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Disciplinary Liability and Other Means Impacting the Employee's Behaviour in Labour Relations in Latvia and Lithuania

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The article examines the regulation and practice of employee liability in employment relationships in two Baltic states – Latvia and Lithuania. Considering that the Latvian Labour Law regulates the disciplinary liability of employees, while in Lithuania disciplinary punishments (except for the most severe punishment – dismissal) have not been provided for since 2017, the authors analyse the regulatory framework of these countries and reflect on the case law, as well as outline the main differences and problematic issues in the context of employee liability.

Keywords: disciplinary liability, employer, employee, reproof, reprimand, notice of termination by an employer.

Contents

Introduction

Employee disciplinary liability in many countries is seen as an important mechanism for disciplining employees, i.e. punishing the offending employee, at the same time serving as a preventive tool for avoiding possible misconduct, which can have a positive impact on the quality of work, productivity and efficiency of the employer's business.

The Latvian Labour Law (hereafter – LL) provides for two types of disciplinary punishment – reproof (Latv. *piezīme*) and reprimand (Latv. *rājiens*). As practice shows, disciplinary punishment is a relatively common form of punishment in practice, and it is not uncommon for employees who have been disciplinarily punished to take legal action to have the disciplinary punishment overturned. The section of the article on the Latvian legislation will address various issues related to the application of disciplinary punishments, e.g., the difference between the two disciplinary punishments – a reproof and a reprimand, what procedural steps an employer must take in order to apply a disciplinary punishment, the problem of the time limit for applying disciplinary punishments, the procedure for challenging disciplinary punishments and how to distinguish a disciplinary punishment from an employer's notice, which is also considered a means of punishing an employee. To clarify the content and the problems of these issues, the decisions of the courts of different instances will be analysed.

However, the situation in Lithuania is different: since 2017, Lithuania has moved away from disciplinary punishments in the form of a reproof or a reprimand, but it leaves the most severe penalty – dismissal. Currently, the Lithuanian legislation retains only the employer's notice as a mechanism to punish an employee for misconduct and at the same time to deter other employees from committing misconduct. The article will outline the reasons why Lithuania decided to opt out of disciplinary liability, as well as the main findings on notice as a form of punishment and the procedural aspects of this procedure.

Due to the limited volume of the article, it will not deal with the civil liability framework as a form of employee liability.

1. Disciplinary liability of employees in Latvia

1.1. Characteristics of regulatory framework

In Latvia, the main regulatory act that regulates employment relationships is the LL, which was adopted in 2001 and entered into force on 1 June 2002.[1] Disciplinary liability is regulated by Article 90 of the LL, and this article was amended several times (last amendments were adopted in 2018).

Public officials – those employed in various service relationships have specific laws and regulations governing their disciplinary liability, e.g. the 1994 Judicial Disciplinary Liability Law[2] governs the liability of judges, but the 2006 Law On Disciplinary Liability of State Civil Servants[3] governs the disciplinary liability of

[1] Darba likums [Labour Law] (06.07.2001). Available: https://likumi.lv/ta/en/en/id/26019-labour-law [last viewed 06.06.2024].

[2] Tiesnešu disciplinārās atbildības likums [Judicial Disciplinary Liability Law] (10.11.1994). Available: https://likumi.lv/ta/en/en/id/57677-judicial-disciplinary-liability-law [last viewed 06.06.2024].

[3] Valsts civildienesta ierēdņu disciplinmāratbildības likums [Law On Disciplinary Liability of State Civil Servants] (30.05.2006). Available: https://likumi.lv/ta/en/en/id/136110-law-on-disciplinary-liability-of-state-civil-servants [last viewed 06.06.2024].

civil servants. Compared to the LL, these special laws contain a more comprehensive disciplinary framework and a wider range of disciplinary punishments. For example, Article 11 of the Law on Disciplinary Liability of Civil Servants provides for disciplinary sanctions that do not apply in the employment relationship, such as reprimand, reduction of the monthly wage (not more than by 20% for a time period from three months to one year); demotion for a time period not exceeding three years, removal from the position and removal from the position without the right to apply for a position in state administration for one year.

1.2. Types of disciplinary punishment and cases of application

The disciplinary responsibility of the employee and the right of the employer to punish the employee for violations of the working procedure arise from the employee's commitment to comply with certain working procedures and orders of the employer. The agreement on subordination is one of the essential components which distinguishes the employment contract from other contracts.[4] As stated in the legal literature, disciplinary liability is incurred when an employee is guilty of an unlawful act, i.e. negligently performing their duties or acting unlawfully, or is guilty of an omission, i.e. failing to perform their duties.[5]

The purpose of disciplinary punishment is not only to punish and ensure that the offending employee complies with the conditions of the working procedure and the contract of employment and refrains from committing further violations, but also as a deterrent to try to prevent other employees from committing possible violations in the future.[6]

In Latvia, there are only two disciplinary punishments in employment relationships – reproof and reprimand. Article 90 of the LL does not identify any differences between them, but in practice a reprimand is generally considered to be a more severe disciplinary punishment than a reproof. The employer has the right to reproof or reprimand the employee at its discretion. In order to specify the application of these types of disciplinary punishment at a particular employer, the employer may, in the terms and conditions of employment or in another internal regulation (local source of law), define what is meant by a reproof and a reprimand for that employer, i.e. for which violations each of these punishments is applied and what consequences it entails at that employer.[7] It should be emphasized that the employer's internal rules on the disciplinary liability of an employee must not, of course, worsen the employee's legal position in relation to the rules laid down in the LL. Employers (especially small companies) rarely set criteria in their internal legislation to distinguish which type of

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[4] *Slaidiņa, V., Skultāne, I.* Darba tiesības [Employment Rights]. Rīga: Zvaigzne ABC, 2011, p. 101.

[5] Ibid.

[6] Darba likums ar komentāriem [Labour Law with comments]. Zvērinātu advokātu birojs „BDO Zelmenis&Liberte". Riga: Latvijas Brīvo arodbiedrību savienība: 2020, p. 237. Available also: https://arodbiedribas.lv/wp-content/uploads/2020/02/new_dl_ar_kom.pdf; see also: Judgement of 19 May 2022 of the Vidzeme District Court in case No. C71240421, para. 12. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].
On the importance of work from the point of view of the legal philosophy, see: *Lazdiņš, J.* Laime Jāņa Pliekšāna (Raiņa) tiesību filozofijā [Happiness in the legal philosophy of Jānis Pliekšāns (Rainis)]. Latvijas Vēstures Institūta Žurnāls, 2022, Speciālizlaidums, 116, pp. 7–22.

[7] In comparison, UK legislation requires employers to make internal rules for disciplinary action and encourages internal rules to be made in line with the Acas Code of Practice on disciplinary and grievance procedures. See: Taking disciplinary action against an employee. Available: https://www.gov.uk/taking-disciplinary-action; http://www.acas.org.uk/index.aspx?articleid=2174 [last viewed 12.05.2024].

disciplinary punishment is applicable to an employee. Employers usually assess this on a case-by-case basis after a specific violation has been committed.

In practice, employers sometimes have terms and conditions of employment that provide for "disciplinary punishments" that the employer itself has devised, such as pay cuts, demotions, etc.[8] However, these are not disciplinary punishments that are allowed in the employment relationship, so such "punishments" will be considered null and void. It should be stressed that Latvian LL does not allow penalties of a material nature – fines, contractual penalties, etc. Consequently, even if the employee agrees to it, contractual penalties cannot be agreed upon in the employment contract. The only case in Latvia where a contractual penalty may be applied in the context of an employment relationship is in the case of a breach of a restriction of competition by an employee – i.e. if the former employee, after termination of the employment relationship, fails to comply with the agreed restriction of competition and takes up employment with a competitor of another employer or otherwise breaches the terms of the agreement[9] (see Article 84 of the LL). In the case of a breach of a restriction on competition, the application of a contractual penalty is possible because the employment relationship between the contracting parties – i.e. between the employee and the employer – no longer exists.

Article 90(1) of the LL states: "an employer may give a written reproof or issue a reprimand in writing to an employee for violation of specified working procedures or an employment contract, referring to the circumstances that indicate the violation committed." Accordingly, under this Article, disciplinary punishment is applicable if the employee has either breached the established working procedure or the terms of the contract of employment. According to Article 54 of the LL, the working procedure in an undertaking is determined by the working procedure regulations, the collective agreement, the employment contract and the orders of the employer. The case law also indicates that, in addition to the collective agreement, the working procedure regulations, the employment contract and the orders, the working procedure in an undertaking is also governed by job descriptions, various regulations and other acts issued by the employer's management, including the concept of "working procedure and contract regulations", which covers not only individual employer's documents with such titles, but also regulatory acts governing the duties of members of certain professions at work.[10]

As stated in the case law, an employee may be subject to disciplinary punishment in cases where the employee has committed an unlawful, culpable act (act or omission) – has failed to perform or has improperly performed the duties set out in the employment contract or working procedure, "without it being necessary to establish that the breach committed is substantial, that the employee acted with malicious intent or that the employer has suffered damage as a result of the breach."[11]

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[8] Decision of 5 July 2022 of the Senate Action Session No. SKC-820/2022 in case No. C69335521, para. 3.

[9] An agreement on the restriction on competition may apply to different types of restriction on competition, including permanent competitive economic activity of the employee, employment of the employee with another employer, not poaching of clients or employees of the former employer. (See Article 84 (5) of the LL).

[10] Judgement of 16 March 2023 of the Supreme Court No. SKC-33/2023 in case No. C30397020, para. 10. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[11] Judgement of 7 October 2022 of the Riga District Court in case No. C29278021, para. 7.3. See also: Judgement of 10 November 2023 of the Vidzeme District Court in case No. C71146323, para. 7.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

Although the first paragraph of Article 90 of the LL refers to "violation of the working procedure or the employment contract" as a ground for disciplinary punishment, in the author's opinion, violation of ethical norms may also be a ground for disciplinary punishment (e.g., if an employee is rude to clients, disrespectful to colleagues, etc.).

In contrast to the approach of some foreign countries,[12] the Latvian LL does not stipulate that disciplinary liability is applicable only for violations listed in the regulatory framework. This approach is to be welcomed, as it is undoubtedly not possible for the legislator or the employer to foresee and list all types of disciplinary violations.

In practice, employers sometimes misunderstand the suspension from work (which is regulated by Article 58 of the LL), as a form of disciplinary punishment.[13] In this context, the Supreme Court has also stated that "suspension from work is not a disciplinary sanction for a specific, verified and proven misconduct of an employee, but rather a preventive measure reserved to the employer for the elimination of a possible threat to address potential risks to interests"[14] preventing the employee from being present at work and performing their duties where the employer has as yet unverified but credible facts which give reason to believe that the failure to suspend the employee may prejudice the legitimate interests of the employer or of third parties.[15]

1.3. Procedural rules for the application of disciplinary punishment

1.3.1. Time limit for applying disciplinary punishment

It is essential to comply with the time limit for disciplinary punishment. Article 90(3) of the LL provides "A reproof or a reprimand may be issued not later than within one month from the day of detecting the violation, excluding the period of temporary incapacity of the employee as well as the period when the employee is on leave or does not perform work due to other justifiable reasons, but not later than within 12 months from the day the violation was committed […]".

Thus, the law provides that the employer must impose disciplinary punishment within one month from the date of detecting the violation. It is often difficult (especially in the case of more complex violations) to identify exactly what constitutes the "detecting" of a violation – whether it is, for example, the moment when a whistleblower report or customer complaint is received about an employee's misconduct, or whether "detecting" is when an internal investigation results in a report on the conclusion of the investigation, which already establishes the fact of the violation committed by the employee, and is presented to the employer's management board. Assessing the violation committed by an employee requires verifying various facts, investigating the situation, and often interviewing witnesses (and the interviews may be repeated, for example in the case of contradictory testimony), so one month is a short timeframe for disciplinary punishment in more

[12] As mentioned in the legal literature, in some foreign countries, for example, Belgium and Japan, there is an opposite approach – there it is possible to apply disciplinary liability only for those violations that are exhaustively listed in the regulatory acts. See: *Slaidiņa V., Skultāne I.*, p. 105.

[13] Article 58 (1) of the Labour Law states: Suspension from work is a temporary prohibition, imposed by a written order of an employer, for an employee to be present at the workplace and to perform work, without disbursing remuneration to the employee during the period of suspension.

[14] Judgement of 26 April 2022 of the Riga District Court in case No. C33412221, para. 11.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[15] Ibid.

complex situations. Therefore, a proposal to extend the time limit to three months (similar to the right of the employer under Article 58 of the LL to suspend an employee from work for up to three months) should be considered. Also, because the LL does not automatically link disciplinary punishment to any other negative consequences, there is no reasonable justification for such a short time limit of one month. Moreover, in employment relationships, the general limitation period for bringing an action (including for damage caused by an employee) is two years, which means that even if the employee had not been subject to disciplinary punishment, the employer could claim damages from the employee within two years.

Until the 2014 amendments to the LL, the maximum period within which disciplinary punishment could be imposed was only 6 months from the date of the violation.[16] The Cabinet of Ministers, as the promoter of the draft law, suggested that this period should be extended to 12 months, explaining that it is necessary to reduce the number of cases in which it is impossible to punish an employee because the employee is temporarily unable to work, is on maternity leave and has been absent from work for more than six months. Therefore, to reduce the number of cases where an employee fails to perform their duties for justified reasons for more than six months and therefore avoids disciplinary liability, a proposal to extend the period for issuing a reproof and a reprimand to twelve months was proposed and accepted by the Latvian Parliament. The existing version thus provides for a more favourable condition for the employer in terms of time limits.[17]

To summarise, the employer must take a decision on disciplinary punishment within one month from the day of detecting the violation , but this does not include the employee's period of temporary incapacity for work, leave or other excusable reasons, but if 12 months have elapsed since the violation was committed, the disciplinary punishment will not be applicable – it will be time-barred (this period is preclusive and cannot be extended).

1.3.2. Request and evaluation of the employee's explanations

In order for an employer to impose a disciplinary punishment, Article 90(2) of the LL sets out the obligations that an employer must fulfil, namely, "(2) Prior to expressing a reproof or a reprimand, the employer shall familiarise the employee in writing with the essence of the violation he or she has committed and then request from him or her an explanation in writing regarding the violation committed."

Thus, the employer is first obliged to inform the employee of the nature of the violation, stating both the factual circumstances of the violation and the corresponding legal circumstances, i.e. the rule under which the employee's conduct qualifies as a violation. It follows that the employer, when issuing either a reproof or a reprimand, must justify it based on objective circumstances indicating that a violation has been committed. In fulfilling this requirement, it is not sufficient to refer to general circumstances without adding substance – the employer is obliged to specify the specific acts and circumstances in which the violation was committed.

The employer shall, in accordance with this Article of the LL, require the employee to provide a written explanation of the violation. The law does not specify the period

[16] Darba likums [Labour Law] (06.07.2001). Available: https://www.vestnesis.lv/ta/id/26019-darba-likums [last viewed 06.06.2024].

[17] Likumprojekts "Grozījumi Darba likumā" [Draft Law "Amendments on Labour Law"]. Latvijas Republikas Ministru kabinets. No. 90/TA-952 (2013). Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/1016FA82F40AC4EFC2257BC50037F713?OpenDocument [last viewed 06.06.2024].

within which the employee must provide a written explanation. When issuing the request for an explanation, the employer should, for the sake of clarity, specify till which date the employee should provide the explanation. The employer should set this time limit with the calculation that the reproof or reprimand may be given no later than one month from the date of the discovery of the violation (to comply with the time limit for disciplinary punishment laid down in Article 90(3)).[18] Failure to submit written explanations within the time limit shall not prevent the employer from taking disciplinary action against the employee. It should be noted here that, although Article 90(2) of the LL provides that the employee shall submit the explanation in writing, exceptions to this mandatory written requirement could be made in certain cases in the employee's interest (e.g. if the employee is unable to do so due to a health condition, because the employee is visually impaired, etc.) – in this case this provision should be applied reasonably, finding alternative options for the recording of the explanation. Even in a situation where the employee has not provided a written explanation, but would have presented the explanation orally, and the employer is thus clear about the employee's viewpoint (position) on the violation, in the author's view, there would be no reason to disregard such an oral explanation (to treat it as unprecedented). Consequently, the statutory requirement for a written explanation should not be understood as absolute in all cases.

Based on the explanation given by the employee, an assessment is made as to whether the violation has been committed or whether there are justifiable reasons for it, leading to a decision on whether or not to impose a disciplinary punishment. Explanations are therefore requested on the circumstances which give rise to the imposition of a possible disciplinary punishment.[19] In each individual case, when deciding whether to impose a punishment, the employer must consider the proportionality between the violation committed and the punishment to be imposed. Furthermore, when deciding on a disciplinary punishment, the employer must observe that only one reproof or reprimand may be issued for each violation (see Article 90(3)).

1.3.3. Form and content of disciplinary punishment

The LL requires disciplinary punishment to be in writing. A reproof or reprimand must be in the form of a written order by the employer. Article 90(3) of the LL provides: "the employer has the obligation to issue a written order to an employee by which the employee is issued a reproof or a reprimand." The mandatory written form requirement is included to allow the employee to challenge the disciplinary punishment in court if necessary. If the employer orally refers to the employee's breach of the working procedure or the contract of employment, this will not constitute a disciplinary punishment and will have no legal effect.

It must be clear from the order imposing the disciplinary punishment exactly for what violation the employer is imposing disciplinary liability. The employee will then be able to defend himself properly if he considers that the disciplinary punishment is unjustified.[20]

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[18] Darba likums ar komentāriem [Labour Law with comments]. Zvērinātu advokātu birojs „BDO Zelmenis&Liberte". Riga: Latvijas Brīvo arodbiedrību savienība, 2020, p.176.

[19] Judgement of 1 March 2022 of the Latgale District Court in case No. C26138120, para. 7.1. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[20] Judgement of 15 March 2023 of the Riga District Court in case No. C30584221, para. 10.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

When imposing a reproof or reprimand, the employer must consider the nature of the violation, how significant it was, the circumstances in which it occurred, and the employee's previous work and personal qualities.[21] In addition, the employer must assess the proportionality between the violation and the punishment. Although the legislation in principle allows a high degree of flexibility to the employer in the application of disciplinary punishment, the employer should respect the principle of equality – i.e. the same employer should have the same disciplinary policy for different employees for the same violation in the same circumstances (i.e. principle of equal rights). As further pointed out in Latvian case law, if an employer targets only one or a few employees for unlawful conduct, but at the same time does not impose liability on other employees, the employer's actions may show signs of targeting a specific person, which, in conjunction with other signs, may in certain situations also be indicative of psychological terror (i.e., mobbing or bossing).[22]

Disciplinary punishment is individual – this means that in situations where several employees have committed a violation together, each employee must be issued a separate reproof or reprimand.

In case law, there have been cases where several employees have been subject to different disciplinary punishments for the same violation, but the court has found nothing unlawful. These are cases where two or more employees have committed the same violation, but one is a first-time offender and the other is a repeat offender. In this case,[23] the first-time offender was issued a reproof, and the repeated offender was reprimanded. Therefore, it can be concluded that if a person has committed the same violation with the same consequences repeatedly, a different (i.e., more severe) disciplinary punishment may be imposed compared to a first-time offender.

To summarise, in order for an employer to prove that disciplinary punishment has been imposed, the employer must have three documents, dated consecutively, to prove it: 1) a document in which the employer describes the nature of the violation committed and on the basis of which the employee's explanation is requested; 2) a written explanation by the employee; 3) a document (order) containing the decision to impose disciplinary punishment and the type of disciplinary punishment. In the event of a dispute, the employer may need to prove that these documents were issued to the employee. Accordingly, the issue of these documents and the notification of the employee should be done either by registered mail or by delivery against signature (preferably in the presence of neutral witnesses). In fact, all the forms of informing the employee referred to in Article 112.[1] of the LL "Notification of notice" would apply in this situation (even though the Article grammatically refers specifically to the forms of notification of notice).

1.4. The employee's right to request the revocation of disciplinary punishment

The LL lays down rules on how an employee can ask the employer to revoke a disciplinary punishment or challenge it in court. To balance the interests of the parties in this respect, the LL was amended in 2018.

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[21] *Slaidiņa, V., Skultāne, I.* Darba tiesības [Employment Rights], p. 108.

[22] Judgement of 28 April 2020 of the Supreme Court in case No. SKC-276/2020 C30407917, para. 10.4.3., see also: Judgement of 3 July 2019 of the Supreme Court Administrative Law department in case No. SKC 474/2019 (A420287716), para. 12. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[23] Judgement of 29 January 2015 of the Vidzeme District Court in case No. C14034114. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi/pdf/205459.pdf [last viewed 06.06.2024].

Article 90(4) of the LL provides that an employee has the right to request the revocation of a reproof or reprimand within one month from the date on which the reproof or reprimand was made. However, it should be stressed that in a situation where an employee seeks to have a disciplinary punishment revoked, the employee must comply with the procedure laid down in Article 94, i.e. the employee must first submit a complaint to the duly authorised person within the undertaking, who shall examine the employee's complaint immediately but no later than within seven calendar days of receipt of the complaint. By providing for such an internal pre-litigation procedure in cases of revocation of disciplinary punishment, the legislator has sought to relieve the courts by allowing for the possibility that the employer might change its decision, or the parties might find a compromise when considering the issue of revocation of disciplinary punishment. The employee and the representative of employees have the right to participate in the examination of the complaint, provide explanations and express their views.

The requirement in Article 94(2) of the LL for the employer to deal with the complaint "immediately but not later than seven days" after receiving it may be burdensome in situations where there are several holidays in a row (e.g. Christmas holidays, turn of the year holidays).

If the employer has not dealt with the complaint within seven days and has not given the employee a reply on the decision taken, the employer is deemed to have revoked the reproof or reprimand. This presumption was introduced by the 2018 amendments to encourage employers to respond in good faith to employee complaints. Recent case law has also concluded that: "[...] by failing to review the claimant's complaint regarding the revocation of the reprimand and by failing to provide a reply on the decision within the seven-day time limit set out in Article 94(2) of the LL [...] the respondent has breached the statutory preclusive time limit for reviewing the complaint, which, under Article 90(4), gives rise to a presumption that the employer has revoked the reprimand."[24]

If, when considering a complaint about the revocation of a reproof or reprimand, the employer decides not to revoke the disciplinary punishment, the employee must be informed of this and the employee has the right to bring an action before the courts within one month of receipt of the employer's decision. It should be noted that if the employee has not complied with the preliminary out-of-court procedure laid down in Article 94 of the LL for the relevant category of cases, the court will have grounds, based on Article 132(1)(7) of the Civil Procedure Law, not to accept the employee's claim.[25]

In an action for revocation of an order imposing a disciplinary punishment, the rules laid down in the Civil Procedure Law apply.[26] The court is obliged to examine whether the employer had a lawful basis for imposing the disciplinary punishment.[27] Respectively, the employer must specify the violation committed by the employee and provide evidence to prove it.[28]

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[24] Judgement of 5 May 2022 of the Riga District Court in case No. C30506821, para. 7.3. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[25] Darba likums ar komentāriem [Labour Law with comments]. Zvērinātu advokātu birojs „BDO Zelmenis&Liberte". Riga: Latvijas Brīvo arodbiedrību savienība, 2020, p. 246.

[26] Civilprocesa likums [Civil Procedure Law] (14.10.1998). Available: https://likumi.lv/ta/en/en/id/50500-civil-procedure-law [last viewed 06.06.2024].

[27] Judgement of 10 November 2023 of the Vidzeme District Court in case No. C71146323, para. 7.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[28] Judgement of 5 May 2022 of the Riga District Court in case No. C30584221, para. 10.3. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

The Labour Law's regulation on the protection of the rights of the employee as a socially weaker party leads to the conclusion that the employer bears the burden of proving that the disciplinary punishment imposed on the employee is justified.[29]

Latvian case law shows that disputes over the revocation of disciplinary punishments come before the courts quite frequently. The punishments imposed may limit the employee's opportunities for promotion, affect future remuneration or have other adverse consequences for the employee.[30] One of the aspects where the fact of disciplinary punishment can also have a negative impact is in situations where the employer carries out a reduction in the number of employees. In such situations, according to Article 108 of the LL, the preference for continuation of the employment relationship is given to those employees with better performance, and the criterion of "better performance" may also include an assessment of the employee's previous performance or disciplinary punishment.

Given that a disciplinary punishment may have the above negative consequences for the employee, the LL provides for the regulation of the extinction of disciplinary punishments – Article 90(5) of the LL provides: "If a new reproof or reprimand has not been issued to the employee within a one-year period from the day of issuing a reproof or reprimand to the employee, the employee shall be regarded as not having been disciplined." This means, for example, that an employer would not be justified in refusing to grant an employee a bonus or other material incentives payable to employees of that employer, simply because the employee had been subject to a disciplinary punishment more than one year ago.

1.5. Distinction between disciplinary action and termination of employment

The LL – Article 101 – lays down the framework for employers' notice (notice of termination by an employer), i.e. the situations in which the employer is entitled to unilaterally notify the employee of the termination of the employment relationship are listed. Points 1 to 5 of the first paragraph of this Article list the cases under which the employer may, subject to the conditions, procedure and time limits laid down by law, terminate the contract of employment on the grounds of the employee's conduct. These cases of termination related to the employee's conduct are the following circumstances: 1) the employee has significantly violated the employment contract or the specified working procedures without a justifiable reason; 2) the employee, when performing work, has acted illegally and therefore has lost the trust of the employer; the employee, when performing work, has acted contrary to moral principles and such action is incompatible with the continuation of employment relationship; 4) the employee, when performing work, is under the influence of alcohol, narcotic or toxic substances; 5) the employee has grossly violated labour protection regulations and has jeopardised the safety and health of other persons. These five cases of termination are essentially similar to the violations for which disciplinary liability may be imposed, which is why the relevant question in legal studies is how to draw the line between disciplinary punishment and the more severe measure of termination of employment contract. As indicated by the case law, a reproof, a reprimand and

[29] Judgement of 5 May 2022 of the Riga District Court in case No. C30584221, para. 10.3. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024], see also: Pierādīšanas pienākuma sadale civillietās [Distribution of the burden of proof in civil cases]. Senāta prakses apkopojums (2017.-2021.). LR Augstākās tiesas Senāts. 2022, pp. 17–19. Available: www.at.gov.lv

[30] Judgement of 9 March 2011 of the Supreme Court Civil Case Department in case No. SKC-281/2011. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

the harshest measure – notice of termination, are all legal remedies which an employer may impose on an employee for unlawful conduct, considering the seriousness of the violation.[31]

The Supreme Court's case law recognises that the criterion for the application of a disciplinary punishment and Article 101(1)(1) of the LL[32] is essentially one, i.e. a breach of the established working procedure or the employment contract. However, the constituent elements of these provisions are delimited only by the substantiality of the violation.[33] Thus, the case law emphasises that the difference between a disciplinary punishment and a termination of the employment relationship is the substantiality of the violation committed by the employee, since, without doubt, a reproof or a reprimand is a more lenient sanction for the employee than termination of the employment relationship. Where an employee has committed a violation, the employer must always assess the substantiality of the violation. In particular, if the employee's violation is not substantial, the employer is entitled to issue a reproof or reprimand the employee (or, of course, not to take disciplinary action), but only if the employee's violation is substantial will the employer be entitled to terminate the contract of employment. The case law also states that, although termination is not a disciplinary punishment, "termination of the employment relationship on non-retaliatory grounds is the most serious possible consequence that an employee may suffer if he has, without justifiable cause, seriously breached his contract of employment or the established working procedures, with adverse consequences for his reputation and future career. Termination of employment is therefore, in its meaning, the most serious of the punishments that an employer may impose on an employee for a serious breach of the contract of employment or of the established working procedures."[34]

As mentioned above, the LL provides that only one reproof or reprimand may be issued for each violation (Article 90(3)). In developing the principle of law derived from this provision, case law has recognised that, in labour law, a disciplinary punishment and termination of employment cannot be imposed at the same time.[35] The imposition of several punishments on an employee for the same violation may lead to the conclusion that the employee is thereby impermissibly exposed to repeated negative consequences which, by their very nature, fall within the scope of the *ne bis in idem* or double jeopardy principle.[36] It should be clarified that this does not exclude the possibility that, in addition to disciplinary liability, an employee may also be subject to other forms of liability, such as civil liability, administrative liability or even criminal liability, for the same violation.

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[31] Judgement of 26 April 2022 of the Riga District Court in case No. C33412221, para. 11.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[32] Article 101 (1) 1) of the Labour Law prescribes: "An employer has the right to give a written notice of termination of an employment contract in case if the employee has significantly violated the employment contract or the specified working procedures without a justifiable reason."

[33] Judgement of 13 December 2022 of the Supreme Court of the Republic of Latvia of No. SKC-858/2022 in case C30584221, para. 7.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[34] Judgement of 8 March 2024 of the Kurzeme District Court in case No. C69427723, para. 11.3.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[35] Decision of 5 July 2022 of the Senate Action Session in case No. SKC-820/2022 C69335521, para. 3, see also Judgement ofc9 March 2011 of the Senate in case No. SKC 281/2011 (C30379509). Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[36] Decision of 5 July 2022 of the Senate Action Session in case No. SKC-820/2022 C69335521, para. 3. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

In the event of a notice, the employer must comply with the provisions of Article 101(2) of the LL: "When deciding on the possible notice of termination of the employment contract, the employer has the obligation to evaluate the seriousness of the violation committed, the circumstances in which it has been committed, as well as the personal characteristics of the employee and his or her previous position." As the court concluded, "the reprimands thus can be taken into account in assessing the respondent's past performance, whereas in the case of a notice of termination, […] the notice cannot be based solely on the circumstances of the employee's past performance."[37] The systematic nature of the violations is a reflection of the employee's past performance, but not of the substantiality of the violation in question.[38]

2. Regulation of employees' liability in Lithuania

2.1. Changes in legal regulation

The concept of labour discipline as a legal category in Lithuanian law emerged only after the adoption of the Labour Code of the Republic of Lithuania in 2002[39] (hereinafter – LC).[40] As in Latvia, so in Lithuania LC stipulated that disciplinary measures could be applied to employees who violated labour discipline (Art. 227 of the LC), from them: 1) note; 2) reprimand; 3) dismissal (Art. 237 of the LC). Article 234 of the LC provides that a breach of labour discipline is the failure to perform or the improper performance of work duties due to the fault of the employee. The first two disciplinary penalties were discretionary and could be imposed by the employer for almost any breach of work discipline. However, the most severe disciplinary sanction, dismissal, can only be imposed by the employer in cases provided for by law (Art. 136 (3) of the LC):

(1) where the employee is negligent in the performance of his/her duties or otherwise breaches labour discipline, provided that he/she has been disciplined at least once during the preceding twelve months;
(2) where the employee has committed a single act of serious misconduct (Article 235 of the LC).

At the time, the Supreme Court of Lithuania stated that the purpose of disciplinary sanctions other than dismissal was to discipline the offending employee, to encourage the employee to obey the employer's work discipline and to perform his/her job functions in good faith.[41] As the nature of work itself has changed over more than 10 years, bringing the relationship between employee and employer closer to a contractual relationship of equals, there has been a need for change in this area, too. After the Lithuanian labour law reform, in 1 July 2017, after the entry

[37] Judgement of 8 May 2023 of the Riga District Court in case No. C33421321, para. 12.3. See also: Judgement No. SKC-281/2011. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[38] Judgement of 8 May 2023 of the Riga District Court in case No. C33421321, para. 12.3. See also: Judgement of 9 March 2011 of the Supreme Court Civil Case Department in case No. SKC-281/2011. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[39] Labour Code of the Republic of Lithuania. (04.06.2002). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.169334?positionInSearchResults=99&searchModelUUID=f7e66a51-941a-4253-9217-ab50c4890a49 [last viewed 06.06.2024].

[40] *Tiažkijus, V.* Darbo teisė: Teorija ir praktika [Labor Law: Theory and Practice]. I tomas. Vilnius: Justitia, 2005, pp. 15–16.

[41] Judgement of 25 June 2001 of the Supreme Court of Lithuania in case G. Skolov v. UAB "Geola", No. 3K-3-740/2001. Teismų praktika, No. 16, 2001. p. 138.

into force of the new version of the LC,[42] the concept of disciplinary responsibility of an employee no longer exists. Since 2017, Article 58 of the LC newly regulates the procedure for terminating the employment contract due to the employee's fault, which provides: An employer has the right to terminate an employment contract without notice and without payment of severance pay if the employee, through an act or omission attributable to him or her, commits a breach of the obligations imposed by employment law or the employment contract. The reason for termination may be: 1) a serious breach of the employee's employment duties; 2) a second breach of the same employment obligations committed by the employee within the last twelve months.

According to Prof. T. Davulis, "this does not mean that a party's failure to perform or improper performance of its contractual obligations will not lead to negative consequences – breaches of employment obligations will be grounds for termination of the employment contract or for refusal to grant incentive payments (Art. 58(2)-(3), 142(2) of the LC)."[43] In other words, the move refusal from disciplinary penalties is away from the avoidance of "punishment" and towards the enforcement of agreements, the recognition of the parties as equal partners in the employment relationship, and the pursuit of accountability between parties.[44]

However, the regulation of civil servants' disciplinary liability still is determined in the regulatory acts of Lithuania. Article 33 of the Civil Service Law provides that one of the following disciplinary penalties may be imposed on a civil servant for official misconduct: 1) a warning; 2) a reprimand; 3) a severe reprimand; 4) dismissal.[45]

2.2. Grounds for violation of work duties

As mentioned above, the LC currently includes only one – the most severe disciplinary sanction, – dismissal. According to Article 58(2) of the LC, the reason for termination of an employment contract may be 1) gross violation of the employee's job duties or 2) a second instance of the employee committing the same job duty violation over the past 12 months. In the Article 58(3) of the LC there are listed seven violations which can be considered a gross violation of job duties, i.e.:

1) failure to come to work for the entire workday or shift without a valid reason;
2) showing up at the workplace during working hours under the influence of alcohol or narcotic, psychotropic or toxic substances, except for cases when said intoxication was caused by the performance of professional duties;
3) refusal to undergo a medical examination when such an examination is required according to labour law provisions;
4) harassment on the basis of gender or sexual harassment, acts of a discriminatory nature, or the violation of honour and dignity with respect to other employees or third parties during working hours or at the workplace;

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[42] Labour Code of the Republic of Lithuania (14.09.2016). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/676587f2cf1911e9a56df936f065a619?jfwid=-k3id7tf7e[last viewed 30.05.2024].

[43] *Davulis, T.* Darbo teisės rekodifikavimas Lietuvoje 2016–2017 [The Recodification of Labour Law in Lithuania 2016–2017]. Teisė, 104, 2017, p. 23.

[44] *Mačernytė-Panomariovienė, I., Krasauskas, R., Vainorienė, A., Bagdanskis, T., Sederevičė, D.* Besikeičiantys darbo santykiai ir jų reguliavimas Lietuvoje. Monografija [Changing Employment Relations and their Regulation in Lithuania. Collective Monograph]. Vilnius: Mykolo Romerio universitetas, 375, 2023, p. 31.

[45] Republic of Lithuania Law on the Civil Service (25.06.2020). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/7c2993b22a7211eb8c97e01ffe050e1c [last viewed 30.05.2024].

5) deliberately causing the employer material damage or attempting to deliberately cause the employer material damage;
6) an act of a criminal nature committed during working hours or at the workplace;
7) other infringements which result in gross violation of the employee's job duties.

However, the legislator's list is not exhaustive, other violations of duties can be regulated by the employer in local normative legal acts. It should also be noted that dismissal is a right of the employer, not an obligation.

Disciplinary action is exclusively reserved for breaches of labour discipline in the case of failure to perform or improper performance of work duties. However, the regulatory framework may also impose disciplinary liability on an employee for other misconduct, such as breaches of ethical norms.[46] The Supreme Court of Lithuania has ruled that "disciplinary penalties, including dismissal, may be imposed only if the employee commits a breach of labour discipline resulting from the failure to perform or improper performance of the duties laid down in the LC, the employment contract, the rules of procedure and/or other special legal acts, due to the employee's fault." [47]

According to Prof. T. Davulis, if the employer gives illegal instructions or does not inform the employee of his/her specific duties, the failure to comply with such instructions, or the failure to perform certain work without knowing that it is required to be carried out, may not be the basis for imposing disciplinary liability, as the prerequisites of the disciplinary liability – the employee's unlawful actions and/or guilt for the breach of the workplace disciplinary rules – do not exist either.[48]

According to the case law of the Court of Cassation of Lithuania, an unstated obligation is not an obligation. Where an employer fails to fulfil his duty to inform an employee of his duties and the employee, although exercising due care, fails to perform certain duties or performs them improperly precisely because of his ignorance, the employee's actions cannot be qualified as a fault and cannot form the basis for disciplinary liability.[49] On the other hand, there are exceptions under the law when dismissal cannot be considered a breach of duty, such as, a worker's refusal to work for reduced pay (Art. 45(2) of the LC)[50]; a worker's refusal to telework (Art. 52(2) of the LC); a temporary worker's refusal to work for a temporary worker (Art. 74(3) of the LC)); the reasoned refusal of a worker to work if there is a risk to his safety and health, or to work in a job for which he has not been trained to work safely, if he is not provided with collective protective equipment or if he is not provided with the necessary personal protective equipment himself (Art. 159 of the LC).

Disciplinary liability is a type of individual legal liability. It applies only to employees where the employer and the individual employee have an employment relationship. Therefore, as pointed out in one of the cases, it cannot be a breach of duty

[46] Commentary to the Labour Code of the Republic of Lithuania. Part III. Individual labour relations. Vilnius: Justitia, 2004. 622:345; Judgement of 12 July 2018 of the Supreme Court of Lithuania in case No. 3K-3-310- 403/2018. Available: https://eteismai.lt/ [last viewed 31.05.2024].

[47] Judgement of 12 July 2018 of the Supreme Court of Lithuania in case No 3K-3-310-403/2018. Available: https://eteismai.lt/ [last viewed 31.05.2024].

[48] Darbo teisė [Labour law]. Prof. Dr. Nekrošius, I. (ed.). Vilnius: TIC, 2008, pp. 384–385.

[49] Judgement 28 March 2019 of the Supreme Court of Lithuania in case No. e3K-3-130-701/2019. Available: https://eteismai.lt/ [last viewed 31.05.2024].

[50] Judgement of 30 May 2005 of the Supreme Court of Lithuania in case No. 3K-3-314/2005; Judgement of 25 June 2020 of the Supreme Court of Lithuania in case No. e3K-3-199701/2020, p. 37. Available: https://eteismai.lt/ [last viewed 31.05.2024].

for a conflict to take place in a place other than the place of work (public place) and during a period other than the applicant's working day (rest day), when the applicant is not carrying out his immediate duties.[51]

Before the new LC, disciplinary liability was exclusive to the employee. Now "Disciplinary liability" is changed to "proper performance of job duties". For example, the LC also provides for consequences for the employer in the event of a breach of duty: "if the employment relationship under a fixed-term contract lasts for more than one year, the employer must give the employee at least five working days' written notice of the termination of the employment relationship at the end of the fixed term, and at least ten working days' written notice of the termination of the employment relationship if the employment relationship under a fixed-term contract lasts for more than three years. In the event of a breach of this obligation, the employer must pay the employee's wages for each day of the breach, up to a maximum of five or ten working days" (see Art. 69 of the LC). In the LC we find that both parties are liable for breaches of employment obligations, i.e. both the employee and the employer, e.g. Art. 41 of the LC states: "1. The parties to an employment contract shall observe the duties of equality between the sexes, non-discrimination on other grounds, fairness, the provision of information necessary for the conclusion and performance of the contract and the preservation of confidential information, before the conclusion of the employment contract and also when no employment contract has been concluded. It shall be prohibited to request information from a staff member which does not relate to his state of health, his qualifications or other circumstances not connected with the direct performance of his duties. 2. If these obligations are not fulfilled or are not properly fulfilled, the other party to the employment contract shall have the right to apply to the labour disputes body and claim compensation for the damage caused or to resort to any other remedy provided for in this Code."

If an employment contract has been concluded but did not enter into force without any fault on the part of the employee, the employer must pay the employee compensation in an amount no less than the employee's remuneration for the agreed period of work but no longer than one month. But in case if an employment contract was concluded but did not enter into force due to the fault of the employee, i.e. the employee failed to give the employer advance notice three working days before the agreed employment commencement date, the employee must compensate the employer for damages in an amount no more than the employee's remuneration for the agreed period of work but no longer than two weeks (Art. 42 of the LC).

The new Labour Law attempts to put the parties on an equal footing, stating that "in exercising their rights and fulfilling their duties, employers and employees must act in good faith, cooperate and not abuse the law", "Each party must exercise its rights and duties in such a way as to enable the other party to assert its rights with the least possible time and expense", "If one party fails to perform or improperly performs the obligations set out in this Article, the other party shall be entitled to damages or to have its rights protected by other means" (Art. 24 of the LC).

2.3. Procedural prerequisites for applying penalty

Based on the type of violation committed by the employee, the employer has various procedures for establishing the fact of the violation and the actions to be taken by the employer.

[51] Judgement of 12 July 2018 of the Supreme Court of Lithuania in case No. 3K-3-310- 403/2018. Available: https://eteismai.lt/ [last viewed 31.05.2024].

If an employee comes to work under the influence of alcohol or narcotic, psychotropic or toxic substances, the employer shall suspend the employee from work that day/shift, without allowing the employee to work and without paying remuneration. The law allows the employer to dismiss such an employee for fault on the grounds that "appearing drunk or under the influence of narcotic, toxic or psychotropic substances in the course of one's work at the place of work, except where such intoxication is caused by the performance of one's professional duties (Article 58 (3)(2) of the LC)" is considered to be a serious misconduct at work.

In investigating the circumstances of a possible violation of job duties committed by an employee, the employer may suspend the employee from work for up to 30 calendar days, paying the employee his or her average remuneration. Once the period of suspension is over, the employee shall be returned to the previous job, provided that grounds to terminate the employment contract did not arise due to the suspension.

In order to be able to terminate an employment contract with an employee who has committed a breach of duty, an essential condition is the determination of the employee's fault for the breach of duty. The fault of the employee can be manifested by action or inaction. In this case, the form of fault – intent or negligence – matters when it is directly provided for in the legal norm. For example, intentionally causing property damage to the employer or attempting to intentionally cause him property damage is considered a gross violation of work duties (See Art. 58(3)(5) of the LC).

Before taking the decision to terminate an employment contract, the employer must demand a written explanation from the employee, except for cases when the employee does not provide this explanation within the reasonable period established by the employer. The purpose of the above provision in Article 58(4) of the LC is to ensure that the employer has full information about the breach of employment obligations committed by the employee. By failing to request a written explanation from the employee, the employer restricts its ability to ascertain and take into account all the circumstances relevant to the decision to terminate the contract of employment pursuant to Article 58 of the LC, and also bears the risk of possible negative consequences, since the employee may not agree with the dismissal and may contest it, may point to circumstances (for example, confirming the absence of fault) which make it impossible to find that the dismissal was due to a breach of his/her duties and to apply the termination of the contract of employment pursuant to Article 58, of which the employer would have been aware had the employer decided differently to terminate the contract of employment on the grounds of fault. The Court finds that, where it is established that a serious breach of employment obligations has been committed, a breach of the provision in Article 58(4) of the LC concerning the requirement of a written explanation from the employee is not sufficient grounds for declaring the dismissal unlawful.[52]

An employment contract may only be terminated due to the same job duty violation being committed by the employee for a second time if when the first violation was established, the employee had the opportunity to provide an explanation, and the employer warned the employee, within one month of the violation coming to light, of possible dismissal for a repeat violation (Art. 58(4) of the LC).

It should be noted that the violation must be repeated within a period of twelve months, i.e. if a violation was committed, which according to the above-mentioned case law corresponds to the concept of a second violation of the same job duties, but

[52] Judgement of 28 March 2019 of the Supreme Court of Lithuania in case No. e3K-3-130-701/2019, pp. 50–51. Available: https://eteismai.lt/ [last viewed 31.05.2024].

exceeding the twelve-month period, then such a violation can be determined and the employee can be warned for such actions, but the employee cannot be dismissed, because these violations should be recorded as independent and separate, since the employee would not have violated the work order in the last twelve months.

The Supreme Court of Lithuania, noting the importance of the warning, has clarified that, in order for the grounds for termination of the contract of employment under Article 58(2)(2) of the LC to be applicable, the second breach of the employment contract must have been committed within the twelve months preceding the warning given to the employee, that is to say, the second breach must have been committed after the employee, who, after committing the first breach of his employment contract as established by the employer, and who has had the possibility of an opportunity of explaining his conduct to the employer, has been given a warning of his possible dismissal on grounds of the next offence.[53] Therefore, in the case of repeated breaches of employment obligations, the court must determine, on a case-by-case basis, whether the previous breaches of employment obligations, which have been recorded in accordance with the statutory provisions, and the subsequent breaches of employment obligations, which have been committed within a 12-month period, must be considered to be identical within the meaning of that provision of law.[54] It should be noted that the Supreme Court of Lithuania has ruled that mere references in the warning and the termination order to the same clauses of the institution's local regulations are not sufficient grounds for concluding that identical breaches of employment obligations have been committed.[55]

In order to dismiss a person under Article 58(2)(1) of the LC, the employer must prove not only that the misconduct has been committed, but also that the misconduct qualifies as grave.[56] In employment cases concerning the lawfulness and reasonableness of a disciplinary measure, the burden of proving that the disciplinary measure was lawful and reasonable rests with the employer (usually the defendant). In such cases, the employer must prove that all the conditions for disciplinary liability have been met[57].

When solving the question of whether a specific violation of work duties can be classified as gross, it is necessary to analyse its objective and subjective signs - the nature of the employee's illegal behaviour, the negative consequences caused by this violation, the degree and form of the employee's guilt, the motives and goals of the employee's actions, the influence of the actions of other persons on this violation and other important circumstances, it must also be assessed what kind of goods were violated, how clearly the duties of the employee were specified, what is the practice of assessing such or similar violations in the workplace, etc.[58] In the case law of

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[53] Judgement of 5 July 2019 of the Supreme Court of Lithuania in case No. e3K-3-244-248/2019, p. 38. Available: https://eteismai.lt/ [last viewed 31.05.2024].

[54] Ibid., p. 29.

[55] Ibid., p. 35.

[56] Judgement of 28 March 2019 of the Supreme Court of Lithuania in case No. e3K-3-130-701/201, p. 32; Judgement of 20 May 2020 of the Supreme Court of Lithuania in case No. e3K-3-158-684/2020, p. 28; Judgement of 24 February 2021 of the Supreme Court of Lithuania in case No. 3K-3-25248/2021, p. 19; Judgement of 12 May 2021 of the Supreme Court of Lithuania in case No. 3K-3-116-943/2021, p. 12.

[57] Judgement of 4 October 2004 of the Supreme Court of Lithuania in case V. B., R. Ž. v. AB "Panevėžio duona", No. 3K-3-513/2004.

[58] Judgement of 14 December 2012 of the Supreme Court of Lithuania in case No. 3K-3-562/2012; Judgement of 3 January 2013 of the Supreme Court of Lithuania in case No. 3K-3-107/2013; Judgement of 19 December 2018 of the Supreme Court of Lithuania in case No. e3K-3-461-695/2018 29, p. 30; Judgement of 27 February 2019 of the Supreme Court of Lithuania in case No. e3K-3-27-701/2019, p. 62; Judgement of 12 May 2021 of the Supreme Court of Lithuania in case No. e3K-3116-943/2021, p. 13.

the Court of Cassation (which is also relevant for the application of the provisions of the LC which entered into force on 1 July 2017), it has been pointed out that, when selecting the type of disciplinary sanction in accordance with the criteria laid down in Article 238 of the LC (which are essentially the same as the criteria laid down in Article 58(5) of the LC in force as from 1 July 2017), the employer must also assess the appropriateness of the disciplinary sanction to be applied and the impact of the sanction on the enforcement of labour discipline. The employee's attitude towards the infringement, the admission of guilt and the critical assessment of his or her conduct are also relevant to the choice of the type of disciplinary action, as they indicate whether the employer can expect the person who committed the infringement to reform himself or herself in the future, so that there is no need to be wary of his or her unlawful conduct or to fear deliberately unlawful actions. In other words, the employer shall assess the totality of the circumstances in order to decide whether there are grounds for confidence in the employee.[59] In order to establish a gross violation of labour discipline, it is not necessary in all cases that the employer suffers real losses due to the illegal actions of the employee[60].

LC does not provide the concept of the same violation of employment duties and does not otherwise disclose what is considered "the same violation of employment duties". In the assessment of the Court of Cassation, this condition should not be interpreted narrowly, as a requirement that the violations be identical, and also too broadly – so that any violation of work duties is not recognized as the same violation.[61] The Supreme Court of Lithuania decided that violations of work duties committed in the same field of activity, when the improperly performed duties are of a similar nature (for example, violations of financial discipline, violations of balancing public and private interests, violations of work safety requirements, absence from work or other violation of working time, etc.). The assessment of whether violations of work duties should be considered the same may depend on the functions performed by the employee, as well as the scope and variety of duties (for example, different criteria could be applied to managerial employees and those employees whose function is narrower). It should be emphasized that a similar opinion regarding which violations of work duties are to be considered the same is also taught in the legal doctrine.[62]

Dismissal should be a measure proportionate to the violation or entirety thereof, e.g., in one of the cases, the Court found that, in the event of a dispute, neither the law nor the provisions of the employment contract concluded by the parties make it clear that the employee had the obligation to acquire the qualifications necessary for working with the current employer at his own expense and during his rest, therefore there is no reason to state this breach of duty. The Court of Cassation drew attention to the fact that even if the failure to acquire the specified qualification would be qualified as a violation of the employee's work duties, such a violation should not be considered gross in accordance with Article 58(3)(7) of the LC.[63]

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[59] Judgement of 12 May 2021 of the Supreme Court of Lithuania in case No. e3K-3116-943/2021, p. 8.

[60] Judgement of 24 February 2021 of the Supreme Court of Lithuania in case No. 3K-3-25-248/2021, pp. 19–20.

[61] Judgement of 5 July 2019 of the Supreme Court of Lithuania in case No. e3K-3-244-248/2019.

[62] *Bagdanskis, T., Mačiulaitis, V, Mikalopas, M*. Lietuvos Respublikos darbo kodekso komentaras. Individualieji darbo santykiai [Commentary on the Labour Code of the Republic of Lithuania. Individual labour relations]. Vilnius: Rito projects, 2018, p. 253; *Bagdanskis, T.* Materialinė atsakomybė darbo teisėje [Material liability in labour law]. Vilnius, Registrų centras, 2008, p. 371.

[63] Judgement of 24 January 2021 of the Supreme Court of Lithuania in case No. 3K-3-25-248/2021, pp. 33–37.

The employer must take the decision to terminate an employment contract due to a violation committed by the employee within one month of the violation coming to light and within six months of the day that it was committed. The latter deadline shall be extended to two years if the violation committed by the employee comes to light upon carrying out an audit, an inventory check or an inspection of activities.

2.4. Consequences of applying a penalty and rights to dispute employers' resolution

A participant in an employment relationship who believes that another subject of labour law has violated his or her rights as a result of non-fulfilment or improper fulfilment of labour law provisions or mutual agreements must apply to a labour dispute commission with an application to resolve the labour dispute on rights within three months or, in cases of unlawful suspension, unlawful dismissal or breach of a collective agreement – within one month of when he or she found out or should have found out about the violation of rights (Art. 220 (1) of the LC).

The legal doctrine states that a finding of an infringement of employment obligations (except in the case of a decision to terminate the contract of employment) or a warning of possible dismissal for a second identical infringement is not subject to the procedure laid down in the Labour Disputes Act; the legality of such a finding may be examined by the labour disputes bodies only in the event that the employee contests the legality of dismissal from his/her job for serious misconduct or for a repetitive infringement of obligations in the manner laid down in Article 220(1) of the LC. The case law follows a similar line of reasoning. The Court finds that the adoption of the defendant's order establishing the applicant's breach of her employment obligations and warning the applicant of her possible dismissal for a second such breach is merely a procedural act, which did not have any substantive legal effects on the applicant, and that, in accordance with the legal provisions and case law discussed above, it follows that such an employer's order could not have been contested before the labour disputes committee or before a court.[64]

A staff member who is found to have breached his/her duties may be denied a bonus, if he/she commits a breach of his/her duties under labour law or the contract of employment during the preceding six months. The case law shows that employers impose even stricter restrictions, e.g. no bonus shall be awarded to employees who have committed serious misconduct in the last five years for perfect and continuous service with the company.[65]

It should be noted that the legislator only gives the employer such a right in respect of bonuses where the employer, on its own initiative, wishes to reward the employee for good work, performance or results (as a one-off act). Other bonuses intended to reward the employee's performance under the contract of employment, if the employer has agreed to pay them as an integral part of the salary, must be paid by the employer notwithstanding that the employee has committed a breach of duty.

Recent case law of the Court of Cassation on the qualification of bonuses paid to an employee states that a mandatory feature of a performance bonus is the establishment of clear indicators for the calculation and payment of the bonus amount. In the absence of clear indicators, there is no reason at all to classify the bonus as part of the remuneration. Such an attribute is not necessary to qualify an incentive bonus. On the other hand, this does not negate the fact that an incentive bonus

[64] Judgement of 4 April 2019 if the Vilnius District Court in case No. e2A-1350-910/2019; Judgement of 30 January 2018 of the Kaunas District Court in case No. e2S-289-773/2018.

[65] Judgement of 15 January 2024 of the Klaipėda District Court in case No. e2A-92-613/2024.

can also be defined on the basis of clear indicators for its calculation and payment. The employer's discretion to determine and pay the incentive bonus also implies the employer's right to decide on the calculation and payment of the bonus. This exercise of the employer's discretion is also manifested where, although the employer clearly defines the parameters for the calculation and payment of the bonus, the employer, while defining the parameters for payment, also establishes a rule that the bonus may be reduced or waived (withheld) in cases determined by the employer, including for breaches of labour discipline, thus confirming that the bonus is not paid as a permanent component of the remuneration.[66]

If an employee is suspended from work in the absence of a legal basis, the labour dispute resolution body shall order that the employee be reinstated and paid average remuneration for the period of forced absence and the material and non-material damage incurred. If an employee is dismissed from work in the absence of a legal basis or in violation of the procedure established by laws, the labour dispute resolution body shall take a decision to recognise the dismissal as being unlawful and to order that the employee be reinstated and paid average remuneration for the period of forced absence, from the date of dismissal to the date of enforcement of the decision but no more than one year, and the material and non-material damage incurred (Art. 218 of LC).

In case of breach of duty, the employee is threatened with dismissal. Of course, even if there is a gross violation of employment obligations or a second violation of the same employment obligations, the employer is not obliged to terminate the employment contract, but in such a situation, the future of the employee's employment relationship depends on the employer's grace. It should be noted that the termination of the employment contract due to the fault of the employee is formalized without warning, without paying the employee severance pay. However, is termination of employment the only consequence employees face? It turns out that such employees not only lose their main source of income – work, do not receive severance pay, but also because they are fired due to their fault – they do not receive unemployment insurance benefits for 3 months from the day of registration at the Employment Service.[67] This represents another negative consequence (punishment) for such employees. This regulation contradicts the Social and Employment Policy formed by the EU and Article 48 of the Treaty on the Functioning of the European Union, which stipulates that "the European Parliament and the Council shall take the measures necessary to ensure the free movement of workers in the field of social security; to this end, they adopt provisions to ensure for migrant workers and self-employed workers and their dependents: the payment of social benefits to persons living in the territories of the Member States"[68].

Summary

Although the laws and regulations of Latvia and Lithuania are quite similar in many legal issues, there are several differences in the regulation of disciplinary liability in labour relations. While two types of punishment are recognized as disciplinary

[66] Judgement of 2 February 2023 of the Supreme Court of Lithuania in case No. 3K-3-3-403/2023, p. 85. Judgement of 16 November 2022 of the Supreme Court of Lithuania in case No. e3K-3-260-1075/2022, pp. 34–35.

[67] Lietuvos Respublikos valstybinio socialinio draudimo įstatymas [Law on State Social Insurance of the Republic of Lithuania]. Lietuvos Aidas, 3 March 2023 .

[68] Consolidated version of the Treaty on the Functioning of the European Union. Available: https://eur-lex.europa.eu/legal-content/LT/ALL/?uri=CELEX%3A12012E%2FTXT [last viewed 06.06.2024].

punishments in labour law in Latvia – a reproof and a reprimand, Lithuania has refused such types of disciplinary punishment since 2017, and the most severe punishment in Lithuania nowadays is the employer's right to terminate an employee's employment contract. It should be noted that the regulation of disciplinary punishments has been preserved in the public sector, including civil service.

In general, disciplinary liability is a specific type of liability in employment relations, which by their nature are legal relations existing in the field of private law and regulated by an employment contract. As concluded above, the nature of work itself has changed over more than 10 years, bringing the relationship between employee and employer closer to a contractual relationship of equals, therefore a change of understanding has taken place in Lithuania, avoiding the understanding of "punishment" and reorienting to the enforcement of agreements, the recognition of the parties as equal partners in the employment relationship.

The experience of both countries shows that questions about the employee's liability often come up for consideration in the courts of these countries, and case law provides important insights into the interpretation of these questions. For example, in Latvian jurisprudence, in order to separate the employee's disciplinary punishment mechanisms from the employer's right to terminate the employment contract, the principle of prohibition of double jeopardy principle or *ne bis in idem* has been defined, i.e., case law has recognized that disciplinary punishment and termination of employment cannot be imposed at the same time.

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