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The possible effects of the appearance of the grievance fee in the Hungarian labour law

Introduction

There always has been a special connection between the labour and civil law regulation,[1] at least since we can speak about independent labour law material, or labour law as an independent legal sphere.[2] Though the independence of the regulation can be questioned in the Hungarian legal system, too, it is indisputable that the two legal fields cannot be regarded united, without any differentiation, and the main reason of it is the different type of the regulated legal relationships. Namely, nowadays the employment relationship – besides its unquestionable civil law-type and its growing flexibility[3] – is characteristic of the special status, the hierarchic structure which is also characteristic of the classical labour relationships, that is the employer's power over the employee, and its consequence, her/his surplus rights. Therefore, the fundamental characteristics of the content of the legal relationship cannot be overlapped with the classical civil law, namely civil law legal relations, since they are in coordinate relation, not in superior.[4] This significant difference justifies the existence of the independent regulation and legal practice anyway.

In spite of this it cannot be questioned that the inner logic of the labour relationships, and several elements of the legal relationship – mainly the employment contract and its several aspects – do not differ from the civil law,

[1] G. Kenderes, *A munkajogi és polgári jogi szabályozás viszonyának egyes alapkérdései*, Jogtudományi Közlöny 2001, Vol. 56, No. 3, p. 113–120.

[2] J. Radnay, *Munkajog*, Budapest 2009, p. 29–40.

[3] G. Kiss, *Új foglalkoztatási módszerek a munkajog határán – az atipikus foglalkoztatástól a szerződési típusválasztási kényszer versus típusválasztási szabadság problematikájáig*, Magyar Jog 2007, Vol. 54, No. 1, p. 1–14.

[4] G. Kiss, *Munkajog*, Budapest 2005, p. 93–94.

namely, we can come to the conclusion that though, regarding the subjects and objects[5] of the legal relation the nature of the legal relationships are definitely different, several legal institutions can be named which regulation in fact can be thought of as parallel – even with minimal differences – referring to the labour and civil law legal regulation material. It is true in spite of the fact that it could have been impossible in a form declared in law before the Hungarian labour law reform started in 2012, even if judicial intentions like this were clear earlier.[6]

Most of the norms declared in the general conduct requirements (fundamental principles),[7] the establishment of a contract, legal statements, the statute of limitations, invalidity, some aspects of termination of the legal relationship, the application of the services, the compensation law what is the theme of this essay/study, both its financial and non-financial forms can be regarded as such institutions. Regarding the questions regulated with slight differences but by the same intellectuality and referring to the „relationship" with long history between the civil and labour law,[8] the Act I of 2012 Act on the Labour Code has made significant progress, since the legislator made the Act IV of 1959 Act on the Civil Code and the Act V of 2013 Act on the Civil Code coming into force on 15th March of 2014 background law, namely, in several questions in the lack of Labour Code, the rules of Civil Code must be applied, this way assisting labour legal application by civil law rules.[9] So it is necessary to examine how certain regulations of the new Civil Code coming into force soon influences the Labour Code referring to the fact that the Civil Code itself contains new rules, too, so certain questions cannot be regarded as the „continuation" of the earlier civil law antecedents, but rather

[5] Work performed for remuneration.

[6] T. Prugberger, *Európai és magyar összehasonlító munka- és közszolgálati jog*, Budapest 2006, p. 43–48.

[7] Typically, they are of legal origin, so the general expectable clause, the prohibition of the abuse of rights, the requirement of good faith, the obligation of co-operation and information, the protection of personal rights, or even the new rule according to which the basis of the Civil Code declares that nobody can refer to malfeasance conduct with the aim of advantages (6. § paragraph (1) 2. turn) or the allusive conduct-type rule (6. § paragraph (2) 2. turn). Besides, several basic principles are characteristic of the Hungarian labour law – the requirement of equal treatment, the protection of the employer' rightful economic interest, the obligation of confidentiality, the right to control – which aren't relevant to the fundamental principles of civil law, but it is clear that most of the requirements and the theoretical basis of the general behavioural requirements come from civil law.

[8] J. Radnay, *A munkaszerződés és a munkaviszony egyes kérdései*, Gazdaság és Jog 2006, Vol. 14, No. 9, p. 19–21.

[9] Besides, it cannot disregard that the background law-type of the Civil Code will result general attitude change in long-term, but its refinement and modification will result changes soon expectedly.

they reflect new views, so they require new approach from both the legislative and judicial part, and also from the part of the legal science. This change has effects on the remedy law at several points, too, but the most important is the institution of the grievance fee which has only indirect connection with the legal remedy what needs to be analysed anyway, mainly because the legislator disposes of it in accordance with the 9. § (1) of the T/12824. bill not in the circle of the liability for damages, but in connection with the personal rights, and this way the rule of the Labour Code referring to the Civil Code also changes and this raises both dogmatical and practical questions at the same time.

So this way the special relationship between the Labour Code and the Civil Code can be described as it follows. The system of employment law is completed by the norms of civil law, exactly the general requirements of contract law. Of course, not all the rules of civil law can be applied for employment relationships, but the ideas and most of the requirements in connection with the solution of the contracts are used in labour law as well. In concluding the questions and problems of liability for damages and the grievance fee is connected with special legal framework of these two different fields of Hungarian law.

The dogmatics and development of non-pecuniary damages in Hungarian civil law

Non-pecuniary damage has been present in civil law regulations since the 19th century.[10] At the turn of the century, Béni Grosschmid claims that "As a regulation, obligation for damages only includes compensation for pecuniary damage. Thus, the opposite has to be understood as exceptions of narrower or wider scope, departing from the general argument."[11] In comparison, Károly Szladits states:

> *The pain resulting from bodily harm, the grievance of honour, artistic or business reputation, etc. cannot be expressed by pecuniary decrease: that is, the cases of ethical or personal damage [...] in such cases the aggrieved party receives compensation for the damage, and so it becomes easier for them to bear with it. This is the so called non-pecuniary (or ethical) damage.*[12]

[10] T. Fézer, *A nem vagyoni kártérítés kérdései a hazai jogalkalmazásban*, Miskolc 2003, p. 113.
[11] B. Grosschmid, *Fejezetek kötelmi jogunk köréből I*, Budapest 1901, p. 765.
[12] K. Szladits, *A magyar magánjog vázlata II. rész*, Budapest 1933, p. 73.

Géza Marton delinieates two forms of civil law sanctions: first, the so-called "restitutive" sanction, which serves the purpose of restitution, while the essential function of the second one, "repressive" sanction can be grasped by its punitive nature.[13] According to Tamás Lábady's standpoint, non-pecuniary damage specifically presupposes an obligation based on personal damage, and it is consequently inseparable from personality rights.[14] At the same time, however, we also need to realize that – again, quoting the words of Lábady – non-pecuniary damage is a "contradiction in terms," and we can only dispose of its contradictions by legal fiction.[15] Fiction means that the law balances certain damage and the value of this is approximately equal with that of an advantage of another kind.[16] The same is articulated by Ferenc Petrik, who poses the following question: "And can we talk about damage at all?"[17] If we examine this institution from a functional aspect, Lábady writes, and then its purpose is the compensation for a personal damage, in which the solidarity of the state is expressed for the aggrieved party, and also, its reparation against the party at fault.[18] The viewpoint of Péter Bárdos somewhat contradicts this, since he argues that the purpose of non-pecuniary damages can neither be reparation nor compensation, but it is exclusively a kind of proportional restitution by means of the law, the subject of which can only be a natural person.[19]

The first comprehensive regulation of liability for non-pecuniary damage is to be found in clause XIV of 1914, in the Media Act, which permitted the adjustment of financial compensation for damages caused by a press release not only for pecuniary damage but for non-pecuniary damage as well. According to 39. § of the act, "the aggrieved party can claim damages for a pecuniary damage caused by a press release and for a non-pecuniary damage as well if it is (with regard to the circumstances of the case) equitable." According to the legislation, the courts state the amount of the compensation for the non-pecuniary damage considering all the circumstances, especially the financial situation of the two parties.

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[13] G. Marton, *A polgári jogi felelősség*, Budapest 1992, p. 24.

[14] T. Lábady, *A nem vagyoni kártérítés ujabb bírói gyakorlata*, Budapest 1992, p. 30.

[15] *Ibidem*, p. 31.

[16] *Ibidem*, p. 33.

[17] Quoted by: Z. Lomniczi, B.L. Gazsó, *A nem vagyoni kártérítéssel kapcsolatos perek legújabb tendenciái*, Budapest 2011, p. 7.

[18] G. Marton, *Kártérítési kötelmek jogellenes magatartásból* IV. 782, quoted by: T. Lábady, *A nem vagyoni kártérítés...*, p. 32.

[19] T. Pataky, *A nem vagyoni kártérítés szabályozása és bírói gyakorlata – Beszámoló a Magyar Jogászegylet Biztosításjogi Szekciója 2008. június 6-án tartott üléséről*, Biztosítási Szemle 2008, Vol. 54, No. 5, p. 9–13.

Clause XLI of 1914 on the protection of honour is closely connected to this, since it extends protection to behaviours expressed not via the press, too. The legislation remained consistent in further relevant regulations (Authorial Act, 1921, clause LIV; 1923, clause V on unfair competition), which also knew the notion on non-pecuniary damages. According to 1114. § of the 1928 Civil Code bill, whoever commits a forbidden action or misprision either intentionally or because of gross negligence, and is bound to pay a compensation, also has to provide a financial restitution for the non-pecuniary damage of the aggrieved party – if, considering all the circumstances of the case, equity necessitates it.

The historical development of non-pecuniary damage recoiled as a result of the Supreme Court's principal decision III of 1953, which annihilated the institution of non-pecuniary damages by claiming that amidst socialist living conditions, ethical values cannot be expressed in money. The legal practice tried to compensate for this obviously inequitable situation with the extended interpretation of the so-called "general compensation".[20] This unclarified legal environment was finally settled by the 354. § of the law IV of 1977, which placed the regulations on non-pecuniary damages within the Civil Code. This was supplemented by the 16th directive of the Supreme Court, which focussed primarily on bodily harm, and injuries causing health damage, somewhat passing over the protection of personality rights. The directive was overruled by the 21st directive of the Supreme Court, wishing to provide an opportunity to establish a judicial practice examining "the overall protection of personality and ethical values".

A certain view has evolved in the legal literature on which this is based, namely, that in the course on adjusting non-pecuniary damages the regulations of liability in the Civil Code have to prevail,[21] so when stating liability for non-pecuniary damages, four conditions have to appear according to Civil Code regulations: the supervening of the damage, malfeasance, culpability and causative connection.[22] However, while in the case of pecuniary damage the act of malfeasance (if the legislation does not make an exception) stems from causing damage,[23] in the case of non-pecuniary damage, from the damage itself no malfeasance can be inferred.[24] In the case of non-pecuniary com-

[20] I. Kertész, *Vagyoni kárpótlás nem vagyoni kárért*, Jogtudományi Közlöny 1958, Vol. 13, No. 3–4, p. 89–95.

[21] K. Törő, *Személyiségvédelem a polgári jogban*, Budapest 1979, p. 141.

[22] F. Petrik, *A személyiségi jog védelme, A sajtó-helyreigazítás*, Budapest 2001, p. 201.

[23] G. Eörsi, *A polgári jogi kártérítési felelősség kézikönyve*, Budapest 1966, p. 108.

[24] F. Petrik, *Nem vagyoni kárpótlás: a személyiségvédelem általános és feltétlen eszköze*, Magyar Jog 1991, Vol. 39, No. 6, p. 337–343.

pensation the basis of malfeasance is that "the law places under its protection the personal rights of the person as well – beside their pecuniary rights – and obliges everyone to respect personal rights."[25] Consequently, quoting Ferenc Petrik, "only such behaviours lead to a claim for non-pecuniary compensation which are against the law, that is, which violate personal rights".[26]

The most throughout influence on the legal practice was the 34/1992. (VI. 1.) Constitutional Court (in the following: CC) ruling, which basically annihilated all previous legal regulations and in its justification has created the modern basis of non-pecuniary compensation.[27] The CC's court ruling in its mandatory section has stated that the following passage of the Civil Code, 1959, clause IV, 354. § is unconstitutional: "...if the damage hinders the aggrieved party's participation in social life or seriously encumbers their life, or is disadvantageous for the legal entity in its participation in economic circulation", and annihilated it. As a result of the partial annihilation, the 354. § remained operative with the following text: "The causer of the damage is bound to compensate for the non-pecuniary damage of the aggrieved party." Furthermore, the CC stated that the following passage of the Labour Code, 1992, Act XXII, 177. § (2) paragraph, " the participation of the employee in social life or everyday life, as a result of the damage, became enduringly and seriously hindered" is unconstitutional, and thus annihilated it. As a result of the partial annihilation, the 177. § (2) paragraph of the Act was put into force with the following text: "The worker's non-pecuniary damages also have to be compensated for."

In the justification of the regulation, the CC stated that the institution of non-pecuniary compensation is a legal device within the Civil Code for cases of personal tort. Thus, in the interpretation of the CC, the condition of a claim for non-pecuniary compensation is the personality right tort.[28] Besides, the regulation also includes that it has identified the kinds of non-pecuniary compensation according to the previous regulations on the consequences of the violation of law, that is, it only protected the personal rights depending on the effect of the violation of the law, and limited the non-pecuniary compensation to more serious cases which resulted in an arbitrary stipulation. A crucial point of the decision is the statement that the amount of the damages and the damage itself suffered by the person are both based on approximation, which do not have any objective benchmark, and thus it cannot be constitutionally suited to the consequences within the legislation.

[25] F. Petrik, *A törvényszerkesztő dilemmái III*, Magyar Jog 1978, Vol. 25, No. 3, p. 221–237.
[26] F. Petrik, *Nem vagyoni kárpótlás...*, p. 337–343.
[27] T. Fézer, *A nem vagyoni kártérítés kérdései...*, p. 113.
[28] T. Fézer, *A nem vagyoni kártérítés kérdései...*, p. 112.

In such cases only the personal devotion, the common sense and the temperance of the courts can have a decisive role.[29] The legal institution within the right for compensation – according to the standpoint of CC – cannot be utilized, since in such cases there is no pecuniary damage and thus we cannot talk about a „full" or „not full" compensation. Either the basis of the tort is thus not the damage itself but the damage of the person.

On the whole we can argue that in our operative jurisdiction the 1992 CC regulation has assigned those legal frameworks where the practice on non-pecuniary practice are precedential. Also, from the regulations of the Civil Code it can be stated that the non-pecuniary compensation within civil law is not a separate form of liability,[30] but a liability figure connected to the damage of personal rights in which the violation of the law stands in the tort of a law connected to the person.[31]

From among these conditions, it is obviously the notion of damage that needs to be examined in connection with non-pecuniary compensation. The literature on civil law in this question has applied various approaches, examining the issue from the following aspects: the occurrence of non-pecuniary damage usually is observable in three areas: the damage of health or body, an attack against other personality rights and as the effect of a faulty influence on the participation in the economic circulation.[32] Actual physical injury includes injuries in accidents, aesthetic harm in connection with this, the change in the quality of life, losing certain social or everyday pleasures as well. Here the labour regulations do not raise any special problem, since in connection with such damages, the full and objective liability of the employer and its full obligation for compensation prevail.

With relevance to personal rights, the scope of damaging behaviours is wide; anything belongs to it which results in personality rights tort, and the damage caused by this. On the basis of the judgments to be presented later, it is already arguable that in connection with this group of cases the practice of labour jurisdiction follows an extended interpretation. Into the third group belong those cases where the damage influences participation in the economic circulation. The actions pertaining to this issue are interesting because according to certain authors, the aggrieved party in such a case cannot only be a natural person, but a legal entity as well participating in economic law.[33]

[29] E. Tálné Molnár, *A munkáltató kártérítési felelőssége*, Budapest 2009, p. 259–297.

[30] K. Törő, *A nem vagyoni kártérítés gyakorlati kérdései*, Magyar Jog 1992, Vol. 39, No. 8, p. 449–454.

[31] B.F., *A nem vagyoni kár megtérítése*, Cégvezetés 2007, Vol. 16, No. 1, p. 131–134.

[32] Ö. Zoltán, *A nem vagyoni kár megtérítéséről*, Magyar Jog 1991, Vol. 31, No. 9, p. 529–533.

[33] *Ibidem*, p. 529–533.

Judicial practice understands by non-pecuniary damage or drawback the aggrieved party's social exclusion, the negative change of the human personality and their mental-emotional quality of life.[34] In connection with this it has to be examined to what extent the given (sued) behaviours resulted for the aggrieved party the emergence of a negative value judgment, and to what extent it modified their social position.[35]

From among the four above mentioned damage elements the proving of the violation of law and culpability do not mean any problem, however, the notion of non-pecuniary drawback and in connection with causal connection we can find differing opinions,[36] where the courts in several cases – somewhat opposing the spirit of the CC ruling – have emphasised the institution as a compensation. The Supreme Court has previously stated that the pecuniary nature of the claim for compensation is not altered by whether its putting into force is based on the personality rights tort;[37] however, in itself as a condition of the compensation it is not sufficient that it is a personality rights tort but it is also needed that in connection with the violation of the law, its consequences the aggrieved party suffered some disadvantaged situation.[38] Thus, it means that even though in the light of the CC ruling it is theoretically sufficient that the aggrieved party can prove the fact of aggrievement, still, the court in addition requested the proving of some concrete disadvantage. From this the judge can only divert if the disadvantage is publicly known.[39]

By publicly known facts judicial practice means such facts that are actually referential in any case of any tort, that is, if the violation of the law was proven, then, as a publicly known fact, it is acceptable that the aggrieved party did not suffer a pecuniary damage, which can be compensated for with a non-pecuniary restitution.[40] The practice crystallized by the end of 2000 and according to this the non-pecuniary compensation can be requested if they can prove that the violation of the law is causally connected to some disadvantage, to the lessening of which or its elimination the adjusting of non-pecuniary compensation is reasonable.[41]

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[34] T. Kiss, *Nem vagyoni kártérítés vagy sérelemdíj*, Jogtudományi Közlöny 2007, Vol. 62, No. 4, p. 164–172.

[35] P. Havasi, *A nem vagyoni kár bírósági gyakorlat*, Gazdaság és Jog 2002, Vol. 10, No. 1, p. 11–14.

[36] T. Kiss, *Nem vagyoni kártérítés...*, p. 164–172.

[37] BH 1991.476, Curia of Hungary.

[38] Pfv. 20895/2000/3, Curia of Hungary.

[39] K. Horeczky, *A nem vagyoni kártérítés jogintézménye*, Gazdaság és Jog 1996, Vol. 4, No. 2, p. 13–16.

[40] T. Kiss, *Nem vagyoni kártérítés...*, p. 164–172.

[41] See for example: Pfv. IV.20.895/2000, Pfv.22.955/1994, Pfv.III.20.403/1995, Curia of Hungary.

In the course of the recodification of the Civil Code it emerged that the institution of the non-pecuniary compensation should be revised, as it had been urged by the judicial practice[42] and the necessity to renew the contents of this legal institution also appeared.[43] As a result, the new Civil Code reformed the legal institution, and placed the regulation in the second volume (The Person as a Legal Subject), among the sanctions for the tort concerning personal rights. The law articulates the general protection of personal rights[44] and in clause XII it details the sanctions of such a tort. The law knows the notion of independent sanctions from culpability,[45] in connection with which we can claim that the application of objective personal protection is independent from the party at fault's ability to violate the law and their culpability.[46]

Summing up the above we can see that non-pecuniary compensation with the putting into force of the new Civil Code was reregulated. The Labour Code at present does not contain the notion of compensation yet, but parallel with the putting into force of the new Civil Code, there will be changes in the regulations and they will include it, in accordance with the new Civil Code.

The regulation of compensation in the new Civil Code with reference to the features of labour relations

The 2nd volume, clause XI of the new Civil Code contains the regulations of personal rights. Here, 2:42. § states the obligation for the general protection of personality rights, which is based on the principle that everybody is bound to respect personality rights.

2:43. § enumerates the personality rights. Based on this, the tort concerning personality rights especially includes

a) life tort, bodily harm or health damage;
b) personal liberty tort, privacy, or home;
c) discrimination;
d) honour or reputation tort;
e) privacy tort or the right to the protection of personal data;

[42] See for example: T. Lábady, *A deliktuális felelősség változásáról és ennek a polgári jogi kodifikációra gyakorolt hatásáról*, Jura 2002, Vol. 8, No. 1, p. 72–78.

[43] L. Vékás, *Sérelemdíj – Fájdalomdíj: Gondolatok az új Ptk. reformjavaslatáról a német jog újabb fejleményei tükrében*, Magyar Jog 2005, Vol. 49, No. 4, p. 193–207.

[44] 2:42. § paragraph (2): Everyone is bound to respect human dignity and the personality rights originating from it. These personality rights are under the protection of the law.

[45] 2:41.§ [sanctions independent from culpability].

[46] F. Petrik (ed.), *Az új Ptk. magyarázata IIVI*, Budapest 2013, p. 160.

f) the right to bear their own names;
g) the right to have an image or audio recording.

The items listed in point a) are in the focus of the present paper, however, theoretically it is not impossible that within the field of labour relations the other areas can be violated, too.

As opposed to the previous examples, the consequences of personality rights tort are different as well. Among these, one can differentiate between objective and subjective groups. 2:51. § enumerates the sanctions independent from culpability, which result in a disadvantage based on the fact of the tort in itself, and thus it is not necessary to examine the consciousness of the person committing the tort. Among the options enumerated in paragraph (1) it is observable that most of these are not pecuniary sanctions, so if the aggrieved party claims that the tort is based on this legislation, then according to the overruling regulation in the judicial consequences it is not the pecuniary nature of the case that would dominate.

The crucial legal institution connected to the present study is the compensation as regulated in 2:52. §. According to the legislation, "whose personality rights are damaged, can claim compensation for the non-pecuniary damage they suffered".[47] Consequently, the condition of adjusting the compensation is the tort concerning personality rights (malfeasance) and non-pecuniary damage.[48] The second paragraph states that "to the conditions of obliging someone to pay a compensation – especially the identification of the person bound to pay the compensation and the method of exculpation – the regulations of compensation liability have to be applied and beyond the fact of the claim, there is no need to prove any other disadvantage that emerged." As a result, the causal connection between the behaviour and the tort has to be proven as a further condition of liability, as well as culpability itself (according to general culpability liability) or the regulations on the pursuers of especially dangerous activities.[49]

Based on 2:53. §, if the tort concerning personality rights also leads to pecuniary damage, then the aggrieved party can also claim compensation for the damages based on the regulations of the liability for malfeasance.[50]

This is a major innovation in the law, since it breaks away from the previous judicial practice,[51] i.e. the non-pecuniary compensation can be adjusted in total or in the form of supplies. The new Civil Code clearly articulates that

[47] 2:52. § paragraph (1).
[48] F. Petrik (ed.), *Az új Ptk. magyarázata*..., p. 164.
[49] *Ibidem*, p. 165.
[50] *Ibidem*, p. 167.
[51] Directive no. 19, point 6, PEH 24-2, Curia of Hungary quoted by: F. Petrik (ed.), *Az új Ptk. magyarázata*..., p. 166.

The amount of compensation is stated by the court in total, with regard to the circumstances of the case – especially the weight of the malfeasance, its recidivious nature and the level of culpability, the effect of the malfeasance on the aggrieved party and their environment.[52]

Based on the above, in the field of tort concerning personality rights, we can distinguish between three areas. The first one is tort resulting from bodily change (2:43. § based on point a)), which includes every such case where the aggrieved party suffers an injury of their physical state, health, and some kind of decrease or deterioration occurs. The second one includes mental changes (2:43. § from points b) to g)), which means the "inner lesion" of the personality. The third group takes place in the relationship between the outside world and the aggrieved party, when the social acceptance of the aggrieved party, their social judgment might be affected. In the case of these latter changes it is unusual to claim non-pecuniary damages in labour court cases.

In connection with claims connected to labour relations our standpoint is that the most common case is tort resulting from bodily harm and to a minimal level, though, but in sues for damages there are also examples where the employer committed malfeasant actions and the employees wished to vindicate the psychic consequences of the employer's (real or imagined) malfeasant action in the form of non-pecuniary damage. In the past three years we can find six such judgments by the Curia of Hungary (formerly the Supreme Court).[53]

The question arises, whether with the appearance of compensation the sums adjusted in previous court cases as non-pecuniary damages would be points of reference for the future? The answer to this question is beyond the scope of this present study; however, we still find it important to share a few ideas on this issue.

Considering the legal nature of the compensation, it is a restitution, that is, amends for the non-pecuniary damage suffered by the aggrieved party.[54] As a result, the weight of the malfeasance its recidivious nature, its effects and other circumstances of the party at fault's attitude define it. The legislator has left the concrete details of the procedure to the judicial practice. Having surveyed this,[55] it seems constructive that the amounts of the adjusted sum will not change in the future, with regard to the fact that the judicial practice

[52] 2:52. § paragraph (3).

[53] Mfv.I.10.880/2009/4, Mfv.I.10.282/2007/3, Mfv.II.10.714/2009/5, Mfv.I.10.283/2012/5, Mfv.I.10.871/2010/5, Mfv.II.10.990/2010/4, Curia of Hungary.

[54] F. Petrik (ed.), *Az új Ptk. magyarázata*..., p. 166.

[55] E. Tálné Molnár, *A munkáltató kártérítési*..., p. 259–297.

so far has proceeded based on the life situation, the pecuniary and income conditions of the aggrieved party (and not rarely even the party at fault).

However, there is a major difference remaining after the modifications of the Labour Code. Based on 2:52. § (3) paragraph of the Civil Code, the court adjusts the compensation in total, considering all the circumstances of the case. As opposed to this, 173. § (1) of the Labour Code "As a compensation, supplies can also be adjusted. Usually supplies have to be adjusted if the compensation serves the purpose of providing for or partly providing for the employee or a relative of the employee." So it is clear that in the Labour Code the present judicial practice of the regulations is maintained in this field, while for employees it means a significant advantage.

According to the new regulations of the Labour Code, in the course of adjusting compensation the regulations of the Civil Code have to be followed. Thus, 2:53. § of the Civil Code will serve as precedent, which regulates the liability for compensation. According to the law, "whoever suffers damage as a result of the tort concerning their personality rights, can claim compensation for the damage caused by malfeasance from the party at fault, based on the regulations on liability."

The protection of personal rights in the Labour Code

Basically, these entitlements are both parties' legal due during the labour relationship, but – because of the nature of the legal relationship – in different ways. However, in the 9 § (1) of the Labour Code it is a fundamental principle that the persons' – subject to law – personal rights must be kept in respect. It is very important because the personal rights – which are as a matter of fact based on civil law – belong to the persons' most fundamental rights, by which one's personal integrity realizes, and unfolds one's personality. We can find its base in the unrestrictable fundamental human and constitutional right to human dignity.

The first group of these rules[56] approaches the question from the employee's part putting her/his legal protection to the fore and the general requirements can be deduced from them. According to it these rights can be restricted only if the restriction is absolutely necessary because of a reason in direct connection with the function of the employment relationship and it is proportioned with its purpose. However, the employee must be informed about its way, conditions and expected content in advance. On the one hand the law interprets the respect of personal rights rather free, since

[56] 9–10. § of the Labour Code.

their infringement is allowed in an unproportionally wide sphere. What is more, contrary to the facts explicated above the literacy is not compulsory according to the law, namely the employee's personal right can be restricted in a form of a verbal instruction. In the Labour Code of 1992 (previous Labour Code) such concrete rules were not declared, but the governing legal practice in the last 20 years[57] highlighted that this kind of legal practice is absolutely necessary. It is important that the employee cannot wave her/his rights of this kind generally in advance, and any kind of provisions is valid only in writing. These norms definitely serve the protection of the entitled employees' personal rights, since they define the employer's margin regarding this question.

It must be added that this kind of interpretation of these general rules – namely, the protection of the personal rights – will be distinguished from the Labour Code when the new Civil Code comes into force and in its place accordingly the new 9. § (1) a regulation referring to the Civil Code will be put which though comprehensively, but allowing differences of the Labour Code, controls the protection of personal rights in the employment relationship.[58]

The second group of these rules[59] is about the protection of the employee's personal data. These rules had important role even in the Labour Code of 1992. The employee can be asked to make only such report which is important from the point of the labour relationship and does not infringe her/his personal rights. The report of personal data to a third party is restricted, and it is also important that the employee cannot store or manage such data without restraint at her/his own discretion. Naturally, there are exceptions to the main rule that is the data processing for statistical purposes. Furthermore, these basic entitlements can be interpreted as the employer's obligation of confidentiality. This way the legislator tries to balance this obligation with the extensive obligation of confidentiality imposed on the employer.

Finally, we would like to note the third group of personal rights[60] which appears in the Labour Code in a special way. Practically, in this circle the Labour Code is about the employer's right to intervention and control which importance is that this kind of actions set further limits to the employer necessarily. Naturally, they are compatible with the purpose of the employment relationship, since without the employer's entitlement for control her/his in-

[57] See for example: EBH2005. 1237, EBH2000. 359, EBH2000. 249, BH2001. 467, Curia of Hungary.

[58] According to this rule in case the Labour Code does not order differently for the employee's and the employer's personal rights, 2:42–54. § of the new Civil Code must be applied referring to the fact that on application of the 2:52. § paragraph (2) and (3) and 2:53 § the rules of the Labour Code in connection with liability for damages must be applied.

[59] 10. § of the Labour Code.

[60] 9–10. § and in connection with it 8. § paragraph (2) of the Labour Code.

struction right would not be relevant any longer, namely, practically it would not be possible to speak about employer's right in its original meaning.[61] The employee's conduct can be controlled only in connection with her/his work what cannot – neither its means nor its methods – infringe her/his right to human dignity, and the control over her/his private life is totally forbidden. Some contradiction can be observed between this norm and the 8. § (2) of the Labour Code, since the possible restriction over the cases of conduct beyond the working time often coincides with the problematic question of the private life and free time control.[62] So the controlling authority is restricted because control over these would infringe personal rights for sure. The interpretation of the protection of the right to human dignity and private life as absolute limit is noteworthy, because these rights being fundamental human rights must not be limited. However, in accordance with the function of the employment relationship the employee can be controlled anyway within the frames of the employment contract and the Labour Code The employer is also obliged to inform the employee in advance about the technical means by which she/he carries out checks – e.g. the control in a room with camera – so the law tries to prevent „interception", secret surveillance which out coming could be the cause of termination or sanction later.

The appearance of non-material infringe in labour law judgments

As we noted above in connection with the non-material infringement the 34/1992. (VI. 1.) AB resolution removed the provisions of the Labour Code partly, so the only exposure remained in the law is that the employer is obliged to compensate the employee for the non-material infringement. So it can be stated that both civil and labour courts face the same problems, and at the latter the practice is modified because according to the Labour Code liability rules should be applied. But in our opinion it does not make great differ-

[61] T. Gyulavári (ed.), *Munkajog*, Budapest 2012, p. 255–260.

[62] According to 8. § paragraph (2) the employee beyond the working time cannot have such conduct which – on the basis of the type of her/his scope of duties, position in the employer' organisation – directly and factually is proper for damaging the employer's good faith, rightful economic interest or the aim of the labour relationship, this way the employee's conduct can be restricted but only in such cases that were mentioned in connection with the protection of personal rights (9. § paragraph (2)) but about such restrictions the employee should be informed in writing in advance. It is noted that this rule is new in the Labour Code, but as a consequence of the employer's broad instruct and control right in judicial practice this kind of interpretation has not been exclusive so far. It is interesting that the labour law regulation which turns into the direction of the equality of the parties is not perfectly compatible with this disproportionate and arbitrary restriction.

ences, since in connection with the non-material compensation the most difficult point is the definition of the measure of the compensation during which the courts have to make decisions after due care.[63]

In connection with the labour judgments it is necessary to refer to the MK 30. commitment which names the circle of infringements where to confirm the employer's liability is of high importance. They are the employee's life, physical integrity and health. Besides, at labour law compensation the actual existence of the legal relationship is a conceptual element, namely, labour relationship must exist between the parties, otherwise the norms of the Labour Code cannot be applied, namely, if an infringement is committed after the labour relationship, the authorised person can present claim according to the rules of the civil law.

In labour actions the non-material infringements are judged somewhat differently. These judgments are parallel to the general civil law judgments in the sense that the employee's accident or physical damage establishes the claim for non-material infringement. At the same time in labour law judgments the courts interpret the personal damages narrower, so in the examined period we have not found such judgments which would have settled the non-material infringement as a consequence of e.g. illegal termination in spite of the fact that in principle it is not unprecedented in the judicial practice.[64] On the basis of this data we think that the employees typically claim for non-material infringement because of occupational accident or deteriorating health and other (e.g. the humiliating treatment from the employer's part, stress, etc.) damages appear in smaller proportion.

The possible interpretation of the grievance fee in connection of the protection of personal rights in labour law

The present Labour Code in force does not even include the concept of non-material compensation, and in contrast with the Labour Code of 1992 in the circle of the liability for damages there is no reference to the employer's obligation to compensate the employee's infringement of which she/he suffered as a consequence of tort affected not her/his property but her/his personality (non-material infringement). So at first sight it is not quite clear whether the legislator's intention was that regarding the employment relationships the non-material damage would not belong to the damages that should be compensated, but it can be read from the minister's reasoning of the bill that since

[63] G. Nádas, *A munkabalesetekkel kapcsolatos kárfelelősség problematikája*, Miskolc 2004, p. 22.
[64] See for example: EBH 2002/790, Mfv.I.10.711/2006/4, Curia of Hungary.

the Labour Code refers to the Civil Code in this respect, too,[65] on the basis of the 355. § (4) of the Civil Code the aggrieved party's non-material damage must be compensated, too, namely, in this respect the tortfeasor is obliged to make compensation like in the case of property damage. Generally, it is true that the same rules refer to the compensation of the non-material damage but there can be differences from the compensation of the material damage as a consequence of its nature. Therefore, the 355. § (1) declares the main rule, namely, if the restoration of the original state – in integrum restitutio – is not possible, or the aggrieved party does not demand it because of a good cause, the tortfeasor is obliged to compensate both the material and non-material damage in order to avoid the consequences of the damage.

This way the Labour Code according to the established dogmatics of the liability in the civil law – referring to the Chapter XXXI of the Civil Code – disposes of the non-material damage as one form of damages within the frames of compensation law. In contrast, the change as a consequence of the new Civil Code disposes to apply the relevant rules of the new Civil Code in case of the damage of the personal rights, in fact the obligation to compensate the damage in personal right is put to the level of basic law and in our opinion, if this approach will receive enough emphasis in the future legal application, will improve the more effective protection of the personal rights anyway, what is of high importance in the employment relationship.[66] Dogmatically, this solution is noteworthy anyway, though the new Civil Code disposes to apply the general rules of liability for damage, but it may raise the question whether it is expedient quasi to take out the special legal institution of non-material compensation from the compensation law and to highlight its function less emphasizing its compensation feature in the classical sense.

In connection with the rules of personal protection of the Labour Code it must be emphasized that in most of the cases the judicial practice does not examine carefully enough the occurrence and measure of the non-material damage, and on judging the amount of compensation it does not balance carefully enough. We think that in this respect it is correct to make closer relationship with the protection of personal rights, since this way the tortfeasor can be obliged to compensate the non-material damage on the basis of certain relevant statutory provisions. At the same time it must be noted that because of the special legal feature of the non-material damage the judicature is often in a difficult position when tries to judge „correct" or at least equitable in such cases. It is necessary to add that the protection of personal rights

[65] Bill No. T/4786. Act on the Labour Code, 177. §.
[66] T. Gyulavári (ed.), *Munkajog*..., p. 85–88.

in the Labour Code – in it the amended rules can show directions – can be divided into general and special spheres in a special way, since besides the application of the relevant parts of the new Civil Code, the further rules of the 9. § of the Labour Code contains such norms which definitely come from the specialities of the employment relationship mentioned above. Namely, if we take base either the general damage of the personal rights or the definite labour law cases – let's think of the excessively arbitrary restriction of the personal rights – it is progressive from the legislator's part that he intends to organize the legal consequences unitedly ensuring that the non-material damage should be compensated – henceforward partly within the frames of the judicial discretion.

It is important to note that the new rules can bring more united aspect and approach to the field of the labour law protection of the personal rights, though it is true in general that the protection of personality is mostly entitled for the employee, but in fact the Labour Code provisions the application of the new Civil Code for both the employer and the employee, so this legal construction can improve the aim of the statutory instrument according to which the parties' legal status would be – even if not equal but – at least closer to each other. All these have important role in the protection of economic and social interests and in this respect it should be noted that according to the legislator's intention the rules of the non-material compensation would be more united and effective, and in connection with the grievance fee even simpler in the long run.

Final consideration – the expected effects of the grievance fee in labour law

The application of grievance fee may have significant importance on the labour law judging practice referring to the amended conceptual system. It must be emphasized that the regulation itself and its grounds are not enough to answer the emerged questions, since it is a great task for the Hungarian judicature. It is clear from the previous legal practice that the institution of the non-material compensation – independently from its current regulation method – is a practical legal institution, and both the advantages and disadvantages of this thesis appear in such judgments. Basically, the courts manage the legal questions of the non-material compensation flexible, and this in many cases leads to the actual assessment of the damage and the appropriate compensation. However, in some cases the courts can hardly establish the non-material damage and mainly the amount because of its special legal

nature. Though referring to the rules of the new Civil Code the Labour Code will be changed in a special way but we think that the result of the correct and evolutionary legal interpretation will be a legal interpretation of non-material damage which will be well-founded but flexible enough. Its main function will be that the infringed person should receive effective legal remedy by the grievance fee. Finally, attention should be paid to the fact that the clear and united civil law rules can make the ruling easier in labour law cases. However, the fundamental differentiating specific nature of labour law which separates it from the civil law must not be left without attention, referring to the social function of the labour law regulation and the conceptual differences that still exist.

Abstrakt

Opracowanie omawia jedną z nowych instytucji prawnych w węgierskim prawie cywilnym i prawie pracy, zadośćuczynienie za szkody niemajątkowe. Funkcją tej instytucji prawnej jest ochrona podmiotów prawnych i zadośćuczynienie za poniesione szkody niematerialne. Pojęcie szkody niemajątkowej zostało omówione zarówno w ujęciu teoretycznym, jak i praktycznym. Autorzy przedstawili swoje wnioski dotyczące funkcji zadośćuczynienia za szkody niemajątkowe w prawie pracy, uwzględniając szczególne zasady praw osobistych pracowników.

Słowa kluczowe: prawo cywilne, prawo pracy, odszkodowanie niepieniężne, prawa osobiste, odpowiedzialność deliktowa