

LEGAL CONDITIONS NEEDED FOR ENGAGING THE DISCIPLINARY RESPONSIBILITY OF THE TEACHING STAFF

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Abstract: *In the international context, the Romanian society evolves at an energetic rate determined by the amplification and diversification of social, economic and, finally, political relations. At the same time, it can be easily observed that the constantly changing and evolving legislation is being improved by new regulations and, to the same extent, by the transposition of European norms into the national legal system. The teaching staff, the auxiliary teaching staff, as well as the management, guidance and control staff in the pre-university education are disciplinary responsible for violating the obligations arising from the individual employment contract and by disregarding the behavioural rules that affect the interest of the education and the prestige of the institution according to laws. The disciplinary liability, as well as the criminal responsibility, fulfils the functions of sanctioning, prevention and education, but it is especially different from the patrimonial responsibility, which mainly fulfils a reparative function. Once a disciplinary offense has been committed, the teaching staff is likely to be applied a special disciplinary sanction regulated by the National Education Law no. 1/2011. The disciplinary sanction is carried out with the strict observance of the legal provisions, respectively of the principle of the legality of the sanction, and the application of the disciplinary sanctions is made gradually, from the mildest to the most severe. In conclusion, the disciplinary offence from the individual employment contract, from the internal regulations, from the decisions of the employer is the engine of engaging the disciplinary responsibility, in compliance with the legal conditions.*

Key words: *teaching staff; disciplinary responsibility; sanction; disciplinary offence.*

Introductory aspects

For a good performance of the employment relations, the teachers must respect the obligations established in the individual or collective labour contract and, at the same time, have a conduct adequate to the academic space, established according to the ethical principles and values. In principle, the activity of the employers, as far as the social relations developed at work is concerned, must be dominated by the discipline of the work, this can be defined as the “necessary order in carrying out the work process, which implies the fulfilment of the work duties and the observance of the norms of conduct by the participants in this process”. (Ticlea, 2016: 851)

In practice, the disciplinary liability can be combined with the other forms of legal responsibility; this interfering without altering its own particularities, and the event that involves the disciplinary responsibility, as a form of the legal responsibility, is represented by the unlawful act, respectively the disciplinary offence. The fact that generates the disciplinary responsibility is the disciplinary offence that represents the deed not allowed by law, with antisocial consequences and which injures a certain order. Therefore, without disciplinary offence, we cannot talk about training the disciplinary responsibility regarding the teaching staff.

1. The specificity and the conditions for engaging in disciplinary responsibility

In the legal literature, the disciplinary responsibility is defined as “the set of labour law norms that define the disciplinary offences, establish the disciplinary sanctions and regulate the substantive and procedural conditions for their application, constituting the specific legal responsibility of the labour law - the disciplinary responsibility”. (Stefanescu, 2014: 769)

A particularly important opinion emphasized that "the disciplinary liability can only be incurred if the socially dangerous act was committed by a person who is in working relations with an employer, based on an individual employment contract". (Ticlea, 2016: 853)

Certain contracts regulated by the civil legislation, such as the contracts of enterprise, of mandate and of services, having not as essential condition the subordination of a party to the other, does not present the characters of the employment contract and, therefore, their holders do not respond disciplinarily. At the same time, we would like to emphasize that the students who carry out the practical activity based on a contract concluded with the educational units cannot be subject to disciplinary responsibility under the Labour Code, but only according to the specific regulations of the education.

Also, the opinion that the disciplinary responsibility is involved in the situation in which an employee commits a disciplinary offence was accepted. Unlike the other forms of legal responsibility, disciplinary liability is contractual in nature and is independent of the other forms.

In accordance with the legal provisions, the main essential elements necessary to carry out the disciplinary responsibility that must be cumulatively fulfilled are: the quality of employee, the existence of an unlawful deed, the committing of the deed with guilt, a harmful result and the causal link between the deed and the result. Therefore, we could confirm that there is an approximation of the disciplinary liability to the criminal liability which for its training must meet a number of conditions cumulatively, such as the existence of an unlawful act that fulfils the obligatory features of an offense, the guilt of the offender manifested in the form and of intent or blame and the causal relationship between the illicit fact and the result.

In conclusion, the disciplinary responsibility can be defined as “that form of the legal responsibility, specific to the labour law, which consists in sanctioning the acts of infringement with guilt by any employee of the legal norms, the internal regulation, the individual and / or collective labour contract, orders and legal depositions of the hierarchical leaders qualified by law as disciplinary violations”. (Ticlea, 2016: 853)

As in the case of criminal liability, the disciplinary liability, having a strictly personal character, which results from the *intuitu* character of the individual employment contract, is not transmitted to the heirs. Therefore, the cumulation of disciplinary liability with other forms of legal, respectively patrimonial, contraventional, criminal liability, is possible, however, if other social relations, autonomous in relation to those regarding the state of disciplinary order, were violated. (Beligradeanu, 2006: 171-173)

As the offense is the only basis of the criminal liability, and the commission of the contravention the only ground of the contraventional liability, in the case of disciplinary liability the only base is the disciplinary offence. Synthesizing, by disciplinary offence we mean any violation of the rules of the discipline of work committed by the employee, and implicitly a violation of the job description. It should be emphasized that the labour law does not list and does not describe, in particular, the disciplinary violations, but according to the legal provisions, the internal regulation, drawn up by the employer with the consultation of the union or the employees' representatives, must necessarily contain the disciplinary offences.

In the judicial practice it was retained that, in the event that the deed committed by the employee is not provided as a disciplinary offence in the personnel status, the internal regulation, the individual or collective labour contract applicable, or does not meet the constituent elements of such a legal framework (so, it does not fit in the template provided in the personnel statute, the internal regulation, the individual labour contract or the collective labour contract applicable), it cannot be considered a disciplinary offence, with all the consequences arising from here”. (Revista romana de dreptul muncii, 2015: 141)

That said, in order to respond disciplinarily, it is necessary to meet the following constituent elements of the disciplinary offence:

- the object (social relations at work, order and discipline at work);
- the objective side (respectively the deed - the action or inaction of the employee);
- the subject (always a natural person in quality of qualified subject, respectively the employee);
- subjective side (guilt - direct and indirect intention, or fault in the form of employee's ease or negligence).

Regarding the first constituent element of the disciplinary offence, respectively the object, it constitutes the social relations of work, the order and the discipline of the work. As regards the legal employment relations, they are transposed into the employment obligations assumed by signing the employment

contract, synthesized, in their turn, in the generic obligation to strictly respect the internal order of the unit, the labour discipline.

(https://www.codulmuncii.ro/titulul_2/capitolul_2/art_39_1.html)

The second constitutive element of the disciplinary liability, namely offence, represents the objective side, respectively the deed, that is the action or inaction of the employee through which the good progress of the unit is affected.

"It is known that committing an unlawful act is of the essence of disciplinary liability, and the absence of such an act or the impossibility of proving it leads to the exemption of liability of that employee." (Revista Romana De Dreptul Muncii, 2015: 106-107)

Considering the diversity of situations, but also the specificity of the employment relations, the current legislation does not enumerate, in particular, the disciplinary offences, which is stemming from the fact that they may also result from violations of the internal regulations that are distinct from one entity to another.

In practice, illicit acts can be encountered, and they are commonly characterized by disciplinary offence such as non-compliance with the work program, failure to perform the employment tasks indicated in the job description, breach of the obligation registered in the internal regulations to inform the boss directly as soon as an employee has become aware of the existence of irregularities or offences committed in the unit, given that they are of nature to attract the disciplinary sanction of the guilty one. A very important aspect is that the labour law does not provide and does not regulate the situation in which the employee receives an order that he considers contrary to the rules of conduct or against the social norms. We believe that, in the future, the legislator should regulate such situations in which the employee practically does not know how to act.

The third constituent element of the disciplinary offence is the subject of the disciplinary offence, which is a qualified one, namely an employee employed by an employer.

Given the uniqueness of work discipline, the imperative obligation to respect it also lies with regard to the detached or delegated staff, as well as students, whether during internship and practical trainings or not. According to the particular features of the detachment, the management of the unit in which the detached persons carry out their activity is able to apply disciplinary sanctions to them, in compliance with the legal provisions, except for the dismissal and relegation in function which can be applied only with the agreement of the employer who detached them. Students that work during practical trainings or internship can be sanctioned according to the school and university regulations by the educational institution that sent them to the practice.

The last constitutive element of the disciplinary offence, respectively the subjective side or the guilt, consists in committing an unlawful act, contrary to the discipline of work, with intent or fault. Intention can manifest itself whether in the form of direct intention, when the subject foresees and wants the harmful effect of his deed to happen, and indirect intention, when he foresees the harmful effect,

without wishing it to happen, but accepting its production nevertheless. Guilt is also of two kinds - ease, when the subject foresees the effect, but he hopelessly hopes he can avoid it- and the carelessness, when the subject does not foresee the effect, although he could or should have foreseen it. "The possibility of predicting the harmful result of the deed must be evaluated in concrete, on a case-by-case basis, taking into account the author's training, capacity, experience and personal skills." (Ghimpu, 1970: 37)

The disciplinary liability cannot be incurred in the absence of guilt, and in the situation in which the employer orders the sanctioning of the employee, its measure is illegal, being contrary to the legislation in force.

With respect of the labour discipline and the normative acts in force, the employer, whether being a natural, a legal person or an institution, is the one who establishes the corresponding attributions of each employee, but also but also the dispositions of obligatory character. It should be emphasized that the work obligations established for the employees must be legal and possible. "By virtue of the subordination report, which characterizes social labour relations, the employee must comply not only with the general labour obligations provided by the normative acts, in the collective labour contract and in the individual labour contract, in the internal regulation and job description, but also with the measures (provisions) given by the employer through decisions, written or verbal orders, in the exercise of his duties of guidance and control". (Curtea de Apel Constanta, 2008)

As it has been shown in the specialized literature, "disciplinary sanctions are means of constraint provided by law, aimed at defending the disciplinary order, developing the spirit of responsibility for conscientious fulfilment of work duties and observing the behavioural norms, as well as preventing the occurrence of certain acts of indiscipline". (Ticlea, 2011: 272)

2. Exonerating causes of disciplinary liability

As we have shown above, disciplinary liability can be exercised only if all the constituent elements of the deviation are fulfilled, and the absence of any of them makes it impossible to exist. In fact, it has been shown that although the act meets the characteristics of the disciplinary offence, certain circumstances existing at the time of committing it lead to the idea that, in principle, the activity of the employee is not illicit, that he is not guilty and that the exemption of liability is required.

In the current labour regulation, the legislator did not foresee and did not indicate these causes of exoneration, but these were "borrowed" from the criminal law. Thus, the current penal code, by law no. 286/2009, regulates the justifying causes in art. 18-22 and the causes of non-imputability in art. 23-31, due to which an act provided by the criminal law does not constitute an offense. Some of these cases (legitimate defense, state of necessity, exercise of a right or fulfilment of an obligation, the consent of the injured person, physical or moral constraint, intoxication, error, forcible case) find applicability also in respect of disciplinary

misconduct. The cases taken from the criminal matter can determine that an unlawful act of an employee does not constitute a disciplinary offense, even if the required constitutive elements are met.

3. Disciplinary sanctions applicable to teaching staff

With regard to the application of the disciplinary sanction, this privilege was left to the employer, who may or may not sanction the employee who violated the labor discipline rules. There are also situations, for example the case of the ones guilty of sexual harassment, when the application of a disciplinary sanction is mandatory, not being requiring the opinion of the employer for the purpose of applying or not, of the sanction.

(<http://www.mmuncii.ro/j33/images/Documente/Legislatie/L202-2002-R.pdf>)

It should be emphasized that disciplinary sanctions are expressly provided by law, from the mildest to the most severe.

“As a consequence, the employer cannot apply another sanction, than one of the ones established by the law, and by the collective labour contract, no disciplinary sanctions can be provided other than those regulated by the labour law.” (Stefanescu, 1997: 106)

Given that the disciplinary sanctions are provided by the law in a gradual way, from the mildest to the most severe, it follows that when choosing between one of them, in order to correspond to the offences committed, the general criteria that the law provides for must be applied: the circumstances in which the deed was committed, the degree of guilt, the consequences of the disciplinary misconduct, the general behaviour in the working environment of the employee, the possible disciplinary sanctions applied before it.

The law of national education no. 1/2011 distinctly stipulates the sanctions applicable to the teaching staff from pre-university education (art. 280 paragraph 2), to the teaching staff from the higher education (art. 312 paragraph 2 and art. 318), as well as to the research and development staff (art. 324).

Thus, the main disciplinary sanctions applicable to the teaching staff in accordance with art. 312 of Law no. 1/2011 for the breach of the duties incumbent upon them according to the individual employment contract, as well as for the violation of the behavioural norms that harm the interest of the education and the prestige of the institution are the following:

- a) written warning;
- b) decrease of the basic salary, cumulative, if appropriate, with the compensation of management, guidance and control;
- c) suspension, for a determined period of time, of the right to enrol in a competition for the occupation of a higher educational function or of a management, guidance and control function, as a member in doctoral, master's or bachelor's committees;
- d) dismissal from the educational management position.

The rules of behaviour that dominate the academic environment are set out in the University Charter, without prejudice to the right to opinion, freedom of expression and academic freedom. The university charter is one of the most important documents that must be found at the level of each university. "The university charter cannot contain provisions contrary to the legislation in force", states the Law on national education no. 1/2011, and, "the non-observance of the laws in the content of the University Charter attracts the legal nullity of the respective act".

4. Cumulation of disciplinary liability with criminal liability

The cumulation of disciplinary liability with criminal liability can occur even if there are essential differences, as well as significant similarities between the two forms of legal responsibility. Thus, it is found that "between the two forms of legal liability there is an essential difference, determined by their different source, as the criminal liability finds its source in the law, being, as such, of a legal nature, while the disciplinary liability finds its source in the contract concluded between the parties, being, as such, of a contractual nature". (Ticlea, 2016: 864)

At the same time, it was pointed out that both the disciplinary and the criminal offence are the engines of employing the specific forms of responsibility, and these have clear similarities in that they are facts that are not allowed by law, with consequences that affect the various social relations and are committed with guilt.

If, under the umbrella of disciplinary responsibility, there is a determined social order, namely that of labour relations at the level of the employers, in the sphere of criminal responsibility enter relations and values, considered essential for the whole society such as sovereignty, independence and state unity, public property, person and its rights, as well as the entire rule of law.

Considering the cumulation of the criminal responsibility with the disciplinary responsibility, in practice the situation was encountered in cases where the same distinct act committed by an employee at his place of work could affect both the social order at the level of the major values protected by the criminal law, as well as the disciplinary order from the respective unit. If during the criminal trial, it is found that the act brings together the constituent elements of an offence in relation to work, which was committed with guilt by the respective employee, after the latter is being condemned by a definitive sentence, the employer is entitled to apply later, cumulatively, the disciplinary sanction of dismissal. The solution is obviously valid even if the conditional suspension of the execution of the prison sentence was ordered. (Revista Romana de Dreptul Muncii, 2014: 109-110) Consequently, considering the above, even if the two forms of legal responsibility have particularities, but also significant similarities, both in theory and in practice the cumulation of disciplinary liability with criminal liability can operate.

Conclusions

In conclusion, the disciplinary liability can be combined with the other forms of legal responsibility, respectively the contraventional liability, as well as the criminal liability, taking into account the autonomy of the spheres of social relations legally protected by various normative acts. At the same time, it should be emphasized that the legislator has also classified as a disciplinary offence the breach of work secrecy, but also breach of fidelity obligations, even if these offences are committed outside the unit's framework and after the working hours. Given that labour law does not regulate the situation in which an employee receives an illegal order or disposition from the employer, we consider that such regulation is necessary in the future in order to prevent such unpleasant situations in practice.

However, art. 45 paragraph 3 of Law no. 188/1999 expressly establishes the procedure by which the civil servant, in an identical situation must follow, namely, (...) to refuse, in writing and motivated, the fulfilment of the provisions received from the hierarchical superior", and in the situation in which the disposition is received is written, the civil servant is obliged to execute it, unless this is manifestly illegal, in which case he must "inform the hierarchical superior of the person who issued the disposition of such situation."

The disciplinary sanctions applicable to the teaching staff have the role of preventing the production of indiscipline acts within the educational unit, and these constitute means of constraint provided by the law, have as purpose the defence of the disciplinary order, the development of the spirit of responsibility for the conscientious fulfilment of the service duties and compliance with the rules of behaviour.

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