Some Theoretical and Practical Elements Concerning the Communication of Disciplinary Decisions. Elements of Comparative Law

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Abstract

This article discusses some theoretical and practical elements regarding the communication of disciplinary decisions to an employee who is guilty of committing violations of the rules that define the work discipline at the level of the unit. It contains the analysis of two communication perspectives: 1) Communication of the disciplinary sanctioning decision in the terms and under the conditions provided for by art. 252 para. (3) and (4) of the Labor Code and 2) the communication of the disciplinary sanctioning decision by electronic means in the light of the amendments introduced by Government Emergency Ordinance no. 36/2021 on the use of electronic signature in the field of labor relations. Also considered as a reference case is Decision No. 34/2016 of the High Court of Cassation and Justice with reference to the possibility of communicating dismissal decisions by electronic mail in order to distinguish what the legal hypotheses in this regard are in practice. In order to better understand the legislative optics regarding the communication of disciplinary decisions, some elements of comparative law are given as an example, with reference to countries such as Georgia and Austria.

Keywords*: disciplinary liability, dismissal, gross breach of labor discipline, labor law.*

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1. Preliminaries

In Romania, the concept of "work discipline" is not enshrined in a separate regulation. As a rule, the legislator refers to this concept when enumerating the main obligations of the employee, stating in Art. 39 para. 2 letter b) of the Labor Code that one of the main obligations of the employee in the performance of the employment contract is to abide by the disciplinary rules established by the employer. The hypothesis is that the employee is in fact in a subordinate relationship in relation to the person for whom he works, i.e. the employer, since the law confers on the latter the prerogative of discipline. Within the meaning of this concept, the employer has independence in the organization and functioning of the activity, in the determination of the duties of each employee, but also in the issuing of binding provisions for the employee, subject to their legality, as well as autonomy in the exercise of control over the performance of the employee's duties and, implicitly, in the finding of disciplinary offences[2]. From this perspective, the employer's disciplinary prerogative may act as a regulator of the internal order within the establishment in question, any breach of this order entailing the employee's liability[3].

Beyond, however, the component of the disciplinary prerogative, the

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[2] Bucharest Court of Appeal, Decision no. 2373/2016, published in portal.just.ro no. 1 of May 11, 2016.

[3] See on this Alexandru Țiclea *Disciplinary liability in employment relationships - Legislation. Doctrină. Jurisprudence,* Ed. C.H Beck, Bucharest, 2017, p. 2.

disciplinary process of the employee can be delimited into three main stages, namely the phase prior to summoning the employee, the time of the hearing and the phase following the investigation of the employee.

It can be said that strict compliance with these steps is essential for the validity of the disciplinary sanctioning process. But the disciplinary process is a complex one, both in terms of the way it is regulated and in terms of case law, so in what follows we will focus on certain aspects relating to the stage following the preliminary disciplinary investigation procedure, namely the moment when the employer communicates the decision to impose disciplinary sanctions. We will analyze both elements relating to the legislative technique established at the doctrinal level in this respect and elements that generate significant practical controversies. In addition, the *comparative law elements* used will attempt to illustrate how other legal systems regulate aspects relating to the communication of disciplinary decisions. The legal systems of Georgia and Austria will be considered.

2. Communication of the disciplinary decision. Deadline and conditions

In Romanian law, the regulations regarding the time limit for communicating disciplinary sanctions are contained in Art. 252 para. (3) and (4) of the Labor Code, stipulating that "the decision of sanction shall be communicated to the employee no later than **5 calendar days** from the date of issuance and shall take effect from the date of communication". In accordance with para. (4) of the same Article 252 of the Labor Code, the communication shall be delivered personally to the employee, with a signature of receipt, or, in case of refusal of receipt, by registered mail, to the domicile or residence communicated by the employee. It should be pointed out that the legislator uses the phrase "shall be delivered personally to the employer", pointing out that any other way of taking cognizance of it has no legal value[4]. From the analysis of the same regulations, the second sentence of Article 252 para. 4 of the Labor Code establishes an exception to this rule in case of refusal of the employee to receive the document related to the disciplinary decision. In the latter case, the employer must provide proof that he has notified the employee of the disciplinary decision by registered letter to the employee's home address or residence communicated by the employee. In other words, if the employee does not inform the employer that he or she lives at a different address, of which the employer was unaware, sending the disciplinary decision to the address mentioned in the employee's identity card fulfills the legal conditions within the meaning of the provisions of the Act[5] .

However, in terms of how the legal employment relationship between employer and employee is approached today, much has also changed in domestic legislation with the amendments made by Government Emergency Ordinance no. 36/2021 on the use of electronic signature in the field of labor relations, and for amending and supplementing certain normative acts, published in the Official Gazette no. 474 of May 6, 2021,

[4] It has been consistently emphasized in case law that it is irrelevant if the employee became aware of the existence of the decision in another way (Court of Appeal Timisoara, Labor and Social Security Litigation Section, Decision 2323/2008, in *Buletinul Curților de Apel* no. 4/2009, Ed. C.H Beck, Bucharest, p. 46-48).
[5] A point of view consistently mentioned in case law (Satu Mare Court, Civil Section I, Civil Judgment No. 618/20.06.2013).

approved with amendments by Law No. 208/2021, published in the Official Gazette No. 720 of July 22, 2021, which supplemented the Labor Code with a new paragraph in Article 16 (1), respectively 16 (1^1) in the sense that the parties may opt to use advanced electronic signature or qualified electronic signature when concluding, amending, suspending or, as the case may be, terminating the individual employment contract. In the light of these amendments, it follows that if the parties have opted under the individual employment contract to use an electronic signature in employment relations, the employee may also be notified of the decision to impose a penalty by email.

Things become more nuanced, however, and require certain delimitations if the disciplinary sanctioning decision concerns the dismissal of the employee. With regard to the possibility of communicating the disciplinary sanctioning decision by electronic means, Decision No. 34/2016[6] of the High Court of Cassation and Justice on the delivery of a preliminary ruling on a question of law, in which the High Court of Cassation and Justice (ICCJ) held that "in the interpretation and application of the provisions of Article 77 of the Labor Code, with reference to the provisions of Article 278 para. (1) of the Labor Code and to the provisions of Art. 1.326 of the Civil Code, the individual dismissal decision issued pursuant to the provisions of Art. 76 of the Labor Code may be communicated by electronic mail, this being a means of communication that is procedurally capable of triggering the running of the time limit for the judicial challenge of the decision, pursuant to the provisions of Art. 211 letter a) of Law no. 62/2011, in relation to the provisions of Art. 216 of the same normative act, with reference to the provisions of Art. 184 para. (1) of the Code of Civil Procedure, provided that the employee has communicated these contact details to the employer and this form of communication is customary between the parties. The decision thus communicated by electronic mail, in electronically accessible PDF format, must comply only with the formal requirements imposed by the provisions of Article 76 of the Labor Code, and not those imposed by Law no. 455/2001, concerning the electronic form of the document"[7] . But since the above-mentioned decision of the ICCJ makes no reference to disciplinary dismissal, but only to dismissal for reasons not related to the employee (Art. 65 of the Labor Code), it has been held in the doctrine[8] that it cannot be applied, by analogy, in the case of disciplinary dismissal.

As far as our law is concerned, I would add that, with the entry into force of the new paragraph of Article 16 (1), respectively 16 (1^1) of the Labor Code in the sense that the parties may opt to use advanced electronic signature or qualified electronic signature when concluding, amending, suspending or, as the case may be, terminating the individual employment contract, the manner of transmission and communication of the disciplinary sanctioning decision depends on the contractual conditions. Currently, from the interpretation of the provisions of labor law and, in addition, those imposed by Decision No. 34/2016 of the ICCJ, if the communication of the sanctioning decision concerns a dismissal regardless of its form (including disciplinary dismissal), it follows that the communication of the decision may be carried out by electronic means, if the individual employment contract provided for the use of electronic signature, pursuant to

[6] Published in Official Gazette, Part I No. 18 of 09/01/2017.
[7] For details on the content of the decision: https://www.iccj.ro/2016/10/24/decizia-nr-34-din-24-octombrie-2016/, consulted on 1.05.2024.
[8] See Raluca Dimitriu (coord.) *Adviser Labor Code,* Ed. Rentrop & Straton, Bucharest, 2020, p. C11/002.

Article 16 (1^1) of the Labor Code. If, however, the individual employment contract does not provide for such an option, a distinction is made between the communication of a disciplinary dismissal decision and a dismissal decision for reasons not related to the employee's person, only the latter may be communicated to the employee by electronic means. Moreover, the dismissal decision may no longer be revoked once it has been communicated to the employee, as the High Court of Cassation and Justice held in Decision No. 18/2016, published in Official Gazette No. 767 of September 30, 2016, in the course of an appeal in the interest of the law.[9]

From a **comparative law** perspective, there are also legal systems that opt for less rigorous rules on the content and communication of disciplinary sanctions. For example, in **Georgia,** the provisions of the Labor Code allow the employer to resort to immediate dismissal in case of *serious* breach by the employee of the obligations laid down in the employment contract, internal regulations[10] or collective agreement or in case of *repeated* breach of the obligations laid down in the employment contract, internal regulations or collective agreement within 1 year after the last disciplinary sanction[11]. From the procedural point of view, the Labor Code of Georgia stipulates for the case of immediate dismissal of the employee under the legal conditions that the employee has the right to request the employer by a written request within 30 calendar days from the receipt of the notice of dismissal to justify the reasons for the immediate dismissal. In order to comply with this obligation to issue a written justification for the termination of the employment contract, the legislator gives the employer seven calendar days from receipt of the request. If the employer refuses to issue a written justification or if the employee wishes to contest the employer's decision to terminate the employment contract, he/she may appeal to the court within 30 calendar days either from the date of expiration of the 7 days within which the employer was to respond or from the date of receipt by the employer of the written justification of the reasons for dismissal, the burden of proof being on the employer[12].

3. Appeal against the disciplinary decision

In our law, regardless of the form that the disciplinary sanction decision takes, be it the termination of the employment contract or another lighter disciplinary measure, the employee has the possibility to appeal it within 30 calendar days from the date on which it was communicated, as provided by the regulations contained in Art. 268 para. (1) letter b) of the Labor Code. However, in conjunction with the provisions of art. 252 para. (5) of the Labor Code, "The sanctioning decision may be challenged by the employee before the competent courts[13] within 30 calendar days from the date of

[9] For details on the content of the decision: https://www.iccj.ro/2016/10/17/decizia-nr-18-din-17-octombrie-2016/, consulted on 1.05.2024.

[10] An additional requirement imposed by Art. 37 para. (2) of the Labor Code of Georgia in order to operate the immediate dismissal for breach of the obligations of the Internal Regulations is that the Internal Regulations must be an integral part of the employment contract

[11] See in this regard Zakaria Shvelidze, *Georgia*, in R. Blanpain (ed.), *International Encyclopaedia for Labor Law*, Kluwer Law International, 2019, p. 73.

[12] Ibid, p. 71.

[13] Pursuant to the provisions of art. 208 of Law no. 62/2011 on social dialog, individual labor disputes are settled in first instance by the court, https://lege5.ro/App/Document/gmzdoojvgm/conflictele-individuale-de-munca-lege-62-2011?pid=62313815#p-62313815, consulted on 1.05.2024.

communication". In other words, as this is a special jurisdiction from a material and territorial point of view, it belongs to the court[14] in whose district the plaintiff is domiciled or works[15]. In the doctrine[16] an isolated opinion has been expressed in relation to the deadline for contesting the decision to apply the disciplinary sanction, on the grounds that the disciplinary dismissal sanction which in accordance with the provisions of Law no. 62/2011 on social dialogue in art. 211 letter a) - a law subsequent to the Labor Code - is 45 calendar days from the date on which the interested party became aware of it and is in favor of the employee. Although the correctness of this argument cannot be contested, this contradiction of opinions rather raised a question of substance, which is related to the intervention of the legislator. Proof that, subsequently, by Law no. 269/2021 for the amendment of Law no. 62/2011 on Social Dialogue and Law no. 53/2003 - Labor Code, the provisions of art. 211 letter a) of the Law on Social Dialogue were repealed, and the crystallized solution regarding the employee's appeal against the dismissal decision is that of respecting the 30 calendar days deadline from the date of communication.

Against the background of the contradictory opinions perpetuated over time between case law and doctrine[17], the main issue here is the possibility for the court to change the employer's sanction - even if it is procedurally correct - if it considers it too harsh in relation to the misconduct committed, as affecting the employer's disciplinary prerogative. In the absence of any clear specification in the regulatory text specifying the possible solutions in the case of appeals[18], the solution came from the High Court of Cassation and Justice[19], which ruled in an appeal in the interest of the law that "the court competent to decide the employee's appeal against the disciplinary sanction applied by the employer, finding that it is wrongly individualized, may replace it with another disciplinary sanction". Their aim is essentially to ensure that the disciplinary sanction is correctly individualized in as many cases as possible[20]. However, this decision also makes employers responsible, so that the principle of fairness and proportionality in relation to the seriousness of the act can be proved by them in the process of

[14] This rule has been established and constantly upheld by case law in litigation concerning conflicts of jurisdiction. (Brașov Court of Appeal, Labor and Social Security Litigation Section, Civil Ruling no. 1/F/M/ 14.03.2008).

[15] Article 210 of Law no. 62/2011 on social dialog.

[16] Ion Traian Ștefănescu *Theoretical and Practical Treatise of Labor Law,* 2017, Ed. Universul Juridic, Bucharest, p. 860.

[17] Alexandru Țiclea, Laura Georgescu, *Labor Law. University Course*, Ed. Universul Juridic, Bucharest, 2020, p. 497.

[18] See in this regards Alexandru Țiclea, *Disciplinary liability in labor relations-Legislation.* C.H Beck, Bucharest, 2014, p. 490.

[19] By Decision No. 11 of June 10, 2013 on the examination of appeals in the interest of the law on the interpretation and application of the provisions of Art. 252 para. 5 of the Labor Code (For the content: https://legislatie.just.ro/Public/DetaliiDocument/150127, consulted on 1.05.2024).

[20] For example, in one judgment, the court held that "*the misconduct committed by the employee was not serious, did not cause any damage to the unit, and the circumstances in which the act was committed (medical condition of the leg, spirit of caring), the age and previous behavior of the employee lead to the conclusion that the sanction imposed by the employer is disproportionately serious in relation to the seriousness of the act. Even if the employee did not comply with the rules of work discipline, it has not been proved that this misconduct was major or that it had negative repercussions and consequences among the other employees. The court also held that although the disciplinary prerogative rests with the employer, it must exercise its rights in good faith and in a balanced manner*." (Court of Appeal Galați, Decision no. 1346/2012, http://portal.just.ro).

individualizing disciplinary sanctions.

In any case, if, for any reason, the court finds that the decision to dismiss the employee is unlawful, the provisions of Art. 80 paras. 1) and 2) of the Labor Code. According to them, if the dismissal has been carried out unreasonably or unlawfully, the court will order its annulment and will oblige the employer to pay compensation equal to the indexed, increased and updated salaries and other rights that the employee would have benefited from and only at the request of the employee, the court that ordered the annulment of the dismissal will restore the parties to the situation prior to the issuance of the dismissal act.

4. Elements of comparative law

In comparative law, other legal systems have slightly different rules. In **Georgia**[21] , in contrast to domestic law, the employee is automatically reinstated by force of the judgment of the court annulling the dismissal. According to Art. 38 para. (8) of the Labor Code of Georgia, the court may decide to reinstate an unlawfully dismissed employee in an equivalent position, and if the court finds that the reinstatement of the dismissed employee in the same position is not possible or if the position occupied by the employee no longer exists, he/she should be reinstated in an equivalent, comparable position. As the law does not define the notion of "equivalent post", the employer will take into account criteria such as function, salary, rights and obligations of service in the previous post. In addition to the same regulations stipulated by the Labor Code, the Georgian legislator also specifies that in the event that reinstatement in the same or an equivalent position is no longer possible, as an alternative, the employer shall be obliged to pay the employee compensation in the amount determined by the court. In the absence of express rules in the legal text on the amount of such compensation, in the view of the case-law, the compensation awarded to the employee should be appropriate, having regard to the damage suffered, the nature of the employment, the length of service and acquired rights, the unlawful reason for termination and the need to prevent the recurrence of such situations in the future, but also to personal circumstances such as age, family, size of the undertaking. Also, in **Austria**[22], the success of a disciplinary decision depends to a very large extent on whether the employer's measure is lawful. If the employee contests the dismissal decision and the court finds that the dismissal decision was abusive, the unlawfully interrupted employment relationship is automatically resumed as if no dismissal had taken place. In addition, as a consequence of this practice, the employee against whom the unfair dismissal was unfairly dismissed is, as a general rule, entitled to a salary for the period between the dismissal and the continuation of the employment contract. Under the *Act on Labor and Social Security Courts*, such a judgment is enforceable.

5. Some conclusions and proposals *de lege ferenda*

In the context of what has been analyzed above, we consider that an addition to

[21] See in this respect Zakaria Shvelidze, *op. cit.*, p. 72.
[22] Stephen Hardy &Mark Butler, *European Employment Laws: a comparative guide,* Ed. Spiramus Press, 2011, p. 37.

the Labor Code is necessary in relation to Art. 252 para. 4 of the Labor Code. The current provision contained in the aforementioned article, to the effect that the disciplinary *sanctioning decision shall be delivered personally to the employee, with a signature of receipt, or, in case of refusal to receive it, by registered mail, to the domicile or residence communicated by the employee,* is incomplete in view of the evolution of individual employment relations. In these circumstances, it **would be appropriate, *de lege ferenda,* for the decision to impose a disciplinary penalty, irrespective of the effect produced, to be capable of being communicated by electronic means**. Indeed, with regard to the communication of the dismissal decision for reasons not related to the employee, there is Decision No. 34/2016 of the ICCJ which obliges in this respect, but it cannot cover by analogy all types of dismissal or disciplinary sanction, as the decision is of strict interpretation. Such a hypothesis could be validated by the intervention of the legislator in the normative text.

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