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SHOULD THE IDENTITY OF THE PERSON WHO NOTIFIES THE HIGHER EDUCATION INSTITUTION REGARDING THE COMMISSION OF AN ACT THAT MAY CONSTITUTE A DISCIPLINARY MISCONDUCT BE REVEALED?

Ana ȘTEFĂNESCU*

Abstract

From the perspective of guaranteeing the right to defence to the person in question, we believe that the higher education institution, through the persons involved in the disciplinary activity and those who have access to the resulting documents has no obligation to keep confidential the identity of the sender of the complaint to the one indicated in the complaint (as being the one who would have committed an act that could constitute a disciplinary misconduct).

Thus, de lege ferenda, we propose that the complaint in its entirety be communicated to the person in question and the identity of the person who notifies the higher education institution regarding the commission of an act that may constitute a disciplinary misconduct be recorded in the final report of the Review Commission to be attached, as appropriate, to the sanctioning decision.

The arguments that support the above are detailed in this material, using as well already regulated best practice models.

Thus, we believe that it will prove useful in the academic environment and will discourage those under the protection of "anonymity" to act even in bad faith.

Keywords:

disciplinary misconduct, complaint, anonymity, higher education, academic environment, teaching staff, identity of the author of notification, confidentiality

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1. Issues

According to article 17 paragraph (1) of Law no. 1/2011 of the national education¹, “any person may notify the educational unit/institution regarding the commission of an act that may constitute a disciplinary misconduct. The complaint is made in writing and is registered at the registry of the educational unit/institution.”

This provision is applicable to the teaching and research staff, to the auxiliary teaching and research staff, as well as to the management, guidance and control staff working in higher education.

As the first sentence of this article does not raise issues of interpretation, being in agreement with the common law in the matter - the Labour Code² - and with the doctrinal explanations in the matter [*anyone can make the complaint*], and the second one is more than succinct as compared to other texts in the legislation applicable to special categories of employees, an interesting issue naturally occurs, especially from the perspective of guaranteeing the right to defence to the person concerned, and even of the prohibition of moral harassment in the workplace: *does the higher education unit/institution, through the persons involved in the disciplinary activity and those who have access to the resulting documents, have the obligation to keep confidential the identity of the sender of the complaint* in relation to the one indicated in the complaint (as the one who would have committed an act that could constitute a disciplinary misconduct)?

The aspect is important because the answer to such a problem is given, in fact, in the specific procedures by means of the decisions of the university senates. We know from practice that they are either incomplete or that the solution is to preserve the confidentiality in relation to the identity of the sender of the complaint, as there is a general emphasis on the idea of confidentiality in labour relations. Moreover, according to some models of criminal procedural law, if the complaint does not contain the name of the sender or his/her address or other identification data, then sometimes the solution at university level is that the complaint could turn into self-compliant, which is also problematic.

Thus, it would be better for the legislator to decide by expressly regulating the solutions; even if, in our opinion, they derive, as we will show, by way of interpretation (not very difficult), so that even now they could already be included in the specific procedures by the decisions of the university senates.

¹ Published in the Official Gazette no. 18 of January 10th, 2011, subsequently amended.

² Law no. 53/2003 - Labour Code, republished in the Official Romanian Gazette, Part I, no. 315 din April 10, 2017, subsequently amended.

2. Regulation of the guarantee of the right to defence - the provisions of the special law and those of common law in the matter

Overall, the provisions of the disciplinary matter from the special law, Law no. 1/2011 of the national education, are very brief, in relation to those of the Labour Code and contain in the economy of regulation, serious differences that pose problems in establishing the correspondence of notions and concepts from the two categories of provisions.

Guaranteeing the right to defence is, however, a common principle.

It is reproduced in the special law in article 314 paragraph (1): "The disciplinary sanction is applied only after carrying out the investigation of the notified deed, the hearing of the person in question and the verification of the claims made by him/her during the defence".

It is a similar transposition of article 251 of the Labour Code: "Under the sanction of absolute nullity, no measure, except the one provided in article 248 paragraph (1) letter (a), can be ordered before carrying out a preliminary disciplinary investigation".

We cannot find a provision similar to the one from paragraph (4) of article 251 of the Labour Code in the special law, but it also applies in the academic environment, representing a detailing of the principle of guaranteeing the right to defence, which is worth to be reproduced especially because it contains a positive obsessive and important repetition of the indefinite pronominal adjective "all", marking the concern of the legislator to ensure the right to defence: "During the preliminary disciplinary investigation, the employee has the right to draw up and support all defences in his/her favour and to offer to the commission or to the person authorized to carry out the investigation all the evidence and motivations he/she deems necessary, as well as the right to be assisted, at his/her request, by an external consultant specialized in labour law or by a representative of the trade union of which he is a member".

De lege ferenda

In view of the above, as far as we are concerned, it is clear to us that precisely in order to be able to defend him/herself, the employee, including the one from the academic environment, must know *all* the acts, facts, documents and persons who have been considered in the disciplinary procedure including the author of the complaint, respectively even the complaint; Indeed, the conclusion of the Disciplinary Commission and of the Review Commission, detailed in the report which they draw up, is based on all these. Otherwise, he/she could not build his/her defence in full knowledge; and, we are talking about "all the defences in his/her favour"

and "all the evidence and motivations he/she deems necessary". So, it's about what he/she finds useful and not just anyone else.

Moreover, if it were to act otherwise, the adversarial principle, mandatory in any disciplinary activity, would not be respected either.

On the other hand, there is the issue of objectivity of the members of the Review Commission, so it must be ensured that they are not in situations of incompatibility or conflicts of interest in relation to the "parties" - the author of the complaint and the person in question. However, the person in question is the one interested from this perspective.

Also, by not knowing the author of the complaint, he/she would be unable to indicate, in turn, that he/she could be the victim of an act of moral harassment at work. Indeed, the "protection" of anonymity can inspire anyone to file complaints in bad faith. Even if the person concerned proves to be innocent, the time lost, stress and other professional and personal inconveniences, including medical ones, are undeniable.

Therefore, for a correct understanding of the issue from the perspective of transposing the legal provisions in the regulations of the universities, *de lege ferenda*, the legislator should regulate the content of such a complaint: *The complaint must refer to the following a) the identification data of the person (last name, first name, domicile or, as the case may be, place of work and position held by the person who filed the complaint or the name and registered office of the legal person, as well as the name and title of the legal representative), including, where applicable, contact details email, phone; b) the identification data of the person whose deed is notified as a disciplinary misconduct (last name, first name, faculty or research unit in which he/she carries out his/her activity); c) the description of the deed that represents the object of the complaint and the date of when it was committed; presentation of the evidence on which the complaint is based; e) date; f) signature.*

Also, *de lege ferenda*, it is required that the complaint in its entirety be communicated to the person in question and that the identity of the person who notifies the higher education institution regarding the commission of an act that may constitute disciplinary misconduct be recorded in the final report of the Review Commission which will be attached, as appropriate, to the sanctioning decision.

There are best practice models in this regard, for example in the legislation applicable to civil servants.

Thus, G.D no. 1.344/2007 regarding the norms of organization and operation of the disciplinary commissions³ [still in force until a new normative act with the same object, under article 626 paragraph (1) of the

³ Published in the Romanian Official Gazette, Part I, no. 768 of November 13th, 2007, subsequently amended.

Administrative Code⁴, which will certainly largely take over the basic aspects of the old regulation], mentions in article 28 paragraph (1): “The complaint shall be drawn up in writing and shall include the following elements: a) last name, first name, domicile or, as the case may be, place of work and title held by the person who filed the complaint or the name and registered office of the legal person, as well as the name and title of the legal representative; b) the last name and first name of the civil servant whose act is notified as a disciplinary misconduct and the name of the authority or public institution in which he/she carries out his/her activity; c) the description of the deed that constitutes the object of the complaint and the date when it was committed; d) the presentation of the evidence on which the complaint is based; e) the correspondence address, if it is different from the one provided at (a); f) date; g) signature.”. Paragraph (2) of the same article stipulates that the complaint “must be accompanied, when possible, by the documents supporting it”.

Moreover, *the identity of the person who filed the complaint is a mandatory element in the report of the disciplinary commission*, which is brought to the attention of the civil servant whose deed was notified, as provided in article 49 paragraph (1) and paragraph (3). Also, *this report, which includes the identity of the person who filed the complaint, is annexed to the disciplinary sanction decision*, under the sanction of absolute nullity, according to article 50 paragraph (4) of the decision. The provisions of article 532 paragraph (2) of the Administrative Code are in the same respect.

Last but not least, in support of our proposal, we will refer to G.O no. 27/2000 regarding the regulation of the activity for the settlement of petitions⁵, precisely because it is about the identity of the person who can *notify* the educational unit/institution regarding the commission of a deed that can represent a disciplinary misconduct; and the complaint has, in a broad sense, the meaning of petition. As it is known, according to article 7 of this normative act, “anonymous petitions or those which do not contain the identification data of the petitioner shall not be taken into account and will be classified”.

We consider that the same solution should be retained if the complaint does not contain the sender's name or address or other identification data, the model for regulating the content of the complaint for

⁴ E.O. no. 57/2019 - Administrative Code, published in the Romanian Official Gazette, Part I, no. 555 of July 5th, 2019.

⁵ Published in the Romanian Official Gazette, Part I, no. 84 February 1st, 2002, subsequently amended.

the situation of civil servants being eloquent in this regard, as we have shown.

Conclusions

Our proposal, as we have drawn from the outset, is based, in essence, on the guarantee of the right of defence for the person concerned.

Both the text of article 314 paragraph (1) of Law no. 1/2011 of national education, especially the text of article 251 paragraph (1) and (4) [the one in paragraph 4 applicable as a common law in the academic environment] gives satisfaction to the well-known principle of the right to defence. "Employer's failure to comply with it is sanctioned with the absolute nullity of the ordered measure.

The Constitutional Court has ruled in its case law "that legal employment relationships must take place within a legal framework, in order to respect the rights and duties as well as the legitimate interests of both parties. In this context, the disciplinary investigation prior to the application of the sanction contributes greatly to the prevention of abusive, illegal or ungrounded measures, ordered by the employer, taking advantage of its dominant situation (...)”⁶.

The conditioning of the application of disciplinary sanctions by the performance of preliminary investigations does not diminish in any way the disciplinary liability of the employees and does not create any privilege for them⁷. In the event that the labour dispute triggered by the application of the disciplinary sanction is subject to settlement in court, the parties benefit from the principle of equality of arms, each having at their disposal the same means and procedural guarantees that condition the full enforcement of the right to defence and of the right to a fair trial. ".(A. Țiclea, L. Georgescu, A.O. Duțu, (2020), : 950)

As it is judiciously shown (I.T. Ștefănescu, (2017), : 788), "it cannot be argued that the employee's right to defence is fully capitalized by the appeal to the court [guaranteed, in this case, by article 317 paragraph (2) of Law no. 1/2011 and by article 252 paragraph (5) of the Labour Code]. In this way, the very requirement of a prior investigation would not be justified, since in any case, against the measures ordered by the employer, the access

⁶ Decision of the Constitutional Court no. 95/2008 (published in the Official Gazette no. 153 of February 28, 2008).

⁷ See also Court of Appeal Bucharest, 7th Civil Department, and for cases regarding labour disputes and social insurance, decision no. 3425 / R / 2012, in Revista română de dreptul muncii, no. 5/2012, pp. 134-135.

to justice is guaranteed (Bucharest Municipal Court, 4th Civil Department, Decision no. 1906/R/2001).”

Although we only referred to the situation of complaints regarding the commission of an act that may represent a disciplinary misconduct in higher education, we believe that the solution should also be retained in the private sector for internal regulations or, better, should be expressly regulated according to the model of legislation applicable to officials servants.

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