 to PLN 5,000.[46] Undoubtedly, the two provisions are special in relation to Article 98 para. 3 ASIS.

As it is known, most contribution-payers are obliged to pay previously calculated social insurance, health insurance and the Labour Fund contributions every month.[47] In such a situation, the amount of social insurance and health insurance contributions is much higher than the amount of the contribution to the Labour Fund. At the same time, a misdemeanour of failing to pay the contribution to the Labour Fund carries a penalty of a fine from PLN 3,000 to PLN 5,000 and a misdemeanour of failing to pay social insurance contributions carries a penalty of a fine from PLN 1 to PLN 5,000. This differentiation of penal sanctions, noticeable just in the relation to the two indicated provisions, is not justified by anything.

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41 See, Article 32 ASIS.

42 For more on this issue, see S. Kowalski, *Znowelizowane reguły karania za naruszenie obowiązku opłacania składek*, Monitor Prawa Pracy No. 10, 2012, *passim*.

43 For more, see inter alia: U. Kalina-Prasznic, *Odpowiedzialność karna płatnika składek na ubezpieczenie społeczne*, [in:] J. Sawicki, K. Łucarz (ed.), *Na styku prawa karnego i prawa o wykroczeniach. Zagadnienia materialnoprawne oraz procesowe. Księga jubileuszowa dedykowana Profesorowi Markowi Bojarskiemu*, Vol. I, Wrocław 2016, pp. 206–207; K. Ślebzak, J. Kosonoga, *Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne*, Ius Novum No. 3, 2016, pp. 286–292.

44 In my opinion, the indication of the penal sanction in the provision of Article 98 para. 1 ASIS with the use of a phrase "is subject to a penalty of a fine of PLN 5,000" constitutes a completely autonomous (from Article 24 §1 MC) regulation of the limits to a fine imposed in PLN in the amount indicated in Article 98 para. 1 ASIS.

45 Uniform text, Journal of Laws [Dz.U.] of 2017, item 1938, as amended.

46 In the provision, the legislator only indicated that a perpetrator of a misdemeanour "is subject to a penalty of a fine", which results in the application of the legal norm laid down in Article 24 §1 MC, and this is in accordance with Article 48 MC; compare, the Supreme Court judgement of 8 February 2012, V KK 294/11, OSNKW 2012, No. 6, item 59.

47 See, Article 104 AEPLMI.

It is hard to assume that paying the contribution to the Labour Fund on time is more important for the state than paying social insurance contributions on time. Moreover, it is common knowledge that the size of the sanction laid down in Article 122 para. 1(1) AEPLMI most often precludes the fulfilment of the aims of punishment referred to in Article 33 MC within the statutory limits to a penalty for that misdemeanour. As a result, courts often apply punishment degression, although in accordance with misdemeanour law, extraordinary mitigation of punishment as well as renouncement of punishment should be applied only exceptionally.[48]

An issue that is worth noticing is also making it possible to avoid liability for a misdemeanour in case the contribution is paid late but before a control procedure is initiated in accordance with Article 122 para. 2 AEPLMI and is limited to failure to pay contributions to the Labour Fund. This clearly confirms that there is no complex conception regulating the issue of broadly understood criminal liability for failure to pay contributions to social insurance institutions. It is hard to find rational justification for the situation in which a person who pays the contribution of a few hundred zlotys to the Labour Fund with a few months delay is not subject to punishment, while a person who is a few days late with the payment of the social insurance contribution of a few thousand zlotys is subject to punishment, although in both cases the payment has been made before a control procedure is initiated.

It should be added that it is not understandable, either, why the statutory limits to a penalty for a misdemeanour of failing to report the required data that have impact on the amount of contributions to the Labour Fund (Article 122 para. 1(2) AEPLMI) and the refusal to provide or providing false explanations concerning the data that have impact on the amount of contributions to the Labour Fund (Article 122 para. 1(2) AEPLMI) were determined at the level of PLN 3,000 to PLN 5,000. The twin types of misdemeanours are classified in Article 98 para. 1(2) ASIS and carry a penalty of a fine from PLN 1 to 5,000 and they are often committed simultaneously when a declaration concerning, e.g. social insurance and the Labour Fund, is submitted to ZUS. It is not possible to assume that the indicated conduct consisting in the infringement of the obligations resulting from social insurance provisions is less culpable than the same conduct consisting in the infringement of the provisions on the Labour Fund. Obviously, the part of arguments concerning those relations that were presented earlier remains up-to-date.

7. CONCLUSIONS

1) Penalties for misdemeanours classified in the Act on employment promotion and labour market institutions are very severe in comparison with those for misdemeanours classified in the Misdemeanour Code and in relation to the statutory limits to penalties for those misdemeanours under the regulation laid down in Article 24 §1 MC determining general limits to a fine for a misdemeanour.

[48] Compare, A. Marek, *Prawo*..., pp. 104–105.

2) The only provision determining the minimum limit to a fine at the level of PLN 20, and thus the amount in general constituting the minimum limit to a fine in accordance with Article 24 §1 MC is Article 120 para. 10 AEPLMI classifying a misdemeanour of failing to fulfil an obligation to notify the competent county labour authorities about the circumstances concerning a declaration entered into the registry or the provision of false information on starting work, failing to start work or stopping to work by a foreigner based on a declaration of employing a foreigner.
3) The provisions concerning six types of misdemeanours stipulated in Articles 120 para. 1, 120 paras. 3–5, 121 paras. 1(1–2) AEPLMI lay down a fine exceeding PLN 5,000 which, in accordance with the provision of Article 24 §1 MC, in general constitutes the maximum limit to the statutory fine for a misdemeanour.
4) The legislator lays down the maximum limit to a penalty at a higher level than the maximum limit to a penalty for a crime under Article 81 ATC in case of two misdemeanours classified in Article 121 para. 1a AEPLMI and in Article 121 para. 1(2) AEPLMI.
5) The misdemeanours classified in the provisions of Articles 120 para. 7, 121 paras. 2–3a, 121a, 121c, 122 para. 1, 123 AEPLMI carry a penalty of a fine of PLN 3,000 to PLN 5,000, and misdemeanours classified in Articles 121 paras. 6–8, 121b AEPLMI: PLN 4,000 to PLN 5,000. The difference between the maximum and the minimum limits to a penalty is in those cases inadequate to the circumstances that might be taken into account in the assessment of blameworthiness of a given act, the level of a perpetrator's guilt and other circumstances listed in Article 33 §1 MC, which a court must take into consideration when imposing a penalty for a misdemeanour.
6) The statutory limits to a penalty for a misdemeanour directly connected with a foreigner's work for remuneration defined in Article 120 paras. 3–5 AEPLMI are incoherent with the regulations concerning misdemeanours against employees' rights laid down in the Labour Code because the minimum limit to a penalty for each of those misdemeanours is three times higher than the minimum limit to a penalty for a misdemeanour under Articles 281–283 LC.
7) The statutory limits to a penalty for misdemeanours directly connected with the infringement of the provisions concerning employers' obligations with respect to the Labour Fund laid down in the provisions of Article 122 para. 1 AEPLMI should have statutory limits to penalties harmonised with the provisions classifying twin misdemeanours concerning the infringement of obligations towards social insurance institutions laid down in the provisions of Article 98 ASIS.

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STATUTORY LIMITS TO PENALTY FOR MISDEMEANOURS AGAINST THE PROVISIONS OF THE ACT ON EMPLOYMENT PROMOTION AND LABOUR MARKET INSTITUTIONS

Summary

The study contains an analysis of statutory limits to the penalty of a fine for misdemeanours classified in the Act on employment promotion and labour market institutions. The characteristic feature of those sanctions is their exceptional severity. The author points out that as a result of the amendments to the provisions of the Act on employment promotion and labour market institutions introduced by the acts passed in 2017, there is an excessive aggravation of penalties for the discussed misdemeanours, and in case of two of them, the maximum limit to the statutory penalty was determined at a higher level than for some crimes. Apart from the extremely high limits to most penalties classified in AEPLMI, subject of criticism are also too narrowly established limits to some penal sanctions as well as the lack of coherence of some of them with the regulations pertaining to misdemeanours against employees' rights and misdemeanours consisting in failing to pay contributions to other types of social insurance than the Labour Fund.

Keywords: misdemeanour, out-of-code misdemeanours, penal sanction, employment promotion, Labour Fund

USTAWOWE GRANICE KARY ZA WYKROCZENIA PRZECIWKO PRZEPISOM USTAWY O PROMOCJI ZATRUDNIENIA I INSTYTUCJACH RYNKU PRACY

Streszczenie

Opracowanie zawiera analizę ustawowych granic kar grzywny przewidzianych za wykroczenia stypizowane w ustawie o promocji zatrudnienia i instytucjach rynku pracy. Cechą szczególną tych sankcji jest ich wyjątkowa surowość. Autor zwraca uwagę na fakt, że w następstwie nowelizacji przepisów ustawy o promocji zatrudnienia i instytucjach rynku pracy dokonanych ustawami uchwalonymi w 2017 r. doszło do nadmiernego zaostrzenia kar za wymienione wykroczenia, a w przypadku dwóch z nich górna granica ustawowego zagrożenia karą została określona na poziomie wyższym niż dla niektórych przestępstw. Oprócz nader wysokich granic kar przewidzianych za większość wykroczeń stypizowanych w ustawie o promocji zatrudnienia i instytucjach rynku pracy negatywnej ocenie poddane zostały również: zbyt wąsko ujęte granice niektórych sankcji karnych, a także brak spójności części z nich z regulacjami dotyczącymi wykroczeń przeciwko prawom pracownika oraz wykroczeń polegających na nieopłacaniu składek na innego rodzaju niż Fundusz Pracy formy zabezpieczenia społecznego.

Słowa kluczowe: wykroczenie, wykroczenia pozakodeksowe, sankcja karna, promocja zatrudnienia, Fundusz Pracy

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