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Considerations on the mechanism used for applying disciplinary sanctions

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Abstract. The essential role of the disciplinary sanctions is similar to that of the criminal sanctions and consists in the future prevention of facts that could affect the labor relations, which result from the individual employment contract concluded between the employer and the employee according to the law. In the current labor law, the legislator left within the employer the power to sanction the employee in the situation in which he violates the discipline of work, but this possibility is not a non-binding one, but one in strict compliance with the legislation in force. For the correct application of the disciplinary sanctions, that is to say, without prejudice to the rights of the employee, no disciplinary sanction, except the written warning, can be disposed of before carrying out the preliminary disciplinary investigation. Once the employee's guilt has been ascertained and after carrying out the preliminary investigation in accordance with the imposed procedures, the employer is able to establish the disciplinary sanction taking into account the following legal criteria, such as the circumstances in which the act was committed, the degree of the employee's guilt and, not in last, the general behavior at work. The disciplinary sanction, in general, in order to be implemented by the employer, must be outlined by means of a written one, respectively by a sanctioning decision that is communicated to the employee so that he is aware its provisions, and in certain cases it can challenge an eventual abusive behavior of the employer. Through this administrative instrument there are clearly described the deviations of the employee from the labor norms.

Keywords. disciplinary sanctions, disciplinary investigation, sanction decision, authorized bodies.

1. Introduction

It should be emphasized that the parties of the employment relationship are not on equal footing for different economic reasons, and the main objective of labor law is to guarantee the implementation of all rights arising from the individual employment contract, an instrument which the employer must respect. In the literature it has been stated that the task of labor law is to protect the employee who is in a subordinated position to the employer, so labor law was created in order to generate clear mechanisms to ensure respect for an aspect of individual freedom. [1]

In order to apply the disciplinary sanctions in a correct and coherent way, the legislator stipulated that the preliminary disciplinary investigation has a major implication in the prevention of abusive, illegal or unreasonable measures ordered by the employer, who can take advantage of the inequality of the parties in the labor relations. A central role in the application

of the disciplinary sanctions is the terms of their application and in accordance with art. 252 para. 1 of the Labor Code, „the employer disposes the application of the disciplinary sanction by a decision issued in written form, within 30 calendar days from the date of taking knowledge about committing the disciplinary deviation, but not later than 6 months from the date of the fact commission”.

A particular situation regarding the terms of application of the disciplinary sanctions is that of the civil servants, and in accordance with the provisions of art. 77 paragraph 5 of Law no. 188 / 1999:“disciplinary sanctions shall be applied within a maximum of 1 year from the date of the notification of the disciplinary commission, regarding the commission of the disciplinary infringement, but not later than 2 years from the date of the disciplinary infringement”.

2.The competent bodies to apply disciplinary sanctions

As regards the competence of the bodies in applying the disciplinary sanctions of the employees who deviate from the normal conduct of the labor discipline, the current Labor Code makes no reference in this respect, the only mention being that it is within the employer's discretion to apply these coercive measures.

Considering the ones mentioned above, in principle, in the specialized literature it was appreciated that „the Labor Code does not make any clarification, showing that the disciplinary prerogative belongs to the employer, without distinguishing between natural and legal persons, the latter having collective or one-person management bodies. From the point of view of the disciplinary responsibility, the pre-eminent position is held by the unipersonal bodies (director, general director, president, administrator), which in the legislator's opinion is the competent body to be notified with the commission of a disciplinary offense!' [2]

The legal institution of the delegation may also operate in the case of the application of disciplinary sanctions, in the sense that the competent body of the employer may empower a subordinate to apply any disciplinary sanction, even the harshest, respectively dismissal, and not only the easier ones such as warning or diminution of basic salary.

In practice, the most common situations in which the delegation of disciplinary attributions operate are as follows: the general director may appoint a general deputy director, a deputy director, a chairman of the board of directors or an executive director, including the one responsible for the human resources department. In order to produce effects, the delegation of disciplinary attributions must meet several conditions:

- to express the will of the employer and to regard only attributions that are not legally recognized to be exclusive to the employer;
- to be express, or not to result from the very nature of the delegate's work;
- to be precise (in the sense that the general tasks of organization and control, established by the individual employment contract do not constitute, in the absence of the express delegation, the prerogative of the one in case to apply disciplinary sanctions);
- to be effective, which means that the employer (more precisely the legal representative) takes all the measures that allow the person empowered to actually exercise the attributions entrusted to him;
- to be dated;
- to be accepted, because, on the one hand, it refers to additional tasks compared to the current ones, specific to the function to the one in question, and on the other hand, it may incur the responsibility of the delegate.

3. The preliminary disciplinary investigation - pillar of the disciplinary action

In order to limit a bad faith behavior manifested by the employer, the labor law establishes that the employee can only be sanctioned after a preliminary investigation has been completed.

In the doctrine it was pointed out that the stage of the disciplinary investigation "must be the result of an analysis undertaken by the employer called legally and in practice the disciplinary investigation (inquiry)." [3]

As I mentioned before, no measure, except the written warning, can be disposed of before carrying out a preliminary disciplinary investigation. This rule "has the character of a protective measure, in order to prevent the application of unjustified disciplinary sanctions." [4]

Also, the Romanian Constitutional Court has ruled in its jurisprudence "that the legal labor relations must be carried out in a legal framework, in order to be able to respect the rights and duties as well as the legitimate interests of both parties. In this framework, the disciplinary investigation prior to the application of the sanction largely contributes to the prevention of abusive, illegal or unreasonable measures, ordered by the employer, taking advantage of its dominant situation ..."

The preliminary research procedure involves several obligatory stages:

- informing the employer that a certain employee has committed a disciplinary offense;
- the existence of the manifestation from the employer materialized in a disposition to carry out the investigations addressed to the person or the commission specially empowered by him;
- convocation in writing of the employee for carrying out the investigation;
- the meeting, namely the discussion between the commission and the employee concerned, with the assurance of the right of defense;
- finalizing the research through a report, a signed statement, which will be submitted to the employer.

Further, the employer, through his / her legal representative, having been notified of the commission of the deviation, will order the disciplinary investigation carried out by a commission set up for this purpose. [5] The disciplinary investigation procedure presupposes the presence of the employee before the specific commission. According to the provisions of art. 251 para. 4 of the Labor Code, the employee, taking into account the deed that is imputed to him from the summoner, on the occasion of the investigation, has the possibility to defend himself by presenting the evidence and the reasons he considers necessary. The evidence proposed by the employee before the commission may consist of documents, such as medical certificates from which his incapacity to work results, other documents to justify the reason why, for example, he was absent or late from the work program. Also, in principle, the employee can use in his defense the testimony of some of his colleagues to combat the accusations brought to him.

The presence of the investigated employee in front of the commission, the discussions that take place, the evidence administered and the motivations brought must be able to clarify the situation, to establish the guilt or innocence of the person in question. [6] It was pointed out that "the activity of disciplinary misconduct requires the establishment of the following aspects: the circumstances in which the deed was committed; the degree of guilt of the employee; the consequences of disciplinary misconduct; the general behavior in the employee's service; any penalties previously applied." [7]

Article 251 paragraph 3 of the Labor Code stipulates that the absence of the employee at the summons made by the employer without any objective reason gives the right to order the sanction without carrying out the preliminary disciplinary investigation.

Carrying out the preliminary investigation and implicitly summoning the employee are obligations established with regard to the employer. Therefore, there is no obligation to require

the employee to participate in the summons, but rather it is his right to attend this summons to make a concrete and effective defense to combat the guilt.

In the specialized literature, it was clearly emphasized that "drafting in imperative terms the necessity of listening to the accused and verifying his claims in defense, prior to the application of the sanction, shows that the legislator understood to make respecting the right to defense a condition of validity of the sanctioning act itself." [8]

We agree with the opinion that the failure to be present at the summons cannot constitute a distinct disciplinary sanction, but it presupposes that the employee thus understood to waive the right of defense, in front of the employer, as recognized by law. [9]

There are also practical situations in which the employee's failure to appear before the disciplinary commission is generated by certain objective reasons, such as temporary incapacity for work, and thus it will not be possible to sanction the one in question. It was found that during the period of this incapacity, the individual employment contract being suspended, the deadlines for applying the disciplinary sanction are automatically suspended.[10]

The doctrine has shown that the employer has the right to suspend the individual employment contract during the disciplinary investigation.[11]

In conclusion, this prerogative regarding the suspension of disciplinary investigation is not unlimited in time, but can be disposed of only as long as the investigation lasts and cannot be extended beyond this duration.

At the end of the preliminary investigation, a report will be drawn up, or as the case may be, a signed statement by the persons empowered to carry it out, stating its results, including, as the case may be, the unjustified refusal of the employee to present himself or to motivate his position, or motivation for which his defenses were not taken into account, the sanction proposal, the sanction that can be applied. In the case of a dispute, the employer must submit to the case file the proof of having performed the preliminary disciplinary procedure. Failure to fulfill this obligation leads to the presumption that this procedure has not been fulfilled.

4.Mechanism of individualization of disciplinary sanctions

Once the employee's guilt has been found, after carrying out the preliminary investigation, the employer will establish the disciplinary sanction. Thus, the employer applies the disciplinary sanction considering the following legal criteria provided in art. 250 of the Labor Code:

- a) The circumstances in which the deed was committed;
- b) The degree of guilt of the employee;
- c) The consequences of disciplinary misconduct;
- d) General behavior at work;
- e) Any disciplinary sanctions previously suffered by him.

The coherent establishment and application of the disciplinary sanctions cannot take place in an arbitrary way, but the criteria imposed by the labor legislation must be considered compulsorily. [12]

Failure to take these criteria into account, according to the Labor Code, automatically leads to an unlawful and illegal dismissal decision.

Therefore, in all cases, the competent body to apply the sanction, will have to pay full attention to its individualization, its dosage, taking into account the criteria provided by law, because only a fair correlation of the sanction with the gravity of the act is of nature to ensure the accomplishment of the educational and preventive role of the responsibility."[13]

The disciplinary sanctions are applied gradually, depending on the deed committed and the degree of guilt of the employee as well as the possible disciplinary sanctions previously disposed. A central place in the mechanism for applying sanctions is also the level of blame. It

should be emphasized that if the deed was involuntarily committed and had no harmful consequences for the employer, and the employee's conduct was one of good faith, then the sanction will be canceled.[14]

In the case of committing a deviation, the employer must take into account the prohibition imposed by art. 249 para. 2 of the Labor Code which stipulates that for a single disciplinary offense there cannot be applied more than one sanction. Therefore, the guilty employee can be applied a single sanction, with moral or material character, according to the gravity of the deviation committed, even if by the committed act, its author would violate several mandatory rules of conduct, transposed into one or more obligations that he has at the workplace.[15]

Regarding the deadlines for applying the disciplinary sanctions, art. 252 para. 1 of the Labor Code regulates two different terms within which the employer will be able to sanction the guilty employees who violate the main rules and regulations arising from the labor discipline - one of 30 calendar days and another one of 6 months.

The term indicated by the labor law, respectively of 30 days, starts from the date when the legal person employer's representative is able to apply disciplinary sanctions or the natural person employer becomes aware about committing the disciplinary deviation and not from the date of committing the act contrary to the labor norms.[16]

The second term, of 6 months, starts from an objective moment, from the date of committing the disciplinary deviation, and its calculation is made in accordance with the provisions of the Romanian Code of civil procedure, that is, it will end on the corresponding day of the last month.

5. The sanction decision - instrument for implementing the disciplinary sanction

According to art. 252 para. 2 of the Labor Code, under the sanction of absolute nullity, the sanctioning decision must contain: a) a description of the fact that constitutes a disciplinary violation; b) the stipulation of the provisions of the personnel status, the internal regulation, individual labor contract or the applicable collective labor contract, which were violated by the employee; c) the reasons why the defenses formulated by the employee were not taken into consideration during the preliminary disciplinary investigation or the reasons why the investigation was not carried out; d) the legal basis on which the disciplinary sanction is applied; e) the term in which the sanction can be contested f) the competent court to which the sanction can be contested.

All these elements listed above, which the legislator stipulates under the sanction of absolute nullity, which "must necessarily contain the decision to apply the disciplinary sentence, have the role, first of all, to inform the employee fully and concretely about the facts, the reasons and the legal grounds for which the sanction is applied, including aspects regarding the remedies and the terms in which the employee has the right to ascertain the soundness and the legality of the measures disposed of by the unilateral will of the employer." [17]

In order to produce effects, the sanctioning decision must be communicated to the employee, in this sense the labor legislation providing for an upper limit of the term, being of no more than 5 calendar days from the date of its issuance.

6. Conclusions

In conclusion, the mechanism for applying disciplinary sanctions is a very clear one and must be strictly adhered to by the employer of the unit in order not to undermine the fundamental rights of the employee. One must always bear in mind that the role of the disciplinary investigation is not to ascertain the commission of the deviation, but to allow the employee to exercise his right to defense against the accusation brought to him.

In this sense, also the provision from para. 4 in art. 251 of the Labor Code mentions that "during the preliminary disciplinary investigation the employee has the right to formulate and to support all the defenses in his favor and to offer to the person empowered to carry out the investigation all the proofs and motifs that he considers necessary...."

We consider that the employee enjoys the presumption of innocence until the completion of the preliminary procedure as in the case of any criminal case. In the absence of the investigation of the disciplinary deviation, the court "will establish the nullity of the decision to terminate the employment contract, and, as a consequence, it will approve the contest and order the reintegration into office." [18]

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