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Instead of Disciplinary Proceedings – The Legal Consequences of the Employee’s Wrongful Breach of Obligations

ABSTRACT

The purpose of this brief essay is to examine the opportunities available to the employer according to the legislation currently in force in the event an employee commits a wrongful breach of obligation. The employer has three options: warning, termination of the legal relationship, or disciplinary liability. The study aims to provide an overview of the previous regulation and the history of the legal instrument of disciplinary liability, the characteristics, advantages and disadvantages of the three options.

KEYWORDS: disciplinary liability, disciplinary proceedings, work discipline, wrongful breach of obligation, legal consequences, warning, Labour Code

I. INTRODUCTION

The expression “disciplinary” sounds slightly archaic among our current labour law technical terms. However, colleagues who are practicing lawyers and are active in labour law in addition to the theoretical tasks may experience that if the employee commits a breach or omission of obligation, the employers demands *disciplinary procedure* straight away. The purpose of this brief essay is to examine the opportunities available to the employer according to the legislation currently in force in the event an employee commits a wrongful breach of obligation, aiming to provide an overview of the previous regulation, and the history of the legal instrument of disciplinary liability.¹

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¹ The present study examines the legal instrument of disciplinary liability and the history thereof in the private law of labour law.

II. HOW CAN THE EMPLOYEE'S WRONGFUL BREACH OF OBLIGATION BE PREVENTED?

However, before assessing the adverse legal consequences in detail, it is inevitable to note what the employer can do to prevent the employee's wrongful breach of obligation. István Kertész – who provided the basic principle for the labour law specialists in respect of disciplinary liability issues – refers back to Gyula Eörsi in this regards as well, making a distinction between technical-organisational and social-psychological defence.² The first group includes – for instance – the various protective and alarm devices and security guards, while the second group includes – according to the wording used by Kertész – “influencing the creation of human determination of will”,³ for which there are two main methods, direct and the indirect legal regulation. Direct legal regulation shall mean when “the preventive instruments are determined by the law itself, without inserting any separate consideration”,⁴ examples of which may be the wage system and the bonus system. Meanwhile, the indirect legal instruments include – for example – exceptional instruments requiring consideration, such as recognition and rewards and their opposite, accountability.⁵ Therefore, if applying the same logic, it can be established that, in course of analysing the regulation of accountability, within the group of social-psychological defence, in the sub-group of indirect legal regulation, we study the cases of accountability.

III. WHAT DOES THE TERM “WORK DISCIPLINE” MEAN?

Before explaining the options, the employer has if the employee wrongfully breaches his/her obligations, it is worth touching upon the question of how work discipline can be defined. Probably the most apt interpretation of work discipline is included in the cited work of István Kertész, where it is defined as part of the moral and legal forms of consciousness established as the reflection of the social work organisation.⁶ However, the definition of Alekszandrov, who interpreted work discipline as the fulfilment of all of the obligations to be fulfilled by the employee based on the employment relationship should also be highlighted.⁷ What can be considered to be within the scope of work discipline

² Kertész I., *A fegyelmi felelősség alapkérdései a munkajogban (The fundamental issues of disciplinary liability in labour law)*, (Közgazdasági és Jogi Könyvkiadó, Budapest, 1964) 106.

³ Ibid. 106.

⁴ Ibid. 107.

⁵ Ibid.

⁶ Ibid. 14.

⁷ Alexandrov, N. G., *Szovjet munkajog (Soviet Labour Law)* (Budapest, 1953) 242, in Kertész, *A fegyelmi felelősség alapkérdései a munkajogban (The fundamental issues of disciplinary liability in labour law)* 19.

based on the current legislation in effect and the case-law? It is worth examining this question from the aspect of whether – for example – the employee is subject to restrictions and obligations in respect of his/her conduct beyond the working time. Pursuant Section 8(2) of Act I of 2012 on the Labour Code, workers may not engage in any conduct, even outside their working hours, that – stemming from the worker's job or position in the employer's hierarchy – directly and factually has the potential to damage the employer's reputation, legitimate economic interest or the intended purpose of the employment relationship. Nowadays, numerous examples of employees' conduct beyond working hours are provided by behaviour arising from the use of social media, in connection with which the provision of the Labour Code cited above, as well as the general standards of conduct shall be taken into consideration. It is not impossible that even a single expression of opinion made in the social media constitutes a wrongful breach of obligation by the employee and results in adverse legal consequences.⁸

IV. WHAT ADVERSE LEGAL CONSEQUENCES ARE TO BE EXPECTED?

In the event of any wrongful breach of obligation by the employee, the employer has three options: warning, termination of the legal relationship – or, according to the former terminology, disciplinary liability – and under the current legislation, the application of the legal consequences in accordance with Section 56 of the Labour Code. Let us examine the legal consequences mentioned!

A warning is the lightest sanction of wrongful breaches of obligation by the employee. There are no prerequisites for using it, and it follows from exercising the employer's rights that the employer is entitled to give warnings to the employee. According to László Román, a warning is merely an antecedent to punishment; it is essentially sanctioning the non-compliance of performance by creating the prospect of punishment.⁹ The warning includes the wrongful breach of obligation that gave rise to the warning, whether it is a written or verbal warning depending on the conduct or omission to be sanctioned, the consequences potential later breaches of obligations may have; moreover, a notification of the legal consequences shall not be forgotten either.¹⁰

⁸ A more elaborate study in this regard is included in Németh J., *A közösségi média használatára alapozott felmondások – megosztó gyakorlatok* (Terminations based on the use of social media – divisive practices), *HR & Munkajog (HR & Labour Law)*, (2013) 4 (6) 13–18.

⁹ Román L., *Munkajog. Elméleti alapvetés (Labour Law. Theoretical fundamentals)*, (Tankönyvkiadó, Budapest, 1989) 331–332.

¹⁰ According to Section 22(5) of the Labour Code, as regards the unilateral acts of employers the reasons must be provided in writing in cases specified by the Labour Code, and shall notify the employee of the means of enforcement of a claim, and also of the time limit available, if shorter than the term of limitation. In the event of failure to provide information as to the time limit, the claim may not be

In the case of verbal warning, the employer should bear in mind that the reason giving rise to the warning, as well as the fact of the verbal warning itself, may be difficult to prove later.

It may be established as a general rule that the warning causes no substantive disadvantage to the employee directly; however, different, exceptional cases are possible, when, for example, for example, the warning may be considered as a bonus decreasing factor, thus – although indirectly – it may cause material disadvantage. A warning policy used by the employer ensures fairness, consistency and predictability. The warning policy may regulate the principles of the warning policy of the employer, and may provide a non-exhaustive list of the conducts giving rise to a warning.

If the warning – as the lightest sanction – may be deemed as one of the extremes in the system of sanctions of the wrongful breaches of obligation by the employee, its opposite – that is, the sanction which may be deemed the most severe – is the termination of the legal relationship. The system of the termination of the legal relationship is regulated in detail by the Labour Code, and this study does not examine it or the related case-law. However, it shall be noted that, in the system of the termination of the legal relationship, termination with immediate effect is the most severe sanction, since in this case the legal relationship of the employee is terminated on the day termination is communicated, with immediate effect, without the employee receiving any financial allowances, since in this case the employee is entitled to neither a termination (exemption from work) period nor severance pay.

So far, two types of legal consequence, warning and the termination of the legal relationship have been discussed in this study. There is another option in addition to these two: the adverse legal consequence regulated in Section 56 of the Labour Code currently in effect, which is otherwise specified by former Labour Codes as disciplinary punishment. It is worth examining thoroughly how liability and the disciplinary right may be interpreted, as well as their history in the previous legislation. In the opinion of István Kertész, three common characteristics shall be taken into consideration in respect of all forms of liability: the subject of all types of liability is a conduct valued unfavourably by society; the end is prevention; while the mean is imposing the penalty (using Gyula Eörsi's expression, "adequate penalty").¹¹

According to Gusztáv Vincenti, the disciplinary right is the right of employer through which the it can force the employee to fulfil their obligations and may impose detrimental punishment on the employee for infringing them. The scope of the

enforced after a period of six months. According to Section 287(1) c) of the Labour Code, in the case of warnings, an action shall be brought within thirty days of the delivery of the warning. However, if the warning does not include a notification of legal remedy then the employee may turn to the court within six months.

¹¹ Kertész, *A fegyelmi felelősség alapkérdései a munkajogban (The fundamental issues of disciplinary liability in labour law)*, 120.

disciplinary right may differ depending on the penalty the employer imposes on the employee for each type of conduct, as well as whether exercising this right is subject to a specific procedure or not.¹² László Román improved the interpretation of the legal instrument of disciplinary liability significantly by analysing why disciplinary liability is a sanction procedure, and therefore a secondary (ancillary) legal relation, i.e. it is not a legal instrument in itself but it may also be interpreted as a separate legal relation, which is separate from the underlying legal relation, and is to be disconnected from it. Furthermore, it alters the roles, since the employer becomes the party exercising disciplinary rights, while the employee becomes the “suspect”.¹³

In terms of history, Vincenti recalls¹⁴ that, in the beginning of the 20th century, disciplinary infringements, punishments and procedure had been regulated accurately by the legislature for those cases where the service relationship of the employee – although not a public service relationship – affected public interest. In this regard, Vincenti mentions Act XVII of 1914 on the Rules of Railway Service, which regulated service infractions, as well as the punishments to be imposed, and the disciplinary procedure. According to Section 31 of this law, minor service infractions had been punishable by orderly punishment, while more severe service infractions had been punishable by disciplinary punishment. Orderly punishments comprised admonishment and a fine, which could not exceed 20% of the annual salary (income) of the employee. Disciplinary punishments included reprimand, as well as a fine, which could not exceed 5% of the annual salary (income) of the employee, transfer, extension – by six months to two years – of the waiting time before being entitled to promotion or an age supplement and, as the most severe punishment, dismissal from service. Act XIX of 1934 on the Rules of Service for the Staff of Hungarian Maritime Commercial Vessels also included extensive disciplinary regulation. It should be mentioned as point of interest and as testament to the way of thinking of the era that Section 95 of Act XII of 1922 amending Law XVII of 1884 on the Industry Act allowed the employer to use light corporal punishment on male apprentices below the age of sixteen, provided that it was unavoidable in order to uphold workplace discipline; however, the employer was not entitled to impose any penalty related to the apprentice’s accommodation.

After the Second World War but before the first Labour Code, the Council of Ministers Decree No. 34/1950. (I. 27.) on the Disciplinary Policy of State-owned Companies is worth mentioning.¹⁵ The policy specified the companies falling within

¹² Vincenti G., *A munka magánjogi szabályai (The private law rules of labour)*, (Grill Károly Könyvkiadó Vállalat, Budapest, 1942) 126.

¹³ Román, *Munkajog. Elméleti alapvetés (Labour Law. Theoretical fundamentals)*, 325–327.

¹⁴ Vincenti, *A munka magánjogi szabályai (The private law rules of labour)*, 127.

¹⁵ The analysis of the decree is available in Farkas J., *Munkajogunk fejlődése a felszabadulástól a Munka Törvénykönyvéig (The development of our labour law from the liberation until the Labour Code)* (Jogi- és Államigazgatási Könyv- és Folyóiratkiadó, Budapest, 1952) 85–89.

its scope in detail. Pursuant to Section 4 of the decree, ensuring work discipline was the obligation and point of honour of all workers. According to the regulation, a disciplinary offence was committed in three cases: first, in the event of a breach of work discipline, plan discipline or the violation of Socialist morals, therefore in particular if the worker committed any criminal offence or misdemeanour in connection with his/her work, if the worker damaged the people's assets wilfully or negligently (e.g. destroying or damaging furniture or accessories, documents, production equipment, stocks of goods or material, etc.), or if the worker tolerated such activity by employees under his/her management, if the worker wrongfully failed to fulfil his/her work obligation (e.g. unjustified absence, refused to work, etc.), if the worker wilfully worked improperly, or if the worker caused serious damage through negligence (e.g. wasting material or energy, high scrapping rate, etc.), if the worker failed to comply with duly issued instructions, breached or circumvented the provisions applicable to working time or wages (e.g. counterfeiting a clocking-in card, other wage fraud etc.), second, leading a scandalous or immoral lifestyle, or in the case of any conduct that made the worker unworthy of filling his/her job function (e.g. being drunk), and, third, in the event of any conduct which showed that the worker was against the state or social order of the people's democracy (e.g. speaking ill of the fundamental institutions of the People's Republic). Wilful or negligent participation in committing any of the disciplinary offences was also considered a disciplinary offence. The disciplinary punishments to be imposed were the following: verbal reprimand, written reprehension, fine, revocation of advantages, transfer, and termination with immediate effect. Except for the verbal reprimand and the termination with immediate effect, more than one disciplinary punishment could be imposed jointly. It is very important to mention that the decree included detailed and accurate regulation of the disciplinary procedure itself, i.e. the process of imposing disciplinary punishment in cases of disciplinary offence. As part of this, Section 15(2) of the decree stipulated that the defendant shall be interviewed before imposing the punishment, and the defendant shall be given an opportunity to present his/her defence. The employee could be suspended from his/her job during the procedure. Although the disciplinary procedure had two stages within the employer, since the decree allowed the disciplinary decision to be appealed; however, the appeal could be adjudicated by the conciliation committee. Nevertheless, legal recourse before the ordinary courts could not be sought against the disciplinary decision adopted based on the policy. However in the opinion of József Farkas, if the application of the disciplinary punishment was not in compliance with the policy then the case could be brought before the ordinary courts;¹⁶ his opinion is supported by the fact that Section 3 of the decree expressly stipulated that "the disciplinary decision made in accordance with the present policy" shall not be reviewed and modified by the ordinary court. If we

¹⁶ Ibid. 88.

know the principle of the Soviet labour law,¹⁷ then we understand why the institution of disciplinary liability had been regulated in such detail in 1950 in Hungary. Namely, in the Soviet Union, work discipline primarily had to be ensured by persuasion as the basic method; however, if this yielded no result, a rather detailed and thorough regulation was necessary. Hence, this is what the analysed decree already ensured in 1950, and our first Labour Code – i.e. Law-Decree 7 of 1957 on the Labour Code (hereinafter referred to as first Labour Code) – followed this path as well, and it already included the disciplinary rules in Chapter XI – Work Discipline upon its entry into effect.¹⁸ Similar to the decree analysed, upholding work discipline was the obligation of all workers under Section 110 of the first Labour Code as well. Similar to the decree, under the first Labour Code, the worker committed a disciplinary offence if he/she committed any criminal offence related to his/her work or committed any other serious criminal offence, in the case of any conduct which showed that the worker was against the state or social order of the people's democracy, if he/she breached work discipline, plan discipline or the rules of Socialist work ethics, if the worker led a scandalous or immoral lifestyle, or otherwise showed any conduct that made him/her unworthy of fulfilling his/her job function. This definition was amended on 1st January 1965 so that the disciplinary offences included the wrongful breach of obligation related to the employment, and conduct unworthy of employment as well.

No changes were made in respect of the disciplinary punishments either compared to the decree analysed since, under Section 113(2), disciplinary punishments were the following: verbal reprimand, written reprehension, fine, revocation of advantages, demotion and termination with immediate effect. Upon its entry into effect, the first Labour Code regulated the disciplinary procedure more laconically, and it included no provisions regarding the imposition of disciplinary punishments; however, as of 1st January 1965, under Section 112, the Council of Ministers had the power to establish the rules of disciplinary procedure.

Act II of 1967 on the Labour Code (hereinafter referred to as the second Labour Code), entering into effect on 1st January 1968, contained a similarly detailed regulation, i.e. the disciplinary punishments and the disciplinary procedure were specified. It shall be noted that, simultaneously with the entry into effect of the second Labour Code, Government Decree 34/1967. (X. 8.) on the implementation of Act II of 1967 on the Labour Code, which accordingly included provisions on disciplinary liability entered into effect. It shall be highlighted that the concept of disciplinary offence – unlike the decree and the wording used by the first Labour Code upon its entry into effect – was merely defined as the wrongful breach of an obligation related to the employment

¹⁷ Pasersztnyik, A. J., *A szovjet munkajog alapelvei (The principles of Soviet labour law)*, (Hírlap, Szaklap-és Könyvkiadó Rt., Budapest, 1949) 46.

¹⁸ As a general rule, the provisions analysed refer to the wording at the time of the entry into effect of both the first and the second Labour Code.

– this is essentially the wording in effect today. The reasoning of the act explains the lack of a subject matter-like list, stating that, considering the diversity and different severity of infringements, it is impossible to list them in such a manner or to specify the scope of serious infringements accurately.¹⁹ Disciplinary punishments could include reprimands, severe reprimands, reduction or revocation of specific advantages and allowances, reduction of the base wage and transfer, as well as termination, so the act – as explained in the reasoning as well – essentially continues to maintain the previous types of disciplinary punishment; however, it adds the reduction of the base wage to the types of punishment. It shall be highlighted that the Government Decree specified – for example – how the reduction or revocation of specific advantages and allowances could be interpreted. It shall be emphasised that the second Labour Code upholds the previous system, according to which disciplinary punishments may only be imposed in the course of a disciplinary procedure. At the same time, the act does not include the rules of imposing disciplinary punishments. However, the reasoning provided detailed guidelines in this regard, and it includes that, in order to allow the punishment imposed to have the appropriate educational effect, it was necessary that the party exercising the disciplinary right assessed all relevant circumstances of the case concerned before determining the extent of the punishment. In the course of the assessment, the impact of the given breach of obligation at the company shall be evaluated first of all since, if the breach of obligation had been serious, it affected the work discipline of the workers of the company more, and imposing a relatively lenient punishment would not deter them from similar breaches of obligation. In addition to serious breaches of obligation such as theft, fraud, a 4 or 5-day unjustified absence, considering the character of certain companies, certain breaches of obligation were considered as particularly serious breaches of obligation, for example, unjustified absence in the case of a bus driver. Similar examples were ticket fraud regarding public transportation, and taxi driver and restaurant servers demanding a tip in case. The reasoning also explains that the examination of the worker's previous behaviour before imposing the punishment was quite a significant circumstance as well. In the case of a frequently insubordinate worker, even smaller breaches of obligation had to be punished more severely, since the behaviour implied that the application of the more lenient punishment had not achieved the appropriate educational effect. On the contrary, excellent and permanently good work, exemplary behaviour, etc. were usually mitigating factors in favour of the worker in the event of first-time breaches of obligation. This had to be evaluated in favour of the worker more if the accountability procedure was the result of his/her negligent conduct, and less if the worker committed a wilful breach of obligation, thus his/her culpability was more serious. In course of evaluating the previous behaviour of the worker, it was advisable to evaluate the entire person and within that, assessing the behaviour shown

¹⁹ The detailed reasoning of Sections 55 and 56 of Act II of 1967 on the Labour Code.

primarily in the last one or two years was considered correct. Usually, the personal and family circumstances of the worker could be taken into consideration if the situation of the worker was actually significantly less favourable compared to the other employees, and if it was not precluded by the gravity of the case and the possible previous behaviour of the worker. As such, for example in a case of theft by a repeat offender, unjustified absences within short periods of time and their family and personal circumstances could only be evaluated in favour of the worker in exceptional cases. Those listed above include only those significant factors which should usually be taken into consideration in order to be able to impose the correct disciplinary punishment. Special circumstances other than those listed above, substantially affecting the assessment of the case, could arise as well. Therefore, if, for example, the worker caused damage after several hours of overtime work and if, after the breach of obligation, the worker dutifully mended matters for the sake of society or the company.²⁰

Summarising the legislation between the post-Second World War period and the change of the regime, it can be established that the institutional system of disciplinary liability was given an emphasised role; up until 1st January 1965, the conducts which could qualify as a disciplinary offence had been specified by the legislation specified in a subject matter-like manner, and the legislation included itemised lists of the disciplinary punishments, as well as specifying the disciplinary procedure itself, too. This was in compliance with the Soviet labour law approach that, if persuasion is not enough to uphold work discipline then detailed regulation is necessary. In addition, it shall be noted in connection with both the first and the second Labour Code, that – as István Kertész put it – comprehensive solutions with criminal law features were developed,²¹ considering that the legislation included provisions on the scope of the disciplinary punishment, suspension from enforcement, and exemption from disciplinary punishment.

Let us review what changes occurred in this regard after the change of the regime. Act XXII of 1992 on the Labour Code, i.e. the third Labour Code, entered into effect on 1st July 1992. Upon reading it, it is immediately noticeable that this Labour Code no longer uses the expression “disciplinary”, nor is it present in the law currently in force.²² The first lines of the general reasoning of the act promptly include that

[...] the management of human resources, the workforce, appears increasingly as a production factor, and as a result *the labour market is gradually becoming part of the economic market*, and starts to operate according to the principles and rules thereof [...]

²⁰ The detailed reasoning of Sections 55 and 56 of Act II of 1967 on the Labour Code.

²¹ Lehoczkyné Kollonay Cs. (szerk.), *A Magyar Munkajog II. (Hungarian Labour law II.)*, (Kulturtrade Kiadó, Budapest, 1949) 9.

²² In the reasoning attached to Chapter VIII of the third Labour Code, it was promptly established that the legal definition of disciplinary liability had ceased.

This change has to be acknowledged by the labour law legislation as well: the legislation logic applied so far has to be discontinued. The market-based legislation also causes the current legislation of administrative character to be replaced with a civil law-like legislation which conforms more with the particularities of the employment relationship. *The legal intervention by the state shall retreat strongly,* and the legal regulation mandatory to the subjects of the employment relationship shall be limited exclusively to determining the guarantee elements of the employment relationship, to specifying the so-called “minimum standards”. (Such are the rules applicable to working time and the maximum amount of overtime work, mandatory resting time, the liability of the employer and the employee, as well as prohibitions on termination). Any other issue related to the employment relationship shall be settled by the subject of the employment relationship – the employer and the employee – through an agreement. Therefore, in this changed situation, the state no longer regulates based on its proprietary function but based on its public order protection function.²³

If we analyse Section 109 of Act XXII of 1992, then the provisions of the general reasoning are verified as follows.

Thus, only one single section of the third Labour Code, Section 109, contained the provisions applicable to the employee’s wrongful breach of obligation arising from the employment, in the chapter titled “the rules of work”. Instead of disciplinary punishment, the term used is “adverse legal consequence”, and instead of the disciplinary procedure the Labour Code stipulates only procedural rules. It is also a stark change that the act did not specify the disciplinary punishments (adverse legal consequences) or the disciplinary procedure (disciplinary rules) itself; however, it referred the determination of both the punishments and the procedure to the collective agreement. In respect of the procedure, the only guarantee provided by the act was that it had to be ensured that the employee had opportunity to present his/her defence and he/she may employ a legal representative. In addition to the above, the third Labour Code also stipulated that no measure containing any adverse legal consequence in respect of the employee could be taken if one year had already elapsed from the wrongful breach of obligation being committed, as well as that measures containing adverse legal consequence could only be imposed in a written, justified resolution, which includes the notification related to legal remedies. In respect of the adverse legal consequences, the act stipulated as another guarantee provision that the adverse consequences related to employment and to be imposed shall not violate the personal rights and the human dignity of the employee, as well as that fines could not be imposed as an adverse legal consequence. The Labour Code did not include any provision at all concerning the scope and effect of the adverse legal consequence, exemption from the adverse legal consequence, the suspension of

²³ The general reasoning of Act XXII of 1992 on the Labour Code.

enforcement, or any provision applicable to the enforceability of the adverse legal consequence at the new employer in the case of termination of employment. Moreover, it follows from the above that, in addition to ensuring the guarantee provisions, the act entrusted the parties – or more accurately, the collective agreement – with establishing the adverse legal consequences and the procedure. It shall be emphasised that, considering the requirement of regulation in a collective agreement, the adverse legal consequence under Section 109 could be imposed by the employer exclusively if there was a collective agreement at the employer, and if the collective agreement regulated adverse legal consequences and procedural rules as well. This is reflected in court decision No. BH 1999, 275. as well, which states that if the employer intends to impose any other legal consequence in addition to the extraordinary termination against the employer who had wrongfully breached their obligation arising from the employment relationship, such consequences shall be regulated by the employer in the collective agreement, by determining the rules of the procedure. This provision is probably even more markedly reflected in court decision No. BH 1998, 197., which held that it followed from the provisions of the act that, even in the event of proven wrongful breach of obligation, no adverse consequences could be imposed on the employee unless the procedure for imposing them had been regulated by the collective agreement.

The court decision were useful in respect of the case-law concerning the provisions on adverse legal consequences as well; for example decision No. BH 1996, 668., which stated that, pursuant to the collective agreement, the employer may impose all adverse legal consequences against its employer who had committed a wrongful breach of obligation, as a result of which certain elements of the employment relationship may change: this however shall not be final compared to the employment contract concluded. In addition, according to decision No. EBH 2002, 691., in the case of a wrongful breach of obligation arising from the employment relationship, the collective agreement could stipulate legal consequences as a result of which certain elements of the employment relationship change; this however shall not be final compared to the employment contract concluded. Therefore, the legal consequences may amend certain elements of the employment relationship for an interim period, temporarily; that is, the adverse legal consequence cannot and could not in any way modify certain elements of the employment relationship permanently, since that would constitute and would have constituted a unilateral amendment of the employment contract. According to the established judicial practice, if the employer voluntarily established incentive pay for its employee, its the revocation however does not fall within the scope of the employer's unrestricted discretion, and the conditions for the revocation shall have a causal relationship with the employee's obligation arising from his/her employment, and shall also be adequately concrete.²⁴ In this regard, the question of whether, for

²⁴ Court decision No. BH 1997, 371.

example, the time period when the employee is exempt from his/her working obligation – for instance if the employee becomes unfit for work, is on sick leave or receives sick pay – should be calculated in the duration of the enforcement of the adverse legal consequence. Decision No. EBH 2001, 567. provides guidance in this regard, when it states that if the collective agreement did not regulate the enforcement of the adverse legal consequence imposed for a fixed-term – in the specific case, the reduction of the base wage by 20% for six months – then only that period may be taken into account in respect of the duration of the punishment, during which the adverse legal consequence could actually be imposed, and all those periods when the adverse legal consequence could not be enforced for objective reasons shall be disregarded during the term of the employment relationship.

Furthermore, labour law department opinion No. MK 122 shall be mentioned, according to which if the employee refuses to participate in any examination aimed at verifying whether the employee is under the influence of alcohol or whether the alcohol ban applicable to the employee is complied with, this refusal shall in itself be adequate to impose the adverse legal consequences. Any employee who refuses to participate in such an examination may be prohibited from work, and for this reason it is lawful to withdraw his/her wage for the duration of the prohibition. The employer shall notify the employee in writing of result of the examination carried out by the employer. If the employee does not accept the result, he employer shall bear the burden of proof.

What changes did the fourth Labour Code bring about in this regard? The fourth Labour Code is Act I of 2012 on the Labour Code, which entered into effect exactly twenty years after the entry into effect of the third, on 1st July 2012. According to the general reasoning of the act,²⁵ in case of the then-Labour Code – i.e. the third Labour Code – the intention of the legislature was to replace the labour law legislation which was based on state ownership and state control and which applied an administrative law approach with a labour law system which conforms with the conditions of the market economy. To this end, the legislature attempted to reduce state intervention and intended to provide significantly more opportunity for legislation – compared to the previous legislation – to have a private law approach. In this regard, the legislature wanted to give a substantial role to collective agreements as the crucial regulatory factors of the labour market. Section 109 of the third Labour Code complied with this intention, which – as shown above – allowed the use of adverse legal consequences in the event of the employee's wrongful breach of obligation, provided that it was regulated in the collective agreement. Nevertheless, it is a fact that, after the change of the regime, as a result of the privatisation of the state-owned large enterprises and the increased number of small and medium enterprises, the relevance of collective agreements remained relatively limited in shaping the Hungarian labour market.

²⁵ The general reasoning of Act I of 2012 on the Labour Code.

In respect of Section 109 of the third Labour Code this meant that the employers which had no collective agreement had no opportunity to apply Section 109. The legislature intended to change this system. As a result, according to the provisions of Section 56 of the fourth Labour Code, if the employer or the worker is not covered by a collective agreement, the employment contract may prescribe adverse legal consequences consistent with the gravity of the infringement. This is a rather significant change since, through this provision, the use of adverse legal consequences became available to essentially all employers, provided that the parties specify the adverse legal consequences in the employment contract. This is in compliance with the provisions of the reasoning of Section 56 of the fourth Labour Code, according to which the purpose is the more consistent enforcement of the contract principle. Another key change, compared not only to the third Labour Code but compared to the legislation of previous decades as well, is that it is not required to specify the procedural rules in the employment contract (collective agreement), so the employer may impose adverse legal consequences even without procedural rules, provided that the parties specify the adverse legal consequences in the employment contract (collective agreement). According to the reasoning attached to Section 56 of the Labour Code, the reason behind this is that if the act does not stipulate any specific procedural obligation for the employer, even in the case of termination with immediate effect on the grounds of the employee's wrongful breach of obligation, then conducting a preliminary procedure of such a character before the application of a comparatively much more lenient legal consequence is not justified. This legislative solution is divisive. On the one hand, it has the definite advantage that it is in line with the flexibility requirement. At the same time, it diminishes the safety principle protecting the employee, although – as Gábor Kártyás established – it is in the interest of the employer as well that any adverse legal consequence is imposed only after thorough examination, in a prudent procedure, which explores the opinion of the employee as well.²⁶

However, in respect of adverse legal consequences – unlike the third Labour Code, which did not allow the imposition of fines²⁷ – the fourth Labour Code stipulates that financial sanctions may be imposed; however, their total amount shall not exceed the employee's monthly base wage in effect at the time when the legal consequence is imposed.

In compliance with the judicial practice established during the third Labour Code,²⁸ the fourth Labour Code directly states that only such sanctions related to the

²⁶ Kártyás G., Mit érdemel az a bűnös? Fegyelmezési lehetőségek az új Mt. alapján (What should we do with the culprit? Disciplining opportunities according to the new Labour Code), (2013) 4 (7–8) *HR & Munkajog (HR & Labour Law)*, (29–33) 32.

²⁷ It shall be noted that although the third Labour Code did not allow the use of fines, the practice used fixed-term base wage reduction, an example for which may be decision No. EBH 2001, 567.

²⁸ Decisions Nos. EBH 2002, 691. and BH 1996, 668.

employment relationship which modify the terms and conditions of the employment relationship for a fixed term may be imposed; it also expressly stipulates that the legal consequence imposed shall be proportionate to the gravity of the breach of obligation. The provision that the sanction shall not violate the personal rights and the human dignity of the employee remained unchanged compared to the previous legislation. Although it followed from the principles and the case-law that the prohibition of double evaluation used to be applicable previously as well, the fourth Labour Code now directly stated that no adverse legal consequence shall be imposed for a breach of obligation which is also referred to by the employer as the reason for terminating the employment.

Section 56(4) includes that the measure imposing adverse legal consequences shall be put in writing, with reasons provided. However, Section 56 does not detail whether the employee may use a legal representative, for example, in course of the clarification of the subject matter. However, Section 21 shall be taken into account in this regard, which allows the employee to make legal statements through his/her authorised representative; accordingly, the Labour Code does ensure the opportunity to employ a legal representative, as the case may be. Compared to the third Labour Code, it is a new rule that under Section 55(2) of the fourth Labour Code, the employer is essentially entitled to suspend the employee; that is, the employer, if so required for investigating the circumstances of an employee's breach of obligations, may exempt the employee from the requirement of availability and from work duty for the period required for the inquiry, in any case for up to thirty days. In respect of the deadlines, the new legislation, i.e. Section 56(3), refers to Subsection 78(2), namely, the deadline to be applied in the event of termination with immediate effect.²⁹

It is inevitable to examine whether the court decisions (BH) and the decisions on principle (EBH) established during the term of the third Labour Code may be applied or not. It can be generally established that, by not requiring procedural rules, specifying the adverse legal consequences in the employment contract, allowing financial sanctions and determining their maximum amount, a new regulatory, and thereby a new legislative environment was created. At the same time some decisions, for examples No. BH 2001, 567. or No. BH 1997, 371., may undoubtedly continue to be applied. The precise comparison of the effective legislation and the decision intended to be used is definitely necessary in order to decide the matter.

In summary, it can be established that the rules of imposing adverse legal consequences in the case of the employee's wrongful breach of obligation have been

²⁹ According to Subsection (2) Section 78, the right of termination without notice may be exercised within a period of fifteen days of gaining knowledge of the grounds for it, in any case within not more than one year of the occurrence of such grounds, or in the event of a criminal offence up to the statute of limitation. If the right of termination without notice is exercised by a body, the date of gaining knowledge shall be the date when the body, acting as the body exercising employer's rights, is informed regarding the grounds for termination without notice.

changed substantially by the fourth Labour Code. It is an undeniable fact that the act intends to entrust the parties, i.e. the employer and the employee, with a much more active role in course of the conclusion or amendment of the employment contract, in order to enforce the contract principle included in the reasoning of the act more consistently as well. In course of the determination of the types of adverse legal consequences, it may provide help and ideas to the parties if they review the previous legislation, and become engrossed in the legislative practice. Theoretical legal experts, as well as practicing attorneys-at-law have an important role in raising awareness of the opportunities provided by the new legislation, and in the promotion thereof in the everyday legal practice. Last but not least, it shall be emphasised that the judicial practice will undoubtedly provide guidance for the interpretation of Section 56. However, this requires Section 56 to be present in the everyday legal practice, since only in this case will subject matters occur, which contribute to the establishment of the judicial practice providing guidance in respect of the issues under debate.