MODIFICATION BY THE COURT OF DISCIPLINARY SANCTION APPLIED TO THE EMPLOYEE IN ROMANIAN LABOUR LAW

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Abstract*: High Court of Justice recently ruled that a court has the right to change too drastic punishment inflicted on an employee by another, more appropriate in relation to the offense committed. The Supreme Court ruling clarifies such a legal provision that was applied by different courts: some substituted for disciplinary sanctions if it were disproportionate to the offense employee, while others refused to do so.*
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LEGAL FRAMEWORK

Article 250 of the Labour Code provides that:

"The employer sets the applicable disciplinary sanction to the seriousness of the offense committed by the employee, taking into account:

a) the circumstances in which the act was committed;
b) the degree of employee's fault;
c) the consequences of misbehavior;
d) the general conduct of the employee;
e) previous any disciplinary sanction of the employee.

Article 252 of the Labour Code provides that:

"(1) The employer order the disciplinary sanction by a writing decision in within 30 calendar days from the date of knowledge about disciplinary irregularity, but no later than six months from the date of the irregularity.

(2) Under penalty of nullity, the decision necessarily includes:

- The description of the act constituting misconduct;
- The specification of the provisions from the personal status, internal rules, individual employment contract or collective agreement which have been infringed by the employee;
- the reasons for what the employee's defenses have been removed during disciplinary research or why, as provided in art. 251 para. (3) the research was not performed;
- the law reason under which the sanction applies
- period within which the penalty may be contested;
- competent court where the sanction may be appealed.

Sanctioning decision shall be communicated to the employee within 5 calendar days from the date of issuance and produce effects by the communication.

Communication is handed personally to the employee, with signature of receipt or, in the case of refusal of receipt, by registered letter at the domicile or residence communicated by him.

Sanctioning decision may be appealed to the courts competent by the employee within 30 calendar days from notification. "

According to the provisions of art.247 para.(2) of the Labour Code, the disciplinary liability is drawn through an offense in relation to work and that is a guilty act or omission committed by the employee that he violated the law, internal regulation, individual employment contract or collective applicable agreement, legal orders of the hierarchical bosses. This liability is drawn ope legis when the employee has committed an act of guilt in connection with his work, in violation of legal norms mentioned above.

The prerogative for application of disciplinary sanctions belongs exclusively to the employer.

In this sense, art.248 of the Labour Code provide that:

"(1) Disciplinary sanction which may be applied by the employer, if the employee commits misconduct is:

a) written warning;

b) demotion, with the wage corresponding to the position in which demotion for a period not exceeding 60 days;

c) reduction in base salary for a period of 1-3 months with 5-10%;

d) reduction in base salary and / or, where appropriate, and management allowance for a period of 1-3 months with 5-10%;

e) disciplinary termination of the individual labor contract.

(2) If by professional regulations approved by a special law, it sets a new sanction regime, it will be applied to this.

(3) Disciplinary sanction is excluded within 12 months from the application, if the employee is not bound for another disciplinary sanction within that period. The cancellation of disciplinary sanctions shall be determined by the employer's decision issued in writing.

At the same time, the criteria for deciding on the sanctions are provided for by art.250 of the Labor Code, shown in the previous.

The sanctioning decision may be appealed to the competent courts by the employee within 30 calendar days from notification, in accordance with art.252 para.(5) of the Labour Code

DOCTRINE

Any activity carried out in a collective framework, which aims to achieve a particular purpose needs two important things: organization and compliance with a certain discipline that is provided by a complex of rules under which to conduct business as and compliance with these rules.

To understand the definition of disciplinary liability is necessary to define the notion of labor discipline, as major social competence, is one of the fundamentals for organizing and conducting effective work processes in all sectors and all departments of activity.

Over time, in the specialty literature, several definitions were formulated for this. So:

- "legal way, their own labor law to ensure labor discipline" (Stefanescu, 2007)
- "that form of judicial responsibility, specific to the labor law, which consists of sanctioning violation charged with guilt by any employee, regardless of job title or that the handle of the obligations under labor contract, including the rules of conduct"(Ghimpu & Ticlea, 2000)
- "consists of a set of legal rules who sanction misbehavior" (Popa , 2004)
- "violation by public service obligation to undertake their disciplinary responsibility and further this is called deviations from office and punished with reprimand, warning, reduction in salary, demotion, suspension from office, disciplinary transfer, dismissal, etc." (Athanasiu, 2007)

Disciplinary liability has the following characteristic features (Ghimpu & Ticlea, Stefanescu, Sasu):

- It has a contractual nature, only because individual labor contract conclusion determines a hierarchical subordination and thus a legal basis for disciplinary action by the governing bodies;
- It translates into a material or moral constraint;
- exercise a threefold function: sanctions, preventive and education, leading to defending the internal order of unity;
- Has strictly personal character, not being admitted for another person act and no transmission to the heirs of employee (in case of civil liability);
- Presents a lower social danger that other facts that affect the general interests (offenses and penalties);
- It is a form of liability, independent of all other forms of legal liability.

The Labour Code (Article 247, paragraph 1) defines the disciplinary liability as powers of the employer who has the right to apply the law, disciplinary sanctions whenever its employees found that they have committed a disciplinary offense and in paragraph 2 continues: Deviation discipline is an act in relation to work and which consist of a culpable action or inaction committed by the employee that he violated legal standards, labor contract or collective labor agreement applicable, orders and legal provisions of hierarchical leaders.

For disciplinary action to be triggered, it is necessary to have met a number of its defining elements:

- Unlawful conduct - conduct that ignores legal provision which violates work duties (eg rules on protection, hygiene and safety at work in the unit);
- Guilt - action involves the deliberate nature of the subject by risk taking behavior resulting from wrong. This may be intentional, direct or indirect, or fault, or negligence easily.

- harmful result: order perturbation its disciplinary unit / image and prestige affect the employer or its products
- Causal link - the causal link between the act and the result of its perpetration.

Although the Labour Code does not make any reference about violating rules of behavior in the unit, we believe that, on the one hand, nothing prevents the parties to provide such rules by internal rules or applicable collective labor contract and thus their failure be the subject of disciplinary proceedings, and on the other hand, Article 39 para. (2). g) of the Labor Code provides for the possibility of establishing other obligations to the employee by law or applicable collective agreement, whose violation is, naturally, a disciplinary offence.

Disciplinary irregularity is necessary and sufficient condition, under single disciplinary liability. Disciplinary violations must meet a number of items, cumulative (taken in criminal matters) to lead to employee disciplinary liability:

- object, namely social values protected by labor discipline;
- subject, which is always a person employed by an employer;
- objective side, which always involves a material element in terms of action or inaction, that is a crime committed suddenly or continue as a result dangerous by damaging the social value protected by violating labor discipline that work and a causal link between the act and dangerous consequences;
- subjective side (the employee's guilt) in this matter has no relevance if the act is committed intentionally or by mistake, the guilt is assessed on a case by case basis depending on a number of factors such as professional training of the employee and / or his experience so that the degree of guilt may have relevance in individualizing sanctions, lack of guilt leads to not meeting disciplinary elements to intervene, if however, the employer has the employee disciplinary sanctions, the measure is illegal.

Into the Labour Code are not listed expressly the misbehaviors (Law on the Statute of civil servants No.188/1999 include limiting the actions that constitute misconduct[)]. According to Art.247, paragraph (2) misbehavior is an act "in connection with work", making it possible to discipline the employee sanction for an act in connection with his work, committed outside the unit during or outside of so, as long as the employment relationship with the employer affected by damage image, reputation or if the employer violated certain obligations expressly set (eg, the obligation of fidelity to the employer).

In Article 249, the Labour law clearly states that the same disciplinary may apply to only one penalty and disciplinary fines as punishment labor discipline prohibited. All the regulations in Article 248 stipulate that it radiates as a disciplinary sanction within 12 months of the application, if the employee is not bound for another disciplinary action within that period. Cancellation of disciplinary sanctions shall be determined by the employer's decision issued in writing.

In the penalties, the employer has the obligation to establish the applicable sanction in relation to the offense committed by the employee disciplinary, taking into account the following:

- the circumstances in which the offense was committed;

- the degree of guilt of the employee;
- the consequences of misbehavior;
- general behavior of the employee;
- any previous disciplinary sanctions suffered by the employee.

To apply a sanction, the employer must make a prior disciplinary research (Article 251), where the employee will be convened in writing by the person authorized by the employer to carry out research, specifying the subject, date, time and place of the meeting and if it does not show undisclosed employer may penalize an objective and in his absence, without the effects of disciplinary investigation (Article 251, paragraph 2).

If he shows on in the prior disciplinary research employee is entitled to formulate and sustain any defense in his favor and give the person empowered to carry out all the research evidence and motivations as they consider necessary, and the right to be assisted in request by a representative of the union whose member is (Article 251, paragraph 4). After making a decision it is communicated in writing within 30 calendar days from the date of taking the cunoatinta about committing a disciplinary offense, but no later than six months from the date of the deed (Article 252).

The decision must contain:

- description of the act that constitutes a disciplinary offense;
- specifying the provisions of personal status, bylaw individual employment contract or collective agreement applicable to the employee have been violated;
- the reasons why defenses have been removed by the employee during the disciplinary investigation prior or why, as provided in art. 251 para. (3), no research has been carried out, under the law under which disciplinary sanctions applied;
- period the sanction may be appealed;
- competent court where the penalty can be appealed.

Sanctioning decision shall be communicated to the employee within 5 calendar days from the date of issue and shall be effective from the date of communication. Communication surrenders personal to the employee personnel with signature receipt or, in case of refusal of receipt, by registered mail, the domicile or residence of his submissions. The employee has the right to appeal the decision to the competent courts within 30 calendar days from the date of communication.

CASE LAW

Approach 1: Punishment should be replaced

Some courts have upheld complaints made by employees, have canceled part of the disciplinary prepared by the employer and replaced it with the punishment inflicted by another, determined according to the degree of guilt of the offense and the employee's actual danger (Appeal Court Alba and Bacau).

The delivery of this solution has been considered the theory that the employer's disciplinary prerogative is not absolute discretionary nature of the court to remove the prerogative to check how the employer applied the criteria of individuation and establishing disciplinary sanction. Such intervention of the court of justice you purpose of

effectively solving the case before it because the court can not be limited to a determination of the legality or illegality of the act or fact disputed legal.

Approach 2: The decision to sanction may be canceled entirely, but the penalty should not be replaced

On the other hand, there were instances that have found that application of disciplinary sanctions is the exclusive prerogative of the employer that he has the prerogative disciplinary, having the power to individualize applicable disciplinary sanction against the seriousness of the disciplinary, taking into account the circumstances in which the offense was committed, the degree of guilt, the consequences of misbehavior, the general behavior of the employee and any penalties incurred by it (Appeal Court Suceava).

These courts have reasoned opinion arguing that the sanction may not attribute court, since it can only exercise control of legality and rationality of the act of disciplining.

"To the extent that after the control court finds that the employer has not complied with the proportion between the act committed by the employee and the sanction which he applied, it must be concluded disciplinary sanction illegality measure in whole or in consequence of the cancellation decision and not reindividualizarii sanction. If they agree to the contrary, the court would get to replace employer, which can not be accepted," claimed the courts.

Approach 3: The penalty should not be replaced. Otherwise, the court violates a principle of operation

In a third approach to jurisprudence, the opinion is that if they replace it with another punishment, the court would violate the principle of availability, since it would decide on something that is not asked (Appeal Court Craiova).

According to the principle of availability, the court must decide only on people who have been sued and the object of the case established by the applicant in the application for summons, not having the right to decide on any matter under discussion by the court ex officio, without this being requested by any of the parties.

And "the top" there are different interpretations of the legal regulations. Interpretation of legal provisions is not unitary even when referring to the two institutions has initiated appeals on points of law.

The Managing Board of the Bucharest Court of Appeal considers that an appeal court invested with the decision to sanction only verify compliance by the employer with the legal provisions on the procedure of applying disciplinary sanctions and analyze the legality and validity of the contested decision, without being able substitute the individualization of employer sanctions, the result of applying a less drastic sanctions.

On the other hand, the Attorney General of Romania considers that, in solving such a work conflict, if the court finds that the punishment is unjustified in relation to the offense, it must partially cancel and replace the decision to sanction one more right. By doing so, courts do not turn into disciplinary bodies, because they do not default administrative research to establish legal acts and facts that was violated labor discipline,

just as censors on sanctions already applied by the employer, providing a framework for the protection of employees in its relations with the employer, with the principle of proportionality", says attorney general.

THE JURISPRUDENCE OF HIGH COURT

Decision Nr.11/2013, published in Official Gazette no. 460 of 25 July 2013, allowed the appeals on points of law submitted to the High Court of Cassation and Justice of the Appeals Court and Prosecutor's Office High Court, which notes that the two institutions is unitary judicial practice regarding disciplinary replacement by the courts that have judged the appeals filed by employees against their disciplinary sanctions.

The High Court stated that "The court competent to hear the appeal against the employee disciplinary sanction imposed by the employer, finding that it is wrong individualized, one can substitute another punishment.

The High Court decision is mandatory, according to art.517 para.4 of the Code of Civil Procedure. According to the legal provisions mentioned, the decision pronounced by the courts necessarily be applied from the date on which it was published in the Official Gazette.

In resolving the appeal brought against the decision of the disciplinary sanction, the courts have jurisdiction to review not only the legality, but also the validity and enforcement measure issued by the employer, in accordance with art.269 para.(1) of the Labour Code, in which case they check how the employer applied the criteria for individuation and establishing disciplinary sanction.

This attribute of the court is enshrined the principle of fact-finding in civil process, enacted by art.22 of the Code of Civil Procedure (former art.129 para.5 of the former Code of Civil Procedure).

In relation to the issue that was before the appeals on points of law of the case before, the High Court observed that labor discipline is an objective condition, necessary and indispensable conduct of business of each employee. The need to respect a certain order, some rules to coordinate the conduct of individuals to achieve a common goal, it is necessary to force the evidence, reasoning applies to any human activity carried out collectively.

Highlighting the importance of the duty to observe labor discipline, the Labour Code states that a distinct obligation to employees. This obligation is the right of the employer as provided in art.247 para.(1) to apply disciplinary sanctions whenever employees find that they commit misconduct.

Under this principle, an objective means of labor discipline a system of rules that governs the behavior of employees in the process of collective work.

From the subjective point of view of the employee, labor discipline is a legal obligation synthesis that incorporates and summarizes all obligations assumed by the conclusion of the individual employment contract.

However, this obligation is contractual in nature, because, although it is provided generic law, arises specifically in charge of a person determined by its inclusion in the working of a unit, following the conclusion of the contract.

The employment contract has the effect of hierarchical subordination, objective condition of the organization and work efficiency. The direct link between individual employment contract and disciplinary determines both persons entitled to apply disciplinary measures and the conditions and limits its application.

In this context, the legislative framework highlighted, the High Court held that, being invested with prosecution appeal against the decision to sanction issued by the employer, the court has to verify the legality and soundness of the measure, devolution exercising control of a judicial nature. To appreciate the seriousness of misbehavior and how individualization of the penalty in relation to the criteria established by the legislature specifically, the court has not only the possibility of appreciating the evidence adduced during the preliminary disciplinary research conducted under the empire of art. 251 of the Labor Code and allowing the direct administration of an additional evidence.

In these circumstances, if it finds that the disciplinary sanction is unjustified in relation to the misconduct disciplinary, court will accept the appeal, the partial annulment of the contested decision and the penalty imposed by the employer to replace another measure of punishment.

In doing so, the courts do not turn into disciplinary bodies, because they do not default administrative investigations to establish the juridical acts and deeds by which violated labor discipline, but censors extent already applied sanctions for employers, providing a framework protection of the employee in his relations with the employer, with the principle of proportionality, according to which any action taken must be appropriate, necessary and proper purpose.

This is not court interference in disciplinary prerogative of the employer, as his right to sanction misbehavior has ceased with the sanction. However, after this time, become effective powers of the court to exercise judicial review of the lawfulness and merits of the decision sanctioning control includes the right jurisdiction to decide its own solution.

In fact, no court is applying sanction but is invested in the employee's complaint, the court only changes partly contested decision, holding that in terms of individualization, and respectively dosage sanction decision is unlawful under the provisions of art.250 of the Labor Code, which establishes mandatory criteria that the employer must consider in determining cumulative disciplinary sanction.

In this context, it notes that the disciplinary prerogative of the employer cannot be one absolute discretion, any disciplinary sanctions may be applied only to the statutory provisions and, in any case, it cannot legally remove the prerogative court hear a labor dispute on the legality and validity of a disciplinary action to check and how the employer has applied these criteria in relation to the offense committed by the employee.

Since, in accordance with art.252 para. (5) of the Labour Code, the decision may be appealed by the employee labor jurisdiction cannot be reduced in this case just to check the formal aspects of the employer's unilateral act and respect for the disciplinary proceedings, the essence of judicial review is just analyzing the individualizing disciplinary measure.

Therefore, replacing the sanction measure subsumes analysis merits sanction decision.

Per a contrario, if the court would not recognize the plenitude of power, would mean that the wrongful act of the employee disciplinary remain unpunished, which would be unthinkable in terms of harm to the rights and interests of the employer, which is prohibited from applying other penalty for the same offense, according to art.249 para.(2) of the Labour Code.

On the other hand, the employee free access to court would be illusory if the court's role would be limited to the legality of disciplinary measure without censorship circumstances in which it was taken that penalty, leaving the employee free choice employer in establishing and applying criteria individualization of the measure.

In the present case the reasoning is fully applicable to the High Court of Cassation and Justice made the decision no. 16/2012, published in Official Gazette of Romania, Part I, no. 817 of 5 December 2012 on the existence of reasons of analogy on how the legislature intended to regulate under special laws, the issue raised with respect to how the courts have resolved appeals against disciplinary action taken employer under special laws.

Thus, art.80 of Law no.188/1999 on the Statute of civil servants, republished, with subsequent amendments, provides that "public servant dissatisfied with the sanction imposed may appeal administrative court, requesting the cancellation or modification, if appropriate, order or sanction."

Likewise, the provisions of art.89 para.(4) of Law no. 567/2004 on the status of specialized auxiliary personnel of courts and prosecutors' offices attached to them and the staff who work at the National Institute of Forensic Expertise, as amended and supplemented, states: "The decision to sanction may be appealed within 30 days of notification, the labor and social security tribunal in whose jurisdiction the appellant resides. "

Finally, the provisions of art.51 para.(3) of Law no.317/2004 on the Superior Council of Magistracy, republished, as amended, provides that "against the decisions referred to in paragraph (1) may exercise the appeal within 15 days of notification by the judge or prosecutor sanctioned or, where appropriate, Judicial Inspection or disciplinary action by other holders who exercised it. Jurisdiction of the appeal the Panel of five judges of the High Court of Cassation and Justice ... ".

This solution is consistent with the jurisprudence of constitutional litigation has held that "'penalty decision may be challenged in the courts competent person", in this way the appellant being able to enjoy all the procedural safeguards provided by law, the taking of evidence required before courts which resolve these claims "(Decision no. 63 of 17 February 2004 the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 211 of 10 March 2004).

High Court holds that this solution is consistent with the European Court of Human Rights on the implementation of Article 6 para. 1 of the European Convention on Human Rights on effective access to a fair trial and the right to a fair trial, the positive obligation of States under the procedures relating to private law disputes worn either between individuals, or between an individual and the state, through the organs or institutions.

European Court of Human Rights in examining compliance with the effect of access to a higher court to a litigant, has held that the protection of individual rights is "protection of rights practical and effective, not theoretical and illusory" (Airey v. Ireland case) and the positive obligation of signatories is an obligation to do traditionally associated with economic and social rights, being the "adopt reasonable and appropriate steps to protect the rights of the individual incumbent" (Lopez Ostra vs. Spain case).

Procedural aspect, the positive obligation of signatories includes the obligation to ensure a fair judicial procedure enabling cutting any dispute between private parties (Case Sovtransavto Holding v. Ukraine).

Moreover, national legislation of the signatory states should not contain provisions that violate the rights protected by the European Convention on Human Rights or allow third parties conduct contrary to the Convention, which the literature has called "horizontal effect" of the Convention (Decision Ghibuşi against Romania).

The Court also held that the scope of art. 6 of the Convention include labor disputes, including the so-called contentious disciplinary disciplinary courts and courts lays the power to conduct a proper examination of the submissions, arguments and evidence (Case Buzescu against Romania).

CONCLUSIONS

Doing the replacement of the penalty, the court does not Give Anything else or more than Requested, but restores the balance between the employee's wrongful conduct and the sanction imposed by the employer disproportionate.

Although all these special laws was envisaged court hearing an appeal against the decision to take disciplinary action against the employee to replace disciplinary sanction by the employer, the practice courts is uniform, meaning that when the penalty not applied the principle of proportionality, the solutions are given individualizer the penalty.

Clearly, replacing the penalty proceeding, the courts will application of non reformatio in pejus principle enshrined in the provisions of art.481 and art.502 of the Code of Civil Procedure.

In doing so, the court shall balance the relationship between the parties, in the sense that the employee did not create a situation more difficult than it was previously challenged disciplinary measure, but also ensures achieving the purpose of disciplinary liability, meaning that if it recognizes only right to cancel the sanction of the court employee would remain unpunished, non apply a penalty for the same offense.

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