

Elements to Be Considered Prior to Summoning the Employee to a Disciplinary Investigation. Establishment of Disciplinary Misconduct Committed by the Employee and the Conditions for Disciplinary Liability

Lecturer **Mihaela Emilia MARICA¹**

Abstract

Given the mandatory nature of the preliminary disciplinary investigation procedure, this disciplinary process to which employees are submitted can be divided into three main phases, namely the phase prior to the employee's summoning, the moment of the employee's hearing and the phase following employee's investigation. Clarity on these stages and the proceedings corresponding to each of them, is essential for the validity of the disciplinary sanction. As the disciplinary process is complex both in terms of the current regulatory framework and judicial practice, the present article addresses some aspects of the preliminary disciplinary investigation procedure, with special focus on the problems identified in the phase prior to the employee's summoning to the disciplinary investigation. We will consider both descriptive technical elements and elements that generate significant divergences or controversy over practical matters. The comparative law elements presented will also highlight how other legal systems regulate issues relating to the procedure for imposing disciplinary sanctions. The legal regulations of Bulgaria, the United Kingdom, Cyprus, New Zealand are presented.

Keywords: disciplinary procedure, disciplinary sanctions, employee, work discipline.

JEL Classification: K31

1. Preliminary considerations

Romanian legislation has based its protection against abuse (which may arise from the way in which employers apply disciplinary sanctions) on the employer's obligation to conduct a preliminary disciplinary investigation procedure, which, according to the legislation in force, comprises several stages. Any employer, before applying disciplinary sanctions against those employees guilty of committing disciplinary offences in violation of legal rules, internal regulations, individual employment contract or the applicable collective employment contract, as well as orders and legitimate requirements from hierarchical managers, must take into account the employers' compliance with certain formal conditions that validate the disciplinary measure applied.

The success of a legal and fair disciplinary process is based on employers' strict compliance with the procedure of prior disciplinary investigation. The purpose of this requirement imposed by the legislator (compliance with this procedure) is to give the employee the opportunity to make his or her point of view known about the alleged misconduct, but also to guarantee the right of defense enshrined by Constitution in most legal systems. At the same time, it is a means of clarifying the factual situation, but also a tool which helps the employer to make a fair decision on the most appropriate disciplinary sanction. According to the legal doctrine², the presumption of innocence stipulated by Art. 23 para. (11) of the Constitution in criminal matters is also applicable, by analogy, in the field of disciplinary liability. The legislation imposes a prior disciplinary investigation essentially as an expression of this presumption, and any other solution might open the door to endless abuses against employees.

Given the mandatory nature of the preliminary disciplinary investigation procedure, the disciplinary process to which employees are subject can be divided into three main phases, namely the phase prior to the employee's summoning, the moment of the employee's hearing and the phase after the employee's investigation. Clarity on these stages and the procedures pertaining to each of them is essential for the validity of the disciplinary sanction process. As the disciplinary process is complex both in terms of the current regulatory framework and judicial practice, the present article will address some aspects of the preliminary disciplinary investigation procedure, with special focus

¹ Mihaela Emilia Marica - Faculty of Law, Bucharest University of Economic Studies, Romania, mihaela.marica@drept.ase.ro.

² See in this regard Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, Ed. Universul Juridic, Bucharest, 2017, p. 846.

on the problems identified in the phase prior to the employee's summoning to the disciplinary investigation. We will consider both descriptive technical elements, and elements that generate significant controversy over practical matters. The comparative law elements presented will also highlight how other legal systems regulate issues relating to the procedure for imposing disciplinary sanctions. The legal regulations of Bulgaria, the United Kingdom, Cyprus and New Zealand are presented below.

2. The stage prior to summoning the employee. Establishment of the disciplinary misconduct (offence) committed by the employee and the conditions of disciplinary liability

Once an employee has committed an act that may potentially qualify as disciplinary misconduct involves the employer's obligation to act in accordance with certain procedures – that is, the employer's conduct has to abide by legal regulations of a procedural nature. A number of elements are relevant in relation to the employer's compliance with the prior disciplinary investigation procedure. Before taking any formal steps to initiate a preliminary disciplinary investigation, the employer must ensure that the employee has indeed committed an act with the potential for misconduct which is connected with his/her work, as the provisions of the Labour Code itself stipulate with regard to the concept of disciplinary misconduct³ and that there are no other circumstances that would abolish the responsibility of the employee thus rendering him/her not liable. According to Romanian law, an employee may be held liable for disciplinary offenses (misconduct) only if the employer has verified prior substantiation of the following prerequisites:

a) The act committed indeed evinces the elements that constitute a "disciplinary offence".

It should be noted that in this context, the employer needs to ascertain the facts, and this fact-finding process may or may not be a formal investigation. The increased autonomy of the employer in the disciplinary investigation is also linked to the fact that it is the employer who establishes and investigates the act committed by the employee, and it is also the employer who decides on the sanction he considers appropriate. However, in disciplinary matters, it is recommended that each stage of the procedure should be set out by the employer, in order to justify, finally, if necessary, the appropriateness of the disciplinary measure taken.

Thus, according to Article 247 para. (2) of the Labour Code, "disciplinary misconduct is a work-related act consisting of an action or inaction committed with guilt by the employee, by which he/she has violated the legal rules, internal regulations, the individual employment contract or the applicable collective labour contract, orders and legitimate directions received from hierarchical superiors". This text can be considered slightly terse and incomplete, as the Labour Code does not provide a list of at least examples of potentially wrongful acts. It is therefore considered that any breach of the rules defining labour discipline from the employer's point of view may be regarded as disciplinary offence.

Another problem that may arise here is the delimitation of the moment of the commission of the act from the moment of the determination of the disciplinary offence, since the two are treated as distinct elements. This becomes important in the context of the application of the principle of the presumption of innocence, which the employee enjoys throughout the period up to the moment when the act is established as misconduct. The solution to this problem is based on case law⁴, which takes the view that only after the preliminary investigation has been completed can it be assessed whether the "act" is "disciplinary misconduct", since until that moment the person who committed the "act" is presumed innocent. Moreover, Article 247 para (2) of the Labour Code (republished) subsumes under the concept of "disciplinary misconduct" the concept of "act", considered as an action or inaction,

³ Disciplinary misconduct is a work-related act consisting of an action or inaction committed with fault on the part of the employee, by which he/she has violated the legal rules, internal regulations, the individual employment contract or the applicable collective employment contract, orders and legitimate directions received from the part of his/her hierarchical superiors (Article 247 para. 2).

⁴ In this regard, the court has established that "the moment of the commission of the *act* is distinct and prior to the moment of establishing the existence of *disciplinary misconduct* and only after the completion of the preliminary investigation can it be assessed whether the act in question has the character of a disciplinary misconduct" (Bucharest Court of Appeal, Decision no. 5436/2014, published in portal.just.ro on 20 November 2014).

dependent according to law on the meeting of certain criteria (conditions). These conditions are to be verified after the act has been committed by the body or person authorized by the employer to carry out the preliminary disciplinary investigation. In other words, the "establishment" of the existence of the disciplinary offence will only take place after the preliminary investigation has been completed, i.e. after the act which triggered the preliminary investigation has been committed, precisely in order to establish whether or not the offender is guilty⁵, and to which extent. Therefore, the moment when the "act" is committed is distinct and prior to the moment when the "disciplinary offence" is established, as a result of the necessary verification whether the "act" was committed in violation of legal rules, internal regulations, the individual employment contract or the collective employment contract.

b) The offence was committed by a person in his/her capacity as "employee". From the point of view of the legal regime, the application of disciplinary sanctions by the employer presupposes *sine qua non* that the person sanctioned must be an employee⁶. What is in question is not the act itself qualified as disciplinary misconduct under any circumstances, but those acts which can be qualified as violations of legal rules and norms, and which are related to the employee's work. In other words, if the potentially wrongful act was committed by a person under a contract of a civil nature, the provisions applicable to disciplinary liability do not become operative. Moreover, the situation where the act committed by the employee has the characteristic elements of an offence, if it is not connected with the work performed by the employee, is also irrelevant from this point of view. In relation to the stipulation of Article 247 para (2) of the Labour Code, the employee's act must occur at the workplace or in direct connection with the employment relationship⁷ in order to qualify as misconduct and thus justify disciplinary action. Since the text of the legislation makes no reference to the type of individual employment contract, we consider that the institution of disciplinary liability applies to any of the atypical forms⁸ of individual employment contracts (atypical work arrangements) regulated or covered by national law (fixed-term employment contract, part-time employment contract, employment contract with a temporary employment agent, home-working contract or teleworking contract).

Generally speaking, the regulations of other legal systems are along the same lines. The legal regime applied to employees in terms of disciplinary liability has certain particularities in comparative law, determined by the incidence (occurrence) of certain factors. For example, in **New Zealand**, acts committed by the employee outside the workplace may constitute a legal basis for dismissal of the employee, insofar as the acts have a negative impact on the employee's ability and performance at work or if the relationship of trust between the employer and the employee is seriously jeopardized. New Zealand court practice provides many such cases to illustrate this point: smoking cannabis during lunch breaks and drinking during lunch in breach of workplace safety rules; the situation where the employee is in a position involving a high degree of trust and is convicted of supplying cannabis; a bank teller convicted of using a document with intent to defraud⁹.

c) Appropriateness of a disciplinary sanction. Another important prerequisite at this stage is to establish that the most appropriate decision is for the employee's misconduct to be punished. Given the diversity and the different interests of employers, it is not always the most beneficial option to apply the disciplinary sanction of termination of the individual employment contract.

⁵ Moreover, the High Court of Cassation and Justice validates this point of view by establishing in its practice that "in the interpretation and application of Article 252 para. (1) of the Labour Code, republished, the date from which the 30 calendar days' period for the application of the disciplinary sanction begins is the date of registration of the final report of the preliminary disciplinary investigation at the registry of the respective institution". (Decision No. 16/2012, published in the Official Gazette No. 817 of 5 December 2012).

⁶ Therefore, the disciplinary liability with all the consequences established by law arises from the existence of the employment contract which imposes the legal obligation of the employee to comply with all the rules that govern labour discipline (see in this regard, Ion Traian Ștefănescu *op. cit.*, 2017, p. 828).

⁷ For example, an employee's act committed when participating in team-building activities in connection with work can be considered as disciplinary misconduct.

⁸ For an analysis of the concept of "atypical work arrangements", see Mihaela Emilia Marica, *Contracte de muncă atipice*, Ed. Universul Juridic, Bucharest, 2019, pp. 38 – 42.

⁹ See in this regard Gordon Anderson, (2006), *New Zealand*, in R. Blanpain (ed.), *International Encyclopaedia for Labour Law and Industrial Relations*, vol. 10, Kluwer. Law International, London, p. 141.

According to Article 250 of the Labour Code, the employer shall examine the act committed, its impact on the good functioning and smooth running of the company or institution, as well as the general situation of the employee¹⁰. The employer will apply the sanction in such a way as to ensure that both the *preventive* and *punitive* roles of the disciplinary liability are fulfilled¹¹.

In this context, it is justified to take into account all the consequences of the act in question, but not as an absolute criterion because the fact that the employer (company or institution) has not suffered material damage does not remove the possibility of disciplinary liability. In accordance with current case-law, the existence or non-existence of damage to the company's assets as a result of the misconduct allegedly committed by the employee is not, in itself, a relevant factor in determining the employee's disciplinary liability and the need for the employer to apply a disciplinary sanction¹². Also, if the act has resulted in damage, the employer can address the court claiming for compensation to cover this damage. As a result, the employee may be liable, in parallel to both disciplinary and patrimonial sanctions, and the accumulation of the two liabilities is permitted by law.

3. Situations exempted from the obligation to go through the preliminary disciplinary investigation procedure

The compulsory nature of the prior disciplinary investigation is maintained only in relation to some of the disciplinary sanctions provided for in the Labour Code. In the case of a written warning¹³ or in the event of the employee's unjustified absence from the hearing, this condition loses its mandatory character.

The case law of the courts has provided further clarifications in this respect. Thus, "since the Labour Code does not stipulate that it is necessary to carry out a disciplinary investigation in the case of a written warning, the court cannot hold that the sanctioning decision is absolutely null and void because it does not contain the reasons why the defense formulated by the employee during the preliminary disciplinary investigation was rejected"¹⁴. In another case¹⁵, the court which analyzed the legality of the disciplinary sanction ruled that the sanction of a written warning may be imposed without a prior disciplinary investigation, so that the medical certificate invoked by the applicant (...) has no effect on the legality of the provision imposing the "written warning". With reference to the case law described above, we consider that if the employer has agreed to conduct a prior disciplinary investigation in case, he intends to apply the written warning, then the procedure regulated by Article 251 of the Labour Code applies *ad litteram*.

In considering the legality of the disciplinary sanction decision (with the exception of a written warning), the courts shall verify whether the obligation laid down in Article 251 para (1) of the Labour Code (imposed on the employer) has been fulfilled. Disciplinary sanctions imposed may be confirmed or revoked by the court. A finding that the employer has neglected any of the conditions imposed by law renders the disciplinary measure null and void, and the consequences of this are very severe under the current legislation. For example, the employer could be required to reinstate the employee and pay compensation if he or she was dismissed as a disciplinary measure without strictly complying with the legal provisions¹⁶.

¹⁰ The legislation provides in Article 250 of the Labour Code that "the employer shall determine the applicable disciplinary sanction 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 guilt of the employee; c) the consequences of the disciplinary offence; d) the general conduct at work of the employee; any previous disciplinary sanctions received by the employee."

¹¹ See in this regard Raluca Dimitriu, *Labour Code Advisor*, Rentrop & Straton, 2023, p. 67 (<https://www.rsonline.ro/legislatia-muncii-3/consilier-codul-muncii-828/p-67/>).

¹² Court of Appeal Suceava, Decision no. 158/2017, published in portal.just.ro of 01 March 2017.

¹³ The lightest of the disciplinary sanctions regulated by the Labour Code in Art. 248 para. (1).

¹⁴ Mehedinți Court, Civil judgment no. 120/2017, published in portal.just.ro.

¹⁵ Civil judgment no. 1750/2016, Gorj Court, published in portal.just.ro. on 17.10.2016.

¹⁶ Civil decision no. 328/12.02.2013 of the Court of Appeal Galați, published in portal.just.ro on 12 February 2013.

4. Elements of comparative law

By reference to comparative law, other systems of law appear to be similar. In order to ensure the protection of the employee against possible unlawful disciplinary measures, in some countries the legal provisions on employee disciplinary liability are quite detailed and comprehensive, while in others they are insufficiently detailed and often create difficulties in terms of practical implementation. In **Bulgaria**¹⁷, the Labour Code provides as a fundamental obligation of the employer that disciplinary sanctions should be applied only after ascertaining the employee's point of view, expressed verbally or in writing; if the employer fails to comply with this obligation, then the disciplinary measure is rendered legally ineffective. On the other hand, in **Cyprus**¹⁸, there is already extensive case law (*Andreas Prokopiou Ltd v. Toumazou [2001] 1 CLR 1125 in Greek*) suggesting that there is no rule stipulating that employees must always be given a fair hearing before dismissal. However, the employee's right to be heard before termination of employment can be invoked under Article 7 of Law 45/85 on the ratification of the Termination of Employment Convention, which states that a contract of employment should not be terminated on grounds of misconduct of the employee without giving him/her an opportunity to be heard and to give evidence in his/her defense, unless the employer cannot reasonably be expected to offer such an opportunity. In other words, the employer is not required to hear the employee in the presence of a lawyer or to make the employee aware of the material under investigation in advance, but only to give the employee an opportunity to present his or her views and demonstrate that he/she (the employer) was reasonable in taking the dismissal action. Also, with reference to the legislation of Cyprus, we note that the existing regulations in this state do not impose an obligation on the employer to adopt a disciplinary code, but if the employer chooses to do so, then the respective code must include details on the disciplinary procedure.

Under other legal systems, the general standards on disciplinary liability enshrine more flexible rules on the procedural path of disciplinary investigation prior to dismissal. For example, in the **United Kingdom**, the rules applicable to disciplinary proceedings also allow for immediate dismissal. Thus, where the employee's conduct constitutes a repeated offence, serious disciplinary misconduct or sexual harassment, the employee's disciplinary investigation is no longer a prerequisite. Also, if the employer does not consider it appropriate to terminate the employment contract, he/she will consider alternative sanctions, such as demotion or transfer¹⁹.

A similar legislative approach is in place in **Bulgaria**, where the committing of serious disciplinary offences by an employee (offences mentioned in the text of the law), entails the sudden and immediate termination of the employment contract at the initiative of the employer, without notice or any other formality giving the accused employee the opportunity to defend himself/herself. Although such an attitude on the part of the Bulgarian legislature flagrantly infringes the right to defense and the presumption of innocence of the employee – two fundamental rights in most legal systems, such a hypothesis is lawful²⁰.

5. Conclusions

As we have shown above, in the realm of disciplinary liability, a specific domain of labour law, the employer is both investigator and accuser. The employer is the party affected by the employee's misconduct, and it is also the employer who establishes the fact, investigates it, assesses the disciplinary sanction and applies it. Although the legislator may have wanted to create a system

¹⁷ See Mrachkov, Vassil 'Bulgaria', p. 109, in *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, edited by Roger Blanpain. Alphen aan den Rijn, NL: Kluwer Law International, 2020.

¹⁸ See in this regard Achilles C. Emilianides & Christina Ioannou „Cyprus”, in *International Encyclopaedia for Labour Law*, edited by R. Blanpain, Ed. Kluwer Law International, 2019, p. 128.

¹⁹ Faisal Al-Haidar, *Administrative disciplinary and grievance procedures for public employees in Kuwait and UK*, in „International Journal of Law and Management”, 2018, 60(3), pp. 842-853.

²⁰ Mrachkov, Vassil 'Bulgaria', p. 109, in *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, edited by Roger Blanpain. Alphen aan den Rijn, NL: Kluwer Law International, 2020.

of less restrictive rules to facilitate the procedural path in the matter of disciplinary liability, as a rule, in practice, the disciplinary investigation procedure cannot be triggered in all cases where employees have committed misconduct. The employer must ensure that the employee has indeed committed an act of potential misconduct in connection with his/her work which deserves to be sanctioned.

With reference to comparative law, we also identify different perspectives. In this respect, the existing regulation in Bulgaria is eloquent in the sense of legislative rigidity in the disciplinary investigation procedure. This is completely lacking in the case of serious misconduct, depriving the employee of the opportunity to prove his/her innocence. The right of defense, however, is a fundamental right enshrined in most legal systems.

Bibliography

1. Al-Haidar, Faisal, *Administrative disciplinary and grievance procedures for public employees in Kuwait and UK*, in „International Journal of Law and Management”, 2018, 60(3), pp. 842-853.
2. Blanpain, Roger & Rijn, Alphen aan den (eds.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, NL: Kluwer Law International, 2020.
3. Bucharest Court of Appeal, Decision no. 5436/2014, published in portal.just.ro on 20 November 2014.
4. Civil decision no. 328/12.02.2013 of the Court of Appeal Galați, published in portal.just.ro on 12 February 2013.
5. Civil judgment no. 1750/2016, Gorj Court, published in portal.just.ro. on 17.10.2016.
6. Court of Appeal Suceava, Decision no. 158/2017, published in portal.just.ro of 01 March 2017.
7. Decision of the High Court of Cassation and Justice No. 16/2012, published in the Official Gazette No. 817 of 5 December 2012.
8. Dimitriu, Raluca, *Labour Code Advisor*, Rentrop & Straton, Bucharest, 2023.
9. Law no. 53/2003 regarding the Labor Code, republished in the Official Gazette, Part I no. 345 of May 18, 2011, with subsequent amendments.
10. Marica, Mihaela Emilia, *Contracte de muncă atipice*, Ed. Universul Juridic, Bucharest, 2019.
11. Mehedinți Court, Civil judgment no. 120/2017, published in portal.just.ro.
12. Ștefănescu, Ion Traian, *Tratat teoretic și practic de drept al muncii*, Ed. Universul Juridic, Bucharest, 2017.