

Considerations on Disciplinary Sanctions Applicable to Employees. Elements of Comparative Law

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Abstract

The present article discusses the problematic aspects pertaining to the disciplinary sanctions applicable to employees who commit breaches of the rules defining work discipline. It contains an analysis of the categories of disciplinary sanctions provided for by the Labour Code: written warning; demotion, with the salary corresponding to the position to which the demotion was ordered, for a period not exceeding 60 days; reduction of the basic salary for a period of 1-3 months by 5-10%; reduction of the basic salary and, where applicable, of the management allowance for a period of 1-3 months by 5-10%; disciplinary termination of the individual employment contract. The article highlights, on the one hand, the specifics of domestic regulations with consideration of the most important aspects of case law, and on the other hand, it offers elements of comparative law with reference to countries such as Belgium, Dominican Republic, France, Cyprus in order to provide the legislative optics of other countries as well as reveal the problems in this field of labour law.

Keywords: disciplinary sanctions, written warning, employment contract, misconduct.

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1. Introduction

According to labour law, the application of disciplinary measures concerns not only the employee's obligation to comply with the conventional legal rules, as well as the internal rules communicated once he/she has signed the employment contract, but also the disciplinary prerogative of the employer² which is defined as monitoring the employee's fulfilment of his or her work obligations as well as the employer's authority to punish breaches of the rules. However, beyond the component of the disciplinary prerogative, it is certain that employers must be able to discipline their employees whenever they find that they have deviated from the legal rules or those rules defining work discipline at the workplace³.

The disciplinary sanction is determined by the employer and must be proportionate and reasonable in relation to the circumstances of the situation. The proportionality of the disciplinary measure is determined using the individualization criteria provided for in Article 250 of the Labour Code, which refer to the circumstances in which the offence was committed, the employee's general conduct in the workplace, any disciplinary sanctions previously suffered by the employee, the degree of accountability of the employee and the consequences of the disciplinary offence.

Disciplinary measures are subject to regulations, the legislator providing an explicit enumeration of disciplinary sanctions in Art. 248 (1) of the Labour Code, ranging from a written warning; demotion, with the salary corresponding to the position in which the demotion was ordered, for a period not exceeding 60 days; reduction of the basic salary for a period of 1-3 months by 5-10%; reduction of the basic salary and, where applicable, of the management allowance for a period of 1-3 months by 5-10%; up to the most serious of the disciplinary sanctions, namely disciplinary dismissal (the disciplinary termination of the individual employment contract).

As the comparative law analysis shall demonstrate, the legislative systems that exist in different countries regarding the application of disciplinary measures against an employee appear to be quite similar. In order to ensure the protection of the employee against possible unlawful

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² According to Article 40 para. 1 letter e) in the Labour Code, the employer's rights include the right to ascertain the committing of disciplinary offences and to apply the appropriate sanctions, in accordance with the law, the applicable collective labour agreement and the internal regulations.

³ Some authors state that this prerogative of the employer to penalize the employee for indiscipline is found in different forms in all European legal systems and in all historical periods. (See Raluca Dimitriu, *Elemente de dreptul muncii*, CECCAR Publishing House, 2017, p. 86).

disciplinary measures, in some countries the legal provisions on employee disciplinary liability are quite detailed and comprehensive, while in others they are brief and ambiguous, creating a number of difficulties in their practical implementation.

The present paper will examine on the one hand, the specifics of domestic regulations on disciplinary sanctions provided for in the Labour Code, taking into account the most important aspects of case law, and on the other hand, some elements of comparative law with reference to countries such as **Belgium**, the **Dominican Republic**, **France**, **Cyprus**, in order to provide the legislative optics of other countries as well as reveal the problems arising in this field of labour law.

2. Disciplinary sanctions under the Labour Code

a) *Written warning*. Conceptually, a written warning is a relatively mild disciplinary measure consisting of a written notice to the employee that he or she has breached a rule of work discipline. Only acts involving a lesser breach of work discipline may lead to the written warning. However, like any other disciplinary sanction, its application is conditional on the cumulative fulfilment of the elements of disciplinary misconduct, in the absence of which disciplinary liability cannot be engaged and, consequently, no disciplinary sanctions can be applied to the employee⁴. As it is also the lightest of the disciplinary sanctions, the Labour Code exempts the written warning from the obligation of prior investigation, which is a mandatory condition for the validity of all other disciplinary measures in order to ensure the employee's right of defence. As has been pointed out in the specialized literature, there are objective exceptions to the compulsory nature of the prior disciplinary investigation, either because of the moral nature of the sanction of a written warning or because of the employee's failure to attend the hearing for unjustified reasons⁵.

b) *Demotion, with the salary corresponding to the position to which the demotion was ordered, for a period not exceeding 60 days*. In addition to the written warning, the demotion of the employee, with the salary corresponding to the position to which the demotion was ordered, for a period not exceeding 60 days, is another sanction that may be imposed by the employer in consideration of the disciplinary prerogative provided by law. The same main considerations relating to the employee's violation of the legal rules, the internal rules, the individual employment contract or the applicable collective employment contract, as well as the orders and legal provisions of hierarchical superiors are also the basis for the adoption of this disciplinary measure. Disciplinary misconduct is therefore a necessary and sufficient condition for disciplinary liability and, therefore, the existence of a previous disciplinary sanction against the employee is not in itself sufficient as to justify the application of the measure of demotion, with payment of the salary corresponding to the post to which the demotion was ordered, for a period not exceeding 60 days. The characteristic particularity of this disciplinary measure is that it is limited in scope compared to other disciplinary sanctions. It cannot be imposed on any employee, as demotion means that the employee is moved to a lower position or grade than before, i.e. from a managerial to an executive position⁶. In the application of this disciplinary sanction, the employee who has held a managerial position will be moved to an executive position, but with consideration given to his/her profession⁷. The application of these regulations therefore changes the nature of the work, which, in principle, cannot occur without the employee's consent⁸. However, this premise of unilateral modification of the employment contract is an exception enshrined in the legal provisions contained in Article 48 of the Labour Code,

⁴ Appellate Court Bucharest, Section VII for labour conflicts and social security cases, Decision no. 2689/7 July 2015

⁵ Situation in which the employer may order a sanction without hearing the employee (for details, see Andreea Miclea, PhD thesis, *Concedierea disciplinară – Conținut teoretic și practic în dreptul intern și internațional*, Titu Maiorescu University, 2020, p. 12).

⁶ It has been stated in the literature that demotion does not occur successively on the basis of several disciplinary sanctions. From a practical point of view, an economic director can be demoted to the position of head of economic department, if in the hierarchy of posts in that structure the latter position is immediately below that of director. At the same time, his/her demotion may not be continued by the application of a new disciplinary penalty, to the post of economist, if the latter position is immediately below that of head of the economic department. (For details, see Andreea Miclea, *op. cit.*, p. 179).

⁷ For further details see Irina Sorică, *Răspunderea disciplinară a salariaților*, Wolters Kluwer Publishing House, Bucharest, 2010, p. 156.

⁸ Art. 41 para. (1) Labour Code, "The individual employment contract may be amended only by agreement of the parties".

according to which the employer may temporarily change the place and nature of work without the employee's consent, inter alia, as a disciplinary sanction. This means that, if demotion is permanent, it cannot be legally treated as a disciplinary sanction⁹. All the more so as the regulatory text in this regard is clear, stating that the duration of demotion cannot exceed 60 days.

In Romanian law, there are a number of regulations that require certain clarifications from the perspective of demotion as a disciplinary sanction. Thus, according to Article 49 para. 6 of the Labour Code, in the case of suspension of the individual employment contract, all terms related to the conclusion, modification, execution or termination of the individual employment contract are suspended, except for situations in which the individual employment contract is terminated *de jure*.

In the interpretation of these regulations, if a case of suspension of the individual employment contract occurs during the execution of the disciplinary sanction of demotion, then the execution of the disciplinary sanction shall be suspended and shall be resumed immediately after the end of the case of suspension¹⁰. In other words, if during the execution of the disciplinary sanction of demotion ordered for a period of 60 days, the employee goes on sick leave for a period of 10 days during which the employment contract is suspended, the period of 60 days for which the demotion was ordered will be extended by the duration of the suspension of the individual employment contract, i.e. 10 days.

It should be stressed that the application by the employer of demotion as a disciplinary sanction whenever he/she finds that employees have committed a disciplinary offence is subject to the prior completion of the disciplinary investigation procedure¹¹, otherwise the disciplinary decision of demoting, with payment of the salary corresponding to the position to which the demotion was ordered, for a period not exceeding 60 days, is absolutely null and void. In this regard, case law has further clarified that the absence of a proposal for a sanction by the disciplinary committee cannot render the disciplinary sanction null and void, since the procedure governed by Article 251 of the Labour Code does not provide that the disciplinary investigation must end with the drawing up of a report or minutes, whereby the persons responsible for carrying out the investigation on behalf of the employer express a point of view, which must be taken into account when issuing the sanction decision¹².

c) *Reduction of basic salary for 1-3 months by 5-10%*. A disciplinary sanction, with an obvious pecuniary character, is the sanction provided for in Art. 248 para. (1) of the Labour Code: reduction of basic salary for a period of 1-3 months by 5-10%. It is for the employer to decide whether this disciplinary sanction should be applied, taking into account the circumstances of the offence and its consequences.

While a written warning is a disciplinary measure regulated by labour law for relatively minor disciplinary offences, a 5-10% reduction in the basic salary for a period of 1-3 months is usually applied in cases where the employee's act meets the elements of a disciplinary offence for which the application of a warning would be ineffective in relation to the seriousness of the offence. It follows from the wording of Article 248 para. (1) that the law only provides for the minimum and maximum limits within which the reduction in basic salary must be operated. In other words, the mandatory coordinates envisaged by the legislator are those relating to the duration of the measure (from 1 to 3 months) and the percentage of the reduction in basic salary, which is between 5 and 10%¹³. A disciplinary decision to reduce the basic salary for a period of 1-3 months by 5-10%, outside these coordinates imposed by the legislator, renders the measure legally ineffective. Moreover, with regard to failure to comply with the time and percentage limits within which the reduction may be applied, the situation is similar in the case of a demotion ordered for a period exceeding the legal limit of 60

⁹ In this regard, the Appellate Court Pitesti also ruled in Decision no. 2812/2013, whereby it held that "no prior disciplinary investigation was carried out in the case, a procedure required under penalty of absolute nullity by the provisions of Article 251 para. (1) of the Labour Code, and the demotion was not ordered for a maximum of 60 days, according to Article 248 para. (1)(b) of the Labour Code, in which case it was held that there was no disciplinary sanction (published in portal.just.ro no. 1 of 5 September 2013)".

¹⁰ For details, see Raluca Dimitriu, „Reflecții privind suspendarea contractului individual de muncă și necesitatea regândirii reglementării acesteia cuprinsă în Codul Muncii”, in *Dreptul* no. 2/2015, p. 71.

¹¹ Art. 251 para. (1) in the Labour Code.

¹² The Appellate Court, Bucharest, Civil Judgment no. 795/2015, published in portal.just.ro no. 1 of 12 March 2015.

¹³ See also Alexandru Țiclea, Laura Georgescu, *Dreptul muncii. Curs universitar*, Universul Juridic Publishing House, 2020, p. 479.

days. Given that the application of this sanction has the effect of modifying an essential element of the employment contract, namely the salary, if the disciplinary measure in question is not subject to the limitation of 5-10% of the basic salary for a period of 1-3 months, then it amounts to a unilateral modification of the employment contract in terms of salary, which is prohibited by the Labour Code. From this perspective, it should be noted that the case law also takes the same view¹⁴.

Beyond the regulatory framework, it should be pointed out that, given the legal nature of the measure of reduction of basic salary for a period of 1-3 months by 5-10% as a disciplinary sanction, and the possibility of combining disciplinary and financial liability, the conclusion is that this disciplinary measure should not be treated as compensation for damages. Without insisting on the cumulation of the two forms of liability, the application of a reduction of basic salary for a period of 1-3 months by 5-10% as a disciplinary measure is not inextricably linked to whether or not the employer has suffered damage as a result of the employee's disciplinary offence. If the employee's act meets the elements of disciplinary misconduct and is, at the same time, an act causing damage to the employer, both disciplinary liability, which may entail one of the disciplinary sanctions provided for in the Labour Code, including a reduction in basic salary for a period of 1-3 months by 5-10%, and pecuniary liability whereby the employee is obliged to cover the damage caused to the employer by his act, may be incurred cumulatively¹⁵.

d) *Reduction of basic salary and, where appropriate, of management allowance for a period of 1-3 months by 5-10%.* With regard to this sanction, also of a pecuniary nature, its scope is restricted to employees in managerial positions. Employers have the right to decide freely, in the absence of explicit legal provisions, on the organisation chart and policies for establishing management and executive positions. Such an assumption is based on the provisions of Article 277 of the Labour Code, which states that managerial positions are those defined by law or by the employer's internal regulations. Under the current wording of Article 248(d) of the Labour Code, the employer essentially has two legitimate hypotheses at his disposal, depending on the circumstances of each case. The employer therefore either orders a concurrent reduction in basic salary and management allowance or a reduction in management allowance only¹⁶. But the issue here is not only whether the application of this penalty results in a reduction of the management allowance only or a concomitant reduction of the basic salary and allowance, but whether it is possible that the reduction applied may result in a reduction of salary which may in fact result in a temporary reduction below the level of the gross minimum wage in the country. The answer is yes. Although the rules of labour law are protective in nature, in that they provide that the salary received by an employee under an individual employment contract may not be lower than the guaranteed gross minimum wage, the situation in which the employee finds himself is a punitive one, the legal regime for which is laid down by way of exception¹⁷. In other words, the law makes no distinction with regard to those employed at the minimum wage, so the disciplinary sanction of reducing basic salary and, where appropriate, management allowance for a period of 1-3 months by 5-10% can be applied to any employee who has committed a disciplinary offence, regardless of the salary at which he/she is employed.

From a legal point of view, another thorny issue regarding the reduction of basic pay for a period of 1-3 months by 5-10% or the reduction of basic pay and, where applicable, also of management allowance for a period of 1-3 months by 5-10% as disciplinary measures applied by the employer is their qualification as "disciplinary fines". Views expressed in the literature¹⁸ are to the effect that there is no disciplinary fine, stating that "strictly legally speaking, the two sanctions cannot

¹⁴ Thus, the Court of Brasov ruled that "in the case of the application of a disciplinary sanction consisting in a 5% reduction of the employee's basic salary, the employer was obliged to indicate the period of time for which the measure was applied, which could not be implemented sine die, but only in compliance with the provisions of Article 248 para. (1) of the Labour Code" (*Civil Judgment no. 1608/09.11.2017, Civil Division I*).

¹⁵ See Raluca Dimitriu (ed.) *Consilier Codul muncii*, D43, p. 67 (<https://www.rsonline.ro/legislatia-muncii-3/consilier-codul-muncii-828/p-67/>, accessed on 7.02.2023).

¹⁶ See Dan Țop, *Tratat de dreptul muncii. Doctrină și jurisprudență*, fourth edition revised and expanded, Universul Juridic Publishing House, 2022, p. 580.

¹⁷ See Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, fourth edition revised, Universul Juridic Publishing House, 2017, p. 843.

¹⁸ Ibid, p. 844.

be called 'disciplinary fines' because: on the one hand, the legislator expressly prohibits a disciplinary fine without making a distinction (direct or indirect); on the other hand, such terminology is not used as such for these sanctions". Indeed, the expression "disciplinary fines" is not currently used by the legislator in the Labour Code and does not seem to find application in relation to the employment contract. In Romanian law, as long as the law imposes a list of disciplinary sanctions, which is enumerative and exhaustive, this means that the freedom of negotiation allowed to the parties signing the employment contract does not include, by itself, the right to establish other disciplinary sanctions of a pecuniary nature. From this perspective, we consider that it is not legitimate for the parties to choose to include, in the employment contract or collective agreement, a fine among the disciplinary sanctions applicable in the event of employees committing disciplinary offences, even if this measure would have the same pecuniary effect on the employee. We do not believe that, in terms of the legal regime, a fine is regarded as disciplinary penalty. The legislator wished to emphasise the pecuniary nature of the measure and to exclude any interpretation by expressly prohibiting the disciplinary fine¹⁹. Otherwise, it would have proceeded as in other legal systems which expressly recognise the validity of such a disciplinary measure. In **Belgium**²⁰, for instance, one of the disciplinary measures may also consist of a fine, in which case the amount and purpose of the fine must be specified and the amount of the fine imposed per day may not exceed one fifth of the daily salary. On the other hand, the proceeds of fines must be used for the benefit of employees and the employer is obliged, under penalty of nullity, to inform the persons who have incurred the penalties no later than the first working day after the day on which the disciplinary offence committed by the employee was established.

e) *Disciplinary termination of the individual employment contract.* Without reiterating here the argument relating to the employer's disciplinary prerogative in organising his/her activity, it is important to note that this sanction is considered a drastic measure taken by the employer with a definitive character and, consequently, should only be used in serious cases. In interpreting the provisions of Article 61(a) of the Labour Code, the employer may order dismissal for reasons relating to the employee's person, inter alia, if the employee has committed a serious breach or repeated breaches of the rules of labour discipline or those laid down in the individual employment contract, the applicable collective labour contract or the internal regulations, as a disciplinary sanction. By committing the acts regarded by the employer as disciplinary misconduct, the employees practically breach their own contractual obligations concerning the performance of work and the rules that validate the work discipline for the staff of the respective institution. In any case – as far as the prospects for legislation are concerned – the current Labour Code does not define or list serious or repeated misconduct, which is usually laid down in collective agreements or internal regulations. The Romanian legislator remains committed to a rather flexible approach to the concept of serious misconduct and its boundaries, with the employer playing a significant role in this respect, as he defines and enumerates the acts of misconduct according to the specific nature of the activity carried out.

As this is the most severe disciplinary sanction provided for in the Labour Code, the qualification of the act committed by the employee as serious or the finding of repeated breach of duty are fundamental conditions justifying the employer's option to terminate the employee's employment contract. Without insisting, as the matter is discussed separately, the degree of the employee's innocence is also essential in the decision to terminate the employment contract. Thus, according to the provisions of Article 250, the employer determines the disciplinary sanction applicable in relation to the seriousness of the disciplinary offence committed by the employee, taking into account the following: a) the circumstances in which the offence was committed; b) the degree of culpability of the employee; c) the consequences of the disciplinary offence; d) the general conduct of the employee in the workplace; e) any disciplinary sanctions previously suffered by the employee. In other words, the degree of culpability may influence the employer's choice to take a milder

¹⁹ Actually, Article 249 para. (1) expressly states that "disciplinary fines are prohibited".

²⁰ See Hendrickx, Frank. 'Belgium', p. 40 in Roger Blanpain†, Frank Hendrickx (eds.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, NL: Kluwer Law International, 2022.

disciplinary measure than termination of employment²¹. In the same context, of determining the termination of the individual employment contract as an appropriate disciplinary measure in the opinion of the employer, disciplinary dismissal may be ordered only after the employer has carried out a prior disciplinary investigation in accordance with the regulations imposed by the current Labour Code²². The aim was thus to strengthen the protection of employees by respecting the fundamental right of defence, in application of which employees can formulate and deliver their defence on their own behalf. A solution which can also be seen as an expression of employee protection is the one found by ICCJ (High Court of Cassation and Justice) in an appeal in the interest of the law, which ruled that "the court competent to rule on the employee's appeal against the disciplinary sanction applied by the employer, finding that it is wrongly individualised, may replace it with another disciplinary sanction"²³.

The perspective of the internal regulation on disciplinary termination of employment as the most severe of disciplinary sanctions is also special in terms of the consequences for the employee. The vulnerability of the employee resulting from the application of the sanction of termination of employment can be highlighted on several levels. For example, according to Article 75 para. (1) of the Labour Code, persons dismissed under Art. 61 letter c) and d), art. 65 and 66, have the right to a notice period of no less than 20 working days, provisions which exclude from application the situation of employees dismissed for reasons attributable to themselves, such as disciplinary dismissal²⁴.

Also, the provisions of Article 64 of the Labour Code establish the employer's obligation to propose to the dismissed employee to transfer to another vacant job within the institution, which applies only in the event of dismissal for reasons relating to the employee's person, the employee's physical and/or mental unfitness, professional unsuitability, as well as in the event of the automatic termination of the individual employment contract, following the acceptance of the application for reinstatement of the person who previously occupied the respective position. Thus, the protection envisaged by the provisions of Article 64 of the Labour Code is limited, so that any extension of its scope to situations other than those provided for by law, and thus also to cases of disciplinary dismissal, is unlawful²⁵. Also with reference to these vulnerabilities, another aspect that increases the difference in security and protection between employees who are dismissed on disciplinary grounds and other employees whose employment contract is terminated on other legal grounds concerns the status of the unemployed. In accordance with the provisions of Law No. 76/2002 on the unemployment insurance system and the stimulation of employment, this protection is completely

²¹This view is supported by the practice of national courts. Thus, the Court of First Instance found that 'the plaintiff infringed the obligation laid down in Article 50(f), final sentence, of the Internal Rules - "disclosure of confidential information" - because, after opening the payroll file and becoming aware of the nature of the information contained therein, he forwarded it to his colleague R.I.S. in the Administrative Department, but that act was isolated and limited in nature, as the plaintiff had no intention of making that information public or disclosing it outside the company, and no such acts were proved against him. For those reasons, the court concluded that the penalty imposed on the plaintiff was disproportionate and unlawfully individualized, the defendant having infringed Article 250(a), (b), (d) and (e) of the Labour Code, since he had acted in isolation, in circumstances in which the confidentiality of wages had long been compromised through the fault of other persons. Also, the plaintiff acted with a low degree of culpability and was an employee with a generally good, undisputed conduct and no previous disciplinary sanctions.' (Appellate Court Târgu Mureș, Disciplinary sanction decision. Individualization of the sanction, published in portal.just.ro on 21.08.2014).

²² See M. Gheorghe, *Dreptul individual al muncii. Curs universitar*, Universul Juridic Publishing House, 2015, pp. 400-405.

²³ One of the I.C.C.J.'s arguments was that "the courts, by proceeding in this way, do not become disciplinary bodies, because they do not carry out ex officio administrative investigations to establish the legal acts and facts through which labour discipline has been breached, but only censor the sanctioning measure already applied by the employer, ensuring a framework of protection for the employee in his/her relations with the employer, in compliance with the principle of proportionality, according to which any measure taken must be adequate, necessary and appropriate to the aim pursued". (Decision No. 11/2013 on the examination of appeals in the interest of the law on the interpretation and application of the provisions of Article 252 para. 5 of the Labour Code, published in Official Gazette no. 460 of 25 July 2013).

²⁴ Referring to case law, the court ruled that "the criticism concerning the invalidity of the dismissal decision on the ground that the defendant-employer did not grant the notice period referred to in the individual employment contract is also unfounded, the provisions of Article 75 para. (1) of the Labour Code being unequivocal in this respect. They impose such an obligation only in the case of dismissals ordered pursuant to Article 61 (c) and (d) and Articles 65 and 66 of the Labour Code, respectively, the applicant not being in any of those situations. (Appellate Court Târgu Mureș, Decision no. 388/2014 - Appeal against the decision of disciplinary termination of the individual employment contract. Failure to grant notice. Individualization of the sanction, published in the Bulletin of the Courts of Appeal, no. 3bis of 30 September 2014).

²⁵ The Appellate Court Pitești, Decision no. 935/2014 – appeal against dismissal decision, published in portal.just.ro no. 1 of 8 May 2014.

absent in the case of disciplinary dismissals²⁶. The current legal regulations are likely to disadvantage employees who are dismissed on disciplinary grounds even if they have benefitted from a professional training course or internship funded by the employer during the course of their employment. More specifically, they will have to reimburse the employer for all expenses incurred for the training, in proportion to the number of days not worked during the period laid down in the addendum to the individual employment contract²⁷.

3. Elements of comparative law

In terms of **comparative law**, other legal systems, such as that of the **Dominican Republic**, have distinct rules on the application of the most serious disciplinary sanction. Under Dominican Republic law, the acts constituting grounds for disciplinary dismissal are described in particular in the Labour Code²⁸, but from the point of view of the legal regime, not all errors committed by employees in the performance of their duties justify dismissal. Such dismissal is lawful if the employee is at fault, which must be serious and unjustified, and it is the judge who assesses the seriousness of the fault and its unjustified nature. The analysis of the employee's fault in determining the degree of misconduct justifying dismissal is also enshrined as a matter of principle in the case law of other states.

According to the court practice of **Cyprus**²⁹, it is for the court to determine whether the employee's misconduct is such as to interfere with and prejudice the safety and normal conduct of the employer's business and therefore justify dismissal. A single act of disobedience or misconduct shall not justify dismissal unless it is such as to justify a breach of the employment contract or of one of its essential terms. At the same time, the principle of reasonableness in taking the dismissal decision appears to be a *sine qua non* condition for the validity of the measure, but this does not mean that it is for the tribunal to substitute itself for the employer in taking the decision, but to consider by the standards of a reasonable person whether the reasons really justify dismissal.

²⁶ Published in Monitorul Oficial/Official Gazette, Part 1, no. 103, of 6 February 2002.

²⁷ Art. 198 para. (1), (3) and (4) of the Labour Code.

²⁸ For example, Art. 88 of the Labour Code of the Dominican Republic stipulates that the employer may terminate the employment contract by disciplinary dismissal for the following reasons: (1) the employee influences the employer to commit an error by claiming to have indispensable conditions or knowledge which in reality he/she does not possess, or provides personal references or certificates whose falsity is subsequently proven; (2) the employee performs the duties of the job in a manner that proves his/her incapacity and inefficiency; (3) during work, the employee shows dishonesty, commits acts or attempts of violence, insults or ill-treatment against the employer or the employer's dependent relatives; (4) the employee commits against any of his/her colleagues acts of dishonesty, acts or attempts of violence, insults or ill-treatment, and the order at the workplace is disturbed; (5) the employee commits any dishonest acts, acts or attempts of violence, insults or mistakes outside the workplace, against the employer or his/her dependent relatives or against the company directors; (6) the employee intentionally causes material damage during the performance of the work, to buildings, equipment, machines, tools, raw materials, products and any other objects related to the work; (7) the employee causes serious damage mentioned in the previous section, unintentionally but with negligence that causes the damage; (8) The employee commits fraudulent acts in the workshop or workplace; (9) The employee discloses the company's secrets or makes confidential things public to the detriment of the company; (10) The employee negligently or recklessly compromises the security of the workshop, office or other workplace belonging to the company or the safety of persons therein; (11) The employee's absence from work for two consecutive days or two days in the same month without the permission of the employer or the employee's representative; (12) Absence, without prior notice of good cause, of an employee who is in charge of any work place or machine whose inactivity or stoppage necessarily involves a disruption of the activity; (13) An employee who leaves during working hours without the permission of the employer or employer's representative and without prior notice to the employer or employer's representative of the reason for ceasing work; (14) Disobedience of the employee to an order of the employer or employer's representative; (15) Refusal of the employee to take preventive measures or to follow procedures indicated by law, competent authorities or employers to avoid accidents or illness; (16) if the employee breaches any of the prohibitions provided for in points 1, 2, 5 and 6 of Article 45: - coming to work in an intoxicated state or in any other similar state. - Possession of weapons of any kind during working hours, except for those exceptions for certain workers established by law. - Taking work equipment and finished raw materials from the factory, workshop or institution without the employer's permission. - Any kind of religious or political campaigning at the workplace; (17) In case the employee breaches any of the prohibitions provided for in points 3 and 4 of Article 45 - Taking cash at the workplace during working hours. - Use of machinery and tools given by the employer for work other than that for which they were intended or use of the employer's machinery and tools without the employer's authorization; (18) The employee is sentenced to a custodial sentence by an irrevocable court decision; (19) Any other serious violation of the obligations imposed on the employee by the contract. (See Hernández-Contreras, Carlos. 'Dominican Republic'. In Roger Blanpain†, Frank Hendrickx (eds.), *op. cit.*, pp. 142 - 143).

²⁹ Case *Makris v. Makrisbros Ltd* [1980] 1 CLR 238 (See Achilles C. Emilianides & Christina Ioannou „Cyprus”, in Roger Blanpain†, Frank Hendrickx (eds.), *op. cit.*, p. 124).

In **France**, the regulations of the Labour Code refer to two types of dismissal: disciplinary and economic. The main criterion differentiating the two types of dismissal is the event leading to the termination of the employment contract. The distinction is clear: if the event is assimilated to the employee's behaviour, then the dismissal is disciplinary, otherwise the dismissal is of an economic nature. The case law in this regard is also rich, enshrining a number of situations that may constitute grounds for disciplinary dismissal, from actions of employees that violate managerial rules to actions that harm the employer. In addition, an important step in strengthening protection against dismissal at the regulatory level is the requirement that employers must have a genuine and serious reason for terminating employment, a requirement applicable to both forms of dismissal and to all employers regardless of size. In the 'genuine reason' sense, the employer can provide objective information to prove the reason, and if he/she can demonstrate that the termination was necessary for the proper functioning of the business, then the reason is serious. Another peculiarity of this system of law that differentiates it from the Romanian legislator's view is that the "personal reasons" justifying disciplinary dismissal also include those related to undermining the employer's trust in the employee, such as the employee's poor performance at work, including failure to meet targets set during performance appraisal interviews, incompetence or the employee's inability to work for medical reasons. However, in Romanian legal system these reasons do not fall under the category of disciplinary dismissal, as they have a separate legal regime set out in the Labour Code³⁰.

4. Conclusions

In the context of the analysis of domestic and comparative law regulations, as well as of case law on the legal regime regarding disciplinary sanctions against employees for serious or repeated breaches of labour discipline rules, some conclusions can be drawn. While, in theory, deciding on disciplinary sanctions is reserved for employers in most of the legal systems analyzed, there is also a great number of nuances. Case law consistently reveals that the principle of reasonableness in taking the decision to dismiss as the harshest of sanctions seems to be a *sine qua non* condition for the validity of the measure and to ensure the protection of employees against possible abuses by the employer. As a result, the employer will have to prove that the disciplinary measure taken is lawful and reasonable, by analyzing the circumstances of each individual case. The emphasis on the subjective component of the employer's assessment of the disciplinary sanction applied to the employee leads to the conclusion that it is not possible to create a situational prototype for each individual sanction.

Regarding the elements of comparative law, the French and Cypriot legal systems are noteworthy. As we have seen, in French law, the term disciplinary does not exclusively imply misconduct. What is particular in this system of law are the conceptual aspects which signal a rather broad conception by the legislator of the grounds for disciplinary dismissal. However, the requirement that employers must have a real and serious reason for terminating the employment contract – a requirement expressly enshrined in the case of disciplinary dismissal – reveals the provision of protective measures for employees. In Cyprus too, the significant role of the courts in controlling and assessing the degree of culpability of the employee and his or her misconduct in relation to the offence committed, also aim to protect employees in relation to the enforcement of the most serious of disciplinary sanctions. This approach could show, in the legislator's view, that the most effective sanctions are those that maintain the employment relationship, so that the dismissal of the employee is the employer's last resort.

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³⁰ See Signoretto, Camille, and Julie Valentin, *Individual dismissals for personal and economic reasons in French firms: One or two models?*, pp. 245 – 246, in „European Journal of Law and Economics”, vol. 48, no. 2, October 2019, pp. 241-266.

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