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# REIMBURSEMENT OF EARNINGS OR INCOME LOST BY THE PARTY AS A RESULT OF APPEARING BEFORE A COURT OR A PUBLIC ADMINISTRATION AUTHORITY

**Abstract**

The Article 86.3 of the Act on court costs in civil cases (which also applies in administrative cases and cases tried before administrative courts) establishes the upper limit of compensation for earnings or income lost by a person who appeared before a civil court, administrative court or public administration authority. A similar solution is provided for in Article 618b § 3 of the Code of Criminal Procedure in relation to the maximum amount of compensation for lost earnings that may be awarded to a witness in criminal proceedings. Unless specific provisions do not provide otherwise, this amount is currently (2024) PLN 82.31, which is much lower than the average daily wage of a person receiving the minimum wage and, as such, in most cases, does not compensate for the actual loss suffered by the party, witness or expert who appeared before the court or public administration authority. The applicable provisions specifying the maximum amount of compensation for lost earnings or income are considered inconsistent with the Constitution. For now, however, the Constitutional Tribunal has not recognized them as such, so these provisions are in force. Nevertheless, some judges do not apply them, assuming that they have the right to omit provisions that, in their opinion, are inconsistent with the Constitution. By doing so, they expose themselves to disciplinary liability. Is a regulation establishing an upper limit on the reimbursed income or earnings justified and necessary? Should judges ignore the provisions that set such a limit at too low a level? The author of the paper tries to answer these questions.

**Keywords:** *summons, costs of a party's participation in the proceedings, reimbursement, direct application of the Constitution, democratic state of law, rule of law, judicial independence, judicial law*

## Introduction

The real costs of appearing before a court or administrative authority are usually travel costs, rarely accommodation costs, and in the case of working persons – also lost earnings or income. While a witness or expert can count on reimbursement of appearance costs covering all of the above-mentioned components, regardless of the type of proceedings in connection with which he had to appear at the request of a court or administrative authority, the situation of the parties is different in this matter. Whether a party is entitled to reimbursement of the costs of participation in the proceedings depends mainly on the outcome of the proceedings in court proceedings, and in administrative proceedings – primarily on the nature of the matter. Which appearance costs can be reimbursed to the parties depends on the type of proceedings.

## Civil proceedings

In civil proceedings, the rule is that the costs of appearance are reimbursed to the opposing party by the party that *lost the case*. It is assumed in the literature and civil law jurisprudence that the assessment of whether and to what extent a party won or lost the case should be made by comparing the claims pursued with those finally accepted, and not by comparing the results of the proceedings in individual instances (Demendecki 2005, p. 161). In the event of a settlement and partial acceptance of the demand, the costs are usually mutually abolished (Article 100, Article 104 of the Code of Civil Procedure).

The provisions contained in section 2 of title III of the Act of 28 July 2005 on court costs in civil cases (Journal of Laws of 2023, item 1144, as amended) provide that the costs of a witness's appearance include:

a. travel costs of the witness from the place of residence to the place of performing actions (giving testimony) in proceedings upon court summons;
b. the cost of accommodation and subsistence of the witness at the place where the actions were performed;
c. the equivalent of earnings or income lost due to the appearance.

Pursuant to Article 91 of the above-mentioned Act, if the applicable provisions provide for the award of dues to a party in connection with his or her participation in court proceedings, these dues are awarded to the party in the amount provided for witnesses.

Pursuant to Article 86 of the above-mentioned Act, remuneration for lost earnings or income for each day of participation in the court actions is granted to the witness in the amount of his or her average daily earnings or income. In the case of a witness in an employment relationship, the average daily lost earnings are calculated according to the rules applicable to determining the cash equivalent due to the employee for leave. The loss of earnings or income in connection with an appearing in court and their amount should be duly demonstrated by the witness.

However, the above provisions are of little importance when the court determines the amount that will be reimbursed to a party, witness or expert for

lost earnings or income in connection with an appearance in court, due to the upper limit of such receivables specified in the Act. Pursuant to Article 86.3, this limit is the equivalent of 4.6% of the base amount for persons holding managerial state positions, the amount of which, determined in accordance with separate principles, is set down by the Budget Act. (If the announcement of the Budget Act takes place after January 1 of the year to which the Budget Act applies, the basis for calculating the amount due for the period from January 1 to the date of announcement of the Budget Act is the base amount in force in December of the previous year.)

The above regulation means that the guideline expressed in the literature, according to which the reimbursement of travel expenses and lost earnings due to a participant in the proceedings *should be real, not symbolic* (Zieliński 2019, p. 312) cannot be legally implemented in practice.

## Proceedings before administrative courts

Similar rules apply in the proceedings before administrative courts, where *winning the case* by the complainant against the opposing party, i.e. a public administration authority, means the following situations:

a. the court accepted the complaint;
b. the public administration authority carried out the self-control, i.e. accepted the complaint in its entirety by the date of commencement of the hearing;
c. the public administration authority disposed of the matter in accordance with the arrangements made in the mediation proceedings.

## Criminal proceedings

In criminal proceedings, appearance costs are always awarded to the subsidiary prosecutor. In the event of a conviction or conditional discontinuance of the proceedings, they are ordered from the accused (Article 627, Article 629 of the Code of Criminal Procedure), and in the event of his acquittal or discontinuance of the proceedings – from the State Treasury (Article 632 point 2 of the Code of Criminal Procedure).

The private prosecutor is reimbursed the costs of appearance in the event of conviction of the accused (Article 628 of the Code of Criminal Procedure), conditional discontinuance of the proceedings (Article 629 of the Code of Criminal Procedure) or discontinuance of the proceedings due to the insignificance of the social harmfulness of the act, the perpetrator's insanity or the evidence of an offense prosecuted *ex officio* (Article 622, Article 632 point 1 of the Code of Criminal Procedure).

The accused is always reimbursed for the costs of the proceedings in the event of acquittal (Article 632 of the Code of Criminal Procedure). In a public prosecution trial, even if the proceedings are discontinued – regardless of the reasons for these decisions – the costs of the trial are borne by the State Treasury, with the exception of the costs of applying for a defense lawyer of your choice (Article 632 point 2 of the Code of Criminal Procedure). In the event of discontinuance of the proceedings initiated by private prosecution, the accused is not reimbursed if the discontinuance is the result of reconciliation (Article 632 point 1 of the Code of Criminal Procedure) or the insignificance of the social harmfulness of the act (Article 629 in fine of the Code of Criminal Procedure).

In criminal proceedings, the parties may only apply for reimbursement of expenses incurred in pursuing their rights (Article 616 § 1 point 2 of the Code of Criminal Procedure). Justified expenses include in particular: travel costs from the place of residence to the place of performance of the action (see Article 618a § 1 and 2 of the Code of Criminal Procedure), costs of accommodation and subsistence at the place of the action (see Article 618a § 3 of the Code of Criminal Procedure) and expenses for appointing one defense lawyer or representative in the case. In contrast, the cost of lost earnings or income does not constitute an expense within the meaning of Article 616 § 1 point 2

of the Code of Criminal Procedure and it is not refundable to the party entitled to reimbursement of expenses (Nowicki 2023, pp. 2185–2186). Admittedly Article 618j of the Code of Criminal Procedure states that the dues due to a party in connection with his or her participation in the proceedings are awarded in the amount provided for witnesses, and witnesses are entitled to reimbursement of lost earnings or income, however, this provision only describes the amount of dues that a party may claim, and does not indicate the type of such dues (Nowicki 2023, p. 2186).

## Administrative proceedings

In administrative proceedings, the parties are reimbursed for the costs of appearing when summoned in two cases:

a) when the proceedings were initiated *ex officio*, and

b) when the party, through no fault of his or her own, was incorrectly summoned to appear (Article 56 § 1 of the Code of Administrative Procedure).

The person who responded to the summons is awarded travel costs and other dues determined in accordance with the provisions contained in section 2 of title III of the Act of July 28, 2005 on court costs in civil cases (Journal of Laws of 2023, item 1144 as amended).

A special solution is provided for in Article 6 of the Act of March 11, 2022 on the defense of the homeland. Pursuant to Article 6.2 of this Act: *Employees and persons employed under a civil law contract, summoned to appear in person before the competent authority in matters relating to the obligation to defend, and who have not received remuneration for the time missed due to the summons, are entitled, at their request, to lump-sum compensation for lost earnings. Compensation is due for each day in the amount of 1/30 of the minimum remuneration for work in force in December of the previous year, determined on the basis of the provisions of the Act of October 10, 2002 on minimum remuneration for work (Journal of Laws of 2020, item 2207 and from 2023, it*em 1667). This provision does not apply if the summons is the result of failure or improper fulfillment, through the fault of the summoned person, of the obligations specified in the Act.

Pursuant to Article 77.4 of the Act of 13 October 1998 on the social insurance system (Journal of Laws of 2024, item 497), the Social Insurance Institution (Zakład Ubezpieczeń Społecznych) reimburses persons summoned to appear in person in matters of social security benefits and other benefits paid by the Institute only the travel costs incurred; in contrast, it does not refund the value of earnings lost in connection with the appearance. The situation is similar in the case of calls made by the Agricultural Social Insurance Fund (Article 52.1 of the Act of December 20, 1990 on social insurance for farmers, Journal of Laws of 2024, item 90).

## The problem of the upper limit of the amount of lost earnings or income

As mentioned earlier, pursuant to Article 86.3 of the Act on court costs in civil cases (which also applies in administrative cases and cases tried before administrative courts) the upper limit of compensation for earnings or income lost by a person who appeared before a civil court, administrative court or public administration authority is (unless specific provisions do not provide otherwise) the equivalent of 4.6% of the base amount for persons holding managerial state positions, the amount of which, determined in accordance with separate principles, is set down by the Budget Act. A similar solution is provided for in Article 618b § 3 of the Code of Criminal Procedure in relation to the maximum amount of compensation for lost earnings that may be awarded to a witness in criminal proceedings.

This amount is currently (2024) PLN 82.31 and in most cases does not compensate for the actual loss suffered by the party, witness or expert who appeared before the court or public administration body.

The Ombudsman has repeatedly drawn attention to this problem in his speeches to the Minister of Justice and the Chairman of the Legislative Committee of the Senate of the Republic of Poland. The Ombudsman pointed out that the need to testify is a permissible obligation imposed on a citizen in a democratic state of law, but the content of Article 31.1 of the Constitution of the Republic of Poland argues that the related negative consequences

for the witness should be compensated to a reasonable extent. Although the establishment of the maximum amount of reimbursement for lost earnings should, in the Ombudsman's opinion, be considered justified, the current limit is grossly too low. It is even much lower than the average daily wage of a person receiving the minimum wage. In 2019 and 2020, the minimum wage was set at PLN 2,250 and PLN 2,600, respectively, which gives an annual salary of PLN 27,000 and PLN 31,200. Assuming that there are an average of 250 working days in a calendar year, this means that a person receiving the minimum wage should receive an average daily remuneration of PLN 102.80 in 2019 and PLN 124.80 in 2020.

The Ombudsman emphasized that, in accordance with the position of the Constitutional Tribunal, the right to demand reimbursement of lost income or earnings due to appearing as a witness constitutes a property right subject to constitutional protection pursuant to Article 64.2 of the Constitution of the Republic of Poland. For this reason, in the opinion of the Ombudsman, the current legal situation bears signs of disloyalty of the legislator towards the citizen and is inconsistent with the principle of a democratic state of law specified in Article 2 of the Constitution of the Republic of Poland. In this case, the concern for the financial interest of the State Treasury is disproportionate to the harm caused to the witness (A. Bodnar 2019, pp. 3–6; A. Bodnar 2020, pp. 3–6).

The applicable provisions specifying the maximum amount of compensation for lost earnings or income are considered inconsistent with the Constitution. For now, however, the Constitutional Tribunal has not recognized them as such, so these provisions are in force. Nevertheless, some judges do not apply them, assuming that they have the right to omit provisions that, in their opinion, are inconsistent with the Constitution. By doing so, they expose themselves to disciplinary liability.

A judge of one of the district courts was disciplinary charged with the fact that – while deciding a case concerning the *awarding of remuneration for lost earnings* – acting with direct intent she exceeded her powers in an obvious and flagrant manner by awarding two witnesses *remuneration* for the earnings lost as a result of appearing at the court's summons in the amounts of PLN 300 and 500. According to the disciplinary prosecutor, the judge acted to the detriment of the public interest because the amount due to witnesses could

not exceed PLN 82.31, pursuant to the above-mentioned provision. Thus, her act also met the criteria of an intentional crime prosecuted by public prosecution, specified in Article 231 § 1 of the Penal Code.

The accused judge submitted a statement in which she stated that she acted within the scope of her judicial duties, where judicial independence applies not only to the assessment of evidence, but also to the interpretation of law. Therefore, her interpretation of the law cannot be a reason for any retaliation against the judge, including disciplinary action, in a democratic state. Moreover, in the written explanations submitted, while maintaining her current position, she also pointed to the unconstitutionality of the provision of Article 618b § 3 of the Code of Criminal Procedure, which, in her opinion, justifies the direct application of the Constitution of the Republic of Poland and, consequently, the granting of lost earnings to witnesses in its actual, and not statutorily limited, scope.

The Supreme Court – Chamber of Professional Responsibility (Izba Odpowiedzialności Zawodowej) acquitted the judge (judgment of the Supreme Court – CPR of June 5, 2023, I ZSK 44/22, LEX no. 3567121). It stated that in accordance with the currently dominant line of jurisprudence of the Supreme Court, a judge may be held to disciplinary liability for errors in adjudication only exceptionally, namely in the event of committing an obvious and flagrant violation of the law, visible at once to everyone, without going into the details of the case and without the need to analyze the facts and law. A violation of legal provisions is obvious when the judge's error is easy to detect and was committed in relation to a provision whose meaning should not raise doubts even for a person with average legal qualifications, and its application does not require deeper analysis. In the Supreme Court's opinion, such qualified judicial illegality did not occur in the case in question.

Court jurisprudence presents contradictory positions as to the binding of a judge by the provisions of law, which in his or her opinion are inconsistent with the Constitution, but have not been recognized as such by the Constitutional Tribunal. An excellent overview of these positions can be found in the justification for the above-mentioned judgment of the Supreme Court – CPR of June 5, 2023, I ZSK 44/22.

The prevailing view is that a judge is not entitled to disregard provisions of law that he considers inconsistent with the Constitution. The Supreme Court stated

that the direct application of the Constitution does not mean the competence to control the constitutionality of applicable legislation by courts and other authorities appointed to apply the law. That's because the mode of this control has been clearly and unambiguously shaped by the Constitution itself. The provision of Article 188 of the Constitution reserves adjudication in these matters to the exclusive competence of the Constitutional Tribunal. The presumption of compliance of a statute (act of Parliament) with the Constitution may be rebutted only by a judgment of the Constitutional Tribunal, and the judge's binding by a statute, provided for in Article 178 section 1 of the Constitution, is in force as long as this act remains in force (judgment of the Supreme Court of October 30, 2002, V CKN 1456/00, LEX no. 57237). There are no legal grounds that would allow courts to refuse to apply a statutory norm due to its contradiction with the constitutional norm. The basic provision regulating this issue is Article 178.1 of the Constitution, which states that judges in the exercise of their office are subject to the Constitution and laws. The binding of a judge by a statute (act of Parliament) specified in this provision lasts as long as this legal act remains in force. A court that comes to the conclusion that the statute which it is to apply when adjudicating on a matter is unconstitutional should, pursuant to Article 193 of the Constitution, submit to the Constitutional Tribunal a legal question regarding the compliance of this normative act with the Constitution (judgment of the Supreme Court of February 21, 2007, II KK 261/06, LEX no. 446285; also, among others: judgment of the Supreme Court of June 24 2004, III CK 536/02, LEX no. 172784; decision of the Supreme Court of May 18, 2022, II USK 513/21, LEX no. 3439107; judgment of the Court of Appeal in Białystok of March 29, 2022, III AUa 1202/21, LEX no. 3419684; decision of the Supreme Court of December 10, 2019, IV CSK 451/18, LEX no. 3151850).

Despite the apparent obviousness of the above position, a different view is also presented, even in the jurisprudence of the Supreme Court! According to this view, a judge cannot apply laws without taking into account the constitutional context. The Constitution is the supreme law of the Republic of Poland, and its provisions apply directly, unless the Constitution provides otherwise (Article 8 of the Constitution). There are no provisions of the Constitution that would exclude its direct application by courts. The court applies the Constitution in an individual case and may refuse to apply a provision of a statute or regulation

if it finds it inconsistent with hierarchically higher law. This does not violate the competences of the Constitutional Tribunal, which has a different subject to adjudicate (Article 188 of the Constitution). It decides on a legal provision in terms of its compliance with a higher-level act, and not on the social relations that this provision regulates (judgment of the Supreme Court of July 4, 2012, III PK 87/11, LEX no. 1619703). The obligation to submit a legal question to the Constitutional Tribunal regarding the compliance of a normative act with the Constitution exists when the court has doubts as to this compliance. When a provision is clearly inconsistent with the Constitution, the court adjudicating on the matter has the power to directly apply the Constitution of the Republic of Poland, and this direct application may consist in the pro-constitutional application of a provision of the act that is the basis for the decision and is in contradiction with the Constitution (judgment of the Supreme Administrative Court of November 29. 2016, I OSK 860/15, LEX no. 2169835). Since the Constitution is the supreme law of the Republic of Poland and its provisions are directly applicable, unless the Constitution provides otherwise (Article 8 of the Constitution of the Republic of Poland), and judges in the exercise of their office are independent and subject only to the Constitution and laws (Article 178.1 of the Constitution of the Republic of Poland ), it is possible for the court to independently assess the compliance of statutory provisions with the Constitution for the purposes of the case under consideration, which becomes the duty of the Supreme Court when it has submitted an appropriate legal question to the Constitutional Tribunal, but the question has not been resolved (judgment of the Supreme Court of March 17, 2016, III KRS 42/12, LEX no. 2288953).

## Conclusions

The above two-vote of the Supreme Court clearly demonstrates the fact that expressions such as judicial independence, judges being subject only to the law, and the democratic state of law are mere embellishments, political slogans, and not legal terms that have a specific content. They can be understood freely, depending on the circumstances. This ridicules the Constitution as an act that uses these expressions, and therefore the state. After more

than a quarter of a century of validity (it would be better to use the term: existence) of the Constitution, there is still no consensus as to whether it can be directly applied, and if so, what this means in practice. A state in which even the Supreme Court presents conflicting views as to whether the courts can ignore the applicable provisions of law, finding them inconsistent with the Constitution, has nothing to do with the rule of law. The value of the Constitution cannot be assessed highly if it does not clearly resolve such fundamental issues – like many other issues of fundamental importance, especially in the sphere of human rights and freedoms.

The disciplinary case described earlier makes us realize two things: firstly, that the existence of an upper limit on the reimbursed income or earnings is justified and necessary; secondly, that ignoring a provision that sets such a limit too low is not the best solution to this problem. The latter is also supported by the constitutional principle of equality of citizens before the law, which is contradicted by such actions of the courts. They cause the situation of witnesses and parties who are entitled to reimbursement of income or earnings lost in connection with an appearance to be different depending on whether the appearance took place before a court or before a penal prosecution authority or a public administration authority. While courts can afford to ignore legal provisions they consider inconsistent with the Constitution, penal prosecution authorities and public administration authorities must respect them. As a result, persons who appeared before courts are privileged in terms of reimbursement of appearance costs compared to persons who appeared before a prosecutor or an administrative authority.

However, while ignoring the provision setting the upper limit of the amount to be reimbursed for lost earnings may be justified by its contradiction with the Constitution, omitting the provision requiring the person applying for reimbursement to submit documents confirming the amount of lost earnings should be considered unacceptable behavior of the courts. Nonetheless <Contrary to this>, in the above-mentioned disciplinary case, the judge – according to the arguments of the disciplinary prosecutor – completely ignored also this provision and awarded the witnesses the amounts they applied for, without any verification of the validity of the requests. And the Supreme Court completely omitted this fact in the justification of the acquittal judgment.

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