Considerations on replacing and suspending disciplinary sanctions. The issue of granting compensation for ungrounded or unlawful disciplinary sanctions

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Abstract

Court's ability to replace the disciplinary sanction imposed by the employer with an easier one is the power to individualize employee's disciplinary sanction imposed by the general statutory criteria – the circumstances of committing the crime, the degree of culpability of the employee consequences of a disciplinary offence, the general behaviour of the employee and any disciplinary sanctions previously incurred. Another issue under discussion and which *was not brought about a unified point of view is about the possibility of temporary suspension of disciplinary decision enforcement, pending resolution of the challenge which the court was invested with.* This is why it's necessary the *intervention of the legislator as statuary express the legal nature of the disciplinary decision. In all cases where the court ordered the annulment of illegality punish the employee who suffered an injury will receive compensation under article 52,* paragraph 2, *article 78 or, where appropriate, article 269 paragraph 1 of the Labour Code.*

Keywords*: individualization of disciplinary action, replacing disciplinary, court, disciplinary suspension, compensation, illegal disciplinary sanctions*

In law literature there is a controversy regarding the possibility of the court to replace the disciplinary sanction imposed by the employer with an easier one.

A first opinion[3], which we agree, says that the court, as it has the plenitude of disciplinary jurisdiction, is able to censor the legality and the validity of the penalty. In this case, the court has the right to impose itself a disciplinary sanction by replacing the employer's with an easier one, without making the situation worse for the employee. The court, once vested, has to solve the case in all its aspects. This doesn't mean an interference of the authorities in the employer's powers[4]. The latter's prerogative to order a sanction stops when it is applied. This is the moment when the authorities invested by law with the jurisdictional control intervene, having the right to decide its own solution, their control being a devolutive one[5].

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[3] Ion Traian Stefanescu, *Theoretical and practical treaty of employment law*, Legal Publishing House, Bucharest, 2010, p. 733; Barbu Vlad, Catalin Vasile, Stefania Ivan, Mihai Vlad, *Labour Law*, Cermaprint Publishing House, Bucharest, 2008, p. 361. Also, see Serban Beligrădeanu, *About how to handle the complaints made against disciplinary sanctions* in Romanian Journal of Law no 12/1971, p. 77-78.

[4] Sanda Ghimpu, Alexandru Ţiclea, *Labour Law. Revised and enlarged edition,* „Chance" Publishing House and Press, Bucharest, 1995, p. 362.

[5] Sanda Ghimpu, Ion Traian Ştefănescu, Şerban Beligrădeanu, Gheorghe Mohanu, *Labour Law. Treaty*, 2nd volume, Scientific and encyclopaedic Publishing House, Bucharest, p. 77; Ion Traian

Concluding, an erroneous individualization of disciplinary violations by employers, determine the court intervention, by replacing the disciplinary sanction as the circumstances, the guilt and the consequences of the act were not likely for that penalty[6]. In fact, the court does not apply an easier sanction, but it partly changes the contested decision, as it was an unlawful and too severe[7]. Thus, we are talking about the court's powers to individualize the employee's disciplinary sanction imposed by the general statutory criteria – the circumstances of committing the crime, the degree of culpability of the employee, the consequences of a disciplinary offence, the general behaviour of the employee and any other disciplinary sanctions previously incurred.

The judicial practice maintain the same opinion, that if the court's role is to review only the legality of the measure, and the employer may impose a penalty without admitting the court censorship, the free access to the court of the employee would be illusory[8]. For example, the disciplinary sanction of dismissal was replaced by the reduction of the salary for a period of 1-3 months with 5-10%, whereas the employee guilt is low and he's general behaviour at work and the circumstances in which they have committed does not fit with the penalty[9]. The same decision was given when the court found that the employee acted without knowing that he produces a particular loss and the guilt is reduced[10]. It was also

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Ştefănescu, *Labour discipline and disciplinary responsibility of working staff in socialist units,* Academy Publishing House, Bucharest, 1979, p. 119-120; Sabău Duicu, *Possibility of disciplinary action by another jurisdiction bodies of work invested in solving the appeals against the disciplinary sanction of dissolution of employment* in „Law Journal" no 10-11/1994, p. 55-57; Alexandru Țiclea, Andrei Popescu, Mioara Țichindelean, Constantin Tufan, Ovidiu Ținca, *Labour Law,* Rosetti Publishing House, Bucharest, 2004, p.687; Ion Traian Ştefănescu, *Theoretical and practical treaty..., cited work,* p. 733; Alexandru Țiclea, *Labour law treaty,* Fourth Edition, Legal Universe Publishing House, Bucharest, 2010, p. 888.

[6] Laura Georgescu, *Note to civil decision* no 372/2006, no 458/2006, no 481/2006, no 510/2006 of Court of Appeal Piteşti, Civil, labour disputes and social security law division, in „Romanian journal of labour law" no 1/2007, p. 98-109.

[7] Şerban Beligrădeanu, *Unable prohibition the court possibility to replace a disciplinary punishment applied be the employer with an easier one through provisions of unit internal regulation* in „Law" Journal no 4/2007, p. 117.

[8] Court of Appeal Cluj, civil, labour disputes and social security law, juvenile and family division, decision no 496/2008 in Lucia Uță, Florentina Rotaru, Simona Cristescu, *Labour Law. Disciplinary liability. Legal practice,* Hamangiu Publishing House, Bucharest, 2009, p. 221. See Court of Appeal Craiova, Civil division, decision no 2186/1996 in „Law" Journal no 2/1997, p. 117-120; Court of Appeal Timişoara, civil division, decision no 1386/2002 in Claudia Roşu, *Court's solutions on appeal against disciplinary sanction of dissolution of employment contracts* in „Law" Journal no 12/2002, p. 89. To the point of view that the court has no such possibility, since the application of disciplinary sanctions is the exclusive attribute of the employer, see Court of Appeal, Department for labour disputes, decision no 1526/2003 in Romanian Journal of Labour Law no 1/2004, p. 171-172.

[9] Court of Appeal Bucharest, seventh department for labour disputes and social security causes, decision nr.1686/R/2010 in "Romanian Journal of Labour Law" no 4/2010, p. 112-117; Court of Appeal Piteşti, department of civil causes, labour disputes and social security causes, decision no 372/R-CM/2006 in "Romanian Journal of Labour Law" no 2/2006, p. 108-110.

[10] Court of Appeal Craiova, department of labour disputes and social security causes, decision no 62/2008 in Lucia Uță, Florentina Rotaru, Simona Cristescu, *cited work*, p. 213-215.

considered that the sanction of disciplinary termination of the employment contract can be replaced with an easier one, if the employee breached the rules included in his job description in order to avoid causing a bigger damage to his employer[11].

Other authors[12] have considered that no other body may impose disciplinary sanctions under the sanction of nullity, no matter what place it occupies in the state system, except for those authorities called upon by law to establish and enforce this kind of measures. Some courts agreed that the disciplinary sanction is the exclusive attribute of the employer and that their job is just the judicial control of legality and solidity of a disciplinary measure, meaning that they can't impose others, on the reason that the employer has not properly applies the criteria of individualization under article 266 of the Labour Code[13].

An intermediate point of view[14] says that, although a court may decide the replacement with an easier disciplinary measure, when the employer defined in the internal rules the violations and penalties, the judge can't change the penalty imposed, but only to consider whether the act was committed or not. So, if a certain act was regarded as a serious misconduct by internal rules and its sanction is dismissal, the court can't replace the measure, otherwise they would violate the employer right to organize its activity and would undermine its authority, encouraging indiscipline at work. This opinion is qualified to be wrong[15]. The internal rules can't contain other disciplinary sanctions, except the ones mentioned in Labour Code[16], and the penalties can be applicable only as a result of a pre-disciplinary research[17].

Another issue under discussion in the literature is the possibility of temporary delay of enforcement of the disciplinary decision, until the court gives a solution to the appeal[18].

According to other authors, who we rally, the decision of disciplinary sanction is enforceable. This fact justifies the possibility of introducing an application for stay of execution until the employee's complaint is solved by the

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[11] Court of Appeal Târgu Mureş, department of civil and social security causes and labour disputes, decision no 1181/2008 in Lucia Uţă, Florentina Rotaru, Simona Cristescu, *cited work,* p. 9-14.

[12] D. V. Firoiu, Inadmissibility of the application of other disciplinary action by the body vested with jurisdiction to resolve labour dispute against disciplinary sanctions imposed by the unit in „Law" Journal no 2/1994, p. 60-63; G.Cristescu, *About how to handle disciplinary complaints* in „Romanian Journal of Law" no 12/1971, p. 73-75.

[13] Court of Appeal Cluj, department of civil, labour and social security, juveniles and family causes, decision no 2402/2008; Court of Appeal Alba Iulia, department of labour disputes and social security causes, decision no 944/R/2008 in Lucia Uţă, Florentina Rotaru, Simona Cristescu, *cited work,* p. 218-221, p. 232-235.

[14] A.Postolache, *Rules and judge limits in the characterisation of a disciplinary offence* in „Romanian Journal of Labour Law" no 4/2006, p.105.

[15] Ion Traian Ştefănescu, *Theoretical and practical treaty..., cited work,* p.733; Şerban Beligrădeanu, *Unable prohibition..., op. cit.,* in „Law" Journal no 4/2007, p. 117.

[16] Şerban Beligrădeanu, *Effects of employee's unjustified refusal to submit to prior disciplinary* in „Law" Journal no 8/2005, p. 131.

[17] Ion Traian Ştefănescu, *Theoretical and practical treaty..., cited work..., op. cit.,* p. 733.

[18] Ion Traian Ştefănescu, *Theoretical and practical treaty..., cited work..., op. cit.,* p. 732.

court. For this purpose, shall be applied by analogy the stipulations in the Code of Civil Procedure relating to suspending the enforcement[19] or directly those regarding the presidential ordinance procedure[20]. Judicial practice also allowed the possibility of temporary suspension of enforcement of the disciplinary decision[21].

In another opinion, suspension of the sanction execution is inadmissible[22]. It is considerate a serious violation of law which is not allowed in a state law. One of the reasons was that the disciplinary decision is only a labour law act which comes from the employer who exerts his powers. It is not an executory act.

However, it was claimed that a document may be an executory act/enforceable through the effects they produce, even if this term is not used *in terminis*[23]. Thus is noted that the employer, by using its unilateral powers, creates a legal obligation report in which he has the right to impose a disciplinary sanction and the employee has the related obligation to obey, no matter his will. This is why they draw the conclusion that sanctioning decisions can be classified as executory acts[24].

The acceptance of this solution of admissibility of the temporary suspension of disciplinary decisions has advantages for both employer and employee. The first one would no longer be kept for paying compensations to the employee in order to remove those intervening situations. The latter would not be called to bear the consequences of an unlawful and ungrounded decision.

In this context, we consider it appropriate the interference of the legislator who enacts in an express way the legal nature of the decision of disciplinary sanction.

In all the cases in which the court ordered the annulment for illegality or groundlessness, the employee who suffered damage shall receive compensation under article 52 paragraph 2 or article 78 of the Labour Code. For those situations that are not mentioned in this two legal texts, the compensation shall be received

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[19] See article 403 paragraph 4 Code of Civil Procedure and article 708 of New Code of Civil Procedure – Law no 134/2010.

[20] Article 581 and article 582 of Code of Civil Procedure. In New Code of Civil Procedure – Law no 134/2010 the procedure is established in article 982.

[21] In one case, the court ordered the temporary suspension of the disciplinary decision execution consisting in the dismissal, considering that the Court Valcea was invested to resolve the appeal against this penalty. It was also found that the urgency requirement for gaining entry demand is accomplished, because on one hand, the employee must be present at work because of his employment tasks and, on the second hand, because the irrevocable conclusion, the same court ordered the temporary suspension of the execution of another sanctioning decisions prior to the issue, which the appellant was demoted from office for committing the same alleged disciplinary violations - see Vâlcea Court, civil division, in "Romanian Journal of Labour Law" no 1/2008, p. 141-142.

[22] For details and criticisms of the solution presented in the previous note, see Leontina Constantina Duțescu, Note to the conclusion of the Court Valcea no 79/2007, Civil Division, in "Romanian Journal of Labour Law" no 1/2008, p. 142-144.

[23] Aurelian Gabriel Uluitu, *Possible suspension of the effects of dismissal or disciplinary decision* in „Romanian Journal of Labour Law" no 2/2008, p. 71.

[24] *Ibidem,* p. 71-72.

under article 269 paragraph 1 in the same Code[25] which says that *the employer is obliged under the rules and principles of contractual liability to make up for the loss caused to the employee if he caused him a moral or pecuniary damage during job obligation or in connection with it*. If the sanction was to suspend the individual contract of employment or disciplinary dismissal, the compensation is the remuneration and other entitlements of which the employee would have profited during the period he was absent from work. In addition we are talking about a resuming the previous activity in both situations, but the difference between them comes from the fact that it operates by law in the first case, while in the latter work may be ordered by court only at the requests of the employee (article 78 paragraph 2 of the Labour Code). If the employee does not request it, the solution given by the legislator is that the individual contract of employment ends when the court decision comes final and irrevocable[26]. Although the legislature has not determined the amount of damages for disciplinary sanctions in article 264 paragraph 1 letter c-e of the Labour Code (reduction to a lower rank, basic salary reduction, basic salary reduction and/or management allowance) is understandable that they will consist of the difference between actual salary and the one properly received by the penalized person. By all means, the cancellation of demotion supposes the resumption of the work covered by the individual contract of employment.

If the disciplinary sanctions are improperly imposed, the employee is also entitled to moral damages under article 269 paragraph 1 of the Labour Code. This legal text was changed by article 1 in Law no. 237/2007. Before that, in courts practice there was no unitary point of view concerning moral damages in labour litigations. Some of the courts have ruled that the request for damages is inadmissible in a labour dispute, because it is omitted the civil law role as a common law in relation with labour law[27]. By contrast, other courts considered that the granting of moral damages is admissible because of this role and if there aren't contrary provisions in the labour law or they aren't enough, can be applied article 998-999 of the Civil Code[28]. The High Court of Cassation and Justice put an end to this controversy by an appeal on the points of law in which it is said that the employee is entitled to moral damages only if the law, the collective agreement or the individual contract of employment contains express clauses in this way. It also says that article 998-999 of the Civil Code can't be enforced in employment relations as long as the asset mutual responsibility of the parties in such a report

[25] Ion Traian Ştefănescu, *Theoretical and practical treaty.., cited work,* p. 734.

[26] Paragraph 3 of article 78 of Labour Code was brought into force by Law no 40/2011.

[27] Ialomiţa Court, Civil department, decision no 222F/2005 in Dan Lupaşcu (coordonator), *Reports of judicial practice in employment litigation, 2005,* Juridical Universe Publishing House, Bucharest, 2006, p. 179.

[28] Court of Appeal Bucharest, seventh department for civil, labour disputes and social security causes, decision no 2097/R/2005 in Dan Lupaşcu (coordonator), *cited work,* p.180. See Court of Appeal Bucharest, seventh department for civil, labour disputes and social security causes, decision no 2655/R/2005 in *ibidem,* p. 84-86; Court of Appeal Piteşti, department of civil, labour disputes, social security, juvenile and family causes, decision no 47/R-CM/2007 in „Romanian Journal of Labour Law" nr.6/2007, p. 124-129.

can't flow only from an employment contract, based on principles of contractual liability, while in common law damages for a patrimonial loss can be established only as an exception, if there is a legal provision for that or if there is stated specifically in the contract[29]. Currently the legislator stipulates deliberately in article 269 paragraph 1 of the Labour Code that patrimonial responsibility of the employers may be set for both pecuniary and moral damages.

In order to establish compensation for a non-pecuniary damage, the court will take into account a number of criteria, such as the negative consequences both physical and psychological, the importance of the moral values affected, the extent to which these values have been harmed, the intensity of which the results of the injury were perceived, the extent of which the family, social and professional status of the employee have been affected[30].

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[29] High Court of Cassation and Justice, merged departments, the decision nr. XL (40) /2007 published in the Official Gazette of Romania, Part I, no 763 of 12 November 2007.

[30] Supreme Court of Justice, Civil division, decision no 3812/2000 in „Law" Journal no 11/2001, p. 199-200.