

SUMMARY

2013/45 Court may replace disciplinary sanction by milder sanction (RO)

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Facts

Romanian law allows employers to impose the following disciplinary sanctions:

written warning;

demotion for a period not exceeding 60 days;

5-10% salary reduction for a period of three months;

5-10% reduction of salary and additional executive remuneration also for no longer than three months;

termination of employment.

Since 2011, temporary suspension of the employment contract is no longer a permissible sanction.

When determining the type of disciplinary sanction to impose, the employer must take into consideration the circumstances under which the employee behaved as he or she did; the extent of the employer's own responsibility; the harm caused by the employee's misconduct; his or her behaviour in general; and previous disciplinary sanctions if any. Although the application of disciplinary sanctions is the exclusive prerogative of the employer, the courts have the power to examine how the employer applied the criteria and how it determined the disciplinary sanction in each individual case.

As a rule, the employer must have issued written regulations specifying for each type of misconduct the appropriate disciplinary sanction. For example, the regulations may provide that harassment at work is considered such a serious matter that the appropriate sanction is dismissal.

The Labour Code prohibits employers from applying more than one sanction for the same misconduct. In the event an employee receives no sanction for a period of 12 months, previous sanctions shall be disregarded.

Article 252(5) of the Labour Code gives employees the right to challenge disciplinary sanctions before the courts. Until recently, there was some variation in court practice in relation to this. Some courts believed they had the power to annul a disciplinary sanction or to let it stand, but not to amend it. Other courts believed they could replace a disciplinary sanction with another, lesser sanction, for example, replacing a disciplinary termination with a salary reduction or a temporary demotion.

In order to ensure consistent interpretation and application of Article 252(5), the Bucharest Court of Appeal and the Supreme Court's Prosecutor General in Civil Matters applied to the Supreme Court for a ruling on the correct interpretation of Article 252(5).

Judgment

The Supreme Court held that, as from 25 July 2013 - the date on which its judgment was published in the Romanian Official Gazette - Article 252(5) is to be interpreted to the effect that, in the event a court finds that an employer has erred in imposing a particular type of disciplinary sanctions, it may replace that sanction, if properly challenged, by another lesser disciplinary sanction. The Supreme Court noted that this outcome is in line with the case law

of the European Court of Human Rights on individuals' access to an independent and impartial tribunal. In 2005, in *Buzescu - v - Romania* (appl. 61302/00), the ECtHR held that the scope of Article 6(1) of the ECHR includes employment disputes, which in turn include disputes on disciplinary measures, and in such cases the courts have the power to examine the parties' arguments as well as the evidence. The court also referenced the ECtHR's 1999 judgment in *Airey - v - Ireland* (appl. 6289/73), in which it was held that the protection of individual rights entails "protection of practical and effective rights, but not of theoretical and illusory ones".

Commentary

My advice to employers is to draft their internal regulations as comprehensively as possible, by listing all possible types of misconduct and specifying - within reason - the appropriate sanction for each category. For example, no court is likely to accept dismissal as an appropriate sanction for offending a co-worker on one occasion. However, if the offensive behaviour continues to the extent that it qualifies as 'mobbing', dismissal may be an appropriate sanction. As it happens, a claim is pending at this moment with the courts that deals with precisely such a situation¹.

Another, more obvious piece of advice to employers is to document all misconduct, even where it does not lead to a disciplinary sanction.

The *Buzescu* case to which the Supreme Court referred concerned a decision by the Romanian Union of Lawyers (UAR) to remove the registration of one of its members. As this decision had been taken without hearing the member concerned, the ECtHR held that there had been a violation of Article 6 ECHR. It also held that the annulment of his registration was disproportionate.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, the ways in which employers can discipline employees differ depending on whether the employee is a civil servant or employed in the private sector. In the private sector, there are only two ways to discipline an employee: a written warning or termination of the employment contract. Therefore, the courts can only decide whether the written warning or termination was justified. If not, it will declare the action void with no option to reduce the disciplinary action to something more suitable.

In the public sector, a variety of disciplinary actions can be taken, including reprimands or reductions to salary. Generally, section 60 of the Federal Disciplinary Code applies and this enables the court either to reject a claim against a disciplinary measure or to reduce the

measure to a level it consider more reasonable.

Subject: Miscellaneous

Parties: Court of Appeal and General Prosecutor in Civil Matters in the name of the law

Court: Inalta Curte de Casatie si Justitie a Romaniei (Supreme Court)

Date: 10 June 2013

Case number: 8/2013

Internet Publication:

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Footnote

¹ After this case report was submitted, this case was adjudicated. The court annuled the dismissal, replacing it by a written warning. As a result, the employer must rehire the employee and pay him salary retroactively from the date of the dismissal.

Creator: Inalta Curte de Casatie si Justitie (Romanian Supreme Court)

Verdict at: 2013-06-10

Case number: 8/2013