

ADDRESSING THE CHALLENGES AND OPPORTUNITIES OF THE LABOUR FORCE: PAST AND PRESENT

WORK DISCIPLINE: FORMS, STIMULATIVE AND SANCTIONING MEASURES, DISCIPLINARY PROCEDURE

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Abstract: Discipline is essential for work. Although discipline does not consist merely of punishment, at the hand of authority, for wrongdoing, this external discipline is nevertheless very important, as an essential part in training the individual to be self-disciplined (by means of punishments, rewards and warnings). Employers need to be able to discipline their employees when they either make a mistake at work or do something more serious, such as assault or harass a colleague. That is the reason for which employers should adopt and make effective use of both disciplinary and stimulative procedures. Having in view the dispositions of the Labor Code and other special laws, this article presents the forms of work discipline, ways of achievement, stimulative and sanctioning measures, disciplinary liability of the employee, the phases of disciplinary procedure with all its elements, including appeal against sanctioning decision and cancellation (radiation) of disciplinary sanctions.

Keywords: discipline, employee, employer, liability, sanction, misconduct.

GENERAL CONSIDERATIONS ON WORK DISCIPLINE

According to article 39 par. 2 let. b) of Labor Code, the employee has, among other obligations, the obligation to respect work discipline. The obligation stipulated by law operates at somebody's charge only on the basis of a individual labor contract.

Work discipline is specific to labor relations and can be defined as being "the necessary order in the frame of the performance of social labor relation and of a specific collective, resulted from the observance of some rules or normes of conduct by the members of the collective"¹. For the good functioning of their activity, employers should adopt and make effective use of both disciplinary and

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¹ S. Ghimpu, I. Tr. Ștefănescu, Ș. Beligrădeanu, Gh. Mohanu, *Dreptul muncii*, Bucharest, Scientific and Encyclopedic Publishing House, 1982, vol. II, p. 7.

mediatory procedures. They are guided by the Labor Code and other special laws, such as Law no. 319/2006 concerning labor health and security and Law no. 202/2002 on the equality of chances for men and women.

Work discipline has two forms: technological and organizational discipline.

Technological discipline implies the fair application of all knowledge about means and methods of effectuation the operations necessary for realizing products, works or services, as well as the use, in security conditions, of tools, instalations, machines and work equipments. On the basis of article 22 of Law no. 319/2006 concerning safety and security at workplace, each worker must perform his activity in accordance with his training and experience, as well as with the instructions given by his employer, in order that his person or other person's security should not be put into danger during work process.

Organizational discipline is ensured through the agency of "respect, by all employees, irrespective of their hierarchical level, of all their obligations, as well as the established work relations"².

Working discipline can be realised through the agency of stimulative means, as well as sanctions applied on the basis of disciplinary liability³. Stimulative means and rewards are meant for stimulating the positive actions and results of employees, while the sanctionatory measures are applied for the purpose of preventing new misconducts and punishing any breach of duty and discipline. For the proper fulfilment of their duties or the achievement of certain professional performances, employees can be rewarded through the following measures: verbal or written thanks, adjustment of diplomas and titles, increasement of salary, promotion, adjustment of premiums, benefits, merit wage, other stimulents, recompenses or facilities (office telephone, office car etc.).

DISCIPLINARY LIABILITY

As a form of legal liability specific to labor law⁴, disciplinary liability is an institution that tends to defend the internal order of an enterprise (unity), having a strictly personal character, arising from the "intuitu personae" character of the employment relationship and therefore being excluded the liability for another person.

Regulating disciplinary liability is a guarantee for both individuals and legal entities, state organs or public institutions (when the subject of disciplinary offense is a public official/ civil servant, a military, a magistrate etc.) and for maintaining

² A. Sandu, *Managementul resurselor umane*, Craiova, Universitaria Publishing House, 2005, p. 130.

³ C. Belu, *Dreptul muncii. Ediție revăzută și adăugită*, Craiova, Universitaria Publishing House, 2006, p. 238.

⁴ I. Tr. Ștefănescu, *Tratat de dreptul muncii*, Bucharest, Lumina Lex Publishing House, 2003, p. 466.

public order, its purpose being to prevent and combating misconduct or abuses committed in the line of duty at the expense of public and private interests⁵.

Disciplinary liability exerts a threefold function: disciplinary, preventive and educative function, leading to the establishment and defense of the internal order within the enterprise.

Disciplinary liability is a form of liability independent from all other forms of legal liability: patrimonial liability, tort, administrative or criminal liability.

Disciplinary responsibility involves the following cumulative conditions:

a) existence of a breach of professional duties (misconduct) of the employee, regardless of their severity;

b) employee's misconduct (disciplinary offense) was committed with guilt;

c) the offense has to have disrupted the order required for the normal activity of the employer;

d) between the wrongful act and harmful outcome has to be a causal link.

If proven the guilty and the breach of professional duties, the causal link and the harmful result are presumed.

Disciplinary liability does not operate in some instances that remove the unlawful nature of the employee's act, taken from criminal law cases: self-defense; state of emergency; physical and moral coercion; fortuitous event⁶; major force⁷; error of fact; the execution of an unlawfully issued order; drunkenness.

Execution of an order of service clearly illegal, issued in violation of legal rules on the competence of the issuing body, on the content and form of that order does not discount the disciplinary responsibility of the employee⁸ and drunkenness must be complete and must be caused by circumstances beyond the control of the perpetrator as to relieve him of liability. On the contrary, drunkenness would be considered an aggravating circumstance when the one who committed the unlawful act consciously and freely consumed alcoholic beverages.

Grounds for exemption from disciplinary liability must be properly analyzed and applied to disciplinary offences, according to the specific of employment relationships.

Disciplinary misconduct is an essential requirement, the factual basis of employee's disciplinary liability. Disciplinary misconduct is an offense in relation to work, consisting of an act or omission committed with guilt by the employee through which he violated legal norms, employer's internal rules, individual employment contract or collective agreement applicable, orders and statutory provisions of the hierarchical leaders (art. 247 of the Labour Code).

⁵ See B. Knapp, *Théorie et pratique de droit*, Bale at Frankfurt sur le Main, Éditions Helbing & Lichtenhann, 1944, p. 290.

⁶ See S. Ghimpu, A. Țiclea, *Dreptul muncii*, Bucharest, Editura All Beck, 2000, p. 515.

⁷ See Tr. Ionașcu, E. A. Barasch, *Forța majoră în executarea contractului economic*, in "Studii și cercetări juridice" nr. 3/1964, p. 380.

⁸ For details, see L. C. Dușescu, *Ordinul de serviciu ilegal, cauză exoneratoare de răspundere disciplinară*, in "Revista Română de Dreptul Muncii", nr. 5/2007, pp. 105-107.

Unlike crimes and offenses that are expressly listed and punishable by law, disciplinary offenses can not be individualized by the Labour Code because of their unlimited number. Virtually any action of the employee by which he violates legal norms, internal rules, individual employment contract or collective agreement applicable, provisions and orders of hierarchical leaders represents misconduct. Thus, misbehaviors are determined only by default by setting service obligations of employees in the content of individual employment contract and job description list, which is why labor law can not apply the principle of "nullum crimen sine lege", only the principle of "nulla poena sine lege".⁹

The unlawful nature of the offense results from breaches of employee's proper service obligations. Service obligation means all the duties incumbent upon each employee based on individual labor contract, all the provisions of the law, collective agreements applicable, decisions taken at the unit level, and the rules of professional or private conduct enacted to ensure order and discipline necessary for the smooth conduct of the work process¹⁰.

The Labour Code does not expressly provide some form of guilt for disciplinary offense's existence and for the application of certain disciplinary sanction and hence guilt can take any form¹¹ – intent (direct or indirect) or blameworthiness (easiness or recklessness). If the form and degree of guilt are crucial to criminalize certain acts as crimes, in employment law disciplinary offenses are punishable even when committed by negligence. The degree of guilt is just one criterion taken into account by the employer when individualizing disciplinary sanction. The importance of guilt as a defining element of the disciplinary offense is underlined by the requirement of the preliminary disciplinary investigation, disciplinary committees or the person authorized to carry out the investigation being guided by the principle of presumption of innocence, under which the employee is presumed innocent for the deed on which the employer was notified that it would be misconduct as long as his guilt has not been proven¹².

DISCIPLINARY PROCEDURE

Disciplinary procedure sets out the instruments that employers may use when disciplining an employee. Unless an employer follows the legal disciplinary procedure the Employment tribunal will find dismissals/sanctions to be

⁹ L. Belu, *Relevanța vinovăției în răspunderea juridică*, Craiova, Reprograph Publishing House, 2003, p. 319.

¹⁰ See Gh. Bădică, *Contractul de muncă*, Bucharest, Tribuna Economică Publishing House, 1998, p. 203.

¹¹ See R. C. Radu, E. Voicu, *Regimul disciplinar specific funcționarilor publici*, in "Arhivele Olteniei", New Series, nr. 28/2014, p. 369.

¹² See art. 19 of the Government Decision no. 1344/2007 concerning the rules of organization and functioning of disciplinary commissions, with subsequent amendments.

automatically unfair. No disciplinary action will be taken against an employee until the case has been fully investigated.

Articles 247-252 of the Labor Code, corroborated with the dispositions of Law no. 319/2006 concerning labor health and security and Law no. 202/2002 on the equality of chances for men and women state that disciplinary procedures/decisions should: be put in writing; say to whom they apply; be non-discriminatory; tell employees what disciplinary action might be taken; say what levels of management have the authority to take disciplinary actions; require employees to be informed of the complaints against them and supporting evidence, before a meeting; give employees a chance to have their say before management reaches a decision; provide employees with the right to be accompanied by a trade representative; provide that no employee is dismissed for a slight breach of discipline; require management to fully investigate before any disciplinary action is taken; ensure that employees are given an explanation for any sanction; allow employees to appeal against any disciplinary decision.

General procedure of applying disciplinary sanctions comprises the following phases:

1) *notification* to the competent body in relation to the commission of an offense – can be made by any person who knows about committing a disciplinary offense;

2) *preliminary disciplinary investigation* – is mandatory in the case of all disciplinary sanctions, except the written notice, the lack of this investigation attracting the absolute nullity of the sanctioning decision. To conduct disciplinary investigation, the employee shall be convened in writing by a person authorized by the employer, stating the subject, date, time and place of the meeting. The failure of the employee to be present at the preliminary investigation without an objective reason entitles the employer to sanction him without making preliminary disciplinary research. During preliminary disciplinary investigation employee is entitled to formulate and support defenses in his favor and provide the person empowered to carry out the investigation all the evidence and motives that it deems necessary and the right to be assisted, at his request, by a union representative whose member is.

3) *applying the sanction*. According to art. 252 of the Labour Code, the employer has to apply disciplinary sanction by a decision made in writing within 30 days (limitation period, which can be interrupted or suspended) from the date of knowledge about committing disciplinary offense, but no later than 6 months (limitation period) from the date of the deed. The moment at which commences the 30 calendar days for applying the sanction is the registration date of the final disciplinary report at the unit's registration¹³. All phases of disciplinary

¹³ *Decision no. 16/2012 of the High Court of Cassation and Justice (HCCJ) on the appeal on points of law raised by the Ombudsman and the General Attorney's Office at the HCCJ on the calculation of the 30 days term inside which the employer can impose a disciplinary sanction to the employee, published in the Official Gazette no. 817/2012. See M. Volonciu, in Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, Codul muncii. Comentariu pe articole. Vol. II. Art. 108-298, Bucharest, C.H. Beck Publishing, 2007, pp. 384-386.*

proceedings should be consumed entirely within the period of 6 months; after the completion of this term the employee could no longer be disciplined. Judicial practice held that “the fact of starting alongside disciplinary investigation provided by art. 267 of the Labour Code and criminal proceedings, does not remove the mandatory provision of the text of art. 268 of the Labour Code for the implementation of disciplinary sanction within 30 calendar days from the date of knowledge about committing disciplinary offense, as long as the text lacks the possible existence of grounds for interrupting this period or extension of starting flowing of it up to the finalization of the investigations that followed the start of other procedures. Such an interpretation could create situations where disciplinary investigation could even exceed the duration of 6 months for applying the sanction. Or, the legislator's intention was precisely to limit in time the preliminary disciplinary investigation in two separate limitation periods for 30 days and 6 months respectively”¹⁴.

The decision of disciplinary sanctioning should contain the following mentions: the description of the fact that constitutes disciplinary misconduct; the stipulations of the personnel statute, internal regulations or collective labor contract that were violated by the employee; the reasons for which employee's defence was removed or the motives for which the disciplinary inquiry was not effectuated; the reason of law on the basis of which the sanction is applied; the term inside which the employee have the right to appeal against the disciplinary measure; the instance competent to solve the appeal¹⁵. The lack of any of these mentions shall be sanctioned by absolute nullity of the sanctioning decision. Also, there must be a full concordance between the description of the act which constitutes disciplinary offence, specifying the provisions of the personnel statute, internal rules or collective agreement applicable which were violated by the employee and the legal dispositions under which the disciplinary sanction applies. If the indication of the internal Regulation's provisions and the legal basis is not accurate and relevant another unlawful act than that contained in the” description of the misconduct”, which was not committed by the employee, the sanctioning decision is invalid¹⁶.

The Labor Code expressly and limitatively stipulates the sanctions which can be applied by the employer to the employee that committed misconduct. Because of the fact that, being inexhaustible, misconducts can not be enumerated, the Romanian legislator could not have stipulated for which misconduct one or other sanction would be applied. As a result, the employers is the only one that establishes the applicable sanction, taking into consideration a series of general

¹⁴ See Alba Iulia Court of Appeal – Department of labor and social insurance disputes, Decision no. 115 /29.01.2009, in R. C. Radu, *Legislația muncii. Culegere de decizii, spețe și alte aplicații practice*, Craiova, Aius Publishing House, 2012, p. 317.

¹⁵ Article 268 par. 2 of Labor Code.

¹⁶ Alba Iulia Court of Appeal – Department of labor disputes, *Decision no. 1441/ 09.12.2004*, in R. C. Radu, *op. cit.*, p. 312.

criteria such as¹⁷: the circumstances in which was committed the fact; employee's guilt; the previous behaviour of the employee etc.

General disciplinary sanctions are stipulated by article 248 par. 1 of Labor Code:

a) written warning. The written warning will set out the disciplinary problem, the improvement that is required, the timescale and any help that may be given. The individual will be warned that if his conduct does not meet acceptable standards, he will be punished more severely;

b) demotion for a period which can not exceed 60 days. This penalty applies to serious breaches of order and work discipline, for bringing important damages to the employer, for repeated violations committed by the employee, being the harshest sanction after disciplinary dissolution of the individual employment contract given the triple effect of sanctions pursued by the legislator: moral, patrimonial and prohibitive (in terms of professional development). Demotion may not be ordered for a period greater than 60 days or if there is not a lower function in the same occupation;

c) reduction of the salary with 5-10% for 1-3 months. It is a disciplinary measure whose effects are primarily patrimonial;

d) reduction of the basic salary and/or, as the case may be, the management allowance, with 5-10% for 1-3 months. This penalty is similar to the previous one, applying, however, to employees with management functions. It is up to the employer to opt for one of the two forms provided by the legislator: reduction of salary and management allowance or reduction only of management allowance;

e) disciplinary dismissal (disciplinary dissolution of the individual employment contract). This is the most serious disciplinary sanction, which terminates the employment relationship between the employee and the employer. According to article 61 let. a) of Labor Code, an employee will be dismissed either for a gross misconduct or for repeated violations of the rules of labor discipline or those set by individual employment contract, collective agreement or internal rules applicable.

Article 249 expressly stipulates that disciplinary fines are forbidden.

For a single misconduct only one disciplinary sanction can be applied, according to « *non bis in idem* » principle.

Sanctioning decision shall be communicated to the employee within 5 days from the date of issue and shall take effect once communicated (with signature of receipt or, in case of refusal by registered mail at home or residence).

4) *execution of disciplinary sanction* – occurs by communicating and writing the sanction in the Register of employees and in the personnel file (for all sanctions except written warning); by operating the decreases in payroll (in case of demotion and salary reduction); by removal from records and refusal to admit the presence of the sanctioned employee at the workplace (disciplinary dismissal).

¹⁷ Article 266 of *Labor Code*.

APPEAL AGAINST SANCTIONING DECISION

An employee will have the right to appeal against any disciplinary measure imposed by his employer. An employee who wishes to appeal against a disciplinary decision must do so within thirty days¹⁸. The jurisdiction body competent to judge, in the first instance, appeals against decisions of disciplinary sanctioning, is the tribunal. At the appeal any disciplinary penalty imposed will be reviewed by the judicial instance¹⁹.

If it finds a reason of invalidity of the sanctioning decision or of groundlessness/ illegality of the sanction applied, the court has to annul the decision obliging the employer to pay material damages and, where appropriate, moral damages, for damage suffered by the patrimony or the image of the employee.

A highly controversial issue in the specialised literature generated by a gap in the labor legislation, is the possibility of the court to replace the sanction imposed by the employer with an easier one if it finds that the offense committed is not sufficiently serious to justify the sanction it was applied. Over time, both doctrine and practice were inconsistent in cutting this problem. Most authors, as some courts have upheld that, in case of admitting the complaint of the employee, the court is not competent to apply another easier disciplinary sanction. The Supreme Court has considered that the judicial authority seized with the appeal of the employee against a decision of disciplinary dismissal can only validate the sanctioning measure if it turns out thorough and lawful, or to cancel if it was applied based on a unjustified reason, but has no jurisdiction to replace the sanction imposed by the employer with an easier one²⁰. This solution appears to be the correct one in the light of the provisions of art. 247 par. 1 of the Labour Code which enshrines the disciplinary prerogative of the employer in the following terms: "The employer has disciplinary power by having the right to apply, according to the law, disciplinary sanctions to his employees whenever he finds that they committed misconduct". "De lege ferenda" we believe that the legislature

¹⁸ Art. 211 of the *Social Dialogue Law no. 62/2011* contains provisions to the contrary in the sense that unilateral measures of enforcement, amendment, suspension or termination of the individual employment contract, including commitments to pay certain amounts of money may be appealed within 45 calendar days of the date on which the party concerned became aware of the measure ordered. We believe that this is tantamount to an implicit repeal of art. 252, 5 of the *Labour Code*.

¹⁹ See I. Tr. Ștefănescu, *Tratat de dreptul muncii*, Bucharest, Lumina Lex Publishing House, 2003, p. 475; C. Belu, *op. cit.*, p. 236; S. Ghimpu, Al. Țiclea, *Dreptul muncii*, Bucharest, All Beck Publishing House, 2000, vol. II, p. 88; N. Voiculescu, *Dreptul muncii. Reglementări interne și comunitare*, Bucharest, Rosetti Publishing House, 2003, p. 157; Al. Țiclea, A. Popescu, C. Tufan, M. Țichindeal, O. Ținca, *Dreptul muncii*, Bucharest, Editura Rosetti House, 2004, p. 670. See also The Appeal Court, Craiova, Civil Department, *Decision no. 2186/1996*; The Appeal Court, Ploiești, Civil Department, *Decision no. 309/1998*, unpublished.

²⁰ The Supreme Court of Justice, Civil Department, *Decision no. 1319/1992*, in „*Probleme de drept din deciziile Curții Supreme de Justiție (1990-1992)*” (coord. Leonida Pastor), Bucharest, Orizonturi Publishing House, 1993, p. 236.

should devote express this solution; a last argument is art. 250, according to which the employer establishes the applicable disciplinary sanction in relation to the gravity of the disciplinary offense committed by the employee, taking into account the circumstances in which the act was committed, the degree of fault of the employee, the consequences of disciplinary offense, the general behavior of the employee, any disciplinary sanction previously incurred by him.

CANCELLATION (RADIATION) OF DISCIPLINARY SANCTIONS

Sanctions can be radiated, according to the law, within 12 months of the application, if the employee is not bound for another disciplinary sanction within that period. Cancellation of disciplinary sanctions shall be determined by the employer's decision issued in written form²¹.

Since the law makes no distinction between penalties to be radiated or not, we believe that radiation (cancellation) covers all applicable disciplinary sanctions.

In case of disciplinary dissolution of the individual employment contract, the written act of cancellation acknowledgment will be issued by the new employer of the dismissed person.

²¹ B. Vartolomei, *Radierea de drept a sancțiunilor disciplinare*, in "Revista Română de Dreptul Muncii" nr. 8/2011, p. 49.

