

07_The Breach of the Employers Trust as a Disciplinary Violation under the Bulgarian Labour Law_LT[english]

A major issue in labour law is the challenge of the termination of an employment relationship at the employer's initiative. In its case law, the Supreme Court of Cassation holds that the dismissal procedure has to rely on real facts and to be conducted in strict compliance with the statutory requirements which, more often than not, turn out to be quite difficult for employers and therefore employees are often successful in claiming reinstatement against unfair dismissal. The requirements to the dismissal process, which are laid down in the Labour Code, guarantee the employees' rights but they raise the question whether the employer is too restricted in the choice of staff. Even the Parliamentary Committee for Labour, Social and Demographic Policies is currently debating a possible restriction of the implied protection of certain categories of employees against dismissal, as well as an expansion of the opportunities for an employer to terminate the employment relationship unilaterally.

However, although these amendments may be introduced into the Labour Code, it will still be an open question under what terms and conditions the employer may invoke the disciplinary liability of an employee for non-performance of his or her duties at work and, if necessary, impose the penalty of disciplinary dismissal. It is relevant in this connection to review the main duties of the employee and their linkage to the normal work process, as well as the opportunities for the employer to guarantee the strict discharge of these duties through the disciplinary penalty process.

The duty of the employee to be loyal to the employer by refraining from abuse of the employer's trust, by non-disclosing confidential information and by protecting the reputation of the enterprise might seem, at first glance, to be of minor importance. However, the failure to fulfill this duty is explicitly defined as a disciplinary violation, whereas the breach of the employer's trust and the disclosure of information that is confidential to the employer constitute a serious wrong which is explicitly possible to punish with a disciplinary dismissal.

This legislative solution is justified by the need for the employer to be able to trust his employees, as they operate certain assets of the enterprise, have access to sensitive

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information, and often represent the employer before his partners and clients. In many cases, the non-performance of the duties on part of the employee may not cause substantial damage to the employer, his good name or property, and the damage may be compensated in full through the pecuniary liability of the employee. But when the conduct of the employee reveals an intention to make use of the access to the tangible and non-tangible assets of the enterprise, which has been granted by the employer, or to fail to exercise due diligence in the discharge of his duties, it turns into a breach of trust. In this case, the payment of compensation in cash is not sufficient to remedy the situation because the employee at fault is not in a position to provide guarantees that the same conduct will not be repeated, while the employer cannot be expected to put the employee under continuous surveillance. For this reason the Labour Code provides the opportunity for the employer to impose a disciplinary penalty on the employee, depending on the seriousness of the violation.

The employee's conduct which may constitute a violation of the employee's duty of loyalty takes various forms and the shared feature of all these forms that can be discerned in the case law is the breach of the trust existing between the parties. Examples to this effect are the abuses of authority to derive benefit for oneself or another person (such as the use of discounts offered exclusively to clients or, conversely, offering customers a discount reserved only for employees), the damage of the good name of the employer (through various actions, including the violation of the existing rules of conduct for the employees). A specific case is the engagement in competitive activity during the term of an existing employment relationship, where the employee makes use of the available tangible assets or, at least, the work experience gained with the employer to perform the same work for another party. The engagement in competitive action in this particular case constitutes a breach of trust and may be subject to an explicit ban introduced at the time when the employee is hired. Such a clause in the employment contract will be valid, unlike the ban on the engagement in competitive action after the termination of the employment relationship, as the Supreme Court of Cassation considers the latter to be a violation of the constitutional right to free choice of an occupation and a place of work.

The existence of benefit derived from the employee's conduct is not an indispensable element of the breach of trust as a disciplinary violation. The Supreme Court of Cassation has

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recurrently held that it is sufficient for the employee to have failed to honour the trust vested with him. It is not necessary for this violation to have caused damage to the employer. It is widely accepted in the case law that a breach of trust exists even when the trust vested by the employer is not honoured as a result of non-deliberate action of the employee; what is sufficient is the existence of fault in the civil law sense of the term, i.e. breach of the standard of care in the discharge of the employee's duties.

Nevertheless, these factors are relevant in the assessment of the seriousness of the disciplinary violation because when the conduct of the employee causes damage or is deliberate, the trust of the employer is affected to a greater extent. Therefore a more severe disciplinary penalty will be justified in such cases. Furthermore, the seriousness of the violation is assessed against the backdrop of the duties and responsibilities entrusted to the employee since the employer vests greater trust with employees assigned with managerial or controlling functions. Other features indicative of the extent of trust are the scope of the direct control exercised by the employer (i.e. the breach of trust would be more serious in the case of an employee with greater discretionary powers and greater freedom in the reporting of performance) and the powers of the employee to engage in direct contact with partners and clients of the employer.

The failure of the employee to be loyal to the employer is a serious violation of the work discipline but a disciplinary penalty may be imposed only when the requirements laid down in the Labour Code are met with regard to the proportionality of the penalty, its one-off nature, the opportunity granted to the employee to submit explanations of his conduct, the prescribed notice period and the format and content of the disciplinary penalty order.