

DISCIPLINARY LIABILITY: THE CONTENT, PRINCIPLES AND TYPES

Cand. of Law, Assist.Prof.Valeriy Vyacheslavovych Sereda, Ph.D.
Lviv State University of Internal Affairs, UKRAINE

ABSTRACT

The author suggests to consider disciplinary liability as generic notion, and general and special disciplinary liability can be considered as specific notions. It is stressed that all these types of liability should be based on the principles of legality, validity, expediency, justice, proportionality, inevitability with the mandatory securing the rate of its occurrence and the observance of the presumption of suspect's innocence.

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Disciplinary liability is based on the corresponding principles that reflect the essence of the legal norms governing the corresponding relations.

These include:

- the legality of disciplinary liability;
- the validity of disciplinary liability;
- the expediency of disciplinary liability;
- the justice of disciplinary liability;
- the presumption of suspect's innocence;
- the rate of disciplinary liability occurrence;
- the proportionality of disciplinary liability;
- the inevitability of disciplinary liability.

The legality of disciplinary liability arises from the fact that this liability is only for disciplinary offenses, that is, for guilty wrongful acts. Disciplinary liability may be applied only by bodies and persons vested with appropriate powers. The liability can be used only within the labour legislation limits. Thus, the legislation establishes a comprehensive list of

disciplinary penalties, as well as the period during which these penalties may be imposed, and the order of bringing to the disciplinary liability. Moreover, only one disciplinary penalty may be applied for every guilt. This rule is not applied to committing so-called continuing disciplinary offences (truancy, for instance). If the non-fulfilment or improper fulfilment of job duties assigned to the employee continued, despite the imposition of a disciplinary penalty, a new disciplinary penalty may be applied, including dismissal.

Validity is based on the fact that the legal decision and the legal measure of enforcement impact on the employee can only be justified. A justified decision is one based on the examined evidence, taking into account the severity of the offense, the employee identity, systematic violations of labor discipline etc.

O.T. Barabash noted that disciplinary liability should be reasonable and fair. The validity of disciplinary liability lies in the following:

- a) imposition of a disciplinary penalty only for actions (inactions), connected with the violation of labor discipline;
- b) the application of disciplinary penalties that would not humiliate human dignity and worker's labour honor;
- c) the imposition of one penalty for each violation of labor discipline [1, p. 69].

Expediency envisages consideration of the offender's individual properties, previous work, employee's behavior and attitude to work (i.e. strict individualization when choosing a disciplinary penalty) in each case. The law also allows the possibility of early withdrawal of the disciplinary penalty. If new disciplinary sanctions aren't imposed on the employee, the penalty is to be removed after a year period. However, the employer has the right to remove the recovery of the employee before a specified period on his own initiative, at the request of the employee, a supervisor or representative body of employees. In each case, the question on early withdrawal of disciplinary penalty against the employee should be decided from the standpoint of expediency of that action. Removal of the punishment is not considered as such in the future, because the employee is not considered to have disciplinary action. The removed penalty is not considered to be a penalty in the future, because the employee is not considered to have disciplinary action. Moreover, the law allows the possibility of complete liberation of the labor discipline offender from disciplinary penalty, since the use of disciplinary action is a right, but not an obligation of the employer.

The principle of justice fixes the nature of disciplinary sanctions, and while choosing them the employer must take into account the degree of severity of the committed offense and caused harm, the circumstances under

which the offense was committed, and the employee's previous work. When determining the type of disciplinary sanction the attention should be paid to the degree of severity of the offense, the circumstances under which it was committed, the caused harm, the offender's previous behavior and admission of guilt, the attitude toward the performance of official duties, the qualification level, etc. The principle of justice prevents from increasing the penalty after considering of the complaint of an employee who has been subjected to it. The principle of justice also includes a requirement to impose one legal punishment for a single offense.

The presumption of innocence is that the employee does not have to prove his guilt to the employer about committing a disciplinary offense. The problem of proving the guilt of the employee is the problem of the employer himself. In order to recognize the wrongful act of the employee as a disciplinary offence, the employer must establish the fact of guilt. The only thing that the owner or his authorized body may require from the worker (the offender of labor discipline) is a written explanation of the detected offense. Also according to the Article 7 of ILO Convention № 158 "On termination of employment relations on the initiative of the entrepreneur" in 1982, the employment relations with the worker shall not be terminated for reasons related to his behavior or work, as long as he is not provided the opportunity to prove his innocence, except cases when the employer can't reasonably provide the worker this possibility for the employee [2; 3]. The employee may even refuse to give testimony, and this is the case which requires the act that must be signed by the persons certifying this fact. But the refusal to provide testimony does not prevent the employer to bring workers to disciplinary liability.

The principle of proportionality is distinguished as a permanent legal value of the

ratio of measures of a disciplinary penalty and the severity of a committed offence.

Imposing penalties a legislator requires an employer to take into account the severity of the offence, circumstances under which it was committed, the previous behavior of the employee and his/her attitude to work.

The principle of the rate of disciplinary penalties attachment is defined in terms of imposing disciplinary penalties. The employer's delayed reaction on the committed offense reduces the effectiveness of the disciplinary penalty. The disciplinary penalty cannot be applied later than six months from the day of the misconduct, and according to the results of the audit, the revision of financial-economic activities – later than two years from the date of its committal.

In the scientific literature on labor law stands the principle of **inevitability of disciplinary liability**. This principle is reflected in the fact that any offence should not be neglected by the employer. Maybe this is a lack of conviction or sentence, but always obliged to have an impact in principle of liability, because the latter is a broader measure than punishment, penalty or conviction. It's pointed out of the necessity of the disciplinary action in any case of labor discipline, which in itself is of warning meaning, regardless of whether disciplinary proceedings are realized or disciplinary action based on the personality of an offender and the circumstances of the offense committed won't be applied. However, nowadays sphere of the manifestation of the principle of inevitability of disciplinary liability is significantly narrowed. So how exactly employer has to decide whether to breach in a given case disciplinary sanctions or it's not appropriate. Moreover, even if it is a subject to disciplinary sanctions, it is not necessarily to be completed by application to the perpetrator of a disciplinary penalty. An employer may just use oral interviews with the offender. So we can't talk about the inevitability of disciplinary

liability as a duty of the offender to answer for disciplinary offence committed and suffered from some unpleasant consequences in all cases.

It should be noted that in some cases the employer's right to solve the question of whether to prosecute the offender or not to the disciplinary liability, is limited.

However, the disciplinary responsibility is of inevitable nature, as labor law requires from an employer to apply in some cases disciplinary action to a particular person.

The legal mechanism of disciplinary liability consists of legal regulations providing basis for disciplinary liability, disciplinary sanctions, their imposition order, removal and appeal.

It should be noted that disciplinary compulsion is an extra-judicial, for it is inherent in the widespread use of moral and legal sanctions, it is carried out by the subjects of disciplinary power. If the means of civil legal compulsion can be applied to both individual and collective subjects, then the means of disciplinary compulsion are applied only to physical persons who are not only personalized, but also individualized. There are many sanctions and procedures intended for a certain group of people within its framework [4, c. 348-349].

Taking into account the mentioned above, disciplinary liability may be general and special. Such a division, according to Y. Adushkina conditioned by three grounds:

- firstly, the inclusion of a person in one or another particular type of community;
- secondly, belonging of a citizen to a certain type of organization (for example, it is particularly regulated the liability of employees of enterprises and establishments of the systems of various transport ministries, prosecutors, judges, etc.);
- thirdly, the nature of the functions performed by a person in the given organization.

The responsibility of those employees whose activity is the main content of this organization is especially regulated; they are judges, prosecutors, investigators and others (as opposed to individuals who perform supporting functions in the same organization). "Marked factors, - continuous further the author, - cause (on various subjects) the specific grounds for liability, lists of penalties, hierarchy of disciplinary power, procedural forms and, therefore, determine the differentiation of disciplinary liability" [5, p.28-29].

Thus, the *general disciplinary liability* arises on the basis of the Labor Code of Ukraine regulations and work rules. It is spread over the majority of employees, including seasonal and temporary employees who are not covered by the statutes and regulations on discipline and other special regulations. Even in those branches of national economy where there are statutes or regulations concerning the discipline, much of the employees bear general disciplinary liability. General disciplinary liability under Art. 147 Labour Code of Ukraine suggests two types of disciplinary sanctions: reprimand and dismissal, which are exhaustive.

Special disciplinary liability is provided only for specifically defined categories of employees on the basis of laws and regulations concerning the discipline and special regulations. It is characterized by a special subject of a disciplinary misconduct, specific nature of a disciplinary misconduct, special types of disciplinary sanctions, special procedure for imposing and appealing the disciplinary sanction.

Special subject is the employee who bears disciplinary responsibility according to special normative-legal acts, statutes, regulations, laws.

Special disciplinary liability differs from the general by the following features:

- 1) the persons are liable to its scope;
- 2) regulated by special normative-legal acts;

- 3) the broader content of the disciplinary offense;
- 4) measures of the disciplinary penalty. Thus, for certain categories of the workers, the moral content demands are included in their duties. This applies to judges, prosecutors, public servants, employees, who performs educational functions. Failure to comply with these norms, it is immoral behavior not only during the work, but also in everyday life is the basis for the involvement of the employee to disciplinary action, including dismissal from the office;
- 5) the persons and bodies entitled to apply penalties. The workers carrying disciplinary responsibility in accordance with the statutes, regulations and other legislative acts of the discipline, disciplinary sanctions may be imposed not only by the authority, which is responsible for employment, and higher authorities. The workers occupying elective offices, can only be dismissed by decision of the body which elected them, and only on the grounds provided by the legislation (art 147-1 the Labor code of Ukraine);
- 6) the application procedure and appeals against penalties.

Summing up the mentioned above, we can formulate definitive apparatus of disciplinary liability: disciplinary liability - is a generic concept, and general and specific disciplinary liability can be regarded as a species concept. **Disciplinary liability** is a type of legal liability, which covers the employee's duty both to be responsible to the managing subject or to the authorized body for the disciplinary offense committed by him/her, the essence of which lies in the employee's failure to perform or perform improper the assigned employment or official duties; and to incur disciplinary sanctions provided by the legislation of Ukraine.

General disciplinary liability is a subtype of disciplinary responsibility directed at an employee guilty of nonperformance or improper performance of assigned (by labor legislation, collective and labor agreements) duties resulting in disciplinary sanction, kinds and grounds for the application of which are provided by the Labor Code.

Special disciplinary liability is a subtype of disciplinary liability directed at the legislation defined special subjects who for the committed disciplinary offence bear the punishment within the frames of special regulations providing for more severe disciplinary measures that are implemented by applying special procedures for their imposition.

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