DISPUTES CONCERNING THE RESOLUTION OF LABOR CONFLICTS. COURT MAY REPLACE DISCIPLINARY SANCTION APPLIED BY EMPLOYER

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Abstract: *Disciplinary misconduct is an act related to work and consists of an act or inaction committed with guilt by the employee, in which he violated the legal rules, the internal regulations, the individual employment contract or the applicable collective bargaining agreement, orders and provisions of hierarchical leaders. Work discipline is an objective, necessary and indispensable condition for the activity of each employer. The need to observe a certain order, of some rules that coordinate the conduct of individuals, in order to achieve the common goal, is imposed by the force of evidence, reasoning valid for any human activity carried out in the collective. Based on this principle, work discipline objectively means a system of norms that regulate the behavior of employees in the development of the collective work process. From the subjective point of view, of the employee, the work discipline constitutes a legal obligation of synthesis, which includes and summarizes the totality of the obligations assumed by concluding the individual employment contract.*

Keywords: *disciplinary violation, work discipline, labor dispute.*
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1. Introduction

In the interpretation and application of art. 252 para. (1) of the Labor Code, the employer orders the application of the disciplinary sanction by a decision issued in writing, within 30 calendar days from the date of notification of the disciplinary violation, but not later than 6 months from the date of the commission the date from which the period of 30 calendar days for the application of the disciplinary sanction begins to run is the date of registration of the final report of the preliminary disciplinary investigation at the registry of the unit (Decision of the High Court of Cassation and Justice no. 16/2012 in the file no. 15/2012 was published in the Official Gazette. no. 817/5 December 2012).

Under the sanction of absolute nullity, the decision must include:

a) the description of the deed that constitutes a disciplinary violation;

b) specifying the provisions of the staff statute, the internal regulations, the individual employment contract or the applicable collective labor contract that have been violated by the employee;

c) the reasons for which the defenses formulated by the employee during the preliminary disciplinary investigation were removed or the reasons for which, under the conditions of art.251 par.3, the investigation was not carried out (Art. 251 of the Labor Code)[1];

d) the legal basis on which the disciplinary sanction is applied;

[1] Under the sanction of absolute nullity, no measure, except the one provided in art. 248 para. (1) lit. a), cannot be ordered before carrying out a preliminary disciplinary investigation. In order to carry out the disciplinary investigation, the employer will appoint a person or will establish a commission or will call on the services of an external consultant specialized in the labor legislation, which he / she will empower in this respect. In order to carry out the preliminary disciplinary investigation, the employee will be summoned in writing by the designated person, by the chairman of the commission or by the external consultant, empowered, specifying the object, date, time and place of the meeting. Failure to present the employee at the summons made under the conditions provided in par. (2) without an objective reason gives the employer the right to order the sanction, without carrying out the preliminary disciplinary investigation. During the preliminary disciplinary investigation, the employee has the right to formulate and support all defenses in his favor and to offer the commission or the person authorized to carry out the investigation all the evidence and motivations he deems necessary, as well as the right to be assisted, at his request. to an external consultant specializing in labor law or by a representative of the trade union of which he is a member.

e) the term in which the sanction can be challenged;
f) the competent court where the sanction can be challenged.

The sanctioning decision is communicated to the employee within 5 calendar days from the date of issue and takes effect from the date of communication.

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

According to the provisions of art. 252 paragraph 5 of the Labor Code, it is provided that the sanctioning decision may be challenged by the employee at the competent courts within 30 calendar days from the date of communication (Decision no. 11/2013 RIL pronounced by the HCCJ published in the Official Gazette no. 460 / 25.07.2013)[1].

According to art.269 of the Labor Code, the judgment of labor disputes is within the competence of the courts, established according to the law (Law no. 53/2003 Labor Code, republished in the Official Gazette no. 345 / 18.05.2011, amended by law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, published in M.Of.nr.365 / 30.05.2012, by Law no.2 / 2013 published in M.Of.nr.89 / 12.02.2013, amended by Law 187/2012 for the implementation of the Criminal Code, published in M .Off.nr.757 / 12.11.2012, by Law no.255 / 2013 for the implementation of the Code of Criminal Procedure, published in the Official Gazette no.55 / 14.08.2013, amended by Law no.12 / 2015 published in the Official Gazette no. 52 / 22.01.2015).

Requests relating to the above cases shall be addressed to the competent court in whose constituency the applicant has his domicile or residence or, as the case may be, his seat. If the conditions laid down in the Code of Civil Procedure for active procedural co-participation (Art.59 of the Code of Civil Procedure, republished in the Official Gazette no.247 / 10.04.2015)[2] are met, the application may be made to the court competent for any of the applicants (Law no.76 / 2012 for the implementation of the Code of Civil Procedure, published in the Official Gazette no.365 / 15.07.2012, amended by GEO no.44 / 2012 published in the Official Gazette no.606 / 23.08. 2012, approved by Law no.206 / 2012 published in the Official Gazette no.762 / 03.11.2012). According to the provisions of art. 208 of Law no. 62/2011, individual labor disputes are resolved in the first instance by the court. According to art.210 of Law no.62 / 2011, the requests regarding the settlement of individual labor disputes are addressed to the court in whose constituency the plaintiff has his domicile or place of work (Law no. 62/2011 on social dialogue, republished in Official Gazette no. 625 / 31.08.2012 amended by Law no. 2/2013 published in Official Gazette no. 89 / 12.02.2013).

From the analysis of the legal texts it results that the courts competent to judge requests regarding the settlement of individual labor disputes are the Tribunals.

Emphasizing the importance of the employees' duty to respect the work discipline, the Labor Code stipulates in art.39 paragraph 2 letter b) the obligation to respect the work discipline this being a distinct obligation of the employees. This obligation corresponds to

[1] It admits the appeals in the interest of the law formulated by the Management Board of the Bucharest Court of Appeal and by the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice and, consequently: In the interpretation and application of the provisions of art. 252 para. (5) referred to in art. 250 of the Labor Code states that: The court competent to resolve the employee's appeal against the disciplinary sanction applied by the employer, finding that it is wrongly individualized, may replace it with another disciplinary sanction. Mandatory, according to the provisions of art. 517 para. (4) of the Code of Civil Procedure. Delivered in open court today, 10 June 2013.

[2] Several persons may be plaintiffs or defendants together if the subject-matter of the proceedings is a common right or obligation, if their rights or obligations have the same cause, or if there is a close connection between them.

the employer's right to apply disciplinary sanctions to employees whenever he finds that they are committing disciplinary offenses. Taking the measure of disciplinary sanction being the exclusive attribute of the employer, according to art. 247 paragraph 1 of the Labor Code, namely "the employer has a disciplinary prerogative, having the right to apply, according to law, disciplinary sanctions to his employees whenever he finds that they have committed a disciplinary offense."

Disciplinary misconduct is an act related to work and consists of an act or inaction committed with guilt by the employee, in which he violated the legal rules, the internal regulations, the individual employment contract or the applicable collective bargaining agreement, orders and provisions of hierarchical leaders.

Work discipline is an objective, necessary and indispensable condition for the activity of each employer. The need to observe a certain order, of some rules that coordinate the conduct of individuals, in order to achieve the common goal, is imposed by the force of evidence, reasoning valid for any human activity carried out in the collective.

Based on this principle, work discipline objectively means a system of norms that regulate the behavior of employees in the development of the collective work process.
From the subjective point of view, of the employee, the work discipline constitutes a legal obligation of synthesis, which includes and summarizes the totality of the obligations assumed by concluding the individual employment contract.

At the same time, this obligation is of a contractual nature, because, although it is generically provided in the law, it arises concretely, in charge of a person determined by his employment in the work team of a unit, as a result of concluding the employment contract.

The conclusion of the employment contract has the effect of hierarchical subordination, an objective condition of the organization and efficiency of work.

The direct link between the individual employment contract and the disciplinary liability determines both the persons entitled to apply the disciplinary measure and the conditions and limits of the application of this measure.

Disciplinary liability is incurred by the commission of an act in connection with the work and which consists in an action or inaction committed with guilt by the employee, by which he violated the legal norms provided in the internal regulations, the individual employment contract or the applicable collective bargaining contract. , orders and legal provisions of hierarchical leaders. Thus, the disciplinary liability is attracted ope legis when the employee has committed an act with guilt and in connection with his work, by violating the aforementioned legal norms.

The analysis of the text of the law shows that the prerogative of the application of disciplinary sanctions belongs to and is the exclusive attribute of the employer, because he has the disciplinary prerogative, having the power to individualize the applicable disciplinary sanction in relation to the seriousness of the disciplinary violation. that the deed was committed, the degree of guilt, the consequences of the disciplinary violation, the general behavior of the employee and any sanctions previously suffered by him. Thus, according to art.250 of the Labor Code, the employer establishes the disciplinary sanction applicable in relation to the gravity of the disciplinary misconduct committed by the employee, taking into account the following:
a) the circumstances in which the deed was committed;
b) the degree of guilt of the employee;
c) the consequences of the disciplinary violation;
d) the general behavior of the employee in the service;
e) any disciplinary sanctions previously suffered by him.

In resolving the appeal filed against the disciplinary sanction decision, the courts have the power to analyze not only the legality but also the validity of the sanctioning measure ordered by the employer, in which case it will verify the manner in which the employer applied the criteria for individualization and disciplinary sanction.

This attribute of the court is enshrined in the principle of finding out the truth in the civil process, provided by art. 22 of the Code of Civil Procedure, namely "the role of the judge in finding out the truth".

Because in judicial practice there is no unitary point of view regarding the interpretation and application of the provisions of art. 252 para. (5) referred to in art. 250 of the Labor Code regarding the possibility of the court, notified with an appeal against the decision by which a disciplinary measure was taken against the employee, to replace the disciplinary sanction applied by the employer and because in the case of actions concerning appeals against the decision by that a disciplinary measure has been taken against the employee, when the appeal is admitted, the pronounced solutions are divergent in terms of the possibility of the court to replace the applied sanction with another milder one.

Thus, in an opinion it was considered that the application of a disciplinary sanction is the exclusive attribute of the employer because he has the disciplinary prerogative, having the power to individualize the disciplinary sanction applicable in relation to the seriousness of the disciplinary violation, taking into account the circumstances the act was committed, the degree of guilt, the consequences of the disciplinary violation, the general behavior of the employee and the possible sanctions suffered by him.

On the other hand, it was argued that the application of the disciplinary sanction does not constitute the attribute of the court which can exercise only a control of legality and validity of the act of disciplinary sanction.

Insofar as the judicial control finds that the employer did not respect the proportion between the act committed by the employee and the sanction applied to him, it is necessary to conclude the illegality of the disciplinary sanction measure in its entirety, with the consequence of annulling the decision and not reindividualization of the sanction. If the opposite thesis were accepted, the court would end up replacing the employer, which cannot be accepted.

It is the opinion that we do not agree with, in this opinion, the court, competent to resolve the employee's appeal against the disciplinary sanction applied by the employer, can not replace the sanction, taking disciplinary action being the exclusive attribute of the employer, according to art. 247 of the Labor Code, namely "the employer has a disciplinary prerogative, having the right to apply, according to law, disciplinary sanctions to his employees whenever he finds that they have committed a disciplinary offense."

We consider that the application of the disciplinary sanction does not constitute the attribute of the court, which can exercise only a control of legality and validity of the act of disciplinary sanction. If the judicial control finds that the employer did not respect the proportion between the act committed by the employee and the sanction applied to him, the court will annul the decision of disciplinary sanction as illegal, and will establish another sanction by the pronounced decision.

The employee's free access to court would be illusory if the role of the court were limited to verifying the legality of the disciplinary measure without censoring the circumstances in which this sanction was taken, leaving the employee to the employer's discretion in establishing and applying individualization criteria.

In the present case, the reasoning that the High Court of Cassation and Justice made in Decision no. 16/2012, regarding the existence of reasons of analogy regarding the way in which the legislator understood to regulate, within the special laws, is fully applicable,

the issue under discussion also regarding the way in which the courts resolved the appeals against the disciplinary measures taken by the employer under the special laws.

Thus, art. 536 of the Administrative Code provides that the cases having as object the service report of the civil servant are within the competence of the administrative and fiscal contentious section of the court, except for the situations for which the competence of other courts is expressly established by law. And according to art. 495 of the Administrative Code, it provides that the civil servant dissatisfied with the applied sanction may address the administrative contentious court, requesting the annulment or modification, as the case may be, of the sanctioning order or disposition (GEO no.57 / 2019 regarding the Administrative Code published in the Official Gazette no.555 / 05.07.2019).

In the same sense are the provisions of art. 89 para. (4) of Law no. 567/2004 on the status of specialized auxiliary staff of courts and prosecutor's offices attached to them and of staff working within the National Institute of Forensic Expertise, which states that: "The sanctioning decision may be challenged within 30 days of the communication, to the labor and social security court in whose territorial district the appellant has his domicile. "

In the same sense are the provisions of art. 51 para. (3) of Law no. 317/2004 on the Superior Council of Magistracy, stipulates that "against the decisions provided for in paragraph (1) an appeal may be exercised within 15 days from the communication by the sanctioned judge or prosecutor or, as the case may be, "The competence to resolve the appeal belongs to the Panel of 5 judges of the High Court of Cassation and Justice. The panel of 5 judges cannot include the voting members of the Superior Council of Magistracy or the disciplinary sanctioned judge".

Although all these special laws did not provide for the possibility of the court seised with an appeal against the decision by which a disciplinary action was taken against the employee to replace the disciplinary sanction applied by the employer, the practice of the courts is uniform, in the sense that when the sanction applied does not respect the principle of proportionality, the pronounced solutions are to reindividualize the sanction.

Obviously, proceeding to replace the sanction, the court will apply the principle of non reformatio in pejus, enshrined in the provisions of art. 481, respectively art. 502 of the Code of Civil Procedure[1].

By doing so, the court balances the relationship between the parties, in the sense that the employee is not created a worse situation than the one before the disciplinary measure, but also ensures the achievement of the purpose of disciplinary liability, in the sense that if only the right of the court to annul the sanction applied, the employee would remain unpunished, as a new sanction could not be applied for the same deed.

This solution is in accordance with the jurisprudence of the constitutional contentious which ruled that "the sanctioning decision can be challenged by the employee in the competent courts ..., in this way the appellant having the possibility to benefit from all procedural guarantees provided by law, by administering evidence necessary before the jurisdictions handling such requests" (Decision no. 63/2004 of the Constitutional Court, published in the Official Gazette no. 211 / 10.03.2004).

[1] Art.481 of the Code of Civil Procedure
Not making the situation worse on its own.
The appellant may not create in his own appeal a worse situation than the one in the contested judgment, unless he expressly consents to it or in the specific cases provided by law.
Art.502 of the Code of Civil Procedure
At the judgment of the appeal, as well as at the retrial of the process after the quashing of the decision by the court of appeal, the provisions of art. 481 are applicable accordingly.

The High Court of Cassation and Justice noted that this solution is also in line with the jurisprudence of the European Court of Human Rights regarding the application 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, as a positive obligation of states in private litigation proceedings between either individuals or between individuals and the state, through bodies or its institutions (Law no. 30/1994 on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, published in the Official Gazette no. 135 / 31.05.1994)[1].

The European Court of Human Rights, in examining the observance of the effective right of access before a higher court of a litigant, has ruled that the protection of individual rights means "the protection of concrete and effective rights, not theoretical and illusory" (Airey v. Ireland), and the positive obligation of the signatory states is an obligation to do, traditionally associated with economic and social rights, being to "take reasonable and appropriate measures to protect the rights of the individual" (Lopez Ostra v. Spain).

From a procedural point of view, the positive obligation of the signatory states also includes the obligation to ensure a fair judicial procedure, which would allow the settlement of any dispute between private persons (Sovtransavto Holding v. Ukraine).

The national law of the signatory states must not contain provisions that violate the rights protected by the European Convention on Human Rights or allow third parties to conduct contrary to the provisions of the Convention, which the literature has called the "horizontal effect" of the Convention (Ghibusi v. Romania judgment, published in Official Gazette no. 700 / 16.08.2006)[2].

The European Court also ruled that within the scope of art. 6 of the Convention also includes labor disputes, including the so-called disciplinary litigation before disciplinary courts, and the courts have the prerogative to carry out a proper examination of allegations, reasons and evidence (Buzescu v. Romania, published in the Official Gazette no. 210 / 08.03.2006).

In this last opinion, the appeal filed by the employee was admitted, the decision of disciplinary sanction was partially annulled and the measure of the sanction applied by the employer was replaced with another disciplinary sanction, according to the degree of guilt and the concrete danger of the deed.

In pronouncing this solution, the theory was taken into account that the employer's disciplinary prerogative is not absolute, discretionary, such as to remove the court's prerogative to verify the manner in which the employer applied the criteria for individualization and disciplinary sanction. Such an intervention of the court is related to the finality of the act of justice, to the effective resolution of the dispute brought before the

[1] Article 6, paragraph 1, of the Convention
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. on the merits of any criminal charge against him. The verdict must be pronounced in public, but access to the courtroom may be denied to the press and the public for the duration or part of the trial in the interests of morality, public order or national security in a democratic society, then when the interests of the minors or the protection of the privacy of the parties to the trial so require, or to the extent deemed absolutely necessary by the court when, in special circumstances, publicity would be likely to harm the interests of justice.

[2] 61. The Court points out that a judgment finding an infringement entails for the defendant State a legal obligation to bring the infringement to an end and to remove the consequences so that, as far as possible, the previous situation can be restored [Metaxas v. Greece no. 8,415 / 2002, paragraph 35, May 27, 2004, and Iatridis v. Greece, Fair Satisfaction (GC), no. 31.107 / 1996, paragraph 32, ECHR 2000-XI].
62. The Court found a violation of the applicant's rights by failing to enforce a final judgment ordering her reinstatement.
Consequently, the Court considers that the applicant has suffered non-material and material damage and that that damage has not been sufficiently compensated by the finding of an infringement.

court, because the court cannot be limited only to a finding of the legality or illegality of the contested act or legal fact.

It has been argued that there can be no question of an interference of the jurisdictional bodies in the disciplinary prerogatives, which by their nature belong to the employer, because his right to order the sanction ceases with the application of the sanction. From this moment on, the prerogatives of the bodies vested by law with the jurisdictional control of the sanctioning act begin, namely the courts. This control, in the absence of any express limitation, is devolving and includes the right of the court to rule on its own.

It was noted that the court, in practice, only partially modifies the contested decision, replacing the sanction applied with another, noting that partially, in terms of individualization, respectively the dosage of the sanction, the decision is illegal in relation to art. 250 of the Labor Code, which imperatively establishes the criteria that the employer must take into account cumulatively when establishing the disciplinary sanction.

Such solutions were given by the courts when they overturned the decision issued by the employer and replaced the sanction applied. Thus, according to art. 61 lit. a) of the Labor Code, the employer may order the dismissal for reasons related to the person of the employee in case he committed a serious violation or repeated violations of the rules of labor discipline or those established by the individual employment contract, the collective agreement applicable labor law or internal regulations as a disciplinary sanction. The violations committed by the appellant are not particularly serious, leading to the termination of the employment contract, the appeal filed will be admitted and the contested civil sentence will be modified in part, in the sense that reduction of the basic salary by 10% for 3 months (Decision no. 496 / R / CM / 2008 of the Pitesti Court of Appeal, Civil Section, Labor Conflicts, Minors and Family).

By the civil sentence no. 1033/2002, the Timiş Tribunal rejected the action filed by the plaintiff T.I., in contradiction with the defendant S.N.T.F.C. CFR Călători SA Timişoara, having as object the annulment of the disposition to terminate the employment contract. The Timişoara Court of Appeal allowed the appeal declared by the applicant and partially amended the sentence, in the sense that it partially admitted the action filed and replaced the sanction of termination of the employment contract with the sanction of reducing the basic remuneration by 10% for 3 months.

The applicant, as a train driver, was caught by the control body on the route Arad - Vâlcani on 25.07.2002 having on him the amount of over 346,000 lei collected from passengers, to whom he did not issue travel tickets until at the time of control. In the present case, there was no evidence by the defendant that the applicant had previously been sanctioned for other offenses. Due to the specific nature of the applicant's work, the Court held that these categories of misconduct were of a general nature; on the other hand, in view of the fact that the applicant was no longer sanctioned, he considered that he had been excessively sanctioned by the defendant and ordered the the replacement of the sanction applied with that of the reduction of the basic remuneration by 10% for 3 months (Timişoara Court of Appeal, Civil Decision no. 70 of 2003).

The General Prosecutor expressed the opinion showing that, in resolving this labor dispute, the court exercises a devolutionary control of a jurisdictional nature, because it verifies the legality and validity of the measure taken, not only in terms of the administered material, but also has the possibility of additional evidence. To the extent that it finds that the sanctioning measure is unjustified in relation to the gravity of the disciplinary violation, the court will order the admission of the appeal, the partial annulment of the contested decision and the replacement of the disciplinary sanction applied by the employer with another sanctioning measure. In doing so, the courts do not become disciplinary bodies, because they do not ex officio conduct administrative inquiries to establish acts and legal

acts that violated the discipline of work, but only censor the sanctioning measure already applied by the employer, ensuring a framework for the protection of the employee in his relations with the employer, respecting the principle of proportionality.

As a result of this legal issue, the High Court of Cassation and Justice was appealed in the interest of the law, resolved in the sense that it ruled by the decision of the appeal in the interest of the law that "The competent court to resolve the employee's appeal against to the employer, finding that it is wrongly individualized, may replace it with another disciplinary sanction (Decision no. 11/2013 of the HCCJ appeal in the interest of the law, published in the Official Gazette no. 460 / 25.07.2013, regarding the appeals in the interest of the law formulated by the Board of the Bucharest Court of Appeal and in addition to the High Court of Cassation and Justice regarding the interpretation and application of the provisions of art. 252 para. 5 of the Labor Code regarding the possibility of the court, notified with an appeal against the decision by which a disciplinary measure was taken against the employee, to replace the disciplinary sanction applied by the employer)".

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