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DISCIPLINARY LIABILITY AS A BACKGROUND FOR DISMISSAL OF EMPLOYEES IN LITHUANIA

Tomas Bagdanskis

Mykolas Romeris University, Faculty of Law,
Department of Labour Law and Social Security
Ateities 20, LT-08303 Vilnius, Lithuania
Telephone (+370 5) 271 4633
E-mail t.bagdanskis@mruni.eu

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Abstract. *This article discusses the problematic aspects relating to the employee dismissal based on application of the disciplinary liability. It contains analysis of two grounds for termination of the employment contract without any previous notice: 1) imposing several disciplinary sanctions upon the employee in the course of twelve months, and 2) the employee has only one breach of labour discipline but a gross one. The article is based on legal acts and judgements of Judicial Assemblies of the Civil Division of the Supreme Court of Lithuania and resolutions of the Senate of the Supreme Court of Lithuania in order to provide the legislative execution practice as well as reveal the problems in this field of labour law.*

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

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Introduction

The Republic of Lithuania Labour Code provides a number of grounds for termination of employment contract, one of them being termination of employment contract without notice in case of breach of labour discipline by an employee.

The purpose of this article is to analyze disciplinary liability as a background for dismissal of employees in the Republic of Lithuania, when the employee is guilty of a breach of labour discipline.

To achieve this objective, the legal regulation shall be analyzed in terms of labour discipline and disciplinary liability, and judicial practice (particularly the one of the Supreme Court of Lithuania) shall be analyzed in order to reveal the problematic aspects. This article discloses and summarizes the problems arising in the field of theory and practice.

This topic is relevant in today's society because the labour discipline institute is rather widely applied in practice, and employers either fail to understand and properly apply it or simply abuse their position when imposing disciplinary sanctions upon employees, dismissing them and thus avoiding payments and other warranties to be applied to employees in the case of termination of labour relations on the employer's initiative.

1. Labour Discipline and Disciplinary Liability

Within the legal territory labour discipline is normally understood in objective and subjective sense. Objectively, labour discipline is a set of legal norms establishing workplace procedures (performance), employee's, employer's and administration's duties, incentives, ground for disciplinary liability and imposing of disciplinary sanctions, governing other labour discipline-related relations. Subjectively, labour discipline is perceived as the individual employee's obligation to comply with mandatory provisions of normative legal acts and carry out lawful orders/instructions of the employer and the administration, given/provided on the basis of the employment contract[1]. According to the Labour Code, Art. 234, breach of labour discipline equals to non-performance or improper performance of labour duties through the employee's fault[2]. If the employee's duties are not described in the employment contract as well as in the case of absence of employee's detailed job description or provisions or detailed internal rules of procedure, or where the employee is not familiarized with the abovementioned rules by signing, imposing the relevant disciplinary sanction may be considered irrelevant[3]. Not knowing what work is assigned to him or her and what rules define his or her performance

1 Nekrošius, I., *et al. Darbo teisė* [Labour Law]. Vilnius: Teisinės informacijos centras, 2008, p. 382−383.

2 Labour code (changed and amended). *Official Gazette.* 2002, No. 64-2569.

3 Civil case *L. Krajauskas v. UAB "Alprema"* of SCL Civil Department No. 3K-3-457/2004 as of 15 September 2004.

conditions, the employee will not be able to observe the labour discipline due to the circumstances beyond his or her control.

The following cases are not considered breach of labour discipline: when the employee refuses to carry out the employer's unlawful orders or instructions; when the employee exercises his or her lawful rights, employment contract or the company's internal documents; when non-performance or improper performance of the employee's labour duties occurred through the fault of employer, who failed to secure adequate working process and provide the employee with tools and means necessary to perform his or her work, etc.; when the employee can not properly perform his or her duties due to health problems or lack of qualification (if the work assigned or its nature is new to the employee)[4].

The subject to the breach of labour discipline is the guilty employee, who must possess labour capacity. The object to the breach of labour discipline is work procedures at the enterprise, institution or organization. Objective signs indicating breach of labour discipline include the employee's illegal behaviour (illegal activity) and subjective signs include the fault of the employee, who breached the labour discipline. In the labour law, objective and subjective signs are also known the employee disciplinary liability terms[5]. One of the means of securing labour discipline and proper work is disciplinary liability. Its goal is punishing infringers for the improper performance of their labour functions as well prevention of breaches of labour discipline[6].

Remark, reprimand or dismissal may be applied as a disciplinary measure imposed due to the employee's breach of labour discipline[7]. This article will analyze a disciplinary sanction – dismissal from work.

2. Problems of Imposing Disciplinary Sanctions

2.1. Formal Application of Procedure of Imposing Disciplinary Sanctions

First, it is important to note that the following must be taken into account when imposing a disciplinary sanction:

1) the gravity of breach of labour discipline;
2) the consequences;
3) the employee's fault;
4) the circumstances in which the breach has occurred;
5) the employee's work quality in the past[8].

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4 Petrylaitė, D.; Petrylaitė, V. *Darbo teisė: aktualūs atsakymai darbuotojui* [Labour Law: Topical Answers to the Employee]. Vilnius: Registrų centras, 2010, p. 230−231.

5 *Lietuvos Respublikos darbo kodekso komentaras*. T. 2. [Commentary to the Labour Code of the Republic of Lithuania]. Vilnius: Justitia, 2003, p. 329−330.

6 Nekrošius, I., *et al.*, *supra* note 1, p. 382−383.

7 Labour Code, Art. 237.

8 Labour Code, Art. 238.

According to the Supreme Court of Lithuania (hereinafter referred to as SCL), although LC, Art. 238 establishes criteria, which are to be taken into account when imposing disciplinary sanctions upon employees, which committed breaches of labour discipline, and these criteria provide the employer with the opportunity to customize the sanction type, the sanction should be proportionate to the breach of labour discipline committed and can not be imposed disproportionately to different sanctions upon individual employees for disciplinary breaches of similar nature. As a result, finding that the Applicant did not commit any gross breaches of work procedure, the strictest disciplinary sanction, i.e. dismissal, can not and should not have been imposed upon her[9].

Based on LC, Art. 238, before imposing a disciplinary sanction, the employer must demand in writing for the employee to provide explanation concerning the breach of labour discipline (also in writing). Should the employee fail to provide such explanation within the time period specified by the employer or administration, or provide valid reasons for failing to do so, the disciplinary sanction may be imposed without notice. Disciplinary sanction is imposed based on the employer's or administration's order (instruction). The employee is notified of it upon receipt. The goal of this legislative requirement is both ensuring the employee's right to provide explanation concerning the breach of labour discipline, which the employer believes has been the employee's fault, to provide the employer with knowledge of all the circumstances relevant to application of disciplinary liability and choosing disciplinary sanction. It has been made clear in the court practice that the employee's written explanation of breach of labour discipline is a significant guarantee of legality of disciplinary sanction. The failure to observe it will interfere with the proper investigation of conditions of breach of labour discipline and imposing of disciplinary sanction as well as selection of an adequate disciplinary sanction[10].

Not requiring for the employee to explain the breach of labour discipline, the employer worsens itself and assumes the risk of potential adverse effects, because should the employee disagree with a disciplinary sanction imposed and decide to contest it, he or she may indicate the circumstances, which may eliminate the opportunity of imposing a disciplinary action upon him or her or applying a certain penalty, by knowing which the employer would otherwise have solved the issue of employee's disciplinary liability.

Should the labour dispute be settled in court, the circumstances indicated by the employee, which he or she was unable to explain to the employer due to the employer's breach of LC, Art. 240, Part 1, may form the basis for lifting the disciplinary sanction imposed upon the employee.

As cleared by the court practice, when checking the validity of disciplinary sanction imposed upon the employee at court, it is the employer's obligation to prove the employee's guilt and non-performance as well as the fact that the employee's

9 Civil case *R. B. v. Kauno 2-oji klinikinė ligoninė* of SCL Civil Department No. 3K-3-117/2010 as of 23 March 2010.

10 Civil case *R. K. v. Zarasų rajono savivaldybės taryba* of SCL Civil Department No. 3K-3-59/2006 as of 25 January 2006.

actions were illegal. The specific circumstances proven by the employer should be based on a specific breach of labour discipline rather than the employee's formal labour weaknesses[11].

Thus, provisions of the legal norm discussed concerning the employee's explanation are in the interests of both the employer and the employee, and breach of this requirement is adverse to the interests of both parties of the employment contract.

Given such regulation of procedure of imposing disciplinary sanctions, we are faced with the problem of situation evaluation, where there is a breach of the formal procedure of imposing a disciplinary sanction. It is important to emphasize that in this case, i.e. in the case there is a breach of labour discipline and a disciplinary sanction imposed corresponds to the gravity of the breach, the formal breach of procedure of imposing disciplinary sanctions alone is not a sufficient basis for lifting the disciplinary sanction imposed, because otherwise the law would be used to defend an unfair person.

2.2. Procedure of Imposing Dismissal as a Disciplinary Sanction in the Case of Repeated Breaches of Labour Discipline and Related Problems

LC, Art. 136, Part 3, Para. 1 specifies imposing a disciplinary sanction (dismissal) for systematic non-performance or improper performance of labour duties. If no disciplinary sanction has been previously imposed upon the employee, he or she can not be dismissed in spite of the fact that he or she may have other legal sanctions imposed upon him or her[12]. According to SCL, based on LC, Art. 136, Part 3, Para. 1, composition of the following legal facts is required to terminate the employment contract: the fact that the employee has committed a breach of labour discipline; the fact that such breach of labour discipline was committed after a disciplinary sanction had been imposed upon the employee at least once in the course of the past twelve months; the fact that the employee was informed of the previous disciplinary sanction (LC, Art. 240, Part 3); the fact that the previous disciplinary sanction still remained valid on the date of the repeated breach of labour discipline[13]. Adhering to Prof I. Nekrošius in his views that dismissal is the most severe disciplinary sanction and, as such, is to be imposed when other sanctions have been ineffective[14].

The question of which LC norm is to be applied if the person already has a remark and reprimand due to his or her breaches of labour discipline and commits another breach of labour discipline, which is not gross, remains debatable and problematic:

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11 Civil case *D. C. v. VšĮ Alytaus sporto ir rekreacijos centras* of SCL Civil Department No. 3K-3-393/2009 as of 12 October 2009.

12 Nekrošius, I., *et al*., *supra* note 1, p. 386.

13 Civil case *G. K. v. Akmenės darbo birža* of SCL Civil Department No. 3K-3-311/2010 as of 8 July 2010; Civil case *I. Č. (M.), M. M. v. UAB „Kelias"* of SCL Civil Department No. 3K-3-69/2007 as of 26 February 2007.

14 *Lietuvos Respublikos darbo kodekso komentaras, supra* note 5, p. 156.

should the employer apply a reprimand or LC, Art. 136, Part 3, Para. 1 and terminate the employee's employment contract without notice?

According to the Court-formed practice, detection of a repeated breach of labour discipline on itself does not mean that the strictest disciplinary sanction, i.e. dismissal, should be imposed upon the employee. Each time after finding out that an employee with a valid disciplinary sanction committed another breach of labour discipline, the employer is to decide, which disciplinary sanction of those specified by LC, Art. 237, Part1, should be applied, taking into account the criteria specified by LC, Art. 238, and to choose the most adequate disciplinary sanction possible[15]. Should the employee continue breaching the labour discipline even with a disciplinary sanction imposed on him or her, another disciplinary sanction may be applied[16]. In this situation the employer has a duty (as well as the risk) relating to selection of adequate disciplinary sanction, which in practice often becomes the subject of litigation.

2.3. Procedure of Imposing Dismissal as a Disciplinary Sanction in the Case of Gross Breach of Labour Discipline, and Relating Problems

Should the employee grossly breach his or her labour duties once, the employer has the right to terminate the employment contract without prior notice to the employee[17]. In the context of the legal labour relations the legislature deems breaches of labour discipline implying serious infringements of provisions of laws and other normative legal acts directly regulating the employee's labour duties or other serious infringements of labour duties or rules of procedure, to be gross breach of the labour discipline. Such *idem per idem,* i.e. using a concept to explain the same concept, description of gross beach of the labour discipline is subject to criticism because it still remains unclear, what exactly a gross breach of labour discipline is.

In its practice, SCL found that one of the most serious breaches of the employment contract is to be deemed gross, i.e. particularly intolerable, therefore the employee, whose employment contract has been terminated due to such breach, will receive unfavourable assessment in the labour market and has poor conditions insufficient to compete with other claimants to jobs. For this reason, the employer is allowed to dismiss an employee on this basis only when there is sufficient amount of data to reliably confirm that such dismissal reasonable and legal[18]. When deciding whether breach of labour discipline is to be attributable to the gross breaches of work procedure, it is necessary to analyze both objective and subjective signs of labour discipline infringement, such as the nature of the employee's wrongful conduct, damages and other negative consequences resulting

15 Civil case *G. K. v. Akmenės darbo birža* of SCL Civil Department No. 3K-3-311/2010 as of 8 July 2010.

16 Nekrošius, I., *et al*., *supra* note 1, p. 407.

17 Labour Code, Art. 136, Part 3, Para. 2.

18 Civil case *N. B. v. AB „Lietuvos geležinkeliai"* of SCL Civil Department No. 3K-3-146/2011 as of 29 March 2011; Civil case *Irena Petrašiūnienė v. Viešoji įstaiga Radviliškio ligoninė* of SCL Civil Department No. 3K-3-669/2005 as of 14 December 2005.

from such breach, the employee's guilt and its forms, influence of other persons' actions upon the breach, and other relevant circumstances[19].

LC, Art. 235, Part 2 contains specific cases of violation of labour discipline, which are considered to be gross thus attempting to explain the concept. It should be stressed that this list is illustrative, i.e. non-exhaustive. A gross breach of work duties shall include:

1) improper conduct with visitors or customers or other actions which directly violate constitutional rights of persons;
2) disclosure of state, professional, commercial or technological secrets or communication of them to a rival enterprise;
3) involvement in activities which, pursuant to the provisions of laws, other regulatory acts, work regulations, collective agreements or employment contracts, are incompatible with job functions;
4) abuse of one's position seeking to receive illegal income for oneself or other persons or for any other personal reasons, also self-willed behaviour or bureaucracy;
5) violation of equal rights for women and men or sexual harassment of colleagues, subordinates or customers;
6) refusal to provide information where laws, other regulatory acts or work regulations impose an obligation to do so, or provision of knowingly wrong information in these cases;
7) acts with elements of theft, fraud, misappropriation or embezzlement of property, acceptance of an illegal reward even though the employee did not incur criminal or administrative liability for these acts;
8) where, during the working time, the employee is under the influence of alcohol, narcotic or toxic substances, with the exception of cases where intoxication was caused by the industrial processes at the enterprise;
9) absence from work throughout the day (shift) without valid reasons;
10) refusal to undergo a medical check-up where such check-ups are mandatory.

According to LC, Art. 235, Part 2, Para. 11, gross breaches of labour discipline are other breaches gravely violating the work procedure.

It is Paragraph 11 that causes most of practical problems as gross breach of labour discipline includes both breaches specified by LC, Art. 235, Part 2, Para. 1-10, and other breaches gravely violating the work procedure.

The SCL Senate decree as of 2004 attempted to clarify the issues relating to other breaches gravely violating the work procedure, by stating that Paragraph 11 should be interpreted in such a way that, according to this legal norm, a gross breach of labour duties includes the following:

a) according to other regulatory or local legal acts, professional codes of ethics and rules, a gross breach is a breach violating the work procedure;

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19 Civil case *R. K. v. Zarasų rajono savivaldybės taryba* of SCL Civil Department No. 3K-3-59/2006 as of 25 January 2006.

b) other breach, which, taking into account the legislator's position on assessment of gross breaches of labour discipline (according to its nature, effects, degree of employee's fault and other relevant factors), specified in LC, Art. 235, Part 2, Para. 1–10, is to be classified as a breach grossly violating the work procedure (for example, intentional destruction of employer's property by the employee; faulty actions at work by the employee, whose work is related to accounting, storage, reception, dispensing or transportation of material values, which caused the employer to lose trust and confidence in the employee's ability to perform his or her duties). In this case, only the entity, which imposes the disciplinary sanction, is entitled to qualify the breach as gross[20].

Prior to this SCL interpretation, the courts' perception of LC, Art. 235, Part 2, Para. 11 in the labour law doctrine varied widely. It was assumed that it does not give the employer the opportunity to decide at its own discretion, which employees' activities may be viewed as gross breaches of work procedure, and that the employer should rely on normative legal acts, which specify such breaches, or go by the court approved procedures. Other authors argued that in each specific case the employer is required to independently decide whether the breach can be deemed dross[21].

When assessing validity of the employer imposed disciplinary sanction, one must be take into account the fact that the employer can simply lose trust and confidence in the employee grossly breaching his or her labour duties or work procedures, i.e. lose trust and confidence in the employee's ability to properly perform their job functions in the future; even without the actual property damage incurred upon the employer by the employee's breach of duties, there can non-pecuniary damage to prestige and reputation of profession, office or institution[22]. In order for the beach to be qualified as gross under LC, Art. 235, Part 2, Para. 11, it is not required to establish whether the employer has suffered actual damage or not; gross breach of labour duties may cause other adverse effects, i.e. the employer may lose trust and confidence in the employee with gross breach of labour duties and work order; besides, the actual damage inflicted to the employer by the employee's grave misconduct may occur later, and so on[23]. According to SCL, although the Claimant actually offered psychological counselling and, according to her, received no complaints relating to their quality, The Claimant's failure to fill out the corresponding forms prevented the Defendant from receiving funding from the territorial health insurance fund. Given the continuous breach in the Claimant's duties, she lost the employer's trust and confidence as well as willingness to continue to work with her. Breach of labour duties is to be classified as gross, if such breach causes material infringement of employer's interests causing the employer to rightfully lose trust and confidence in the employees, i.e. the employee's ability to properly perform his or her job functions in the future. According to the SCL formed

20 SCL Senate Resolution No. 45 "On application of the Labour Code provisions regulating termination of employment contracts pursuant to Labour Code, Art. 136, Part 3, Para. 1 and 2, in the court practice" as of 18 June 2004.

21 Nekrošius, I., *et al.*, *supra* note 1, p. 405−406.

22 Civil case *I.V. v. UAB „LIUKS"* of SCL Civil Department No. 3K-3-9/2011 as of 20 January 2011.

23 Civil case *T. B. v. UAB „Tokvila"* of SCL Civil Department No. 3K-3-305/2010 as of 2 July 2010.

law interpretation and application practice, the criteria for qualification of gross breach of labour duties is the employee's breach of duties, which causes the employer to lose trust and confidence in the employee's ability to properly perform his or her work[24]. For example, in other situation, when assessing the essence of accountant's labour duties, SCL pointed out that the essence is accounting management in a particular enterprise in accordance with the requirements established by the laws and other legal acts regulating financial accounting. The accountant's functions and their significance to activities of the specific company determine the fact that trust and confidence in the person managing the company's accounts is important to the employer (i.e. the company owner). As a result, if the employer looses confidence in the accountant (i.e. in the accountant's ability to perform the work assigned to him or her) due to breaches in the company's accounting, which, by their nature and other circumstances that may be relevant in this particular case, may be viewed as a serious breach of labour duties, the employer has the basis for termination of the accountant's employment contract based on LC, Art. 136, Part 3, Para. 2 and Art. 235, Part 2, Para. 11[25].

To summarize, it should be clear that both theory and practice remain uncertain concerning the question of when the employee's breaches of discipline can be viewed as a background for loss of trust and confidence, and hence dismissal with imposing the disciplinary liability institute. In each particular case all circumstances are to be considered and evaluated.

3. Time of Imposing Disciplinary Sanctions and Procedure of Appeal against Disciplinary Sanctions

The total provision in the legislature – a disciplinary sanction, in accordance with the procedure of its imposing, is to be imposed as soon as possible, without delay, in order to secure its higher efficiency[26].

The disciplinary sanction is imposed immediately after the breach of the labour discipline, but not later than within one month following the date of the breach detection, excluding the time, during which the employee was absent due to illness, vacation or business trip, and in the event of initiating a criminal case against the employee, within the earlier of two months following termination of criminal proceedings or court decision effective date (LC, Art. 241, Part 1). The date of the labour discipline breach detection shall be the date on which the employer or its representatives (such as enterprise, institution or organization head of administration officials) will become aware of the employee's breach of labour discipline. A one-month period shall be measured from the date of the administration (administration representative's) awareness of the breach,

24 Civil case *L. Karužienė v. AB „Lietuvos draudimas"* of SCL Civil Department No. 3K-3-532/2005 as of 2 November 2005.

25 Civil case *J. Ch. v. L. Š. IĮ „Meškėnas"* of SCL Civil Department No. 3K-3-560/2007 as of 28 December 2007.

26 *Lietuvos Respublikos darbo kodekso komentaras*, *supra* note 5, p. 351.

i.e. the date, on which the information available will not raise questions concerning the fact of misconduct and the offender's person. A disciplinary sanction may not be imposed after a lapse of six months from the date when the breach was committed. A disciplinary sanction imposed with missing the time for imposing disciplinary sanctions shall be deemed illegal[27]. SCL pointed out that the terms specified by LC, Art. 241 are destructive. After their expiry, rights and responsibilities related to them also disappear; they can not be suspended, extended or renewed, except for the cases specified by the labour legislation. Thus, the mentioned terms are the guarantee that the employee shall not be held liable for breaches committed in the past, i.e. prior to the law-specified time periods (six months or two years in the case of financial breaches). Such regulation provides certainty to the regulated legal labour relations; in addition, there is an example of settling of employee and employer rights and legitimate interests: in the case of financial breaches, a longer two-year term set complies with the employer's interests of having the opportunity of applying the disciplinary liability in the field for a longer period breaches[28].

In practice, there are often issues of measuring the time of imposing a disciplinary sanction in case of preliminary investigation but due to, for example, the long-drawn pre-trial investigation, such preliminary investigation may be terminated with notice to the employer, even though six months had already passed. In such case, one should agree with the view that, upon initiating a pre-trial investigation, a disciplinary sanction should be imposed not later than within two months following the pre-trial investigation termination date[29]. Such approach has been followed in the court practice as well, which states that upon initiating a pre-trial investigation the time of imposing a disciplinary sanction is measured from the date of procedural decision to terminate the pre-trial investigation or court decision (or ruling, in the administrative case). If the employer chooses for investigation to determine the employee's breach to be carried out by a competent authority, it may apply a special two-month period to impose a disciplinary sanction[30]. It can be stated that in this case the period, during which the pre-trial investigation is to be carried out, is not to be included into the six-month limitation period. As mentioned above, the time when the employee absent from work due to illness, vacation or business trip shall be excluded. It is assumed that such circumstances as pre-trial investigation should also be excluded from this period as initiation of pre-trial investigation does not necessarily mean that it is this employee who is guilty of committing the breach of labour discipline. Thus, after the pre-trial investigation has been terminated and the person found innocent, the relevancy of imposing the strictest disciplinary sanction, i.e. dismissal, is to be questioned.

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27 Nekrošius, I., *et al.*, *supra* note 1, p. 408.

28 Civil case *R. B. v. 73-ioji daugiabučių namų savininkų bendrija „Viršuliškės"* of SCL Civil Department No. 3K-3-363/2011 as of 4 October 2011.

29 *Lietuvos Respublikos darbo kodekso komentaras*, *supra* note 5, p. 351.

30 Civil case *S. Jančiauskis v. UAB „Plungės lagūna"* of SCL Civil Department No. 3K-3-649/2005 as of 5 December 2005.

If the employee does not agree with the strictest disciplinary sanction (i.e. dismissal) being imposed upon him or her, he or she must apply directly to the Court because the labour relations between him or her and his or her employer have ended. The employee must apply to the Court for his or her unjust dismissal within the earlier of one month following the date of dismissal (or the date on which he or she received dismissal documents)[31].

3.1. An Obligation of the Court to Examine the Legality of Imposing of all Disciplinary Sanctions, which Served as the Basis for Dismissal

In practice, the question arises whether the Court, in solving the issue of the legality of imposing of the second disciplinary sanction, i.e. dismissal, should also review the legality of the previously imposed disciplinary sanction.

For a long time the SCL formed practice held the opinion that the Court, in hearing a dispute concerning the legality of dismissal based on LC, Art. 136, part 3, Para. 1, must verify legality and validity of the breach of discipline that served as the basis for dismissal as well as legality and validity of disciplinary sanction, which serves as the object of the dispute, and which is a constituent element of the basis for dismissal. This obligation of the Court remains even if the Claimant has no separate claim to raise the corresponding demand as the claim to avoid dismissal based on LC, Art. 136, part 3, Para. 1 includes the requirement for re-check of legality and validity of the previous disciplinary sanction(s). In the subsequent court decisions this interpretation has been supplemented by the following rule: when considering the dispute over the legality of the employee's dismissal due to imposing of disciplinary sanction, the court must check legality and validity of the previous (earlier) disciplinary sanction(s) imposed upon the employee; however, such checking is determined by application of the limitation institute. In other words, if the employee failed to comply with the LC-specified binding procedures of dispute settlement out of court, despite of termination of the labour relations there is no reason to conclude that the order was not binding for him or her (i.e. the employee). If the employee did not apply to the Labour Dispute Committee concerning the previous (earlier) disciplinary sanction(s) imposed on him or her, and a three-month application term specified by LC, Art. 296, has expired prior to the date of the employee's dismissal, the Court, in checking the legality and validity of such disciplinary sanction(s), will apply the period specified by LC, Art. 296, in accordance with the limitation rules, specified by CC, Art. 1.126, Art. 1.128–1.131[32]. This means that courts review the previously imposed and valid disciplinary sanctions only if the three-month period specified by LC, Art. 296, which is the subject to the limitation regulations, has not yet expired. It should be noted that after applying LC, Art. 136, Part 3, Para. 1 the labour relations com to their end thus leaving the employee unable to apply to the Labour Dispute Committee, and appeal against the disciplinary sanction.

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31 Petrylaitė, D.; Petrylaitė, V., *supra* note 4, p. 241.

32 Civil case *I.V. v. UAB „LIUKS"* of SCL Civil Department No. 3K-3-9/2011 as of 20 January 2011.

The legal literature also reflects a different opinion, namely that the employee has the right to ask the Court to check legitimacy of the previous disciplinary sanction (remark or reprimand) imposed upon the employee regardless of the time that has passed since its imposition[33].

Legitimacy and validity of the previous disciplinary sanction is not re-checked if, for example, a dispute on legitimacy and validity of the previous disciplinary legitimacy has been settled by a court decision adopted in another case, or if the employee (the Claimant) has decided not to contest the previous sanction imposed upon him or her[34].

When summarizing, it should be stated that employees have a duty to care for protection of their violated rights as if the employee fails to comply with the statutory compulsory procedure of dispute settlement out of court, there is no reason to conclude that the mentioned order was binding on the employee the labour relations have been terminated. If the employee failed to apply to the Labour Dispute Committee concerning previous (earlier) imposing of disciplinary sanction(s) and a three-month application term specified by LC, Art. 296, has expired prior to the date of his or her dismissal, the Court has the right to dismiss the employee's claims.

4. Legal Flaw in the Procedure of Imposing Disciplinary Sanctions

Pursuant to the Labour Code, Art. 136, Part 3, Para. 1, the employer is entitled to terminate the employment contract without previous notice to the employee, where the employee performs his or her labour duties negligently or otherwise violates labour discipline and in the case disciplinary sanctions have been imposed upon the employee at least once in the course of the past twelve months.

However, LC does not cover such cases as the employer's behaviour when he or she is made aware of the employee's labour discipline violations at different times, when performing the employee performance review. Should violations be disclosed in the course of the review of part of employee's performance, the employer must, pursuant to LC, Art. 241, impose a disciplinary sanction upon the employee within the earlier of one month following the date of such disclosure. Certain disciplinary violations may be disclosed when further continuing the employee performance review, which in themselves may not be serious and were not made after imposing the first disciplinary sanction but rather together with the first breach(es) of labour discipline. This may generally become the basis for loss of trust and confidence in the employee and subsequent employee dismissal in accordance with LC, Art. 136, Part 3, Para. 1 and 2. Also, it should be mentioned that the employer can not initially be aware of the number of employee's breaches of labour discipline discovered by the Committee appointed to investigate implementation of the Applicant's labour functions. As previously mentioned,

33 Petrylaitė, D.; Petrylaitė, V., *supra* note 4, p. 241.

34 SCL Senate Resolution No. 45 "On application of the Labour Code provisions regulating termination of employment contracts pursuant to Labour Code, Art. 136, Part 3, Para. 1 and 2, in the court practice" as of 18 June 2004.

upon discovering the first facts of the employee's improper performance of his or her labour duties, the employer must, in accordance with the terms of imposing disciplinary sanctions, impose disciplinary sanctions upon the employee for individual breaches of labour discipline. However, multiple breaches of labour discipline discovered in the course of the employee performance review may form the employer's reasonable distrust in the employee with so many breaches of labour discipline. Therefore, we believe that it should possible to impose a disciplinary sanction (i.e. dismissal) upon such employee, even if subsequently discovered breaches of labour discipline (if taken alone) are not gross or occur after imposing disciplinary sanctions.

Summarizing disputes on dismissal of employees due to breaches of labour discipline, where the employee goes to the court, it should be acknowledged that the court should examine and determine/establish the following:

1) the exact breach of labour discipline that caused dismissal of the employee (the Claimant);
2) whether the breach of labour discipline that caused dismissal of the employee was indeed made by him or her; whether there is a basis and conditions for application of disciplinary liability;
3) in the case of employee dismissal under the Labour Code, Art. 136, Part 3, Para. 1, whether any disciplinary sanctions have been imposed upon the employee at least once in the course of the past twelve months, and whether the employee has been be notified of this; whether the mentioned disciplinary sanction was in force or lifted on the day of the order (instruction) to dismiss the employee, and if there were reasons for it to be lifted;
4) in the case of employee dismissal under the Labour Code, Art. 136, Part 3, Para. 2, whether the employee committed breach of labour discipline is gross;
5) whether the disciplinary sanction imposed on the employee was indeed imposed in accordance with the procedure and time of imposing of disciplinary actions (Labour Code, Art. 240 and 241, etc.);
6) whether the disciplinary action imposed was chosen taking into consideration the circumstances specified by the Labour Code, Art. 238; whether there are reasons for lifting the disciplinary sanction taking into account the gravity and circumstances of the breach of labour discipline, the employee's previous work and conduct; whether or not the disciplinary sanction complies with the gravity of the offence;
7) whether the employee was dismissed without prejudice to his or her warrantees (Labour Code, Art. 131 and Art. 132, Part 1, etc.);
8) whether there are any reasons for declaring the employee's dismissal illegal.[35]

35 The Supreme Court of Lithuania Senate Resolution No. 45 dd. 9 June 2004 (Para. 21.1).

Conclusions

Analysis of the legal regulation and practical application of disciplinary liability as a background for dismissal of employees in Lithuania leads to the following conclusions:

1. The disciplinary sanction may only be imposed upon the employee for breaches of labour discipline, i.e. non-performance or improper performance of labour duties through the employee's fault.

2. When deciding whether the employee's actions are illegal, it is necessary to evaluate his or her job responsibilities and legislation regulating the working procedures. It is employer's responsibility to properly organize the work, in particular, by ensuring that employees clearly understand their obligations and procedure, thus familiarizing them with the rules of procedure, job descriptions and regulations.

3. The disciplinary liability is one of the means of securing labour discipline and proper work. Should the employer give unlawful orders/instructions or fail to familiarize the employee with his or her specific responsibilities, innocent failure to carry out such orders/instructions or certain works can not become the basis for disciplinary liability as there is no breach of compulsory disciplinary liability terms - employee's illegal actions and/or fault due to the breach of labour discipline. The employer's right to bring the employee to the disciplinary liability comes into effect only if the employer's infringement is not the cause of breach of labour discipline.

4. When assessing the relevancy of the employer imposed disciplinary sanction, one must take into account the fact that the employer may simply lose trust and confidence in the employee with gross violations of work duties or procedures, i.e. in the employee's ability to properly perform his or her job functions; even without the actual property damage incurred upon the employer by the employee's breach of duties, there can non-pecuniary damage to prestige and reputation of profession, office or institution.

5. Should the employee file an action directly with the Court for illegal dismissal, the employer's obligation is to prove in court adequacy of the employee's breach of labour discipline as well as the fact that his or her employment contract was terminated in accordance with the procedure established by the legislation.

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DRAUSMINĖ ATSAKOMYBĖ KAIP DARBUOTOJŲ ATLEIDIMO PAGRINDAS LIETUVOJE

Tomas Bagdanskis

Mykolo Romerio universitetas, Lietuva

Santrauka. *Šiame straipsnyje aptariami probleminiai aspektai, susiję su darbuotojų atleidimu, kurio pagrindas yra drausminės atsakomybės taikymas. Analizuojami du darbo sutarties nutraukimo pagrindai, iš anksto neįspėjus darbuotojo: kai darbuotojui pritaikyta daugiau nei viena drausminė nuobauda per pastaruosius 12 mėnesių ir kai darbuotojas vieną kartą, tačiau šiurkščiai pažeidžia darbo drausmę. Straipsnyje remiamasi teisės aktais bei Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus Teisėjų kolegijų nutartimis, Lietuvos Aukščiausiojo Teismo senato nutarimais siekiant pateikti įstatymų taikymo praktiką ir atskleisti problematiką šioje darbo teisės srityje.*

Lietuvos Respublikos darbo kodeksas numato daugelį darbo sutarties pasibaigimo pagrindų, vienas iš jų – darbo sutarties nutraukimas be įspėjimo, kai darbuotojas pažeidžia darbo drausmę. Straipsnyje analizuojami darbuotojų atleidimo atvejai, kai darbuotojai yra kalti, t. y. atleidimas dėl darbo drausmės pažeidimo.

Straipsnyje atskleidžiamos ir apibendrinamos problemos, kylančios teorijoje ir praktikoje, akcentuojant, kad drausminė atsakomybė yra viena iš priemonių darbo drausmei, tin-

kamam darbui užtikrinti. Jeigu darbdavys duoda neteisėtus nurodymus ar nesupažindina darbuotojo su konkrečiomis jo pareigomis, tokių nurodymų neįvykdymas, tam tikro darbo neatlikimas, nežinant, jog jį reikia atlikti, negali būti pagrindu drausminei atsakomybei, nes būtinųjų drausminės atsakomybės sąlygų – darbuotojo neteisėtų veiksmų ir / ar kaltės dėl darbo drausmės pažeidimo – taip pat nėra. Vertinant paskirtos drausminės nuobaudos pagrįstumą, turi būti atsižvelgiama ir į tai, kad darbdavys tiesiog gali netekti pasitikėjimo darbo pareigas ar darbo tvarką pažeidusiu darbuotoju, t. y. jo sugebėjimu ateityje tinkamai atlikti pavestas darbo funkcijas. Darbdaviui dėl darbuotojo padaryto pareigų pažeidimo, net ir nepatiriant realios turtinės žalos, galima padaryti neturtinio pobūdžio žalą profesijos, tarnybos ar institucijos prestižui ir geram vardui.

Ši tema aktuali šiandieninėje visuomenėje, nes darbo drausmės institutas yra gana plačiai taikomas praktikoje. Neretai darbdaviai arba netinkamai supranta ir taiko, arba tiesiog piktnaudžiauja savo padėtimi taikant drausminę atsakomybę darbuotojui, atleidžiant jį iš darbo, kartu išvengdami išmokų ir kitų garantijų darbuotojams taikymo.

Reikšminiai žodžiai: *drausminė atsakomybė, atleidimas iš darbo, šiurkštus darbo drausmės pažeidimas, darbo teisė.*

Tomas Bagdanskis, Mykolo Romerio universiteto Teisės fakulteto Darbo teisės ir socialinės saugos katedros docentas. Mokslinių tyrimų kryptys: darbo teisė, Europos Sąjungos darbo teisė.

Tomas Bagdanskis, Mykolas Romeris University, Faculty of Law, Department of Labour Law and Social Security, Associate Professor. Reasearch interests: labour law, EU labour law.