Considerations on the modifications brought to disciplinary liability by the Laws no. 40/2011 and 62/2011

Ph.D. Candidate **Radu Ştefan PĂTRU**[1]

Abstract

Law no. 40/2011 modifying and supplementing the Labour Code and the Law on Social Dialogue no. 62/2011 have significantly modified the legislative framework regulating the labour conditions. Starting from this year, the architecture of the labour law fundamental institutions has been subjected to changes that would materialize in new approach directions both for employers and employees as well as for the law courts that will have to interpret the new legal dispositions in an equitable manner. Among the essential amendments brought to the abovementioned law, we will focus on those related to the modifications and applicability of employees' disciplinary liability.

Keywords: *Law on Social Dialogue, disciplinary liability, internal regulation, the collective labour contract, enforcement of disciplinary sanctions, disciplinary investigation*

JEL Classification*: K31*

I. Introductory aspects

Disciplinary liability is a fundamental institution for the labour law. The compliance with the labour discipline bedsides other relevant aspects for an employee's career such as work competence or continuous training, ensure their continuity on the job.

For these reasons, disciplinary research and enforcement of sanctions must be made as objectively as possible without infringing the employees' fundamental rights.

Disciplinary liability, in principle, has the same structure with the one regulated in the previous labour codes, but by the new modifications of the labour legislation it has been affected both directly, through the introduction of provisions regarding the cancellation of the disciplinary sanctions or the abrogation of a sanction related to the suspension of the individual labour contract for a period up to 10 days, and indirectly, through the abrogation of the dispositions related to the collective labour contract at national level since, if we refer, for example, to the sole Collective labour contract at national level concluded for the interval

[1] Radu Ştefan PĂTRU, Academy of Economic Studies of Bucharest, Law Department, radupatru2007@yahoo.com

2007-2010, this comprised dispositions more favourable for employees in terms of the disciplinary liability.

So, the disciplinary liability is one of the labour law institutions that made the object of recent legislative amendments and, in this article we intend to make a short analysis of the main aspects of novelty related to employees' disciplinary liability.

II. Abrogation of letter b of art. 248 (former article 264) from the Labour Code, namely the sanction of suspension of the individual labour contract for a period that cannot exceed 10 working days

A relevant disposition for the disciplinary liability is the abrogation of letter b of art. 248 from the Labour Code (former art. 264) that also provided among the disciplinary sanctions "the suspension of employee's individual labour contract for a period that cannot exceed 10 working days".

The legislator chose to eliminate this sanction from the sanctions applied to the employee because the sanctioning function of disciplinary liability may be fulfilled through the other sanctions provided by the Labour Code.

This sanction aimed at both a moral and pecuniary aspect, meaning that the employee could not practice their profession or job on the one hand, and they were deprived of their salary, on the other hand, what gave this sanction the character of a double penalty.

The sanction provided in art. 264, letter b from the Labour Code is also regulated by other states, but it has a different applicability from the way in which it is enforced in our domestic law.

For instance, in England the rule is to suspend the individual labour contract with the payment of salary.

The employee may be paid their salary only exceptionally, when this is stipulated in the individual labour contract or the collective agreements.[2]

Taking into consideration that the other sanctions provided in the Labour Code focus on a wide range of restrictions that may be enforced to the employee, starting from reduction of salary and ending with the possibility to even dismiss the employee, we consider as opportune the elimination of sanction from letter b of art. 248 (former art. 264), namely "the suspension of employee's individual labour contract for a period that cannot exceed 10 working days" from the Labour Code.

[2] See Alexandru Ţiclea, *Tratat de Dreptul Muncii*, edition V, "Universul Juridic" Publishing House, Bucharest, 2011, p. 761

III. Disciplinary investigation in the light of new amendments of labour legislation

The new legislative dispositions in the field of collective negotiation stipulate the abrogation of the sole collective labour contract at national level from the Romanian legislative framework.

For this purpose, the Law on Social Dialogue stipulates as follows in art. 128, paragraph (1): "The collective labour contracts may be negotiated at the level of units, groups of units and activity sectors".

As one may notice, the possibility to negotiate the collective labour contract and the labour contract at national level are missing from this enumeration.

The right to collective negotiation is a constitutional right of utmost importance, the fundamental Romanian law mentioning it in art. 41, paragraph (5) as follows: "The right to collective negotiations in terms of labour and the mandatory character of collective conventions are guaranteed."

Taking into account the relationship between the constitutional text and the new legal framework on collective labour contracts, two opinions emerged.

The first opinion sustains that the abrogation of the sole collective labour contract at national level is not in the spirit of the Constitution, since the state influenced the collective negotiation right in its entirety by reducing an important negotiation level namely the national one.

The right to collective negotiation is guaranteed by Constitution at any level without any exception, so that, by the new provisions, it is considered that this right was impaired and it can no longer be applied in its entirety.

As for the second opinion that has been already accepted by the Constitutional Court, it is considered that giving up the sole collective labour contract at national level does not contravene the constitutional dispositions since the state has the right to eliminate the collective labour contract concluded at this level.

In Decision no. 574 of May 4, 2011, on the abrogation of collective labour contracts at national level, the Constitutional Court decided as follows: "As for the elimination of collective contracts at national level, the Court finds that the text of art. 41, paragraph (5) from the Constitution does not stipulate or guarantee collective negotiations at national level, so that the framework in which they are carried out is the one established by the legislator. Conversely, they would reach the absolutization of the right to collective negotiations, a right that might take into consideration the economic and social conditions existing in society at a given time. The idea is to maintain a just balance between employers' and trade unions' interests; of course, there will be domains where the economic and social conditions allow the conclusion of collective labour contracts much more favourable for employees, and others in which rights are negotiated at an inferior level, so that by a collective contract at national level they might have higher rights

as compared to the extent permitted by the domain in which they work, and this impairs the economic viability of the employers from this field."[3]

Taking into account that the opinions of the Constitutional Court formulated by means of its decisions are mandatory, they consider the dispositions of the Law no. 62/2011 related to the collective labour contracts as constitutional.

In this context, in 2011 no sole collective labour contract at national level has been concluded and the dispositions of the former sole collective labour contract at national level concluded for the period 2007-2010 are no longer applicable.

Knowing that a series of reasonable clauses from this contract have not been taken over in the labour legislation, certain labour law institutions will be affected and change their applicability.

Among them there is the institution of disciplinary liability, especially one important component hereof, namely disciplinary investigation.

In accordance with art. 242, letter g from the Labour Code, an employer must insert within their Internal Regulation dispositions related to the disciplinary investigation, what turns the Internal regulation into the main source of labour law for disciplinary investigation.

Relying on a loophole existing in the Labour Code, the sole Collective labour contract at national level concluded for the interval 2007-2010 regulates supplementary dispositions regarding disciplinary investigation that used to be carried out by one board, on the one hand, and on the other hand it was compulsory in any situation and for the enforcement of any sanction, including the written warning.

In article 75, paragraph (1) from the sole Collective labour contract at national level concluded for the period 2007-2010, they stipulated as follows: "Under the penalty of absolute nullity, no sanction may be decided upon before carrying out a preliminary disciplinary investigation".

This provision was in a consensus with the spirit and equity of law since it is normal for an employee to be given a sanction only after they have been investigated and the board has come to the conclusion that the employee had breached the labour discipline.

Despite all these, in the Labour Code at art. 251, paragraph (1), it is stipulated as follows: "Under the penalty of absolute nullity, no sanction, except the one provided in art. 248, paragraph (1), letter a), (*written warning, respectively, author's emphasis*), may be decided upon before carrying out a preliminary disciplinary investigation".

[3] Decision 574 of May 4, 2011 on the constitutional challenge of the provisions of the Law on social dialogue in its entirety , especially of art. 3 paragraph (1) and (2), art. 4, art. 41 paragraph (1), title IV on the National Tripartite Council for Social Dialogue, title V on the Economic and Social Council, art. 138 paragraph (3), art. 183 paragraph (1) and (2), art. 186 paragraph (1), art. 202, art. 205, art. 209 and art. 224, letter a) from the law published in the Official Gazette no. 368/26.05.2011

We consider that this disposition was in a clear contradiction with the elementary law principles stipulating that no one may be given a penalty or sanction but after an equitable suit or, in our case, after an equitable disciplinary investigation.

This is true the more so as disciplinary law is also called the "small criminal law" exactly due to its utmost importance within social relationships.

In art. 75, paragraph (2), the sole Collective labour contract at national level concluded for the interval 2007-2010 stipulated that "for the investigation of the disciplinary infringement and the proposal of sanction, the employer shall set up a board. A representative of the trade union whose member the employee[4] is shall make part from the board in quality of an observer, without the right to vote".

The article mentioned in the subsequent paragraphs also provided the board's manner of functioning, thus the discipline board was compelled to summon the employee in writing by at least 5 working days before the carrying out of the board procedures.

The board chose the date, place and time of meeting also having obligation to communicate the employee the reason for which they were summoned.

At present, the employee may be summoned at any time by the person empowered by the employer, and in the silence of the law, one may even imagine the situation when the employee is summoned on the very day when the disciplinary investigation takes place not having the reasonable time for the preparation of their defence.

Among other things, the board used to have as attributions "to establish the deeds and their consequences, the circumstances in which the deeds were committed and any other relevant data based on which they might establish the existence or inexistence of guilt".

By taking over the dispositions of the Labour Code on the Board's investigation activity, the following aspects were provided in the sole collective labour contract at national level for the interval 2007-2010, aspects that were taken into consideration by the board when carrying out the investigation:

a) the circumstances in which the deed had been committed;

b) employee's level of guilt;

c) consequences of the disciplinary infringement;

d) employee's general conduct at work;

e) possible disciplinary sanctions previously given to the employee.

Based on the investigation carried out, the Board used to propose the employer the enforcement or non-enforcement of a sanction for the employee in question.

One may notice that the Board's attributions and way of work were in the spirit of the Labour Code they leading to more favourable dispositions for the employees.

[4] See the sole Collective labour contract at national level for 2007-2010 published in the Official Gazette, part V, no. 5 of 29/01/2007.

The reason for which sanctions were enforced resides in the fact that a board made up of several members is much more objective than the investigation conducted by a single person.

Further, a representative of the trade union used to make part of the board whose presence ensured the representation of employee's interests, whereas now the presence of a trade union member is a faculty left at employee's discretion.

At present, they apply the dispositions of the Labour Code, unless the Internal regulation stipulates otherwise.

Thus, in art. 251 paragraph (2) from the Labour Code, they mention that the disciplinary investigation shall be carried out by a person empowered by the employer for this purpose.

The objectivity and efficiency of the way in which disciplinary liability shall be established raise a serious question because the law does not mention anything else about the person that is to conduct the disciplinary investigation except that they are empowered by the employer for this purpose.

So it is possible that this person may be a close friend of the employer, but they may also be a close friend or even a relative of either party since the law fails to provide an incompatibility clause for this person.

The Labour Code does not also specify if the person in question must or must not have specialized (juridical) studies or at least a higher education.

In this context, the problem is if it is possible to take over the previous regulations existing in the sole collective labour contract at national level in the internal regulation.

The answer is favourable in this case too. In those units where the internal regulation will comprise dispositions in this respect, for the enforcement of each sanction, including the written warning, disciplinary research shall be carried out by a board.

At the same time, to make up for those deficiencies existing in the labour legislation, the question is if one may introduce dispositions related to the disciplinary investigation in the collective labour contracts at the level of unit, groups of units or activity sector.

We consider that the answer is affirmative again, since the definition of the collective labour contract from art. 229 says that it may also comprise "other rights and obligations resulted from work relationships", even if pursuant to art. 242 from the Labour Code the aspects related to disciplinary investigation belong to the internal regulation; so they may comprise substantive aspects related to parties' rights and obligations.

IV. Cancellation of sanctions decided against employees

Among the new positive dispositions of the Law no. 40/2011, there is the cancelation of sanction decided against employees.

Thus, in art. 248 (former article 264), paragraph (3) was added as follows: "(3) The disciplinary sanction shall be cancelled de jure within 12 months since its

enforcement if the employee has not been given another disciplinary sanction within this interval. The cancellation of disciplinary sanctions shall be made by employer's decision issued in a written form".

As is known, disciplinary law has an outstanding importance for every person having the quality of an employee.

The work relations regarded as fundamental relations for people's existence may be affected by certain disciplinary sanctions that put employees in the impossibility to enjoy their rights following the enforcement of a sanction, so that the manner in which the disciplinary liability operates seems to be of utmost importance.

Just for these reasons, in doctrine, the disciplinary liability is called the "small criminal law" because the implications of this institution have repercussions on the employee just like in the case of criminal judgments registered in the criminal record. In the spirit of this parallel, one may say that just like the institution of rehabilitation exists in the criminal law (in art. 133 of the Criminal Code they stipulate that "Rehabilitation leads to the expiry of any loss of rights and interdictions as well as the incapacities resulting from condemnation") in the disciplinary law must exist the legal provision ensuring rehabilitation after a certain period of time through the cancelation of the sanction received by the employee.

At the same time, when establishing the relapse state, the criminal law does not take into account the offences for which rehabilitation intervened or for which the rehabilitation term was completed, according to art. 38 paragraph (2) from the Criminal Code.

The fact that after the abrogation of the Law no. 1/1970 regulating the disciplinary liability, the legislator did not consider necessary to take over the provisions on rehabilitation in the new law was in a clear contradiction with the principles of disciplinary liability hindering the correct operation of this institution.

This is true the more so as, in certain legislative acts, disciplinary rehabilitation has its own juridical consecration.

Thus, in the Law on the status of public servants no. 188/1999 they provide the cancellation of sanctions within 6 months since the written reprimand and one year since the expiry of the term for which they were enforced in case of other disciplinary sanctions, except when the employee has been dismissed for disciplinary reasons, and then the rehabilitation term is 7 years.

In paragraph (2) of the same article, they stipulate that the cancelation of disciplinary sanctions is ascertained by an administrative document of the manager of the public institution or authority[5].

Once with the introduction of paragraph (3) in art. 248 (former article 264) regulating the cancelation of disciplinary sanctions within 12 months since

[5] See Law no. 188/1999 on the status of public servants, as subsequently amended

enforcement, they covered an important omission of the legislator which has been recalled many times in the specialized literature.[6]

Taking into consideration the importance of this institution, we consider necessary to insist on the effects it produces.

We must bear in mind that the cancelation of sanction within the term specified above occurs only if the employee has not received another sanction in this interval.

If the employee receives another sanction in the 12 month period, in the enforcement of the new sanction the employer shall take into account the first sanction applied and they may dismiss the employee for repeated misconducts.

If the second sanction is enforced after the expiry of a 12 month term, the employee may not be sanctioned for repeated misconducts because the first sanction was cancelled.

The cancellation of the disciplinary sanction operates de jure, employer just ascertains it by the document they issue for the employee. So, the employer is not the one who cancels the disciplinary sanction since their decision in written form has only an ascertaining role.

If the employer unjustifiably refuses to ascertain the cancelation of the disciplinary sanction, the employee may start legal action.

As for the ascertaining of cancelation of the sanction received by the employee, the following problem may raise: if an employee resigns after they have been sanctioned for disciplinary reasons and then they conclude an individual labour contract with another employer, which of the two employers must ascertain the cancelation of the sanction received by the employee from the first employer: the employer who sanctioned the employee or the employer for whom the employee is working at the expiry of the cancelation term?

In this case, we think that the ascertaining decision in written form shall be issued by the employer for whom the employee is working at the expiry of the cancelation term, since this does not contravene the institution of cancelation introduced by the Law no. 40/2011and the employer's decision has only an ascertaining role and the cancelation operates de jure.[7]

Cancelation of disciplinary sanctions shall apply to all categories of sanctions provided by the law. Thus, even the most radical form of sanction, namely the termination of the individual labour contract for disciplinary reasons shall be cancelled if the employee has not been sanctioned again within a 12 month term.

As for the disciplinary dismissal, this does not make the object of any of the two categories of rehabilitations.

---

[6] See Ion Traian Stefanescu, *Tratat de Dreptul Muncii*, Wolters Kluwer Publishing House, Bucharest, 2007, p. 469; Alexandru Ticlea, *Tratat de Dreptul Muncii*, 3rd edition, Universul Juridic Publishing House, Bucharest, 2009, pp. 791-792

[7] See Ion Traian Stefanescu, *Repere concrete rezultate din recenta modificare şi completare a Codului Muncii*, "Revista Română de Jurisprudenţă", no. 2/2011, pp. 22-23, Universul Juridic Publishing House, Bucharest, 2011

If we also take into account the legal regime of rehabilitation of public servants provided by the Law no. 188/1999, we consider that the cancelation of employees' disciplinary sanctions should intervene depending on the sanction received, in other words, disciplinary dismissal would require a longer rehabilitation term.

This disposition of the Law no. 40/2011 on the cancelation of sanctions enforced to employees was considered by the Romanian legal doctrine as one of the necessary amendments brought to the abovementioned normative act.[8]

V. Conclusions

The issue of disciplinary liability is only an example in terms of the negative effects of abrogation of the collective labour contracts at national level.

This fact comes into clear contradiction with the provisions of the international legislative acts that encourage collective negotiation at any level.

Among these, we may mention: Convention no. 98 of 1949 on the right of organization and collective negotiation, Convention no. 135 of 1971 on the employees' representatives, Recommendation no. 163 of 1981 on the collective negotiation, Convention no. 154 of 1981 on the collective negotiation for the public servants, the Recommendation of the International Labour Organization no. 91 of 1951.

In the European Union, collective negotiation appears in article 28 from the fundamental rights Charter of the EU where it is provided that employers and employees represented in accordance with the legal provisions have the right to negotiate and conclude collective conventions[9].

An extremely important document is also the European Social Charter – the revised version, adopted by the European Council, signed by Romania too on May 14th 1997 and ratified by the Law no. 74 of 1999.

In this context, it is necessary that both employees and employers use the legal obligation to negotiate the conclusion of collective labour contracts in the institutions where there are more than 21 employees.

The dispositions of the collective labour contracts concluded at the level of unit may diminish the negative effects of the loss of former favourable dispositions from the sole collective labour contract at national level concluded for the interval 2007-2010.

The new legal provisions, though restrictive for employees, however allow for certain solutions that come to consolidate the employees' statute within the work relationships.

---

[8] Ion Traian Stefanescu, Serban Beligradeanu, *Principalele aspecte teoretice şi practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea şi completarea Legii nr. 53/2003 –Codul Muncii*, "Revista română de Dreptul Muncii", pp.11-48.

[9] In Germany, for example, the sanctioning of employees is made by virtue of a "sanctioning regulation" which is a document issued on the basis of the agreement between employer and the enterprise board, but the provisions from the collective labour contracts have a significant role in terms of disciplinary liability.

But the exam that the participants to social dialogue must pass consists in the concentration of joint efforts in an efficient way that, following negotiations, might lead to the expected results.

The role of trade union movements must not be a "homely" or accompanying one for the employer, but an active role oriented towards the employees' needs, the more so as the provisions of the new labour legislation are a challenge for the participants to the social dialogue.

An efficient trade union movement, after the model of the states where trade union movements represent a genuine tradition, might be a viable solution to promote the employees' rights in a state where legal framework seems not to favour the efficient social dialogue oriented towards the promotion of interests of all the participating parties.

The new regulations in the field of labour legislation seem to be a challenge for the participants to the social dialogue since they will have to find the most efficient solutions for the promotion of the legal and constitutional rights from the domain of labour relationships.

Bibliography

1. Decision no. 574 of 4 May 2011 of the Constitutional on the objection of unconstitutionality of the provisions of the Law on social dialogue in its entirety, as well as, mainly, of the art. 3 paragraph (1) and (2), art. 4, art. 41 paragraph (1), title IV regarding the National Tripartite Council for the Social Dialogue, title V regarding the Economic and Social Council, art. 138 paragraph (3), art. 183 paragraph (1) and (2), art. 186 paragraph (1), art. 202, art. 205, art. 209 and art. 224 lit. a) of the law, published in the Official Gazette no. 368/ 26 May 2011.
2. Dimitriu, Raluca, *Contractul individual de muncă, prezent şi perspective*, Tribuna Economică Publishing House, Bucharest, 2005.
3. Law no. 53/2003 (Labour Code), republished in the Official Gazette of Romania, 1st Part, no. 345 of 18 May 2011.
4. Law no. 62/2011 (Law on Social Dialogue), published in the Official Gazette of Romania, 1st Part, no. 322 of 10 May 2011.
5. Sole Collective labour contract at national level for 2007-2010, published in the Official Gazette, 5th part no. 5 of 29/01/2007.
6. Ştefănescu, Ion Traian, „Repere concrete rezultate din recenta modificare şi completare a Codului Muncii", *Revista Română de Jurisprudenţă* n. 2/2011.
7. Ştefănescu, Ion Traian, Beligrădeanu, Şerban, „Principalele aspecte teoretice şi practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea şi completarea Legii nr. 53/2003 – Codul Muncii", *Revista Română de Dreptul Muncii* n. 3/2011.
8. Ştefănescu, Ion Traian, *Tratat teoretic şi practic de Drept al Muncii*, Universul Juridic Publishing House, Bucharest, 2011.
9. Ţiclea, Alexandru, *Tratat de Dreptul Muncii*, edition V, "Universul Juridic" Publishing House, Bucharest, 2011.