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TOWARDS FAIR DIVISION OF BENEFITS FROM PATENT RIGHTS: REMUNERATION FOR EMPLOYEE-INVENTOR IN POLISH LEGAL SYSTEM AND IN COMPARATIVE CONTEXT

ABSTRACT

Remuneration for the employee-inventor is the key element to stimulate the development both in business and academic units for the beneficiary of the whole society. The purpose of the given article is to analyze whether the polish legal framework for employee remuneration for invention fairly balances interests of inventors and the units for which they are working for. Research has been based on the statutory provisions and comments of legal doctrine. The first element that has been taken into consideration was to whom the right to obtain a patent belong and later – if the right to a patent belong to employer – whether and how the employee-inventor should be remunerated. Both of those problems are differently set in different jurisdictions. Polish law adhere to the systems which by statute prescribes the right to obtain a patent in case of employee inventions to employer and also by statue guarantee remuneration for the employee-inventor both in business and academic environment. Upon the analysis the conclusion of the article is that despite of the fact that the statutory provisions are reasonably and fairly constructed, in certain elements they are vague and left much space for the internal regulation of economic entities and higher educational institutions, which at the end of the day might change the overall assessment and work better for those entities than for the employees. The value of the given paper is the practical approach of the analysis with references to the actual problems that arise.

Keywords: invention, inventor, patent, remuneration, employer, employee, higher education institution

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1. INTRODUCTION

It is well known that innovation is a key element in micro scale by working for companies' commercial benefit and development and in a macro scale by being a driver of state's economies (Ciborowski, 2012). Most frequently inventions are created within employment contract (du Vall, 2008) and are so called „employee inventions" or „service inventions". WIPO National Workshop on Innovative Support Services and Their Management (2004) pointed studies which shows that in industrialized countries the figures for patent applications for companies and corporations are over 80% and for granted patents are over 90%. According to Polish Patent Office statistics for 2021 patens and utility model applicants' structure is as follows: 43,40% commercial subjects, 32,23% higher education institutions, 15,74% individuals, 6,90% research institutes and 1,73% scientific units of the Polish Academy of Sciences (p. 38). It might be therefore noticed that in Poland the scientific units and commercial units are filing a comparable number of patent and utility models applications (40,83 % and 43,40% respectively).

Incentives for employee to create inventions contribute to the benefit of his/her company, corporation and scientific unit as well as for the innovative position of the country. One of the important stimulator for the employee to create an inventions is the remuneration. Without a decent pay to inventors, it will be hard to obtain new and better solutions in different fields of technology (Jyż, 2011). The remuneration systems of employees-inventors are not unified among different countries. It is particularly important in cases when the invention has been created by many inventors, each of whom resides in different country. The differences between jurisdictions relate to a basic issues such as the method of regulation (contractual or legislative), dependence of remuneration for invention of its usage by employer, the calculation methodology, etc. Further analysis will explore the regulation for remuneration in Polish legal system with regard to the solutions in other legal systems.

2. RIGHT TO OBTAIN A PATENT

Remuneration for an invention is an aftermath of a prior question to whom the right to obtain a patent belongs to when the invention has been developed as a part of the employment duties. The research presented by Lando & Anastasi IP company (2017) indicates, that in Poland, as well as in the United Kingdom, France, Germany, Italy, Finland, the Russian Federation, Australia, New Zealand, Philippines, Thailand, Singapore, Brazil, Chile, Mexico, China, Hong Kong, Ghana, Tanzania, South Africa in such a case the right to a patent belongs to an employer, sometimes followed by certain restrictions and requirements. In other countries, like in the USA and Canada it depends on the agreement between an employee and an employer or whether an employee was „hired to invent" or like in India, Colombia, Qatar, the United Arab Emirates it is governed by an employment contract or like in Saudi Arabia, Oman a specific assignment is required. In Japan (after 2016) an employer stipulates whether the invention belongs to him/her and in South Korea an employee owns the invention, and an employer is entitled to royalty-free non-exclusive license in case of SMEs, followed by internal compensation rules. Certain countries possess some other modifications to this models. Typically, when contractual rules regulate the matter, the court interpretation of it is of an utmost importance. Therefore, for example, as Merges (1999) noticed, in the

USA employers have broad powers to claim the right for the employee inventions and the courts interpret those contracts in their favor.

In Polish law the right to a patent is prescribed in the Act of 30 June 2000 Industrial Property Law (hereunder IPLA), art. 11. As a rule, the technical solutions protected by industrial property rights belong to its creators (inventors). Therefore, the Polish law does not recognize the right of a first inventor or the right of an applicant (Kostański, 2020). There are, however, some exhaustive exceptions to the given rule.

One of those exceptions is the employee invention. The provision stipulates that „where an invention, a utility model or an industrial design has been made by a creator in the course of employment duties or in the execution of any other contract, the right referred to in paragraph (1) [the right to obtain a patent – KKL] shall belong to the employer or the commissioner, unless otherwise agreed by the parties concerned". (art. 11(3) IPLA). The given rule is *ius dispositivum* – in a contract concluded before creating the invention it might be stipulated that the right to obtain a patent is assigned to a creator. It cannot be done by the unilateral declaration of will of the employer.

The other situation when an economic entity is entitled to right to obtain a patent is when a creator of an invention who is entitled to obtain a patent makes the invention available for exploitation by the economic entity (art. 20 IPLA). In such a case the assignment of the right to a patent shall be effective from a date on which such an invention has been reported to the economic entity, unless the parties have agreed on another time limit. The given situation is subject to acceptance by the economic entity for exploitation of the invention and notification of the creator of that fact within one month from the report day (art. 21 IPLA).

Provision of IPLA also recognizes a situation where an economic entity assisted the creator in making the invention. In such case the economic entity has the right to exploit the invention in its own field of activity. Parties may stipulate in the assistance agreement, that the right to obtain a patent will belong wholly or partially to the economic entity.

It is worth noticing here, that Polish law does not recognize so called „plant invention", i.e. the situation in which the entitled to right to obtain a patent would not be the particular person but all employees in the workplace where the invention has been created. The right to obtain a patent should be therefore assign to the specific person or persons (Kostański, 2020).

As mentioned, in 2021 patents and utility models applied by higher education institutions (in general) constituted 32,23 % of all applications to the Polish Patent Office. The model prescribed above is modified in case of inventions (and related know-how) created within employment relationship in public higher education institution (hereinafter PHEI) and under the performance of duties resulting from such employment relationship. The given situation is governed by the Act of 20 July 2018 – The Law on Higher Education and Science (hereinafter LHESA) and will be further referred as „scientific invention". Regulation in LHESA is supplemented i.a. by IPLA, therefore the general rules prescribed above applies, if no special regulation is prescribed in LHESA (art. 158 LHESA). What is more, the rules of LHESA concerning the right to a patent might be excluded by the contract between a creator and PHEI (art. 157 LHESA). It is worth mentioning here, that the given regulation continues the changes introduced by the amendment from 2014 to the former statute – the Law on Higher Education from 27 July 2005, which introduced so called „scientists enfranchisement". The amendment was meant to aid the transfer of knowledge from PHEI to industry,

commercialization of scientific works and in consequence improvement of an innovation of Polish industry (Jyż, 2015).

The current solution is that in case of scientific inventions in the process of determining who possess the right to a patent the key moment is information from an employee (scientist, inventor, hereinafter „scientific employee") to PHEI on the research results (like invention) and know-how relating to those results. The LHESA does not provide any information when such information should be provided by the scientific employee. In the internal regulation of PHEI such a term might be prescribed. For example, it might be two weeks from making an invention when an employee or the third party should notify the director of the scientific unit about its creation with information about willingness of making it available for the first time (§ 6 of Resolution No 81 of Senat of Nicolaus Copernicus University in Toruń from 22 December 2020. Regulation on protection, acquiring and using of Intellectual Property Goods and Technology Improvements Designs at Nicolaus Copernicus University in Toruń). From the moment the scientific employee submits PHEI information on research results he/she may either:

- within 14 days in a written form file a declaration of interest in the transfer of rights to those results and the related know-how. Then the PHEI have 3 months from the date of the declaration to decide on its commercialization. In case the PHEI decides:
  - not to undertake commercialization or after the expiry of the time limit of 3 months, the PHEI shall, within 30 days, make an offer to the employee to conclude an unconditional and paid agreement (in writing on pain of invalidity) for the transfer of the rights to the research results and the related know-how (together with the information, works, including the ownership of the media on which they are recorded, and technical experiments). The PHEI may be remunerated for transfer of rights. The given remuneration may not be higher than 5% of the average remuneration in the national economy in the previous year, as published by the President of Statistics in Poland. In 2022 an average remuneration in national economy was 6346,15 PLN (1401, 76 Euro), which means that the given remuneration in 2023 should not exceed 317,30 PLN (70,10 Euro). Importantly however, the internal regulation of higher scientific institution may prescribe that in such case the transfer of right will be free of charge.
    - If the employee does not accept the offer to conclude the agreement on such terms, the rights to the research results and the related know-how (together with the information, works, including the ownership of the media on which they are recorded, and technical experiments), shall belong to the PHEI. According to art. 154.5 LHESA the given provisions shall not apply if the research was conducted: 1) under an agreement with the party financing or co-financing such research, providing for an obligation to transfer the rights to the research results to that party or to an entity other than a contracting party; 2) with the use of financial resources, the rules for the granting or use of which specify a different way of disposing of the research results and the related know-how than the Act.
    - If the employee accepts the offer to conclude the agreement on such terms, the rights to research results and the related know-how (together with the information, works, including the ownership of the media on which they are recorded,

and technical experiments) are transferred to scientific employee. In such case PHEI have a right to remuneration: 25% of the value of funds obtained by the employee from commercialization, reduced by no more than 25% of the costs directly related to such commercialization which were incurred by the employee. If employees formed part of the research team the given amount of remuneration and the share in the funds derived from commercialization, determine the overall remuneration and the share in these funds that a PHEI is entitled from employees forming part of the research team. An employee who is a member of such research team shall be accountable to a PHEI for the given obligations up to the limit of their share in the joint ownership of the research results and the related know-how.

— to undertake commercialization. Then the right to obtain a patent, upon art. 11.3. IPLA belongs to PHEI as an employer. In such case the scientific employee is entitled to remuneration (see point 2 below).
— not file within 14 days a declaration of interest in the transfer of rights to those results and the related know-how. Then right to obtain a patent, upon art. 11.3. IPLA belongs to PHEI as an employer.

3. REMUNERATION FOR AN EMPLOYEE-INVENTOR

Inventors possess two types of rights: economic rights (right to obtain a patent, a patent, right to remuneration) and personal rights (right to be mentioned as such in specifications, registers and other documents and publications). Only inventors are entitled to personal rights and the right to remuneration (art. 8 IPL) (Kostański, 2020; Jyż, 2011) in contrast to right to obtain a patent and a patent, to which can be entitled either an inventor or the third party (du Vall, 2008).

Globally, as research presented by Lando & Anastasi IP company (2017) shows, at least three main approaches might be indicated for determination of remuneration for employees for their employment inventions. First, the regulation in the contract, including employment contract, which is present in Japan, China (in case of no contract compensation might be determined by the court), Brazil (as a rule compensation is limited to a salary, however an employer may grant an employee a share of economic gains from the patent exploitation), Canada, Chile, Colombia (within a salary in the employment contract), India, Mexico (additional compensation is possible if employees salary does not relate to employer's benefit), Qatar, the United Arab Emirates, Singapore, South Korea (in the internal compensation rules of companies). Second, statutory regulation, which is present in Germany (compensation relates to the economic value of the invention and other factors), Spain, Poland, Argentina, Egypt, Ghana, Tanzania, Hong Kong, Indonesia, the Russian Federation. Thirdly, no compensation for employees, like in South Africa.

There is also a difference in approaches concerning whether remuneration is due if the invention is used and whether an employee benefits from it or gets exceptionally high benefit from it, like in a former Polish law (Staszków, 1990).

In Poland the main article in IPLA that prescribes the right to remuneration for an inventor is art. 8.1.2, which states that on the conditions as laid down in the given Act, the author of an invention shall be entitled to remuneration. The given right is a legal right, inter partes,

economic, transferable, inherited right to which entitled is always author against economic entity in the three situations mentioned below (Kostański, 2010). The specific regulation in art. 22 IPLA says that the given remuneration is due for the exploitation by the economic entity of his/her invention, where the right to exploit it or the right to a patent, belongs to that entity in situations mentioned above, namely in art. 11.3. and 11.5 or 21 IPLA. Importantly however, it is agreed in a legal doctrine that the right to remuneration might be differently stipulated in a contract, including the possibility of contractual exclusion of remuneration for an employee-inventor if parties explicitly decide so (Szczepanowska-Kozłowska, 2014; Kostański, 2020; Kostański, 2010; Chlebny, 2015; Michalak, 2016). It has been pointed by Chlebny (2015) that current IPLA only prescribes pecuniary remuneration for employee. Other forms of awarding employee, like honours, awards, additional or equalising remunerations have been abandoned in statute, however employer may prescribe them in internal regulation or in a contract with employee.

Another question is how to calculate the amount of the remuneration for a creator. In general – as Linde (2010) indicates – it should be fair and reasonable. It might be either in the form of lump sum or royalty, however both methods have their pros and cons (p. 21, 29). Under Polish law remuneration might be determined in an agreement. If the parties have failed to agree on the amount of the remuneration it shall be determined in due proportion to the profits obtained by the economic entity from the exploitation of the invention, taking into account circumstances in which the invention has been made, in particular the extent to which the author has been assisted in making the invention as well as the scope of the author's employment duties involved in making the invention (art. 22 IPLA). The given rule is criticized for its ambiguity. First, it is not clear what does it mean „due proportions to the profits of economic entity" – it seems that in case of inventions which may bring high benefits such „due proportion" should not be related to employee's salary (Szczepanowska-Kozłowska, 2014). Michalak (2016) gives a more specific guideline stating that – on one hand – this provision is an equitable clause for court discretionary opinion, but on the other hand he indicates that it seems that the creator's remuneration should not exceed 10% of employer's benefits.

It is also disputable in a Polish doctrine, whether „profits obtained by the economic entity" should only relate to measurable profits gained by the economic entity (this view represents Szczepanowska-Kozłowska, 2014) or also to, so called, immeasurable effects (in particular improvement of health and safety of work) and effects of exercise of a right (in particular royalties from license agreements obtained by economic entity), as it has been referred by Szewc (2012) and Górnicz-Mulcahy (2008) in relation to practice and opinion of scholars. Despite of the fact that the elements for which employees remuneration might be decreased, namely circumstances of making an invention, extent of employers' assistance and scope of inventor's employment duties has been inspired by German Act *Richtlinen fur die Vergutung von Arbeitnehmererfindungen* (Szewc, 2012), they are also criticized for the lack of precision. As Szczepanowska-Kozłowska rightly pointed (2014) at the end of the day in case of a dispute between an inventor and an economic entity the „due proportion" of the remuneration will be established by the subjective (due to ambiguous criteria) decision of a court.

Some remedy to those ambiguities might bring the provision that if the profits obtained by the entity substantially exceed the profits which formed the basis for determination of the

remuneration which has been paid, the author of the invention may claim the increase of the given remuneration (art. 23 IPLA).

The specific calculation of remuneration relates to scientific inventions. According to art. 152 LHESA the senate of PHEI should establish regulations governing the management of copyright, related rights and industrial property rights as well as the principles of commercialization, which shall specify *inter alia* the rights and obligations of PHEI, employees, doctoral students and students with regard to the protection and use of copyright, related rights and industrial property rights and the rules for the remuneration of authors. Apart from details in such regulations, the LHESA establishes the basic rules concerning remuneration for scientific employees. In particular according to art. 155.1.(1) LHESA in the case of commercialization, a scientific employee shall be entitled to no less than:

— 50% of the value of funds obtained by the PHEI from direct commercialization, reduced by no more than 25% of the costs directly related to such commercialization, which were incurred by the PHEI or the special purpose vehicle.
— 50% of the value of funds obtained by the special purpose vehicle as a result of given indirect commercialization, reduced by no more than 25% of the costs directly related to such commercialization which were incurred by the PHEI or the special purpose vehicle.

The meaning of „costs directly related to commercialization" is explained in art. 155.3 LHESA as external costs, in particular the costs of legal protection, expert opinions, valuation of the subject of commercialization and official fees. These costs shall not include the costs incurred before the decision to commercialize and the remuneration. The problematic issue may arise whether the given costs also include those that have been covered by the external funds. In the author's opinion those costs should not be calculated as costs directly related to commercialization in the meaning of the given provision.

Importantly in the context of scientific inventions which very frequently are made in the research teams, the amount of the remuneration and the share in the funds derived from commercialization from a PHEI determines the total remuneration and the share in these funds, to which the employees forming part of the research team are entitled. An employee who is a member of the research team has the right to claim from a PHEI the part of the funds derived from corcialization they are entitled to.

One of the problems concerning the given regulation is that it relates directly to „employees". It might be therefore claimed that a person who lost the status of an employee of PHEI has no longer the right to remuneration. In the author's opinion, the opposite interpretation is correct, namely that the moment determining the right to a patent as well as the status of an employee and the right to remuneration should be the moment of creating the invention. Further changes in the status of employment should be irrelevant. It might be suggested, however, that due to unclear statutory provision, the regulations at the PHEI would stipulate the rules concerning remuneration after expiration of an employment contract. It is possible that such rules would require or suggest making an additional agreement between parties. Consequently, the same arguments and reasoning should apply to the situation mentioned in point 1, i.e. when an employee (or more specifically – a former employee) is obliged to remunerate a public higher institution in consequence of commercialization done by that scientific employee (a former scientific employee).

What happens with the remaining 50% of the value of the funds obtained by the PHEI depends on its internal regulations. One of possible solutions is that a certain percentage of those funds is directed to the unit in which a scientific employee (inventor) is employed (or proportionally where scientific employees are employed). Some part of it might be further reserved for the development of scientific goals and upholding protection of patent rights. In such a regulation there might be also a prescription that some part of the fund must be used solely to promote further support of innovation and entrepreneurship at the PHEI. There may be also a provision that the scientific inventor employed in a spin-off company or its shareholder or a partner is not entitled to additional remuneration from commercialization, like for example in § 12 of the regulation at the Nicolaus Copernicus University in Toruń, Poland.

According to general rules stemming from IPLA, the method of payment for remuneration might be stipulated in the agreement. In case of its absence, the remuneration shall be paid in the total amount or in installments. Payment of a total amount of remuneration or first installment should be paid at the latest within two months from the date on which initial profits have been obtained from the exploitation of the invention. If payment is made by installments, the remaining installments shall be paid at the latest within two months after the expiry of each year, however for no longer than five years from the date on which the first profits have been obtained (art. 22.3 and 22.4 IPLA). As Michalak (2016, p. 46) indicates, the choice of method of payment is on the employer (debtor).

4. CONCLUSIONS

The described system of remuneration in Poland is bifurcated: on one hand it leaves the possibility to govern it by the agreement between parties, on the other hand it gives statutory rules in case such contracts are not concluded or the employers' benefits are much higher than established as a basis for the remuneration. The statutory provisions on a very general – or as Szczepanowska-Kozłowska (2014) claims – „enigmatic" terms fairly divide the obligation of employers and the benefits for inventor-employees. The problem is in particulars. The measurement of remuneration in practice usually depends on internal rules of the employer (established in conformity with statutory regulation), which might not be entirely understood by the employees, and which might be constructed disproportionally with the employers' benefit in relation to the statutory model assumptions. In case of scientific inventions, the regulation is more precise as it refers to PHEI with public money and issues as, so called „scientists enfranchisement" and commercialization of scientific inventions. At the end of the day also in the given situation the specific solutions prescribed in internal regulations of PHEI might be of key importance to assess whether the given system is beneficial for scientists. Especially the rules on how the remaining benefits of the scientific institution (50%) are divided and for whose interests might stimulate or weaken further scientific development.

Summing up, on general statutory terms the solutions prescribed in Polish law seem to be fair for all interested parties, however the final evaluation depends mostly on case-by-case analysis of the internal provisions established in commercial or scientific entities and which – at least in theory and even within the statutory framework – might lead to more favorable solutions for those entities.

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