

CONSIDERATIONS ON POSSIBLE APPROACHES OF DISCIPLINE AT WORK

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Abstract:

This paper aims to open a debate on the opportunity of a broader understanding of the relational matters that occur within organizations when interpreting and applying the provisions of the labour code.

Keywords: *discipline, work, work deviance*

Organizations are communities governed by a series of legal and statutory provisions in order to regulate the social relations between their members and those established between the organization and third parties. This paper aims to address some general issues related to discipline at work and to open a debate on the opportunity of a broader understanding of the relational matters that occur within organizations when interpreting and applying the provisions of the labour code..

From a legal point of view, the employer is the one who establishes, within the limits of the law, the framework for the legal management of discipline at work. Discipline at work is defined in the legal literature as "the required procedures for the development of the work process, which involves the fulfilment of duties and compliance with the rules of conduct by participants in this process" [1].

According to Article 247 Para. 1 of the Labour Code, the employer has the disciplinary prerogative, having the right to apply, according to the law, disciplinary sanctions to his employees whenever he finds that they have committed a disciplinary offense. Furthermore, Article 40 Para. 1 of the Labour Code, which establishes the main rights of the employer, expressly stipulates the employer's right to ascertain the commission of disciplinary offenses and to apply the corresponding sanctions, according to the law, the applicable collective labour agreement and the internal regulations.

However, the issue of discipline in organizations goes beyond the legal limits, being a topic of debate in human resource management and organizational psychology. Thus, one of the main elements related to the discipline is counterproductive behaviour. Workplace deviance has been defined as voluntary behaviour that violates significant organizational norms and, in so doing, threatens the well-being of the organization and its members, or both [2].

In order to establish the limits of desirable behaviour, the employer shall establish, in consultation with the trade union or employee representatives, the concrete rules on discipline in the workplace, disciplinary violations and applicable sanctions, and the rules on disciplinary procedure (Article 242 (e), (f) of the Labour Code). All these are mandatory elements of the internal regulations, a mandatory document for all employers. Organizational norms consist of basic moral standards as well as other traditional community standards, including those prescribed by formal and informal organizational policies, rules, and procedures [3].

In organizational psychology, counterproductive behaviours comprise several categories of behaviours. For example, Gruys and Sackett [4] identified 11 categories of counterproductive behaviours:

- Theft and related behaviour - Help another person or advise them how to take company property or merchandise; Take cash or property belonging to the company; Misuse business expense account; Take cash or property belonging to a co-worker; Take office supplies from the company; Take petty cash from the company; Take cash or property belonging to a customer; Give away goods or services for free; Provide goods or services at less than the price established by the company; Misuse employee discount privileges.
- Destruction of property - Deface, damage, or destroy property, belonging to a co-worker or to a customer; Deface, damage, or destroy property, equipment, or product belonging to the company; Deliberately sabotage the production of product in the company.
- Misuse of information - Destroy or falsify company records or documents; Discuss confidential matters with unauthorized personnel within or outside the organization; Intentionally fail to give a supervisor or co-worker necessary information; Provide the

organization with false information to obtain a job (i.e., regarding education or experience); Lie to employer or supervisor to cover up a mistake.

- Misuse of time and resources - Conduct personal business during work time; Spend time on the internet for reasons not related to work; Take a long lunch or coffee break without approval; Waste time on the job; Waste company resources; Use company resources you aren't authorized to use; Make personal long distance calls at work; Mail personal packages at work; Make personal photocopies at work; Use email for personal purposes; Play computer games during work time; Alter time card to get paid for more hours than you worked; Work unnecessary overtime.
- Unsafe Behavior - Endanger yourself by not following safety procedures; Endanger coworkers by not following safety procedures; Endanger customers by not following safety procedures; Fail to read the manual outlining safety procedures.
- Poor Attendance - Be absent from work without a legitimate excuse; Intentionally come to work late; Use sick leave when not really sick; Leave work early without permission; Miss work without calling in.
- Poor Quality Work - Intentionally perform your job below acceptable standards; Intentionally do work badly or incorrectly; Intentionally do slow or sloppy work.
- Alcohol Use - Come to work under the influence of alcohol; Have your performance affected due to a hangover from alcohol; Engage in alcohol consumption on the job.
- Drug Use - Engage in drug use on the job; Come to work under the influence of drugs; Possess or sell drugs on company property; Have the performance affected due to a hangover from drugs.
- Inappropriate Verbal Actions - Argue or fight with a co-worker; Yell or shout on the job; Verbally abuse a customer, a co-worker or a supervisor; Use sexually explicit language in the workplace; Argue or fight with a supervisor or with a customer.
- Inappropriate Physical Actions - Physically attack (e.g., pushing, shoving, hitting) a co-worker, a customer or a supervisor; Make unwanted sexual advances toward a subordinate, a supervisor, a co-worker or a customer.

The employer shall find particularly beneficial to use the above-mentioned category and items in order to establish the disciplinary rules in the company. Special laws (on such areas as data protection or health & safety) may require adding further

categories or items to the existent ones, but the structure remains reliable both from organizational psychology and legal point of view.

From a legal point of view, the Labour Code strikes a balance between the employer's right to establish and enforce the disciplinary framework at the level of the organization and the employee's right to defence.

First, the employer's freedom to establish the disciplinary framework is limited by the legal definition of disciplinary misconduct. Thus, according to the Article 247 Para. 2 of the Labour Code, the disciplinary offence is an act related to work and which consists in an action or inaction committed with guilt by the employee, by which he violated the legal provisions, internal regulations, individual employment contract or the applicable collective labour contract, the orders and legal instructions of the hierarchy.

First of all, therefore, the deed must exist, i.e. the employee must have committed a series of acts. The employer must therefore prove that the employee acted in a certain way or that, on the contrary, he failed to act even though he was obliged to do so. The proof of the negative fact will be made by proving the existence of all the elements that can lead to the undoubted conclusion of the non-fulfilment of the obligation.

Secondly, the law requires that the act committed by the employee be "related to work", i.e. be in relation to the quality of the perpetrator's employee, the duties provided in the job description, the specificity of the job and the general activity of the employer. However, the condition is not imposed that the act be committed during working hours or at work [5]. Therefore, the disciplinary offence may be committed during the delegation, during the activity of telework or even during the rest leave.

Another condition is that the act must be committed with guilt. The employee's action or inaction must be attributable to its perpetrator, ie the perpetrator was at fault when he acted or, on the contrary, failed to act even though he was obliged to do so. The analysis of the employee's guilt consists in determining the subjective attitude that the author had towards the deed and its consequences, at the moment when he committed it [6].

If the internal regulations provide that a certain act constitutes a disciplinary offense only under the condition that it is committed intentionally, the employer must prove both the guilt and the intent, whether the intent is direct or indirect.

Finally, the deed must have violated the legal provisions, the internal regulations, the applicable individual employment contract or collective bargaining agreement, the orders and legal provisions of the hierarchy.

The only sanctions that the employer can apply in case the employee commits a disciplinary violation are provided by art. 248 of the Labour Code:

- a) the written warning;
- b) demotion from the position, with the granting of the salary corresponding to the position in which the demotion was ordered, for a duration that cannot exceed 60 days;
- c) reduction of the basic salary for a period of 1-3 months by 5-10%;
- d) reduction of the basic salary and / or, as the case may be, and of the management allowance for a period of 1-3 months by 5-10%;
- e) disciplinary termination of the individual employment contract.

Disciplinary sanctions are expressly provided and limited by law, and their enforcement, both in terms of duration and amount, must be performed strictly within the limits of the law [7].

In addition to the substantive guarantees, the employee's rights are also protected by establishing an imperative procedure regarding the investigation of the deed, the establishment of the disciplinary sanction and the content of the sanctioning decision.

The Labour Code stipulates that, under the sanction of absolute nullity, no measure, except for the written warning, may be ordered before a preliminary disciplinary investigation has been carried out. As regards the written warning, the legal provision contradicts its own logic, since the sanction must be granted only after performing the disciplinary investigation, during which the employee is given the right to formulate and defend all defences, which could lead to proving the fact that the deed does not exist, in which case no disciplinary sanction may be imposed. However, if the employer is allowed to establish the sanction of the written warning in the absence of disciplinary investigation, then the sanctioned employee is created an unfavourable

legal situation compared to the other employees, being deprived of the exercise of the right to defence.

Consequently, we consider that Article 251 Para. 1 of the Labour Code must be amended, in the sense that disciplinary investigation should be mandatory in all cases. Only after the disciplinary commission has access to all the information and defences regarding the matter at stake it would be able to propose a certain disciplinary sanction.

Failure to comply with the employer's obligation to conduct the disciplinary investigation shall be sanctioned with the absolute nullity of the entire procedure.

The rules regarding the disciplinary procedure must be established in the internal regulation (Article 242 Letter g of the Labor Code), but the general principles are the following.

The person who is aware of the commission of an act that presents the elements of a disciplinary offence must inform the person who has the competence to represent the employer in the labour relations. The Labour Code does not specify the person entitled to represent the employer, but the Law on Social Dialogue provides that at the plant level, the employer is represented by its governing body, established by law, statute or operating regulations (Article 134 Letter a of the Labour Code). In general, the employer will be represented by the managing director or by the general manager, who may delegate the tasks related to human resources management to the human resources manager.

With regard to the notification received, the managing director, the general manager or, as the case may be, the human resources manager will decide on the initiation of disciplinary proceedings. In order to carry out the disciplinary investigation, the employer will appoint a person or will establish a commission or will resort to the services of an external consultant specialized in the labour legislation, which he will empower in this respect.

The external consultant in labour law may be a lawyer, an expert in labour law or, as the case may be, a mediator specialized in labour law (Article 2311 Para. 4 of the Labour Code).

The legal provisions do not endorse the presence of a human resources specialist or an organizational psychologist, which determines that, in fact, the

disciplinary procedure remains at a strictly legal level of analysis, ignoring the fact that work discipline is a much broader issue of the organization.

In order to carry out the preliminary disciplinary investigation, the employee will be summoned in writing by the appointed person, by the chairman of the commission or by the external consultant, specifying the object, date, time and place of the meeting.

The law does not establish the time that must elapse between the time of communication of the summons and the conduct of the disciplinary investigation. Given that the disciplinary investigation is established for the protection of the employee's rights, we consider that a reasonable interval must be established, which would allow the employee to organize all his defences. For these reasons, summoning the employee for the same day must be considered abusive.

The content of the summons is established imperatively and in order to protect the rights of the employee. In this respect, the "object" of the meeting must be clearly described in order to allow the employee to formulate his defences and present his evidence. For these reasons, we cannot agree with the jurisprudential solution according to which "from the grammatical interpretation of art. 251 it follows that the summons specifies the object of the meeting and not the preliminary disciplinary investigation ... In this sense, it is found that the object of the meeting as it results from the summoning of the respondent is represented by "clarifying the causes of labor legislation" [8]. In fact, another court of appeal noted that a general statement, such as "to clarify the issues in your unit" [9] does not meet the requirements of the law.

The summons is communicated directly to the employee, who will certify by signature the receipt of a copy. If the employee refuses to receive the document or if he is not present at work, then the summons must be sent by mail, with acknowledgment of receipt, to the address that the employee communicated to the employer. The jurisprudence [10] has ruled that the announcements from the newspaper, from the radio, from the local television station or from the headquarters of the unit do not constitute a written summons, within the meaning of Article 252 Para. 2 of the Labour Code.

Failure of the employee to attend the investigation without objective reasons entitles the employer to establish the sanction, without conducting prior disciplinary

investigation. If the employee has an objective reason for not being able to appear, he is obliged to inform the employer.

The disciplinary investigation implies the presence of the employee before the disciplinary investigation commission, the simple correspondence between the parties, even if it consists in communicating the accusation by the employer and the employee's response presenting his defences, not being qualified as disciplinary investigation within the law.

During the preliminary disciplinary investigation, the employee has the right to communicate and sustain all his defences and to provide the person or persons empowered to carry out the investigation with all the evidence and motivations he deems necessary. In order to facilitate the communication, the employer's representatives may draw up an explanatory note, containing questions that may clarify the issues related to the act committed. The employee's refusal to answer the questions in the explanatory note or to present his defences cannot generate the blocking of the procedure, the procedure being completed on the basis of the evidentiary support material prepared by the employer.

During the investigation, the employee has the right to be assisted, at his request, by an external consultant specialized in labour law or by a representative of the trade union of which he is a member.

After assessing the employee's defence, the commission or the authorized person will establish the gravity of the disciplinary offence, taking into account the following aspects:

- a) the circumstances in which the deed was committed;
- b) the degree of guilt of the employee;
- c) the consequences of the disciplinary violation;
- d) the general behaviour of the employee in the service;
- e) any disciplinary sanctions previously suffered by him.

The criteria provided in Article 250 of the Labour Code must be applied cumulatively, in order to establish as accurately as possible the gravity of the deed and the personal circumstances of the perpetrator.

Moreover, organizational psychology research suggests a wide range of reasons why employees engage in deviant behaviour, from reactions to perceived injustice, dissatisfaction, role modelling and thrill-seeking [11]. When assessing the gravity of the disciplinary offence, it may be relevant for the employer to establish the employee's reasons for engaging in such behaviour, to address the reasons and take actions. An important number of predictors of an employee's proclivity toward counterproductive work behaviours are related to the employee, but organizational constraints [12] and organizational justice [13] also play a role in such behaviours.

When the disciplinary commission reduces its activity to the strict and narrow application of the provisions of the Labour Code, this leads to the sanctioning of non-compliant behaviour that constitutes a disciplinary offence but will not allow a broader analysis of work deviances. In this case, employer's action is limited to the individual who acted in an undesirable manner, but no corrective actions aiming to address the discipline at organizational level are put in place.

The disciplinary commission, even if it finds its legal ground in the provisions of the Labour Code, should undertake a multidisciplinary analysis, both from a legal and organisational psychology point of view, in order to completely address the issue of discipline at work.

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