SUSPENSION OF THE PRIOR DISCIPLINARY INVESTIGATION ACCORDING TO LABOR LAW

Nicolae, Grădinaru[1]

Abstract:

In order to conduct the prior disciplinary investigation, the employee shall be convoked in writing by the person authorized by the employer to carry out the research, specifying the subject, date, time and place of the meeting. For this purpose the employer shall appoint a committee charged with conducting the prior disciplinary investigation.

Prior disciplinary research cannot be done without the possibility of the accused person to defend himself. It would be an abuse of the employer to violate these provisions.

Since the employee is entitled to formulate and sustain defence in proving innocence or lesser degree of guilt than imputed, it needs between the moment were disclosed to the employee and the one of performing the prior disciplinary investigation to be a reasonable term for the employee to be able to prepare a defence in this regard.

The employee's failure to present at the convocation, without an objective reason entitles the employer to dispose the sanctioning without making the prior disciplinary investigation.

The objective reason which makes the employee, that is subject to prior disciplinary investigation, unable to present to the preliminary disciplinary investigation, should be at the time of the investigation in question.

Keywords: *guilt; sanction; research; disciplinary; suspension; objective reason.*

1. Considerations on prior disciplinary research

The entire labour legislation is based on general and fundamental2 principles, which are intended to provide legal employment relationships in a legal, reasonable and fair framework, defending both, the legitimate interests of both the employers and the employees. Legal regulations based on these principles should ensure free access of persons to an economic activity, free enterprise, and their exercise under the law guaranteed by art. 45 of the Constitution and unrestricted exercise of the right to employment and social protection of employees devoted to art. 41 of the Constitution.

Within these legal regulations are of particular importance those relating to the conclusion, execution and termination of individual employment contracts. To prevent any abusive behaviour by employers, which would harm the legitimate rights and interests of employees, the Labour Code expressly governing the substantive conditions and the procedural in which employer may decide, on its own initiative, to dismiss the employee with effect of termination individual labour contract.3

The Labour Code provides in Article 39 paragraph 2 letter b and c the obligation to respect work discipline and the obligation to comply with the internal regulations, the collective labour agreement applicable as well as in the individual labour contract.

Disciplinary responsibility has the following features:

- it is a contractual liability. Concluding a individual contract of employment, the employee is obliged to comply with all rules regarding labour discipline.

- it is a personal responsibility. Individual employment contract has a intuitu personae character[4].

---

1 Ph. D. Senior Lecturer, Constantin Brâncoveanu University of Piteşti, nicolae_gradinaru@yahoo.com

2 The Labour Code. Law No. 53/2003, republished in M.Of.nr.345 / 18.05.2011. Fundamental principles .art.3 - Article 9.

3 Decision no.506 / 2005 of the Constitutional Court, published in M.Of.nr.982 / 04.11.2005.

4 "INTUITU personae" in consideration of a specific person, the Latin expression that defines the legal documents at the end of which, the determining factor were represented by the skills, qualities or training of a person, eg employment contract, maintenance contract, contract of mandate representation publishing

- it is implemented by a physical constraint, namely a disciplinary sanction.

- has a penalty and a preventive and educational function, restoring order in the unit where labour discipline was violated.

According to art. 251 of the Labour Code, under penalty of nullity, no action, except as referred to in art. 248 para. (1) a) namely the written warning cannot be ordered before making a prior disciplinary research.

This provision has a role in protecting the employee against unfair sanctions. The courts have consistently held that failure of prior disciplinary research draws absolute nullity of the sanctioning decision[1].

In order to carry, the prior disciplinary investigation, the employee shall be convened in writing by the person authorized by the employer to carry out the research, indicating the object, date, time and place of the meeting. For this purpose the employer shall appoint a disciplinary committee charged with conducting the prior research.

As we can see, the law provides only that it is mandatory the convening in writing of the employee, without specifying also the manner in which it is convened.

We consider that such an employee convocation can be made by any means of communication to ensure the transmission and confirmation of receipt. Thus, we consider that it can be done by handing the employee under signature at workplace and in the absence of the employee at work the dispatch in writing of the convocation can be done by mail as letter with acknowledgment of receipt at the employee's home. The reason for which the legislator in art. 251 of the Labour Code, inserted the requirement of written notification, specifying the object, date, time and place of the meeting was to enable the employee to prepare defences and evidence, knowingly of the act imputed and which he must be notified of this requirement stipulated by art. 251 para. 2 of the Labour Code is respected only when in the convening which was communicated to the employee, are mentioned all the facts constituting the object of prior disciplinary research, not being sufficient to indicate only one of the misbehaviours for which is to be issued the disciplinary measure, because the purpose of the convocation is to ensure the exercise of the right of defence of employee that is under disciplinary investigation.

The law does not stipulate a certain period between the date when the convening is made, and the date of the prior disciplinary research[2].

Prior disciplinary research cannot be done without the possibility of the accused person to defend himself. It would be an abuse of the employer to violate these provisions.

---

contract, the contract for the execution of a painting, a sculpture, etc. Due to this feature, the obligations assumed by the person can not be met by a representative and are not transferable.

1 Civil Decision nr.3258 / 2011 of the Court of Appeal - Civil Division VII cases and labor disputes and social security. Civil Decision nr.4729 / 2008 of the Court of Appeal - Civil Division VII cases and labor disputes and social security. Civil Decision no. 251/2011, dr. C.P. Timisoara Court of Appeal, Division labor disputes and social security.

2 In the collective labor contract at national level for 2007-2010, published in M.Of.nr.5cc / 29.01.2007 Part V, this term was stipulated. According to art. 75 para. (3) of the collective labor agreement "the Commission shall be convened in writing by the employee investigated, at least 5 days prior. The summons shall indicate at least the reason, date, time and place of meeting. "

This term is not expressly provided for in Article 251 of the Labor Code, it was considered that this term is a term of recommendation and therefore, his failure does not void disciplinary decision.

Currently CAOS unique national legislation no longer provided as Law No. 130/1996 republished in M.Of.nr.184/ 19.05.1998 the collective labor agreement was repealed by Law No. 62 / 2011 published in M.Of.nr.322 / 10.05.2011. Law No. 62/2011 and the Labour Code governing collective agreements thus under Article 128 paragraph 1 of Law No. 62/2011, "collective agreements can be negotiated level units, groups of units and sectors activity. "and Article 129, paragraph 1 states' collective agreements can be negotiated level units, groups of units and sectors." C. Gîlcă - Nature deadline for convening the disciplinary investigation. Review of Labour and Social Security no. 7/2008.

Given that the employee is entitled to formulate and support defence in proving its innocence or lesser degree of guilt than imputedit is necessary that from time of, disclosure to the employee and the conduct of the preliminary disciplinary research to be a reasonable time for the the employee to be able to prepare a defence in this regard.

Such a term must exist namely, between the date of the convocation, and the effective date of the prior disciplinary research requires a reasonable time for the employee to have the opportunity to prepare a defence. "The right to defence is guaranteed" under Article 24, paragraph 1 of the Constitution and is a condition for the validity of the decision of sanctioning infringement of this right of the employee, attracts the nullity of the decision[1].

The Constitutional Court stated, in its case, that legal relations of work should be conducted in a legal framework to protect rights and duties as well as the legitimate interests of both parties. In this framework, prior disciplinary research sanctions contribute greatly to preventing abusive measures, illegal or ungrounded, arranged by the employer, taking advantage of its dominant position.

Conditioning the application of disciplinary sanctions trough conducting the prior research does not diminish the disciplinary responsibility of the employees and does not create any privilege. In case the labour dispute triggered by the sanction is subject to settlement by the court, the parties benefit from the principle of equality of arms, each having access to the same tools and procedural safeguards that condition full exercise of the right to defence and the right to a fair trial[2].

Corroborating the provisions of Article 251 paragraph 1 and 2 of the Labour Code, it appears that the legislature intended to subject to the absolute nullity exclusively those cases where the measure of sanctioning was done improperly violating in this regard the fundamental right of the employee to defence. Thus, art. 251 of the Labour Code requires,

---

1The principles underlying disciplinary involvement are:
- Presumption of innocence, according to which a person is presumed innocent until proven guilty. The purpose of the presumption of innocence is to protect the individual against unfair measures by guaranteeing individual liberty by promoting the search for truth by state authorities. It is assumed that the employee disciplinary investigation is innocent so long as his guilt has not been proven and the penalty was not applied;
- Guaranteeing the right to defense, recognizing that the right employee disciplinary investigation, to conduct preliminary disciplinary research, to be convened in writing by the person authorized by the employer to carry out research, indicating the subject, date, time and place of the meeting.
During research prior disciplinary employee is entitled to formulate and support all defenses in his favor and give the person empowered to conduct research all the evidence and reasons it deems necessary, and the right to be assisted in the application by a whose union representative is a member;
- Rapidity of the procedure, which requires the employer to have the sanction issued a decision in writing within 30 calendar days from the date of knowledge about disciplinary irregularity, according to the Labour Code Art.252 and Art .286 provides that applications for settlement of labor disputes shall be heard urgently;
- Contradictory, which involves ensuring the possibility of persons at different positions to express their opinions and defenses related to a disciplinary offense;
- Proportionality, according to which must be a relationship between severity of disciplinary offense, the circumstances of its perpetration and disciplinary sanction imposed. According to Art.250 of the Labour Code, the employer establishes disciplinary sanction applicable to the seriousness of the disciplinary offense committed by the employee, taking into account:
a) the circumstances in which the act was committed;
b) the degree of fault of the employee;
c) the consequences of misbehavior;
d) the general conduct of the employee;
e) any disciplinary action previously incurred by it;
- Legality of the sanction under which disciplinary sanctions may be applied only provided by art.248 of the Labour Code;
- the uniqueness of the sanction under which the a disciplinary offense can not apply but one disciplinary sanction as provided for 249 paragraph 2 of the Labour Code "for the same misconduct can apply only one penalty."
2 Decision nr.607 / 2007 of the Constitutional Court, published in M.Of.nr.577 / 22.08.2007.

under penalty of nullity, to carry out a prior disciplinary research, without which no employee can be placed under sanction and regulates the conduct of this research procedure (Ştefănescu, 2012).

The research provided by the text of law is designed to ensure correct determination of the disciplinary offense, the circumstances in which it was committed, its severity and guilt in relation to which it can also appreciate the applicable penalty, but at the same time also of the exercise of the right to defence of the employee in this procedure.

The essential element of conducting, the prior disciplinary research is the employee's hearing.

During the prior disciplinary research, the employee is entitled to formulate and support all defences in his favour and give the person empowered to conduct research all the evidence and reasons it deems necessary as well as the right to be assisted in the application by a representative of the union whose member he is (Ţiclea, 2012).

The discussions held between representatives of employers appointed to conduct the preliminary investigation and the employee shall be recorded in a report which is to play the circumstances and conditions under which the offense was committed as well as the offender's statements.

Listening to the employee is completed by the "Explanatory Note" that he will give. Hearing shall be recorded in a separate proceeding, which contains questions from the committee members and employee responses.

2. Suspension of the conducting of the prior disciplinary research.

According to paragraph 3 of Article 251 of the Labour Code, employee's failure to present at the convene made without an objective reason entitles the employer to have punishment without making the prior disciplinary research.

Therefore, the employer may sanction the employee, without making prior disciplinary investigation, if not present at the convocation. Therefore, the employee may be sanctioned without the need for disciplinary investigation, for it can no longer be done without the employee.

To to be able to make a disciplinary sanction, the employee, the employer must prove that he refused to receive the convocation, to the disciplinary investigation and not just his absence to the prior research or that he did not receive the first convocation by being out of town. Thus, we believe that an essential condition for the employer to be able to make a disciplinary sanction for the employee, it is necessary to exist evidence of his express refusal to receive the convening or has received notice and refuses to attend the preliminary investigation.

We appreciate that it is essential that the employer can prove his good faith, by the evidence that he tried repeatedly by several ways to call for the employee to the disciplinary investigation, and he refused to receive convocation.

The objective reason, which puts the employee, that is subject to the prior disciplinary research, in the incapacity to be able to present to the prior disciplinary investigation must exist at the time of research in question. The employee for objective reasons (sick leave, annual leave, etc., protected periods by art. 60 of the Labour Code) may not be present at the time and place to conduct, the prior disciplinary research[1].

1 According to Article 60 of the Labour Code Dismissal of employees may be ordered:
a) the duration of temporary disability, as determined by a medical certificate in accordance with law;
b) suspension of activity during the imposition of quarantine;
c) during the employed woman is pregnant, to the extent that the employer is aware of this fact prior to issuing the dismissal decision;
d) the length of maternity leave;

A question arises, however, if the employee is on sick leave he is entitled to be absent from the convocation, made for the prior disciplinary research and in such cases the research is stopped by being impossible to achieve?

In this situation, the employee has an objective reason by being sick, meaning temporary incapacity to work and may miss the convening made by the employer and the search procedure cannot be performed.

According to article 50 b of the Labour Code, the employment contract is suspended by law, in a situation where the employee is on leave for temporary incapacity to work.

In such circumstances the Labour Code in Article 49 paragraph 6 states that if an individual employment contract is under suspension, there will be suspended all deadlines related to the conclusion, amendment, execution or termination of the individual employment contract, unless the individual employment contract legally ceases[1].

According to article 60 paragraph 1 letter a) of the Labour Code, for the duration of temporary disability, determined by a medical certificate, dismissal of employees cannot be ordered.

The same situation is if the employee is hospitalized as accompanying a sick child aged up to 7 years or for disabled children up to the age of 18. The GEO 158/2005, article 26 stipulates that policyholders are entitled to vacation and sick child care allowance under the age of 7 years and a disabled child, for intercurrent diseases, up to the age of 18, and the Order MS / CNAS no. 60/32/2006 approving the Methodological Norms for the application of Ordinance 158/2005 on leave and health2 insurance benefits provided for in art. 49: "Policyholders are entitled to vacation and sick child care allowance under the age of 7 years and in case of a disabled child, for intercurrent diseases, up to the age of 18.". Also, art. 50 states:"The certificate of sick leave to care for a sick child aged up to 7 years and caring for a disabled child aged up to 18 years for intercurrent diseases are issued by the attending physician, under the conditions and to the maximum duration provided by law."

The employer knows that the employee is on sick leave because, according to Article 81 of Decree No. 60/32/2006, policyholders are required to notify payers of health insurance benefits (employer) on the occurrence of the temporary incapacity of work and regarding identification data, shall include the name of the prescribing physician and facility in which operates it within 24 hours from the date of granting sick leave. If the occurrence of the temporary incapacity to work intervened, in declared non-working days, policyholders are required to notify payers of health insurance benefits on the first working day.

The text of those rules establish policyholder's obligation, to notify the payer of the indemnity (employer) within 24 hours and not to present a certificate of medical leave in this period[3].

The implementing rules of the provisions of O.U.G. No. 158/2005 on leave and social health insurance does not establish a penalty for failure to comply the period of 24 hours of the employee.

---

e) the duration of parental leave under the age of 2 years or when the disabled child until the age of three years;
f) leave to care for a sick child up to 7 years or, in the case of children with disabilities, affections, until the age of 18 years;
g) during exercise of eligible positions in the trade union body, unless the dismissal is ready for serious a disciplinary offense or repeated misconduct committed by that person;
h) during the leave.
The provisions of para. (1) does not apply for dismissals that occur as a result of judicial reorganization, dissolution or bankruptcy of the employer, under the law.

1Termination of the individual employment contract is governed by Article 56 of the Labour Code.

2Order MS / CNAS no. 60/32/2006 approving the Methodological Norms for the application of Ordinance 158/2005 on leave and health insurance allowances published in M.Of.nr.147 / 16.02.2006.

3 According to Article 36 paragraph 2 of EO No. 158/2005, sick leave certificate presented to the payer (employer) no later than the 5th of the month following the month for which leave was granted.

Conclusions

In conclusion during temporary incapacity to work leave, the employment contract is suspended by law, and also the prior disciplinary investigation is stopped during this period. So the employer's right to conduct the disciplinary notice is suspended while the employee is temporarily unable to work because of his individual employment contract being suspended by law.

The prior disciplinary investigation procedure can be continued after the period of annual leave or sick leave, the employee being told about another convening in compliance with the reasonable time to prepare his defense, specifying the object, date, time and place of the meeting.

According to Art.252 of the Labour Code, the employer, orders application of the disciplinary sanction issued by a decision in writing within 30 calendar days from the date of acknowledgment about disciplinary irregularity, but no later than six months from the date of the deed.

The period of 30 days being a limitation period that can be interrupted or suspended. If the employee is on leave for temporary incapacity to work, the period of 30 calendar days within which the employer orders the sanction by a decision issued in writing is a limitation period and this period of sick leave is suspended and will begin to run after its expiry when the employee will return to work and resume the procedure of prior disciplinary research where he remained as by being an objective fact that the employee was on sick leave for temporary incapacity to work, and the employer may have under the sanction of absolute nullity, disciplinary action before carrying out the prior disciplinary research.

The Labour Code regulates the two limitation periods which is an application of the principle of protecting the interests of both sides of the employment relationship and equality of arms, namely:

- a minimum period of 30 days for the employer to verify that the issues identified in the preliminary investigation proceedings constitute misconduct if it requires the application of disciplinary sanctions for this offense and to justify the action taken;
- as well as a maximum of six months - which is included within the 30 days - to avoid any abuse of the employer resulting from its dominant position in the employment relationship.

The period of six months, flows from an objective point: date of the deed. After reaching it, the employee cannot be disciplined. All procedural stages, regarding the application of the sanction should be consumed entirely, within the period of six months.

If the text of law specifies that disciplinary violation may be sanctioned in up to six months from the time of the offense by the employee, the reasons for the extension of this period up to 6 months may be targets of the kind mentioned the prior disciplinary investigation being able to be performed anytime in this period taking into account that the employee is not in a state of impossibility of being sanctioned and thus investigated.

In the interpretation and application of art. 252 para. (1) of the Labour Code, the employer disposes imposing the disciplinary sanction issued by a decision in writing within 30 calendar days the date of acknowledgment about the disciplinary irregularity, but no later than six months from the date of committing the deed, the time from which time starts to run of 30 days, for imposing the disciplinary sanction is the date of registration of the final report of the prior disciplinary investigation to the registration unit.

The employer or his representative, able to enforce disciplinary sanction must issue a decision within 30 days from the time it received the final report of prior disciplinary research, stating that it was committed with guilt, a disciplinary offense by the employee in question, on the ground that "art. 252 para. (1) of the Code refers to when finding the disciplinary offense

committed for the term the 30 days, while for the period of six months, the time of reference is different, namely, that of the time of the offense "(Ştefănescu, 2012).

Alexandru Ticlea has the same opinion, saying that "indeed, the 30-day period begins on the date on which the employer's legal representative authorized to impose disciplinary sanctions or individual employer became aware of the irregularity, and not the date the deed" (Ţiclea, 2011).

In the interpretation and application of art. 252 para. (1) of the Labour Code, "the employer disposes imposing the disciplinary sanction issued by a decision in writing within 30 calendar days from the date of acknowledgment about the disciplinary irregularity, but no later than six months from the date committing the crime, "the High Court of Cassation and Justice ordered that the moment from which time starts to run the 30 days for imposing the disciplinary sanction is the date of registration of the final report of the prior disciplinary investigation to the registration unit[1].

Bibliography:

1. Gîlcă Constantin (2008), *The nature of the deadline for convening the disciplinary investigation.* Review of labour law and Social Security no. 7/2008;
2. Ştefănescu Ion Traian (2012), *Theoretical and practical treaty of employment law.* Legal Universe Publishing. Bucharest;
3. Ticlea Alexandru (2011), *Treaty of labour law*, Publishing House. Legal Universe, Bucharest;
4. Ticlea Alexandru (2012), *Treaty of labour law. Sixth edition revised and enlarged. Legislation. Doctrine. Jurisprudence*. Legal Universe Publishing. Bucharest;

Legislation and case law:

1. The Labour Code - Law No. 53/2003 was republished in M.Of.nr.345 / 18.05.2011;
2. Order MS / CNAS no. 60/32/2006 approving the Methodological Norms for the application of Ordinance 158/2005 on leave and health insurance allowances published in M.Of.nr.147 / 16.02.2006;
3. Civil Decision nr.3258 / 2011 of the Court of Appeal - Civil Division VII cases and labour disputes and social security;
4. Civil Decision nr.4729 / 2008 of the Court of Appeal - Civil Division VII cases and labour disputes and social security;
5. Civil Decision no. 251/2011, dr. C.P. Timisoara Court of Appeal, Division labour disputes and social security;
6. Decision nr.607 / 2007 of the Constitutional Court, published in M.Of.nr.577 / 22.08.2007;
   Decision No. 16/2012 published HCCJ M.Of.nr.817 / 05/12/2012;
7. The decision of the High Court of Cassation and Justice no. 16/2012 in case no. 15/2012 was published in the Official Gazette No. 817/5 December 2012 Appeal on points of law.

1 High Court of Cassation and Justice. Appeal on points of law. Decision. 16/2012 in case no. 15/2012 was published in the Official Gazette No. 817/5 December 2012.