Andrea Olšovská – Marek Švec

Disciplinary Procedures in Labour Law

Wolters Kluwer

Citation:
OLŠOVSKÁ, A. – ŠVEC, M. 2022. *Disciplinary Procedures in Labour Law. 1st edition.* Hürth : Wolters Kluwer Deutschland, 2022, p. ...

Copyright sheets: 10,2

Acknowledgement
The monograph has been produced as part of the APVV-18-0443 project titled *"Incursions of private law into other branches of private law (and vice versa)"*.

Authors © **prof. JUDr. Mgr. Andrea Olšovská, PhD. – doc. JUDr. Marek Švec, PhD., LL.M.**

Reviewers: doc. JUDr. Jana Žuľová, PhD.
Faculty of Law, Pavol Jozef Šafárik University in Košice, Slovak Republic

doc. JUDr. Martin Kubinec, PhD.
Faculty of Law, Matej Bel University in Banská Bystrica, Slovak Republic

PhDr. Ing. Václav Kupec, PhD.
Faculty of Economics, University of Finance and Administration, Czech Republic
Faculty of Business Administration, University of Economics and Business in Prague, Czech Republic

JUDr. Pavol Rak, PhD.
Faculty of Law, Comenius University in Bratislava, Slovak Republic

ISBN 978-3-452-30270-0

www.wolterskluwer.de

Cover design by Zuzana Heringešová
Typography by Zuzana Heringešová
Further processing: Wolters Kluwer SR s. r. o., Bratislava, Slovak Republic

CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

Acronyms of Laws

Czech LC	Act no. 262/2006 Statutes, the Labour Code
GDPR regulation	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
Civil Code, CC	Act no. 40/1964 Statutes, the Civil Code, as amended
Commercial Code, ComC	Act no. 513/1991 Statutes, the Commercial Code, as amended
OHS Act	Act no. 124/2006 Statutes on Occupational Health and Safety, as amended
Income Tax Act	Act bo. 595/2003 Statutes on Income Tax, as amended
Collective Bargaining Act	Act no. 2/1991 Statutes on Collective Bargaining, as amended
Social Fund Act	Act no. 152/1994 Statutes on Social Fund and on amendments to the Act no. 286/1992 Statutes on Income Taxes, as amended
Social Security Act	Act No. 461/2003 Statutes on Social Security, as amended
Act on the State Service of Professional Soldiers	Act no. 281/2015 Statutes on State Service of Professional Soldiers, as amended
Labour Code, LC	Act no. 311/2001 Statutes, the Labour Code, as amended
OHS	Occupational Health and Safety

ABOUT THE AUTHORS

doc. JUDr. Marek Švec, PhD., LL.M.

In addition to practicing law and being the secretary general and a member of the Labour Law Association Directorate, Marek Švec holds the position of a senior Faculty member at the School of Law of the Matej Bel University in Banská Bystrica. He graduated from the School of Law at the University of Trnava in Trnava. He earned his doctoral degree and completed the subsequent habilitation procedure in labour law at the School of Law of the University of Trnava in Trnava. He served as a vice-chairman of the Advisory Committee to the Secretary of Labour on the issue the extension of the binding nature of higher-level collective agreements and as a member of a tripartite committee for drafting an amendment to Act no. 2/1991 Statutes on Collective Bargaining as amended. He also participated in drafting other amendments to labour law regulations (for example, the Labour Code, Act no. 5/2004 Statutes on employment services as amended). He is currently listed as a mediator and arbitrator of collective bargaining with the Department of Labour, Social Affairs and Family of the Slovak Republic. Complementing his professional activities is active publishing. He is the author and co-author of a significant number of scientific works in the field of labour law and personnel management or personal data protection. He is the co-author of a commentary on the Labour Code and the Collective Bargaining Act published by the publishing house Wolters Kluwer, co-author of the ASPI Navigator on collective bargaining and the competences of employee representatives within the ASPI system and the co-author of sample labour law documents within the ASPI framework. He is also the senior counsel of the labour issues portal www.pracovnepravo.sk. One of his functions is that of a secretary of the Scientific Council of Wolters Kluwer publishing house in the field of labour law. He is a member of the Scientific Council of the School of Law of Matej Bel University in Banská Bystrica and the School of Mass Media Communication of UCM in Trnava. He is an external assessor of applications for scientific projects within the grant schemes system of APVV, VEGA and KEGA of the Department of Education, Science, Research and Sports of the Slovak Republic.

prof. JUDr. Mgr. Andrea Olšovská, PhD.

Andrea Olšovská is a professor of labour law at the Department of Labour Law and Social Security Law of the School of Law at the University of Trnava in Trnava, where she has been working since 2001. She earned her doctoral degree in labour law at the aforementioned school, later habilitating and earning her professorship from the same. She is the senior expert for the "Labour Law" program. She has been the dean of the school since 2015. At the same time, she has been working at PRK Partners s. r. o. since 2006 and she has been practising law since 2011. She specialises in labour law in her legal practice. In her scientific and professional activities, she mainly focuses on the issue of individual labour law, in particular the establishment and termination of employment; she also publishes and gives lectures for the application practice in this area. In addition, she also deals with current issues, whether it is the issue of atypical employment relationships, economically independent persons, the issue of workplace bullying or collective labour law relations. She has published more than 200 works in the field of labour law; she was a researcher in projects addressing labour law issues. She is the chairperson and a member of the Labour Law Association Directorate, a member of several editorial and scientific boards.

FOREWORD

The classic process of sanctioning or “punishing” employees for insubordination or unsatisfactory execution of work tasks by the employer is basically not provided for in labour law. As the basic source of the labour law, the Labour Code sets out a certain mechanism for dealing with situations where an employee violates work discipline or performs unsatisfactorily, but the result of this mechanism is an option to either terminate employment or to serve a written warning against untoward employee behaviour. The Labour Code also marginally deals with reduction of the leave or vacation pay in connection with certain insubordinations. A comprehensive and effective labour-law regulation governing the sanctioning of employees for their incorrect negative behaviour does not actually exist.

If it is the employer who provides and maintains jobs, and if employees violate their obligations, or do not perform their work as expected of them, as it happens in some cases, the employer should have tools available for them to deal with such situations. However, the Labour Code is ineffective here, as it offers few tools for solving the situations mentioned (written warning, employment termination), and even these often appear to be ineffective (the employer does not wish to proceed with terminating the employee right away). Therefore, it seems necessary to establish new tools that would be regulated in a mandatory and strict manner so that they are not misused. The area of remuneration appears to provide greater scope for embedding sanctioning tools. For example, a contractual penalty is often discussed, which at first glance appears to be an effective tool, but it necessitates a legal arrangement under which it would not be overused and in fact used as a tool for intimidation.

Although the Labour Code provides for a certain process of dealing with insubordination or unsatisfactory performance, this is set in a general and strict manner. Therefore, the application practice creates more detailed processes for sanctioning /”punishing” the employees. This process is often strictly individualised at the company level, as it involves the specifics of the given employer and the work environment. The preferred use of any particular labour law sanction available to the employer depends not only on the overall setting of the employer’s internal environment (for example, on the structure and nature of the employer’s remuneration of the employees in relation to the existence and conditions of awarding individual above-tariff wage components), but also on the employer’s overall approach to employees (for example, whether the employer prefers punitive or motivational mechanisms in the area of remuneration, internal company culture, etc.).

It can be stated that, in principle, the Labour Code does not regulate the type of sanctions against employees at all, with the exception of three basic labour-law institutes in the form of leave reduction pursuant to the § 109 of the Labour Code, not reimbursing the pay lost to public holidays under § 122 (4) of the Labour Code, and adjusting the conditions and process of employment termination under § 63 and § 68 of the Labour Code as a form of the most severe sanction imposed on the employee, when the employer comes to conclusion that it can no longer be reasonably required to continue employing the employee.

Differences in internal company practices among individual employers is so great and specific that there is only a limited number of court decisions in the above-mentioned area that would assess the legality of the employer's procedure in imposing a sanction on the employee from a general point of view. On the other hand, there is also a significant lack of interest on the part of employees to deal with their sanctioning cases in the event that the employer does not terminate their employment. The statement in question sounds all the more contradictory when we take into account relatively frequent occurrence of cases where the employer deducts various above-tariff wage components from employees for an "insufficient or insufficiently flexible" approach to work, does not award the above-tariff wage components due to the finding that it is a wage component "non-claimable" by the employee, reduces the employee's leave pursuant to § 109 of the Labour Code as much as permissible (§ 109 of the Labour Code allows for an option of reducing the employee's leave for unexcused absence from work by 1-2 days, but no maximum possible leave reduction is determined should there be several unexcused absences of employees provided the employment does not come to an end in the respective calendar year), and so on.

The majority of court decisions and professional publications deal mainly with the assessment of the employee's actions and the employer's procedure in the event that the employer decides to terminate the employment under the relevant provisions of the Labour Code. However, there is a lack of significant professional discussion on the issue of "ongoing" imposition of sanctions on employees, which can (and in practice actually mean) a more significant reduction of employee protection under labour law and deterioration of their working and wage conditions than "one-off" employment termination. We must realise that - due to lack of legislation - the complexity of imposing labour law sanctions on employees depends mainly on the creativity of the employer, especially in cases where there are no employee representatives. Judging employee's misconduct does not predominantly happen in the sense that the employer would give the employee a warning following a minor or serious insubordination or a warning in the case of unsatisfactory performance and the case would be considered closed. By issuing these warnings, the employer only ensures that it has fulfiled substantive legal conditions for eventual later termination of the employee. However, alongside the warnings, the employer imposes one or more labour law sanctions on the employee, which are supposed to ensure punitive effect in real time (it is probably difficult to talk about the motivational function of such sanction here, as it is rather a form of direct repression).

Therefore, a frequently disputed in the application practice is not only the form of the sanction imposed on the employee, since employers generally like to reach for the simplest one in the form of reducing the employee's above-tariff remuneration, but also the adequacy of the sanction thus imposed in relation to the seriousness of the employee's actions. The neuralgic point is precisely the "adequacy" of the sanction imposed on the employee in relation to the seriousness and consequences of their actions for the employer, when, in our opinion, an automatic imposition of a sanction may lead to a violation of employee protection under labour law and, in extreme cases, to unequal treatment of employees. Two different types of insubordination in the field of health and safety may not have the same consequences for the employer's internal environment and be of the same gravity, whereas the imposition of an automatic sanction in the form of the employee's wage reduction for a certain period in both cases may even be contrary to good morals or represent an abuse of law. This also applies to cases of larger employers where, for example, the imposition of sanctions is decentralised to individual organisational units of the employer, which subsequently results in a different assessment of the same cases with a different result of the sanction imposed on employees with a direct result of unequal employee treatment.

One may ask whether the imposition of various, especially monetary sanctions (apart from the traditional ones, regulated by the Labour Code) on employees is taking place outside the framework of labour law regulations. Yet the imposition of sanctions must be based on legislation, basic principles of the Labour Code, even if the Labour Code does not directly regulate this process. Thus, it depends on the setting of the working and wage conditions at the employer's whether and what sanctions can be used taking into account the basics of labour law regulations.

For the above-mentioned reasons, the authors decided to prepare a non-traditional publication primarily focused on conducting the disciplinary process by the employers, including imposing sanctions on employees without terminating them. The expert interpretation will address situations where the employers impose types and forms of sanctions on employees other than their actual termination under the relevant provisions of the Labour Code, with the authors also pointing out examples of incorrect application practices occurring among the employers. The aim of the authors is not to offer a comprehensive scientific text on sanctions imposed on employees under labour law, as this is not possible due to a high degree of differentiation among the employers. Rather, the authors wish to pinpoint the most frequently occurring cases that are often disputed between the employers and the employees or the latter's representatives; to provide their own legal perspective on these cases, and to draw attention to possible interconnection with other labour law institutes and to create space for broader professional discussion.

The present publication offers a number of questions that employers should focus on when creating their internal company regulations, rather than clear answers to the questions of the application practice. This is also why this publication is intended for experts who come into daily contact with implementation of individual and collective labour law relations, personnel management, HR agenda, or set up motivational processes for employees. It is intended for the academic community that – will participate in the discussion, or for readers who want to deepen their knowledge in the field that is an important part of the content of labour law relations that no publication has addressed so far.

Trnava, October 2022

Andrea Olšovská, Marek Švec

1 DISCIPLINARY PROCEDURE AND LABOUR LAW SANCTIONS OF THE EMPLOYER

1.1 Disciplinary procedure

In our interpretation/work, we will deal with two types of employee behaviour which might result in imposition of a sanction, as this employee behaviour is negative in nature. This is the kind of employee behaviour which the employer may evaluate either as insubordination or as unsatisfactory performance. It is necessary to emphasise from the start that these are two separate legal regimes of an action against the employee which overlap only in the aspect of what sanctions can be imposed on employees. Distinguishing between these two types of negative employee behaviour is often complicated in practice, and in many cases, there is only a thin line between them. For example, it is necessary to distinguish whether the sanction - a written warning - is imposed under § 63 (1) (d) (4) of the Labour Code (unsatisfactory performance) or under § 63 (1) (e) of the Labour Code (minor insubordination). Quite often, employees and their representatives believe that these are two identical institutes.

For the purposes of this publication, we understand the disciplinary process as the employer's proceeding that follows from a breach of a work duty by the employee (insubordination) and/or the procedure that follows after the employer evaluates the work performed by the employee as unsatisfactory, and the result of which is the imposition of a sanction.

In general, disciplinary process may also result in termination of employment, but we will focus on other sanctions, which may be a written warning of the employer against negative employee behaviour, a leave reduction and/or a decision not to award certain extraordinary/extra-legal/above-tariff monetary compensations, which the remuneration system at the employer's set for those employees against whom the disciplinary process is carried out.

We will omit liability issues that may arise as a result of negative employee behaviour. In practice, it is not uncommon for the employer to suffer damage as a result employee insubordination or unsatisfactory performance.

One of the basic obligations of an employee is the obligation to perform the agreed work responsibly and properly, and the employee must be professionally qualified to perform the agreed type of work for the employment duration. If the employee fails to perform work in accordance with the aforementioned provision, that is, does not meet the required conditions for work performance, is not professionally qualified to perform the agreed work, performs poorly, violates obligations, does not respect the instructions of superiors, the employer may terminate such employee. The Labour Code allows the above-mentioned negative employee behaviour to be resolved by termination. Other tools (except for some in the case of insubordination) are not actually regulated. However, in the framework of our legal interpretation, we will focus only on those reasons that are related to the disciplinary process, namely the insubordination and unsatisfactory performance, and to which the labour law sanctions under examination are linked.

Pursuant to § 63 (1) (d) of the Labour Code, the employer may terminate the employee for the following reasons (these are reasons that lie in the person of the employee), namely, if the employee:

1. does not meet the requirements established by legal regulations for performance of the agreed work;
2. ceased to meet the requirements pursuant to § 42 (2) of the Labour Code;
3. does not meet, through no fault of the employer, the requirements for proper performance of the agreed work specified by the employer in the internal regulation or
4. performs work tasks unsatisfactorily and the employer has asked the employee in writing in the last six months to eliminate the deficiencies and the employee has not eliminated them in a reasonable time.

This reason for termination, related to the employee's inability to perform work, contains four termination reasons - four different facts related to the employee's inability to perform work.

In addition to these, the Labour Code also stipulates the grounds for termination if the employee violates work discipline. In such case, the Labour Code offers a possibility to resolve the situation by regular or immediate employee termination.

The employer is entitled to give notice to an employee pursuant to § 63 (1) (e) of the Labour Code if the /employee gives reasons for which the employer could immediately terminate their employment, or for minor insubordination; for minor insubordination, an employee may be dismissed if the employee has been notified in writing of their possible termination in connection with insubordination in the last six months.

The first reason for termination represents a legal situation of serious insubordination by the employee and the employer may decide whether to give notice to the employee or to terminate the employee immediately under § 68 (1) (b) of the Labour Code (if the degree of insubordination was not such that the employment should end immediately). The second reason for termination represents a situation of minor insubordination by the employee. If the employer wants to terminate the employee for this reason, after the first insubordination, the employer is obliged to warn the employee that if the event of insubordination is repeated in the following six months (that is, the employee violates the same or another obligation in a minor manner), they will be terminated (the employee may be dismissed after being insubordinate in a minor manner twice). The Labour Code stipulates only two grounds for termination for insubordination, a reason for which the employer could immediately terminate the employee and for a minor insubordination. Minor insubordination does not have to be continuous. Before applying this reason for termination, the employer is obliged to notify the employee of the possible termination due to insubordination over the course of the last 6 months. It follows from the above that in order for the employer to give notice, the employee must be insubordinate in a minor manner at least twice. As soon as the employee commits the act of minor insubordination for the first time, the employer shall warn the employee in writing, and after the second minor insubordination, the employer shall effectively terminate the employee. Even before putting the notice of termination due to insubordination into effect, the employer is obliged to inform the employee of the reason for the notice of termination and to allow the employee to comment on it. However, the Labour Code does note stipulate the form of such comment. It can be made either in writing or verbally (but taking into account the possible need for proof, written form may be recommended).

Under § 68 (1) of the Labour Code, the employer may terminate the employee immediately only in exceptional cases and only if the employee

a) has been legally convicted for an intentional crime;
b) has committed serious insubordination.

It should be noted that for the purpose of terminating the employee for misconduct (dismissal, immediate employee termination), the Labour Code also sets objective and subjective deadlines. However, these deadlines are not related to the sanctions imposed under labour law, for which other deadlines or periods can be set within which the sanction may be imposed. For example, in the case of leave reduction, unexcused absence from work in the year in which the right to leave arose is considered.

In the case of not awarding or cutting a certain extra-legal/above-tariff monetary payment, this is based on the conditions set by the remuneration system and should the employee feel entitled to that monetary payment, the employee has the right to demand their payment be made to them within the limitation period.

1.1.1 Internal Company Regulations, Code of Conduct, Compliance Rules

As already mentioned, when considering the nature of the employer, its working environment, and its specificities, it is common for employers to set out employee obligations in their company policies. The employer's internal policies/regulations/ normative acts[1], whose designation in application practice varies (e.g., they are called directives, internal policies, codes, etc.) are, according to labor law theory, in a formal sense, sources of law which regulate employees' working conditions (pursuant to Article 43 of the Labor Code, wage conditions can be regulated only in the employment contract or collective agreement), other obligations and (less frequently) rights of employees, or amend and specify the relevant labor law regulations.[2]

When considering the broader concept of a legal act, it is discussed that if an internal company regulation establishes, changes, or cancels the rights and obligations of the entities involved in labor relations, it could also have the nature of a legal act and thus its validity is also perceived through the formalities of a legal act. However, internal company regulations may only create and change rights and obligations (in fact, they only specify them) if the relevant legal regulation allows it (it may also be a legal regulation which is not like an employment law regulation but contains a rule related to the performance of work) and if it is within its legal framework, under the employee's employment contract or collective agreement. Internal company regulations (since their issuance constitutes unilateral action of the employer, albeit with the possible participation of employee representatives) may not impose obligations beyond the law and the employee's terms and conditions arising from the employment contract or collective agreement.

The nature of an employer's internal policy, therefore, depends on whether it gives rise to, modifies or abolishes a right or obligation arising from employment, causes a legal consequence or merely organizes the work process (e.g., organizational structure, determination of the beginning and end of breaks at work). An essential function of labor law is the organizational function, which enables the

[1] For more information see (included in the author's research): OLŠOVSKÁ, A. – LACLAVÍKOVÁ, M. 2017. Interný predpis zamestnávateľa – prameň pracovného práva? *[Employer's internal policy – a source of labour law?] FONTES IURIS. Tribute to prof. J. Prusák*. Trnava, PF TU. Association of Slovaks in Poland, Krakow 2017. 2017, p. 33 ff. ISBN 978-83-8111-016-7

[2] ŠTEFKO, M. 2010. Sources of labour law. In BĚLINA, M. et al. *Pracovní právo [Labour Law]*. 4th edition. Praha : C. H. Beck 2010, p. 61.

employer to organize and manage employees' work, also through internal company regulations.[3]

As far as the **process of issuing internal company regulations is concerned**, the legislation of the Labor Code in this area is strict. § 84 of the Labor Code only regulates the issuance of work rules, and § 39, para. 2 of the Labor Code governs the issuance of Occupational Safety and Health Protection regulations. Occupational health and safety regulations are also occupational health and safety rules issued by employers in agreement with employee representatives; if no agreement is reached within 15 days of the submission of a proposal, the competent labor inspectorate will decide under a special regulation... The other regulations of the Labor Code do not mention or refer to what types of regulations an employer may issue. However, the LC notes the following regulations. We see as important § 81(c) of the Labor Code, which states that **an employee is obliged to comply with the legal and other regulations applicable to the work performed if it has been duly acquainted with them.** A further reference is made in § 9 para. 1 of the Labor Code, which refers to administrative regulations.

Staff Regulations

As mentioned above, § 84 of the Labor Code provides for only one type of internal policy of the employer, namely the Staff Regulations. An employer may issue Staff Regulations and is required to issue them with the prior consent of the employees' representatives; otherwise, they are invalid. If the employer does not have employee representatives, the employer shall proceed pursuant to § 12 para. 1 of the Labor Code.

According to this provision, if the LC requires the consent of or agreement with the employees' representatives, the employer who does not have employees' representatives may act independently (this provision also provides for exceptions where the employer may not act independently or in cooperation with the employee, e. g., when concluding an agreement on the working time account).

Pursuant to § 84 para. 2 of the Labor Code, the Staff Regulations, therefore, apply the provisions of the Labor Code to the employer's specific conditions under the law. It is binding on the employer and all their employees. It shall enter into force on the date specified therein, but no earlier than on the date it is published by the employer. Therefore, every employee shall be acquainted with Staff Regulations, and the work rules shall be accessible to every employee.

---

[3] For more information see: GALVAS, M. 2007. *A small note on the issue of the basic principles and functions of labour law after the adoption of the new Labour Code [Malá poznámka k problematice základních zásad a funkcí pracovního práva po přijetí nového ZP]*. In *Právník*. 2007, no. 9, p. 1008.

Employer's internal policies/regulations[4]

In addition to the Staff Regulations, employers also issue other internal policies, but the conditions for issuing them are not specified in any law. In this context, it may be considered whether an employer may issue different internal policies and whether the Labor Code legislation may be applied by analogy. However, as a general rule, internal policies bind employees provided they are under generally binding legislation and require that employees be duly acquainted with them to be binding.

In application practice, a question arises whether cooperation with employee representatives is also necessary when issuing these other internal policies (whether a prior consent of employee representatives is required for them to be valid). Considering that the Labor Code specifically regulates only the conditions for issuing Staff Regulations, we posit that a prior consent of employees' representatives is not required for the validity of other internal policies of the employer. A different situation may arise if, for example, in a collective agreement or an agreement between the company and a workers' council, the employer and the employees' representatives agree on conditions for issuing the employer's internal policies. The prerequisite is that the employer's internal policies are issued after a prior consent of employees' representatives. In such case, it could be stated that participation of employees' representatives is required for the employer to issue its internal policies. In practice, however, there are situations where the relations between the employer and the employee representatives are at such level that there is effectively no cooperation. Employers circumvent the work rules institute (as they cannot obtain the consent of the employee representatives) by adopting a number of by-laws that replace the work rules. We see such approach as incompatible with the LC (but it is necessary to know the specific situations, as, in practice, it is also possible to come across employee representatives who purposely block adoption of work rules).

Suppose an employer's internal policy/regulation is considered binding and valid for employees. In that case, we could start from the legal theory that defines the characteristics of legal policy/regulation and apply them by analogy to the employer's internal policies. The conceptual features of a regulation ‚may be defined as those features of the regulation which immediately relate to the very foundations of its validity, i. e., the features which make the regulation a regulation and distinguish it from an attempted regulation; these are the designation of the regulation, the issuing authority, the authorization, the publication...' is promulgated "as

[4] Compiled in accordance with: OLŠOVSKÁ,A. – LACLAVÍKOVÁ, M. 2017. Interný predpis zamestnávateľa – prameň pracovného práva? *[Employer's internal policy – a source of labour law?]* In *FONTES IURIS. Tribute to prof. J. Prusák*. Trnava, PF TU. Association of Slovaks in Poland, Krakow 2017. 2017, p. 34.

a regulation".[5] It follows, therefore, that internal policy should be properly labelled (to make it obvious that it is an internal regulation), issued by an authorized body (the employer or a body authorized by the employer), published and communicated to employees. Concerning the declaration/publication/publication, this should be done in the manner customary for the employer, e.g., on a notice board, at a staff meeting, by handing the document "against signature", by placing it on an intranet, etc. ("these regulations also require their material publication, i. e. their publication").[6] It should be stressed that the publication of an internal regulation does not automatically mean that the employees have also been made aware of it. Therefore, this step shall also be carried out (e.g., in a meeting with employees, it is not enough to hand over the internal policy, but some activity is also required, e.g., an explanation of what the regulation regulates). Of course, the method of familiarization depends on who the addressee is (whether an interpretation is needed or the employees understand the regulation), what obligations (how serious) are embedded in the regulation (whether there are any complicated procedures, obligations), the scope of the regulation is important, etc.

Code of Conduct, Compliance Rules

Although we believe that company regulations shall be consistent with generally binding regulations and are binding on the individual employee concerning their agreed type and place of work, we often perceive the enshrinement of certain employee obligations in company rules as overly binding and requiring behavior that significantly affects the employee outside the workplace and outside working hours, restricts the employee's life outside the workplace, and often does not even correspond to the position held by the employee.

The so-called employer's codes of conduct can be considered an important instrument for extending the obligations of employees and, at the same time, the employer's discretionary power through internal company regulations, which often constitute a significant interference, in particular with the employees' right to privacy, depending on the scope and subject matter of the regulation contained in these documents. Furthermore, the experience shows that, especially for middle and senior management employees, unreasonable restrictions on their actions and behavior outside working hours are often imposed, e.g., various restrictions on their activities on various social or professional social networks.

---

5 PROCHÁZKA, R. – KÁČER, M. 2013. *Teória práva. [Theory of Law]*. 1st edition. Bratislava : C. H. Beck, 2013. p. 155.

6 TOMAN, J. 2014. *Individuálne pracovné právo. Všeobecné ustanovenia a pracovná zmluva [Individual labour law. General provisions and employment contract]*. Bratislava : Fridrich Ebert Stiftung, representation in the Slovak Republic, 2014. p. 56.

In issuing this internal policy, we should analogously draw on § 84 of the Labor Code, as mentioned above, for issuing other internal employer regulations. As a rule, codes of conduct are internal company regulations adopted without employee representatives' participation. Some of them are related to the rights and obligations of employees regulated in the relevant legislation and draw on the nature of their profession (e.g., health care workers, employees in the banking sector, the IT sector, etc.). They may even express values and principles on which the employer operates or pursues its social objectives, e.g., within the framework of the CSR (Corporate Social Responsibility) principles. In addition, some professions, e.g., civil servants, have ethical rules of conduct directly in the law. These codes of conduct shall not be addressed, as they have a legal basis (especially if they refer to work rules or OSH regulations).

The key question is what a code of conduct is. It is not an isolated situation that is effectively just a summary of the obligations of employees. However, according to certain literary sources, the mission of codes of conduct is broader than that. A code of conduct should be helpful, *instilling a sense of responsibility in the employees at all levels of the enterprise, aligning them with the need to think of their actions in moral terms and to develop values appropriate to their position in a particular enterprise; it is a document that regulates the conduct of employees under the ethics of the enterprise, but it is also a document to which employees can refer whenever they are required to act contrary to its contents.*[7]

"By code of conduct we mean a set of general and specific rules of conduct and behavior and their application in practice both internally among members of a particular group and externally in relation to clients, employees, the public or other stakeholders. A code of conduct is intended to improve relationships within an organization and to increase the effectiveness and productivity of its members."[8]

A code of conduct is often considered one of the important tools of a healthy corporate culture. *"However, this is especially true if it includes the rules that the organization requires from its employees and the principles it follows, including principles concerning its employees. In addition to ethical principles, the code can also emphasize important principles of professional practice, thus strengthening employees' professional identity and responsibility.*[9]*"* A distinction is made between a code of

7 MEŇOVSKÝ, I. 2005. *Code of ethics as a tool for building corporate culture* [online]. Available at: <http://www.epi.sk/odborny-clanok/Eticky-kodex-ako-nastroj-budovania-podnikovej-kultury.htm>.

8 *Podnikový etický kodex aneb další aspekt řízení podniku [Corporate code of conduct or another aspect of corporate governance]*. [online]. Available at: <http://www.businessinfo.cz/cs/clanky/podnikovy-eticky-kodex-aneb-dalsi-aspekt-rizeni-podniku-87292.html#!&chapter=1>.

9 URBAN, J. 2017. *Code of conduct: a management tool or a bunch of platitudes? [Etický kodex: nástroj řízení nebo snůška frází?]*. [online]. Available at: <https://ebschool.cz/eticky-kodex-nastroj-rizeni-nebo-snuska-frazi>.

conduct, a code of conduct[10] or staff regulations. *"The purpose of a code of conduct is to provide employees with principles or guidelines for properly handling specific ethically exposed or complicated situations. Therefore, the Code of conduct should not be confused with other documents of the organization, such as its values, mission or mission statement on the one hand (which tend to be problematic because of their lack of specificity and considerable similarity between different organizations), or with detailed rules of work conduct or even the organization's staff regulations."*[11]

In practice, it is perceived that a code of conduct, or documents of this nature, sets a requirement for certain ethical conduct and so-called **"compliance."**[12] **Conduct** (in this publication, we will also use the code of conduct as an umbrella term for compliance rules, particularly concerning the process of issuing these rules, or we will consider them together as documents that set the level of obligations beyond the basic legal framework and are perceived as a certain expected standard of ethical behavior of employees). The latter is that the rules are not primarily intended to motivate employees merely to be better employees but to expect them to behave in such a way that, in addition to fulfilling their work tasks and complying with generally binding regulations, they will be directed towards the general requirement of protecting the interests of the company both during and after working hours. The adoption of codes of conduct (principles of conduct) in the spirit of compliance can, therefore, also be seen as an attempt to create a certain standard of conduct for employees above and beyond what is required of them by classical legal or company regulations under § 81(a) of the Labor Code. Non-compliance, despite the vague formulations "of the grandeur of the goal" in the form of sustainability and consideration of interests of other employees, is sanctioned just like any classical non-compliance with employees' duties. Employers often perceive anchoring of ethical rules as being set within the framework of the basic regulation of employee compliance with work discipline based on generally binding legislation,

---

10 Available at: <https://www.oecd.org/mena/governance/35521418.pdf>.

11 *Jak vytvořit etický kodex organizace [How to create an organizational code of conduct]*. [online]. Available at: <https://kariera.ihned.cz/c1-53354960-jak-vytvorit-eticky-kodex-organizace>.

12 The concept of compliance has no clearly defined content. We perceive it as a process and a requirement for employees' conduct. This term is also used in connection with the designation of a department at the employer (the Compliance Department), whose task is to set ethical principles, ensure compliance with internal policies, and verify their observance. For this publication, the following concept of this term will be used. Compliance requirement or compliance behaviour is a term used in various economic sectors to describe certain "preferred" or "desirable" conduct, principles or rules that regulate (restrict, stipulate) certain products and services, the performance of activities or various processes. They are generally binding, depending on the nature of the internal environment and the organization in which they are adopted. Compliance rules were first applied in consumer protection and environmental protection, creating above-standard requirements for the accountability of the conduct/actions of companies and their employees.

the employment contract and the employer's internal normative acts. However, this view is not always correct, as codes of conduct usually contain obligations beyond the normal requirements of an employee.

The extent to which non-statutory codes of conduct (those not directly supported by ethical rules in the law and which also presuppose their issuance) can interfere with the work process, and often the privacy of employees is not given. Therefore, when they are issued, there is a clash between the requirement to protect the employer's good name, reputation and property, and the loyalty of employees, on the one hand, and the requirement for employees' privacy and to work in an environment that does not unduly restrict them, on the other hand. Nevertheless, codes of conduct generally establish desirable standards of conduct for employees during and after work and during rest periods (especially for employees in management positions). Moreover, codes of conduct regulate not only the obligations of employees towards each other but also towards clients, managers or business partners of the employer, i.e., towards whom the employer expects such conduct.

Admissibility of the content of employees' obligations created through codes of conduct is undoubtedly acceptable to the extent that the obligations conceived therein are based on employment law, work regulations, employees' job positions and, concerning employees' behavior, the regulation refers to such behavior of employees that prevents activities leading to fraud, embezzlement, extortion, theft or other intentional damage to the employer's or third parties property values or to disclosure of trade secrets, confidential information, etc.

The inadmissibility of the content is given to the extent that it regulates the obligations of employees beyond the obligations given by generally binding legal regulations because such an approach is also excluded in the actual creation of the content of other internal company regulations, e.g., work regulations pursuant to § 84 para. 2 of the Labor Code. As we have already indicated, it is not easy to set ethical rules in such a way that they do not jeopardize the employee's privacy, his/her leisure time and, not least, his/her dignity. Since every employee represents his/her or her employer in a certain way, to draw the line on the requirement to behave in a certain way outside working hours, e.g., to behave in public, to comment on contractors, their employees, to present a political opinion, runs the risk of severely restricting the employee's freedom. Therefore, it is important to consider the nature of the employer, its working environment, and the employee's position. The determination of ethical rules should be proportionate and thus consider such aspects. Compliance rules are often accompanied by the imposition of an internal integrity condition on employees, which means that the employee's actions are guided by the company's ethical principles and values and are in compliance with the regulations. This includes adherence to these principles regardless of economic and social pressures.

Several controversial issues arise concerning practical application of codes of conduct. The primary problem arises from adopting a code of conduct by the employer, i.e., whether it can be adopted without participation of employee representatives if they are present. Further problems arise when applying the scope of the obligations imposed on employees (or standards of conduct) concerning respect for their fundamental human rights and freedoms, and the third set of problems relates to the actual handling of a breach of an ethical obligation/rule if the employee has breached it.

In order to be bound by the Code of conduct, **employees** must be **acquainted with** it. According to the conclusions of the case law, a statement by the employee in the employment contract is sufficient to prove that the duty to acquaint/be acquainted has been fulfilled in this sense (however, the above conclusion is based on the specific facts, so we recommend that the employer should have a demonstrable proof that the employees have been informed; if we perceive the protective function of the labor law, we consider that a mere reference in the employment contract is insufficient, especially if the employer's internal policies are not published on the Intranet, or if the wording of the ethical rules is ambiguous and for some of them clarification is required). "*Drawing on the legal assumption that an employee is obliged to comply with the rules relating to the performance of his/her work if he has been duly acquainted with them, the Court examined the plaintiff's objection that he was not actually acquainted with the content of the Code of conduct or any of its annexes when he filled in the personal questionnaire and at the time of signing the employment contract and concluded that the plaintiff's objection was purposeful, since the applicant did not object to this fact when signing the employment contract, although, in view of the wording of point 29. of the employment contract, since by signing the employment contract the plaintiff also accepted the fact that the defendant had made him/her aware of the internal rules which he had to observe in his/her work. Moreover, the Court finds no reason why, exceptionally in the plaintiff's case, the defendant should have departed from its usual procedure of concluding contracts of employment with new employees and failed to inform the plaintiff that he was obliged to acquaint him/herself in detail with the internal rules (including the Code of Conduct) published on the defendant's Intranet. The plaintiff did not request adequate time to study the internal rules – in particular the Code of conduct – prior to concluding the employment contract, and the Court therefore proceeds on the basis of the presumption that the defendant had made the plaintiff aware of the content of the Code of conduct.*"[13]

[13] The District Court of Bratislava III decision of 1 July 2021, Case No. 62 Cpr 9/2019.

1.1.2 Authorities/Entities Investigating Breach of Work Discipline, Ethics Committee

Based on experience from the application practice, since no labor law regulation sets out procedures and conditions of disciplinary process of investigation of breaches of the Code of conduct, employers often set up special mechanisms, various review or ethics committees, to deal with breaches of employees' obligations. It is not uncommon for some employers to have different committees, bodies designed for traditional disciplinary procedures (often different bodies are set up for investigating work discipline and different ones for evaluating employees under remuneration system), and committees investigating ethical failures (ethics committees). Employers also tend to have a parallel process concerning employee complaints (complaints under the Labor Code).

Establishing such committees and bodies and setting up the process is entirely in the hands of the employer, as any labor law does not specifically regulate this area. We have a certain basis, but without setting up a process, a body, only in the case of a commission, which should be designated for the resolution of complaints in the form of anchoring the institute of complaints in § 13 para. 5 of the Labor Code. It can be said that the disciplinary procedure is not anchored anywhere, and the question arises whether it can function at all if the legislation does not recognize it. However, suppose we perceive the employer's right to organize and manage the work of its employees. In that case, the obligation to remunerate them and to set a certain expected level of work performance, the process of employee evaluation is, in fact, an inherent part of the employer's functioning. It is therefore up to the employer how it approaches the process relating to the evaluation of employees, breaches of duty, breaches of the code of conduct, subject, of course, to compliance with the law, its discretionary powers and respect for the dignity of the employee.

In practice, as indicated above, there are cases in which the employer establishes a single committee to deal with disciplinary proceedings, ethical issues and employee complaints, or establishes a separate committee to deal with breaches of obligations under the Code of conduct, or does not establish any committee and evaluates employee conduct through a specific department (e.g., legal, HR, etc.). It is also not exceptional if the employer does not set up any committee or procedure for evaluating employee conduct and addresses possible employee misconduct on an ad hoc basis (e.g., by setting up a special committee) and the relevant senior managers are in charge of employee assessment (in particular for remuneration purposes). The requirement for a formalized process concerning ethical rules, particularly for evaluating compliance with the Code of Conduct, is seen in larger employers. However, the basic elements that are capable of building some ethical awareness among employees at the employer's, namely the existence of a functional code of conduct (which is clear and understandable), a built-in system for reporting breaches of the code and, last but not least, a system of regular monitoring of compliance with the code of conduct, are at the discretion of the employer.[14]

Since no legislation provides for a disciplinary procedure, a process of investigation of breaches of ethical rules or employee misconduct, it is necessary that this process be carried out by bodies/entities that are, in short, authorized to do so, and at the same time that the investigation process respects the principles of labor law and the personality of the employee. In a traditional disciplinary procedure, the ‚investigating' body/authority is usually the relevant manager; a committee set up by the employer's employees or the HR department.

The procedure is set up so that those general boundaries are established in terms of time limits for handling and an oral hearing or written communication with the employee concerned (especially in larger employers). Such procedure does not give rise to any major problems in practice. For smaller employers, disciplinary procedures are dealt with on an ad hoc basis, generally without formal processes in place. However, disciplinary procedures that are open to dispute are conducted not directly by the employer but by an entity/body outside the employer. These are various review processes common for employers belonging to a wider group (e.g., within a group). As these are interesting processes, the issue is dealt with separately in the next part of the publication (the conclusions drawn from this part also apply to the classical disciplinary procedures).

Suppose the employer finds that the employee has breached the work discipline, compliance and integrity rules, of course, with an objective approach to assessing the employee's actions. In that case, the employer may also proceed to impose employment sanctions on the employee.

1.2 Work discipline and unsatisfactory execution of work tasks

In order to understand the issue under scrutiny, it is necessary to pay attention to the definition of unsatisfactory performance and work discipline. Although the term "work discipline" is the term often used in labour law relations, it appears in the Labour Code in some provisions (termination by the employer, immediate employee termination, temporary suspension, obligations arising from employment), we can state that its content is also comprehensible to both employees and employers, the Labour Code or other legal regulation does not define the

[14] PAVLŮ, D. 2016. Managerial decision-making from the point of view of ethics. In *Modern Management* [online]. Available at: <https://modernirizeni.ihned.cz/c1-65339740-manazerske-rozhodovani-z-hlediska-etiky>.

term of work discipline. Under the term "work discipline", the labour law theory understands a collection of legal norms governing work discipline, as well as a collection of duties of an employee, and last but not least, the compliance with duties by the employee.[15] In general, the content of the term work discipline is the employee's duties (the term *"responsibilities"* may also be used).

Insubordination necessitates violation on the part of the employee of those obligations that the employee is bound by in connection with their agreed type and place of work (situations where the employee refuses to fulfil an obligation, instructions that are not related to the work the employee is supposed to perform according to the employment contract should not be considered to constitute insubordination). Pursuant to § 47 (1) (b) of the Labour Code, the employee is obliged to perform work personally according to the employment contract during the specified working hours and to observe work discipline, according to the employer's instructions starting on the day on which the employment is established. In simple terms, we can state that if the employee fails to fulfil their obligations arising from the Labour Code, other regulations (also internal ones) that are binding on the employee, or the employee fails to follow the instructions of relevant persons at the employer's, the employee violates work discipline.

The term work discipline is not defined by the legislation. Labour law theory understands this term as a collection of legal standards governing work discipline, as well as a collection of employee duties and, last but not least, the compliance with duties by the employee, in general, the content of this term is employee duties. Examples of basic duties of the employee, or of senior employees, are given in the provisions of § 81 and § 82 of the Labour Code.[16]

If insubordination is to be legally punishable and constitute a reason for employment termination by the employer or for the purpose of imposing a sanction under labour law, this insubordination on the part of the employee must be caused by at least negligence and must reach a certain degree of intensity. For the purposes of employment termination, the Labour Code distinguishes between minor insubordination and serious insubordination. Assessment of insubordination intensity depends on specific circumstances and is influenced by the employee's personality, their previous approach to fulfilment of work duties, the manner and intensity of the violation of specific work duties, as well as the situation in which the violation occurred, the consequences of the violation for the employer, or the action through which the employee caused damage to the employer, etc.[17]

15 BARANCOVÁ, H. – SCHRONK, R. 2004. *Labour Law.* Bratislava : Sprint, 2004. p. 366.
16 Ruling of the Ružomberok District Court of September 03, 2019, 3 Cpr 10/2018.
17 Cf. Ruling of the Supreme Court of the Slovak Republic of September 29, 2009, case no. 5 Cdo 74/2008.

It is always the task of the court to assess whether the employee has committed a culpable insubordination and, in the case of a positive finding, to decide what degree of insubordination was present in the given case. In these deliberations, the court is not limited by any specific considerations, or boundaries, but only takes into account the specific details of the case under consideration and, in support, valid jurisprudence, if adopted. It follows from the above that when assessing the degree of insubordination, the court is not bound by how the employer evaluates certain actions of its employees in its work regulations or in another internal regulation.[18]

When assessing whether it was a minor or serious insubordination, the courts take into account not only the occurrence of certain damage/harm to the employer in causal connection with the breach of duty by the employee, but they also consider the peculiarities of the employee behaviour and the circumstances under which insubordination occurred. *"One of the basic considerations when deciding on a penalty for insubordination is the intensity thereof. The assessment of insubordination intensity depends on the specific circumstances and is influenced by the employee's personality, their previous attitude towards performance of work duties, the manner and intensity of insubordination, as well as the situation in which the violation occurred, the consequences of the violation for the employer, or the employee's actions that caused damage to the employer, etc."*[19]

This is confirmed by another court decision. *"When examining whether the employee has violated work discipline in a minor, serious or particularly gross manner, the court may take into account the employee's personality, the position the employee holds, their previous attitude towards performance of work tasks, the time and situation in which insubordination occurred, degree of fault of the employee, the manner and intensity of violation of the employee's specific obligations, the consequences of insubordination for employers and on whether the employee caused damage to the employer by their actions, etc."*[20]

In many cases, employers ignore this approach of the courts and impose sanctions under labour law mechanically and automatically according to internal company regulations, that is, only the act of the employee itself is assessed as insubordination with the imposition of all possible sanctions, while consideration of those sanctions takes place within the framework of whether the employee will be also terminated. *"Regarding the aforementioned, the court stated that although the employer may specify cases of serious insubordination in its internal regulation, the*

18 Cf. Ruling of the Regional Court in Bratislava case no. 9 Co 540/2011.

19 Ruling of the Regional Court Nitra of November 28, 2019, case no. 8 CoPr 6/2018.

20 Ruling of the Czech Supreme Court of January 21, 2003, case no. 21 Cdo 1252/2002 cited in the Ruling of the Regional Court in Trnava of April 16, 2019, case no. 9 CoPr 8/2018.

court is not legally bound by such definition on the part of the employer when deciding on the validity of immediate termination of the employee. When assessing the degree of insubordination intensity, the court is not bound by how the employer evaluates certain behaviour of its employee in its rules or other internal regulations."[21]

Depending on the nature of the work performed, the employee is required to turn in work of certain quality (if quality of the service provided or a product manufactured, etc. is important), of a predetermined number (if it is work with quantified output, for example, determined by labour consumption standards) or to provide a service or to manufacture a product in a predetermined manner. If the employee does not meet the employer's expectations, the employer has the option to terminate the employee by giving them a notice due to unsatisfactory performance. Unsatisfactory performance is based on an objective finding, the fault of the employee is not investigated. It is immaterial whether the unsatisfactory performance is a consequence of the employee's inability, incapacity or irresponsible approach to their work duties. "*Unsatisfactory work is – generally speaking – the result of the employee's inability to properly perform the assigned work, regardless of whether this inability results from the employee's subjective nature, from their intellectual capacity, lack of organisational skills, etc. However, it follows from the nature of the matter that the adverse consequences of the employee's incapacity cannot be manifested "immediately", for example, a one-off misconduct immediately after starting work, but only after a certain interval of time. The reason for termination under the provisions of § 46 (1) (e) of the Labour Code can, therefore, only be such deficiencies in the performance of the employee's work duties (unsatisfying work results) that are not unique, but – as mentioned above – when the quality of the required work results has been lacking for a longer period of time, or repeatedly. In order to still be able to proceed with such serious measure as the employee termination, the Act assumes that before the employer proceeds with giving notice under the provisions of § 46 (1) (e) of the Labour Code, the employer would provide the employee with an opportunity to eliminate unsatisfactory work results, and thus actually prevent the termination. For these reasons, because – as stated by the Court of Appeals – ‚there must be a reasonable time gap between the written warning and the notice', the Act stipulates that the notice can only be given if the employee has been called upon to eliminate identified deficiencies within the last 12 months. We cannot agree with the opinion that the failure to fulfil the established requirements for the employee's work results must occur within the specified period of 12 months (note that the amendment to the Labour Code stipulates 6 months). It cannot be ruled out that the failure to meet the requirements will last for a longer period of time, or that unsatisfactory*

[21] Resolution of the Supreme Court of the Slovak Republic of June 14, 2011, case no. 5 Cdo 17/2011.

work results will be remedied only temporarily and last a short time recur afterwards or to the same extent. Therefore, the employer cannot be denied the right to decide on their own, in the period following their call onto the employee to eliminate the deficiencies in their work, that it will no longer wait and proceed with the termination, because the detected defects have not been eliminated, or in the event that they have been eliminated, to wait to see whether the improvement in the employee's work results shows a more stable level and was not just a temporary, short-term and isolated fluctuation in the otherwise unsatisfactory level of work results. If it turns out that the employee's work results are – except for a short period in which they showed improvement – still unsatisfactory, in its decision to terminate the employee, the employer is bound only by the fact that it is obliged do so within 12 months following the call on the employee to eliminate unsatisfactory work results."[22]

It is sufficient for the employer to prove only that there really was unsatisfactory performance. The employer may apply this reason for termination only if the employee has been warned about their unsatisfactory performance and yet has failed to eliminate the alleged shortcomings. The employer's call for remedying unsatisfactory performance must be made in writing. At the same time, the employer must provide the employee with a reasonable period during which the employee has the opportunity to improve their work performance. Only after meeting these conditions is the employer entitled to terminate the employee. The employer may be dissatisfied with the employee's performance for a long time, but if the employer wants to terminate the employee due to unsatisfactory performance, it may do so only after the employer has asked the employee in writing to eliminate the deficiencies in the preceding six months and the employee has not eliminated them in a reasonable time. It should be pointed out that the tasks assigned by the employer must be realistically achievable (or possible). The Labour Code does not stipulate the rules for determining the deadline for eliminating unsatisfactory performance. Therefore, when determining the deadline, it is necessary to base it on the agreed type of work, on the specific conditions under which the work is performed, and to consider the principle of proportionality and, at the same time, the possibility of eliminating the alleged deficiencies. In this situation, it can be considered crucial that the employer's written warning is delivered to the employee in a reasonable time before the notice is given, that is, the employee must have sufficient time to eliminate deficiencies. Only if the employee fails to remedy the deficiencies within a reasonable period of time, may the employer proceed with the termination notice.

In the application practice, the reason for termination due to unsatisfactory performance is often confused with insubordination. In the case of unsatisfactory

[22] Resolution of the Czech Supreme Court of September 22, 2009, case no. 21 Cdo 4066/2008.

performance, it is the objective failure of the employee to perform work to the employer's satisfaction, the employee does not violate obligations under labor law, but is not able to "work well". The employer does not have to prove the fault of the employee in the same way as in the case of insubordination (the employer does not have to prove whether the employee fails to perform satisfactorily intentionally or due to negligence).

Situations may arise when the employee violates work discipline which is coupled with unsatisfactory performance, or that unsatisfactory performance may also occur as a result of insubordination. According to the court, *"for the termination reason under provisions of § 52 (f) of the Labour Code, the sentences following the semicolon, employee work must typically yield unsatisfactory results and no violation of work duties is required at all (although it is not excluded that the employee's work is unsatisfactory also because they have violated some of their duties). The provisions of § 52 (f) of the Labour Code, the sentences following the semicolon, state that an objective finding that the employee's work results are unsatisfactory is needed, regardless of whether this is the result of the employee's culpable actions (at least in the form of negligence). At the same time, it is completely irrelevant whether unsatisfactory work results from the employee's incompetence, incapacity, irresponsible approach to their work duties, etc. It is essential that there are objective unsatisfactory work results (for comparison, there is a judgment of the Supreme Court of November 16, 2006 case no. 21 Cdo 758/2006, published under No. 35 in the journal Soudní judikatura, 2007). Reason for termination under the provisions of § 52 (f) of the Labour Code, the sentences following the semicolon, the work showing employee's unsatisfactory results thus gives the employer the right to decide that it does not have to continue to employ a natural person who is not capable of performing the agreed type of work in the prescribed (required) manner and who is not able, without fault of the employer, to comply with the legitimate demands of their employer in performance of their work (compare with the judgment of the Supreme Court of March 11, 2010 case no. 21 Cdo 4482/2008)."*[23] In many cases, it is also difficult to distinguish whether the employee behaviour meets the definition of unsatisfactory performance or insubordination. In such case, it is necessary to examine whether the employee behaviour, which is not in accordance with their work duties, amounts to culpability (at least breach of duty due to negligence). If the fault of the employee is proven, the insubordination as the reason for termination may be applied.[24]

It also seems interesting to assess the case where the courts considered the employer's right to assess the employee's insubordination and the employee's right

---

[23] Resolution of the Czech Supreme Court of January 31, 2019, case no. 21 Cdo 2676/2018.

[24] Resolution of the Czech Supreme Court of November 31, 2006, case no. 21 Cdo 758/2006.

to protect other subjective rights. The specific case involved a situation where the employer assessed the female employee's actions as unjustified absence, while her action consisted of urgent need to fulfil a basic human right (specifically, the right to protection of life and health – the employee left the workplace due to a deteriorating health condition and to obtain help/medicine she, visited the nearest pharmacy). In this case, the courts prioritised the protection of other rights (in this case the right to protect life and health) against the employer's right to terminate the employee and use their right to dispose of the workforce. The seriousness of the employee's actions consisted of the necessary protection of her other rights, and the employer should have used other forms of sanctions under labor law than employee termination, because it is possible to demand from the employer to continue employing the employee despite her actions and the exceptional situation in which she committed the behaviour that would under other circumstances be considered as a basis for immediate employment termination.

As follows from the legal regulation on employment termination, the Labour Code distinguishes two degrees of insubordination intensity, namely minor and serious insubordination. The degree of intensity/seriousness of insubordination is assessed by the employer depending on the specific circumstances under which the employee violates work discipline, ultimately, in the event of a lawsuit, only the court is authorised to assess and decide on the severity of insubordination. *"Given the nature of the cited legal provision, which belongs to legal standards with an indefinite (abstract) hypothesis, it is always the court's task to define this hypothesis at its own discretion, taking into account the circumstances of the case. It is up to the court to assess whether the employee has committed a culpable insubordination and, in the case of a positive finding, to decide what degree of the insubordination is involved in the case at hand. In these deliberations, the court is not limited by any specific points of view or boundaries, but only examines the specific circumstances of the case under consideration and, in support, the applicable jurisprudence, if adopted. It follows from the above that when assessing the degree of insubordination intensity, the court is not bound by how the employer evaluates a certain behaviour of its employee in its work regulations (or in another internal regulation)."*[25]

Since the assessment of insubordination is ultimately up to the court, the employer should be consistent and evaluate each act of insubordination separately, in accordance with the established jurisprudence. In determining the seriousness, the employer should take into account the employee's personality, the position the employee holds, their previous attitude towards performance, the time and situation in which the insubordination occurred, the extent of the

---

[25] Resolution of the Supreme Court of the Slovak Republic of February 17, 2011, case no. 5 Cdo 17/2011.

employee's culpability, the manner and intensity of the violation of the employee's specific duties, the consequences of insubordination for the employer, whether the employee caused damage by their actions, and at the same time, it is necessary to take into account the specific circumstances of the employer.[26]

If the employer likes to deal with insubordination (and possibly terminate the employment), the employer is obliged to prove (must have relevant evidence) which specific obligation/several obligations the employee violated and that insubordination was the fault of the employee (the employer must prove that the employee violated duty either intentionally or at least as a result of negligence).[27]

In general, it can be stated that, depending on the nature of the work performed, a certain degree of quality of work is required from the employee (if it is work for which the quality of the service provided, the manufactured product, etc. is important), the production of a predetermined number of products (if it is work, the outputs of which can be quantified, for example, by determining labour consumption standards) or the provision of a service or manufacture of a product in a predetermined manner. If the employee fails to meet the employer's expectations (pre-determined procedures), the employer has the option of terminating the employee due to unsatisfactory performance. Unsatisfactory performance is based on an objective finding, the fault of the employee is not investigated. Therefore, it is not essential whether the unsatisfactory performance is a consequence of the employee's inability, incapacity, or an irresponsible approach to performance of work duties. What is important is that objectively there is unsatisfactory performance and the employer can prove it (it does not have to prove any fault of the employee).

The employer can apply this reason for termination only if the employee has been invited in writing to eliminate the deficiencies. The employer's warning against unsatisfactory performance must be made in writing and the employer must provide the employee with a reasonable period of time during which the employee has the opportunity to improve their work performance. Only after meeting these conditions can the employer terminate the employee.

The nature of a written warning (whether against insubordination or as a call for remedying unsatisfactory performance) is not, according to the prevailing opinion, that of a legal act, and it can be concluded that even the employee does not face any legal consequences based on the warning received. The legal qualification thus refers to it as a factual act of the employer, by which they fulfil the

[26] Resolution of the Czech Supreme Court, case no. 21 Cdo 1252/2002; Resolution of the Czech Supreme Court, case no. 21 Cdo 414/2001.

[27] More details in OLŠOVSKÁ, A. 2019. In ŠVEC, M. – TOMAN, J. et al. *Labour Code. Collective Bargaining Act. Commentary,* Bratislava : Wolters Kluwer, 2019. p. 647 et seq.

substantive legal condition established by the legislation for the possibility (not the obligation) of subsequent valid termination of the employee if there is a repeated breach of duty on their part or failure to improve their work performance in the reference period specified. The employer's written warning is thus considered a substantive prerequisite for giving a valid notice, not a legal act and, therefore, the possibility of its review by the court is also questionable, especially if it is a condition for employment termination or for non-recognition or reduction of a certain wage component or some of the above-tariff wage component (remuneration, benefit). Since the Labour Code does not combine a nullity clause with a written warning/notice, it is questionable whether the warning can be expressed verbally or implicitly. However, a question arises related to the obligation to deliver the employer's documents regarding the establishment, change and termination of employment, or the establishment, change and termination of the employee's obligations arising from the employment contract, stipulated in § 38 (1) of the Labour Code. The employer's warning against insubordination as well as its request for remedying unsatisfactory work performance can be considered to be a document that meets the definition of documents under § 38 (1) of the Labour Code, and, therefore the warning/notice in question should be in written form.

At the same time, it is necessary to draw attention to the fact that the validity of the employer's fulfilment of the substantive legal condition is limited by six calendar months, stipulated by both legal provisions (pertaining to the assessment of repeated minor insubordinations by the employee and unsatisfactory work performance when neither has been eliminated within the period specified by the employer with a warning delivered in the preceding six calendar months). Upon expiration of this period, if the employment is not terminated, the employee's personal file will retain this warning, but the employer can no longer validly terminate the employee by giving them the notice.

On the other hand, this does not prevent the employer from considering insubordination by the employee or their unsatisfactory work performance for the purposes of implementing other labour-law institutes for a period longer or shorter than the six calendar months established for valid termination of the employment under § 63 of the Labour Code. Typically, these acts of insubordination are taken into account by the employer when the employee requests the employer a raise to a higher tariff class, or for the purposes of, for example, reduction of various above-tariff wage components per calendar months or other bonuses assessed on the basis of a calendar year.

However, in addition to issuing a warning against insubordination or unsatisfactory work performance, the employer may impose, depending on its internal environment, another sanction under labour law for any specific actions, depending on the nature of the breach of duty by the employee, the number of repetitions of the breach of this duty and, of course, also on assessment of the subjective circumstances under which the employee's actions took place. In addition to other peculiarities, the dominant element of the imposed sanction will be the nature of the employee's work activity and job classification. For most employers, the less substitutable the job position and activity and the more marginal the number of employees at the employer, the less variable and frequent the sanctions imposed on employees. In the case of substitutable work activities and job positions, these are mostly characterised by being linked to the job position, which determines setting of employee sanctions.

1.3 Sanctions under labour law and their adequacy

Although at first glance, due to employment relationship falling under private law, a variability of sanctions to be imposed on the employee under labour law might seem possible, or that this possibility is unlimited, this is not what the Labour Code allows. Upon closer examination of the application practice, there is no such indication. Considering diversity of legal relationships within which dependent labour occurs (be it, for example, in the field of civil service, state employee relations, etc.), we will focus mainly on the private sphere, within which the direct and complete applicability of the Labour Code is exercised and the performance of dependent work is not regulated by other special regulations that would significantly affect working and wage conditions.

The employer's ability to sanction the employee for insubordination or unsatisfactory work performance is significantly limited. For cases of negative employee behaviour, the Labour Code provides an option of terminating the employment or giving a written warning against the employee's negative behaviour (§ 63 and Section 68 of the Labour Code) and only marginally deals with certain sanctions in connection with certain insubordination, namely the leave reduction (§ 109 (3) and (4) of the Labour Code) and decision not to compensate the wage lost to public holidays (§ 122 (4) of the Labour Code). At the same time, it distinguishes the mechanism for insubordination (§ 63 (1) (e) of the Labour Code and § 68 (1) (b) of the Labour Code) and for unsatisfactory work results (§ 63 (1) (d) (4) of the Labour Code) in relation to written warnings and subsequent employment termination.

The very imposition of a sanction under labour law and the imposition of a labour-law sanction of a specific type must, therefore, always be considered with regard to the intended goal that the employer wants to achieve by imposing the labour law sanction. It might seem that the more severe the sanction the employer imposes on the employee (emphasis on the repressive function), the lower the number of similar violations by the employee and also by other employees. However, in practice, the above does not work in many cases. Each employee is different, each employee's misconduct is different. For some, a sanction in the form of an interview with a superior employee is sufficient to effectively achieve the result, which is the performance of work in the required quality and compliance with the work discipline, for some it is necessary to impose a stricter labour-law sanction. An individual approach should, therefore, be taken into account by the employer even in the form of the imposed labour-law sanction, but with the condition of observing the principle of equal treatment, which is not always easy in practice. Absence from work is a frequent negative behaviour of employees, so we can show the employer's approach using this example. The significance of examining the reasons on the part of the employer for which the employee's unexcused absence occurred can have several levels, which have an impact on the effectiveness of the imposed labour-law sanction. If the employee was not present at work because the employee simply did not want to come to work several times (or for a longer period of time), any imposed sanction (which is proven by practice) usually has no effect on similar actions pro futuro and will not have a preventive effect on other employees at all. In this case, the choice of, for example, leave reduction or decision not to pay the above-tariff wage component would probably not be enough and the employer should consider terminating the employment. If the employee was not present at work, for example, for a personal reason, and the Labour Code does not perceive such absence as an obstacle to work, the above-mentioned approach of terminating the employment relationship would not be appropriate. The employer can look for other solutions to the situation, for example, in the form of qualifying the employee's absence as work leave, which the employee will additionally compensate for by working overtime. In such situations, it would be possible to consider reducing the above-tariff wage component, so that the employee realizes that their absence, despite the existence of their reasons, has fundamental effects on the employer as well.

The Labour Code does not directly regulate monetary sanctions that could be imposed on employees (non-awarding of wage compensation under § 122 (4) of the Labour Code can be perceived as a certain monetary sanction).

A contractual penalty cannot be used in the labour-law relations, in accordance with the principle of limitation of contractual types pursuant to § 18 of the Labour Code[28]. A certain form of monetary fine can be perceived as monetary

[28] According to this Act or other labour law regulations, a contract is entered into as soon as the participants have agreed on its content.

compensation paid by the employee to the employer if the employee does not comply with the so-called non-compete clause pursuant to § 83a (5) of the Labour Code[29] and monetary compensation paid by the employee if the employee does not stay with the employer during the notice period pursuant to § 62 (8) of the Labour Code[30]. However, the Labour Code does not typically regulate monetary sanctions that can be imposed on employees. It is, therefore, necessary to think about whether it is even possible to use them in labour relations. Thus, it is necessary to examine whether the setting of wage conditions at the employer in the remuneration system may contain any monetary sanctions.

Pursuant to § 43 (1) (d) of the Labour Code, the employer is obliged to agree with the employee on the essential details, which are the wage conditions, in the employment contract, unless they are agreed in the collective agreement. Unilateral monetary sanctions from the employer are, therefore, not considered at all. This is also confirmed by § 119 (2) of the Labour Code, according to which the employer agrees on wage conditions with the relevant trade union body in the collective agreement or with the employee in the employment contract. For a member of a cooperative, for whom, according to the statutes, an employment relationship is a condition for membership, the wage conditions can also be adjusted by a resolution of the members´ meeting. What can be understood under the term wage conditions can be derived from § 119 (3) of the Labour Code, according to which, in the wage conditions, the employer shall agree, in particular, on the forms of remuneration of the employees, the amount of the basic wage component and other components of benefits provided for work and the conditions of their provision. The basic wage component is the component provided according to the time worked or the performance achieved.

As already mentioned, the Labour Code does not directly regulate monetary sanctions, but the application practice uses them as an effective tool, especially in the form of various extra-legal/above-tariff wage components, which, in the case of disciplinary processes, the employer does not award to the affected employees or reduces their amount. If the application practice uses monetary sanctions, it

29 In the employment contract, the employee and the employer can agree on an adequate monetary compensation, which the employee is obliged to pay if the employee violates the obligation according to § 1. The amount of monetary compensation may not exceed the total amount of the employer's monetary compensation agreed pursuant to the § 4. The amount of monetary compensation shall be reduced accordingly if the employee fulfilled their obligation partially. Upon payment of monetary compensation, the employee's obligation pursuant to the § 1 shall cease.

30 If the employee does not remain with the employer during the notice period, the employer has the right to monetary compensation in an amount not greater than the product of the average monthly earnings of this employee and the length of the notice period, if this monetary compensation has been agreed upon in the employment contract; the agreement on monetary compensation must be in writing, otherwise it is invalid.

is necessary to investigate whether such procedure can be set out in the agreed wage terms in the employment contract or the collective agreement. Therefore, in the following chapters, our interpretation will focus on how the employers approach the definition of various extra-legal monetary payments to employees and how they set out the terms for recognition of those payments in terms of their claimability/non-claimability, and how judicial practice handled some monetary payments that employers perceived as non-claimable. Although when imposing monetary sanctions in the form of non-awarding or reduction of extra-legal monetary benefits, there is often no distinction between employee disciplinary offences, for the reason that the conditions of provision or non-provision of monetary benefits, it is necessary to distinguish whether a monetary sanction will be imposed depending on the quality of work performance or for insubordination.

In practice, depending on the type of breached duty or unfulfilled work task, imposition of sanctions is often focused mainly on the area of employee remuneration, leave reduction or stunted career growth. As a rule, the employer does not consider terminating the employee, otherwise imposition of sanctions in question would not be effective (and it would make more sense to save costs before employment termination rather than to achieve the assumed goal of strengthening the prevention of sanctioned actions by employees). Also for this reason, the majority of sanctioning mechanisms in practice focus of failure to meet the conditions for recognition of above-tariff wage components, fulfilment, examination of K.O. criteria[31] for limiting the progression between individual tariff classes for tariff-remunerated employees, limiting the growth of contractual wages compared to other employees, and for senior employees, sanctioning mechanisms are applied as "malus" or "clawback[32]" for specific types of above-tariff wage components.

The use of various monetary instruments to motivate employees to properly execute their work tasks and to ensure compliance with obligations appears to be effective. We normally perceive them as certain monetary sanctions, although the Labour Code does not stipulate them directly, but they follow from the wage terms.

In practice, monetary sanctions are usually different, depending mainly on the nature of the employer (manufacturing company, services provider, sophisticated services provider, etc.) as well as on the nature of the workplace. If these are the so-called worker or office positions, with a remuneration system based on a combination of guaranteed wage component and a certain type and number of above-tariff wage components, the sanctions will mostly be aimed at reducing or not awarding these individual above-tariff wage components, depending on the

[31] K.O. criterion is a specified condition or situation which, when it occurs, completely disqualifies the employee from the possibility of obtaining a specific above-tariff wage component.

[32] See the interpretation in the following chapters of the publication.

wage terms and conditions for their recognition agreed with the employer. In the case of jobs higher up the hierarchy or jobs involving a specific work activity with a small number of employees, their remuneration system will mostly be based on a combination of a contractual wage or a tariff wage with a small number of above-tariff components in the form of some monthly or quarterly remuneration (including annual bonuses), where imposition of sanctions under labour law will focus on the use of the malus or clawback system. In this case, too, we can therefore quite clearly identify a differentiated perception of sanctions under labour law sanction among different categories of employees, where for some these may fulfil a preventive or repressive function and for others exclusively repressive with the aim of a certain compensation for the damage caused to the employer. Therefore, it is not possible to have a unified perception of the meaning and setting of the sanctioning mechanism for employers, because its creation and impact on employees is unique for each employer and depends on the nature of its internal environment.

If we perceive the set system of wage terms as containing conditions for awarding various financial benefits (beyond the scope of regular remuneration, for the purposes of this publication we will refer to them as benefits and/or above-tariff wage components) depending on the quality of the employee's work and if the employee performs the work unsatisfactorily, this system does not grant the employee certain monetary resources, we can perceive such system as compliant with labour law regulations. In the event that even the basic remuneration is linked to the quality of the work performed, it is necessary to set such system precisely (for example, the wage, its components defined as per the labour consumption standards, task wage). To put it simply, we can state that not awarding certain monetary benefits to an employee who failed to achieve the results does not normally appear as a sanction, but rather the provision of such wage benefits as the employee is entitled to for the work performed. Of course, under the condition that the criteria for evaluating work performance are set objectively and take into account the real possibilities of employees and respect their human dignity.

The question of monetary sanctions for insubordination seems to be more complex, because it incorporates not only a focus on definition of conditions for awarding individual above-tariff wage components, the reduction or non-awarding of which is often used as a form of monetary sanction against the employee, but also the nature of the employee's actions, for which such monetary sanction should be imposed on the employee at all and, at the same time, how the amount of this monetary sanction will be determined and how the employer will calculate the same. When imposing sanctions, the nature of punishment for insubordination comes to the fore, which is often perceived as a one-sided financial penalty for the employee, and therefore opinions on imposition of monetary sanctions for violation of work discipline are contradictory.

It can be stated that in the vast majority of insubordination cases, the quality of the work performed by the employee also suffers (for example, work performance clearly suffers in the event of the employee's unjustified absence). Employee's failure where it comes to work discipline can also have wider consequences when it disrupts the working environment at the employer (for example, the employee achieves the required results, but his vulgar conduct has a negative effect on other employees). That is why we deem it important that the employer has the option to regulate negative behaviour of employees in the workplace, even with monetary sanctions. Employment termination as the only solution appears to be ineffective. In the event that the employer agrees on a remuneration system with predictable conditions for awarding/not awarding above-tariff wage components depending on respecting the work discipline by employees, while observing mandatory labour-law standards and principles, imposition of monetary sanctions in accordance with labour law regulations is believed to be consistent therewith.

Adequacy

The key term for correct setting of disciplinary process by the employer under the conditions of insufficient legal regulation of such process by the Labour Code and – in relation to monetary sanctions practically non-existent – is *"adequacy"*. It is the proportionality between the employee's breach of duty/unsatisfactory work performance and its consequences and the sanction imposed by the employer, not only in relation to a specific employee, but also to other employees where it should have the preventive function. And, of course, closely related to adequacy of a sanction imposed under labour law is the concept of justice.

It is also necessary to answer the question of why the employer wants to impose any sanction on the employee and what significance this sanction should have for the employee in question and for other employees. The choice of the reason for which the employer sanctions the employee is reflected precisely in the consequence of the sanction in relation to the employee and in particular the assessment of whether the imposed sanction is appropriate and fair in relation to the employee's actions. If there is an obvious disparity between the sanction imposed and the employee's actions, when not only from the point of view of the affected employee, but also of other employees, the imposed sanction is clearly disproportionate, the employer creates a problem not only when evaluating the actions of other employees under different circumstances, but at the same time, the employer creates the impression of unfair actions towards all employees. Such approach of the employer may result in decreased efficiency of employees' work performance, as well as in diminished willingness to fulfil their duties better than before, and it is not appropriate to underestimate the feeling of having been "wronged." From the practical point of view, an improperly imposed sanction will cause greater problems for the employer than its imposition will in a specific individual employment relationship, because the impact on their reputation in the eventual recruitment of additional employees is fundamental (this has been the experience of some foreign employers, for whom the jobseekers do not want to work on the grounds that they punish the employees for everything, etc.).

Adequacy of the sanction imposed and its perception as fair could be based on how the mutual assessment of the correlation of several basic human rights and freedoms plays out. Within the labour law framework, we could thus proceed from a mutual clash of the employer's right to perform business activities, to protect their property, the right to demand proper and responsible performance of the employee's work and the employee's right to fair and satisfactory working conditions. The court dealt with the question of proportionality in labour relations, although in connection with insubordination, not directly with sanctions, but we consider it necessary to state that the question of proportionality is also essential for imposition of sanctions and is important for the mutual relationship between the employee and the employer in general. In the given dispute, it was about the employer's efforts to punish the employee's expressions on social networks in terms of violation of the obligation pursuant to § 81 (e) of the Labour Code, when the employer believed that the employee, by their negative comments about the employer or their representatives, was acting contrary to the employer's legitimate interests. *"Freedom of expression and the right to information are guaranteed by the Constitution of the Slovak Republic in § 26 (1), which, however, must not unduly interfere with the honour and good name (reputation) of natural and legal persons. There is thus a conflict between two fundamental rights also published in the Charter of Fundamental Rights and Freedoms, namely the right to protection of personality (Article 10 of the Charter) and the right to freedom of expression and information (Article 17 of the Charter). The Constitution regulated (the only) restrictions on exercising these rights in its Section 26 (4). These restrictions also include "the protection of the rights and freedoms of others... The application of these fundamental rights is about creating an appropriate balance between the right to information on the one hand and the right to protect the personality of the person about whom the information is obtained."*[33]

Pursuant to § 5 of the Labour Code, the employees and the employers are obliged to properly fulfil their obligations arising from the labour law relations. Violation of an employee's duty is precisely a violation of this positive obligation

[33] Ruling of the Regional Court Bratislava of October 26, 2021, case no. 5 Co 150/2020.

of the employee specified in more detail primarily in § 81 or in § 82 of the Labour Code and in other regulations and instructions. If we simplify the reciprocity of rights and obligations within the labour law relations, as a result of insubordination, the employer should have the right to pay the employee lower than agreed wages, provided that such sanctioning mechanism is agreed through the application of § 119 (3) of the Labour Code in relation to § 43 (1) (d) and (e) of the Labour Code. Similarly, the employer should be able to proceed in addressing a case of unsatisfactory work performance. The basic characteristic of the employment relationship is remuneration, and the employer should have the opportunity to provide such wage remuneration to the employee as corresponds to the quality of their dependent work, and in the event that there is any negative employee behaviour, the employer should have the opportunity to modify remuneration.

Due to the fact that neither the Labour Code nor any other labour law regulation govern the employer's procedure for evaluating employee actions, if the employer decides not to terminate the employee but to use another type of sanction under labour law, in the application practice, the procedure is mostly based on the assessment of analogous examples dealing with insubordination or unsatisfactory work performance in the case of employment termination. Also, under the stated premise, we tried to derive the degree of adequacy of the sanction imposed in relation to the employee's actions from the relevant cases of employment termination, in which judicial practice established certain models of appropriateness of the employer's procedure. Also, in this sense, therefore, for example, the nature and amount of the imposed monetary sanction should have corresponded to the seriousness of the employee's actions as described below.

"After taking into account the above-mentioned facts, and after taking into account what specific behaviour of the plaintiff was criticised in the statement (her pouring water on two employees, shoving and head slapping), the court came to conclusion that this was minor insubordination. Under the given circumstances, the court posited pursuant to § 63 of the Labour Code that the defendant should have warned the plaintiff that they would not accept the way in which she managed the branch and how she fulfilled the duties of a senior employee in relation to some employees in creating a favourable working environment and employee development. According to the court, it was also important to warn the plaintiff in order to eliminate subjectivity in the assessment of her behaviour, because what one employee considers to be just a harmless display of temperament, another may consider intimidation. It is important that objective behavioural criteria are established in the workplace and that employees, including the plaintiff, are then consistently required to fulfil them. According to the defendant, it is not possible to fairly ask the defendant to continue employing the plaintiff. The actual essence of insubordination

consisted of systematic hostile behaviour, belittling of colleagues, moral humiliation, which fulfilled the actual essence of mobbing and bossing. It would not create a good working atmosphere, nor favourable working conditions for colleagues, moreover, the plaintiff worked in the position of a senior employee."[34]

Inadequate or incorrect performance of work by the employee is thus logically linked to the possibility of the employer to pay out a wage lower than the amount that is normally granted to the employee for the relevant period when the employee performs the work in a way perfect (expected, agreed upon) for the employer. It is, therefore, not unfair if the employer, for example, proceeds with reduction of any of the above-tariff components of the wage, if such option has been agreed with the employee or employee representatives as part of the remuneration terms upon establishment of an individual relationship under labour law, provided that the application of the sanction in question does not fulfil the material legal conditions of violation of good morals or abuse of law.

Due to absence of assessment of a specific case and specifically formulated terms for awarding above-tariff wage components, it can be stated that in establishing the terms of awarding a specific above-tariff wage component, the employer will state whether its award depends on the qualitative or quantitative level of fulfilment of duties or work tasks by employees. Sanctions under labour law can thus be imposed in both cases in the form of reduction or not awarding the above-tariff wage component. Therefore, it does not primarily depend on the nature of the employee's breach of duty, but also on the facts of how this breach is assessed and to what extent it is included in the terms for awarding specific forms of employee compensation. For the purposes of the interpretation in question, in both cases, the imposition of a monetary sanction is for the failure to perform work tasks in the required quality or quantity. It goes without saying that the appropriateness of the imposed monetary sanction in relation to the employee's breached duty is a relevant fact.

The basic premise of imposing a sanction is the necessity of evaluating whether it is necessary to impose some form of a sanction on the employee under labour law for their actions and, at the same time, to evaluate what form of sanction to impose and what effect it will have on the employee in question, that is, whether it will be appropriate to the nature of the breached duty and its consequences. The adequacy of the sanction imposed under labour law thus represents the essence of the existence of the given labour law sanction, that is, will a warning be enough for the employee to avoid insubordination in the future or is it necessary to choose a more severe punishment in the form of, for example, leave reduction or cutting the above-tariff wage component, so that the employee also "physically"

[34] Ruling of the Bratislava III District Court of October 01, 2021, case no. 24 Cpr 2/2019.

feels the consequences of the breached duty. In this regard, the sanction imposed under labour law is only a repressive component of the employer's remuneration system, which is intended to deter employees from further breach of duty. In the labour law, however, there is basically no mechanism for defining adequacy in relation to the employee's breached duty, and the entire burden of choosing the correct approach is basically left to the employer itself (which can be an advantage to some extent, but also a disadvantage in terms of the cited court conclusions, when the employer chooses incorrect strategy of sanctioning their employees). For a "healthy" working environment, however, we perceive the motivational function of various monetary benefits as important and, therefore, we can consider setting up a remuneration system that primarily provides basic wage benefits in the event that the employee performs the work well (or fulfils work tasks beyond the expected scope), does not commit any insubordination, the remuneration system provides the employee with various other, above-tariff benefits.

For the purposes of labour law, the interpretation of "adequacy" used, for example, in criminal law or commercial law appears inappropriate, since in both cases the basic element of protecting the weaker party in the form of employee is absent (in commercial law, reasonableness is interpreted primarily in relation to the reasonableness of the agreed contractual fine between business partners, and in criminal law reasonableness is assessed primarily in relation to actions of the perpetrator and the threat to the public interest, the consequences of their actions, etc.). In labour law, we cannot apply similar premises, since the employee's actions in violation of one of their duties may not have any identifiable consequence compared to, for example, criminal law, where it is the result of a criminal act, for example, damage to property or damage to the victim's health (legal or factual) in addition to the breach of duty itself, or this consequence, for example, the employer's rights or interests protected by law cannot be quantified (for example, the absence of actions by a senior employee towards subordinate employees in the form of a control activity presupposes a violation of the senior employee's duty, but without a negative consequence if the employees nevertheless perform their work duties properly and responsibly).

Taking into account the above-mentioned starting points for defining the adequacy and nature of the breached duty, the employer must also consider the circumstances under which the breach of duty in question occurred and the consequences of the breach of duty in question. The imposition of sanctions under labour law cannot be implemented as a general rule, as in the case of imposition of contractual fines in commercial law, but it is necessary to assess each breach of duty individually and to take into account the adequacy and fairness of the sanction imposed under labour law. Even if two different employees violate the same obligation, but under possibly different circumstances and with different consequences for the employer or other employees. In our opinion, the imposition of the same sanction in two different cases under different circumstances would lead to the conclusion of inadequacy of the sanction imposed in a specific case. In doing so, the employer should consider not only the nature of the employee's work and position, but also the potential consequences that such breach of duty will bring about. Undoubtedly, delay of an employee in the production process can be considered more serious when violation of the obligation to be present at the workplace at the beginning of working hours causes, for example, interruption of the production process compared to a delay by an administrative employee, whose breach of duty may not have any direct impact on the legitimate interests of the employer except for the missed part of the employee's work shift, for which the employer should pay them the wage (although this is the same breach of duty in both cases of employees, consequences are more serious in the first case and therefore the imposed labour law sanction should also be different).

2 CONCERN REVIEW AS A SPECIAL DISCIPLINARY PROCEDURE MECHANISM

Employers commonly referred to as multinational companies, multinational concerns, or parent and subsidiary companies[35], operating in several countries and interconnected in some way, tend to maintain the same policies in all areas, e.g., ways of organizing the working environment and common business practices, to the extent that the legal environment in which they operate permits. What is interesting in the context of disciplinary procedure is the examination of the so-called corporate process.[36] Review (screening, investigation) procedures and the status of entities/bodies that implement this process and effectively act as in-house bodies shall be examined. However, their creation and activity cannot be influenced by the employer under a concern review. Introduction of concern reviews is directly linked to the desire of the owners of concerns, multinational business entities, to retain influence and the right to enter (control) all the processes of subsidiaries or companies, regardless of the national (local) legal environment in which their subsidiaries operate. While initially the focus of concern reviews was primarily the issue of assessing the commercial, production or administrative-technical relations taking place in local companies, the increasing desire to influence the overall environment of companies and also the degree of

---

35 Given the focus of the publication, it is not our aim to provide a commercial law interpretation of the status and operation of such companies, so we use commonly used terms.

36 When using the term "concern", we rely mainly on German and Austrian law, or Czech law, which is related to both. Czech Act No. 90/2012 Statutes, the Commercial Code, contains a definition of a multinational concern in § 66a para. 7. *"If one or more persons are subjected to a single management (hereinafter referred to as the "controlled person") by another person (hereinafter referred to as the "controlling person"), such persons shall form a concern (holding) with the controlling person and their undertakings, including the undertaking of the controlling person, shall constitute a concern. Unless the contrary is proved, the controlling person and the persons controlled by him shall be deemed a concern. Persons may also be subject to unified control by contract (hereinafter referred to as a "controlling contract"). A control agreement may also be concluded in relations between the controlling person and the persons controlled by the controlling person.... "*. The definition is also contained in the German Aktiengesetz in the provisions of § 18 as follows: *"If the ruling [i.e. controlling] and one or more dependent [i.e. controlled] undertakings are united under the single management of the ruling undertaking; they form a concern; the individual undertakings are concern undertakings. Undertakings between which there is a controlling contract (...) or one of which is integrated into the other (...) shall be regarded as undertakings under single management. A dependent undertaking shall be presumed to form a concern with the parent undertaking*'.

flexibility of labor relations has led to significant penetration of concern reviews also into the implementation of the content of local labor relations entered into and exercised under national laws.

The deepening interest in introducing concern reviews also in the area of labor relations is, in many cases, a consequence of increasing revelations of conduct detrimental to the interests of the Group[37]. There are breaches of rules that can be seen in terms of labor discipline as ethical rules, a kind of superstructure of the basic duties of employees, which are intended to set rules for the internal functioning of the company that does not, in turn, endanger the company's reputation externally. The review procedures concern the investigation of such negative employee behaviours, which consist, for example, of favouring only certain business partners in exchange for additional benefits for senior employees, in cooperation with state administration authorities in exchange for favourable authorization processes in individual administrative procedures, or in the selective choice of local suppliers for the repair of machinery and equipment, which were not chosen according to the established procedure of achieving the most favourable price-performance ratio.[38]

In simple terms, suppose there is negative employee behavior that can significantly affect the reputation of not only the local employer (but also the group, multinational company). In that case, the disciplinary procedure falls into the hands of an entity/body that the employer does not set up, but is rather a joint body of the group or, as a rule, a body set up by the parent company. At the same time, the members of this body are not employed by the employer and the employer has not (and cannot) in any way fill such positions. Considering the predominantly national nature of employment relations legislation and the absence of relevant legislation (national or European), the process of concern review thus finds itself in somewhat a vacuum. The review body is effectively placed in the position of the employer vis-à-vis the employees under investigation, and it is therefore questionable whether it has the status of a kind of representative of

---

[37] ZAUŠKOVÁ, A. – KUBOVICS, M. – ŠČEPKOVÁ, S. 2022. Digitalisation in industry 4.0. In MIHAJLOVIĆ, I. (eds.) *Possibilities and barriers for Industry 4.0 implementation in SMEs in V4 countries and Serbia*. Bor : Univerzitet u Beogradu, 2022, pp. 372-407; other in ZAUŠKOVÁ, A. et al. 2022. Current state and prediction of the future of digitization as a part of industry 4.0. In *Serbian Journal of Management*. 2022, vol. 17, no. 1, pp. 111-123.

[38] As practice shows, it is not infrequently the case of causing damage to property on a large scale, in which the factual essence of some crimes against property is often fulfilled. However, in order to preserve the reputation of the group, the vast majority of the cases investigated are not referred to the law enforcement authorities but end with the conclusion of an 'agreement' to terminate the employment relationship, particularly for employees in the first or second line of management in the employer's organizational structure.

the employer acting on behalf of the employer. In practice, neither the body nor its members have any authority from the local employer under review. Whether this would be through the use of the institution of representation or if one of the members of the review body is an employee of the employer, we can consider the issue of delegation.

However, it is necessary to consider whether there needs to be any direct legal relationship between the ‚reviewed/investigated' employee and the review body (or its members) and whether there needs to be a legal relationship between the local employer and that body. Indeed, the results of the review procedure are the basis for the subsequent decisions of the employer (in many cases, the decision also consists of the termination of the employment relationship with the employee). Therefore, we can ask ourselves whether the review procedure, which is, in fact, a certain (and essential) part of the disciplinary procedure (the employee's behavior is assessed, the circumstances of a breach of a rule are examined, etc.), can be considered as a part of the disciplinary procedure.) is a legal proceeding. Therefore, if a body outside the employer carries out the review procedure, it should be in the position of a representative, or the review procedure is only of a sort of advisory nature. For the employer, its findings are only on an individual basis. Therefore, there does not need to be any legal relationship between the employee and the review body (it is sufficient that the review process is part of the employer's internal policies, or the process is adopted within the framework of the concern, without the need to anchor it in an internal policy).

If we assume that the employer has adopted the concern's regulations as its own, we can perceive the legitimacy of the review procedure precisely in this step (in such case, the relationship of the review body both concerning the local employer (who usually has to accept the process) and the relationship between the review body and the employee concerned is resolved). First, however, these rules should be formally issued, and for them to be binding on the employees, the employees should be made aware of them.[39] We see it important that employees also understand the regulations (it is often the case that concert regulations are issued only in English and ordinary employees do not understand them and consequently find themselves to be a part of the review procedure without being aware of the process) and that they are drafted in Slovakia.(Provided they are seen not as ordinary management acts but as regulations enshrining rights and obligations and thus having the nature of legal acts). In addition, these corporate regulations must align with local legislation (the duty of confidentiality and personal data protection are also seen as important).

[39] Pursuant to § 81(c) of the Labour Code, an employee is obliged to comply with the legislation and other regulations applicable to his work if he has been duly informed of them.

Given that we assume the professionalism of the members of the review body, their actions should comply with the relevant legal framework while respecting the employee's human dignity. Accordingly, we consider that if the actions of the review bodies are in any way detrimental to the employee, the employer is primarily liable for such actions (he is the one who did not prevent any negative behavior of the review body and effectively consented to its action in his/her workplace) and the employee should be able to defend him/herself; whether pursuant to § 13 of the Labor Code (if it were discriminatory conduct or possibly conduct against good morals, bullying) and in the event of damage, we can also consider the establishment of liability relationships.

In practice, however, it is possible to encounter cases in which the employer does not see the concern's regulations as part of its internal policies and perceives them as its subordination to the concern's regime (not only has it not issued the relevant internal policies, but it has not even informed the employees about the concern's regulations, nor has it explained these rules to them). As a result, should there subsequently be a breach of the concern's regulations concerning employment relations, the employer cannot assess such employee's conduct as a breach of the workplace rules, even if the conclusions of the review procedure have confirmed the breach of the concern's regulations (in this case, it is open to dispute whether a review procedure could have been carried out, but if we perceive that the employer has complied with the concern regulations, we can perceive that the review body could have carried out a review procedure, but no sanctions can be imposed).

If we proceed from the operation of concerns, the relations between the central management of the concern and the local companies are, said, created on a hierarchical principle, and the individual companies often adopt the concern regulations without assessing their compliance with the local legislation. Subsequently, the concern regulations often contain institutes and processes that are not even known to local law or are often beyond the legal framework. Employment relations are often perceived as rules not known to our labor law and could therefore be applied here. However, for some of them, we cannot confirm with certainty that they align with the purpose of mandatory labor law. It is common for review bodies not to be required to have any powers of attorney or authorizations drawn up by local companies concerning the head office. Formal adoption of Group policies, rules and regulations are sufficient for reviewing employees of the entire concern. It can be argued that such an approach may call into question the entire concern review process, particularly if at least one of the members of the review body is not an employee of the employer concerned. Therefore, an unauthorized body has acted against the employee. In practice, the most frequent cases are those in which there is an attempt to separate the local links from the concern review process and the review body. The review is conducted essentially without the representatives of the local employer, who then becomes a passive recipient of the concern review decision on whether or not the group's regulations/code of conduct/compliance rules have been breached. The employer is then required to take advantage of the relevant employment sanctions (in some concerns, sanctions are even given, and the employer is effectively unable to decide otherwise than as set out in the concern's rules). In the context of concern revisions, although the employee's employer acts in the position of local employment regulation as the employee's employment with the power to exercise the employer's discretionary power, it is hierarchically subordinate to the concern regulations and the bodies established by the concern.

In this case, it is a procedure which should ensure an independent investigation in which the employer cannot interfere (it happens that the members of the review body have, in some areas, even broader powers than the managers of the employee concerned).

It happens that the review body conducts the whole procedure regardless of the content of local legal norms or internal governing acts of the employer, its internal environment, and the result is a decision on the violation of ethical rules/violation of work discipline or a decision that there was no violation. The local employer (usually its HR department) receives only the decision on the outcome of the investigation and is obliged, if the employee is found guilty, to take the appropriate employment consequences against him/her/her (often not only) according to the national employment law.

Even at first sight, the procedure of concern review against local company employees may appear as a legal construct with several controversial areas in terms of compliance with national laws.

Bearing in mind that review procedures are primarily designed to investigate/investigate situations where there have been serious breaches of the code of conduct, damage to the reputation of the employer, the Group, leakage of sensitive information, therefore, employees of the employer concerned are usually excluded from such procedures to ensure objectivity. Furthermore, as it is not obvious which employees were complicit in the violations under investigation, it seems appropriate that the investigative body be composed of members outside the local employer's employees (even outside the employer's bodies). This is because, in many cases, there are also managers or other senior employees involved in serious breaches of the rules, who would be the ones who would be involved in the disciplinary procedure, the investigation, and whose involvement also in the review procedure would thus not achieve the desired objective.

Since we view the concern review procedure as a separate disciplinary proceeding, it shall be conducted under conditions outlined in our interpretation and analysis of disciplinary procedure and the related sanctions. We see it important to point out proportionality concerning sanctions that may be imposed and the review procedure as a whole. In practice, we encounter cases where an employee is denied the opportunity to consult a lawyer or have a staff representative present during the review procedure. It even happens that the review procedure is conducted in a foreign language that the employee concerned does not even understand. Even in such circumstances, the results of the review procedure are binding on the employer under the concern's regulations, and the employer subsequently imposes sanctions. We consider that if a sanction (or termination of employment) is imposed, the employee should be successful in any litigation against the employer, as the employer could find itself in the position of having failed to prove the employee's misconduct in a relevant way.

Our conclusions should be seen in general terms, as each case should be considered individually. Nevertheless, we wanted to point out the situations that occur in practice and the fact that if the employers are undergoing concern reviews, these should align with the Slovak labor law and the basic principles of the Labor Code. Otherwise, we doubt their relevance and compliance with labor law, including the imposition of labor law sanctions. Employees are often asked questions which are not related to their work and which infringe on the employee's privacy. We also perceive it as a problem that many employers are bound by the outcome of the review procedure in the sense of company regulations and cannot intervene in the process. They have to accept the proposed procedures but do not comply with the legislation. The employer finds him/herself in a situation where he has to choose between complying with the relevant legislation and complying with the company rules. However, of course, he has to comply with the legislation (in this case, the whole process can be questioned because it is questionable whether the persons carrying out the review process are acting on behalf of the employer at all).

Review body

The question which quite naturally arises in connection with an investigation of a particular employee's conduct in the context of concern review is on what legal basis such investigation (we use the term investigation, which we consider appropriate concerning usually the process of interviewing an employee to establish the specifics of the employee's conduct that amounted to misconduct and to establish whether misconduct occurred and to collect relevant evidence) is conducted at all (this area is dealt with in the preceding section of this publication) and who may conduct such proceedings. Accordingly, this part of the publication focuses on the status of the review body and some aspects of the review procedure.

The practical exercise of a concern review, simply said, corresponds to a classical police investigation of a person. In the framework of the internal rules, the review body, or the members of this body, referred to as investigators, are usually granted four basic rights – absolute right of access to all documents, files or information systems, regardless of their nature, absolute right to obtain any information relevant to the subject matter of the investigation, unlimited right of access to all working areas or facilities of the concern (including those belonging to local employers), unlimited right to obtain information.[40]

Once the relevant information has been obtained, the review body proceeds with the next step. The investigation often takes the form of (often repeated) interviews in which the staff member is asked to comment on facts that the review investigators perceive to be relevant to establish whether any misconduct has occurred. However, it shall be borne in mind that this process is nuanced, and its quality and nature depend on the particular concern or employer (since this cannot be generalized, the above conclusions are based on the authors' practical experience). A specific feature of the review investigations is the fact that no concern's regulations (nor any employer's regulations or the law itself) regulate in detail the concern review process; the possibilities of defense and protection of the employee are not regulated, often not even the obligation to draw up minutes and the possibility of the employee's commenting on them, and so on. Consequently, the employee is not even informed of the facts investigated. However, usually only at the end of the interviews, when the employee has already commented on all the facts inquired about (without, of course, knowing whether or not their answers are relevant), is the employee informed that they have allegedly committed some misconduct (which may or may not be confirmed).

Of course, the concern reviews are set up differently, and it depends on each case whether such a conclusion can be made. Suppose we view the setting of a concern review as consistent with the law, and the concern review process is effectively identical to the disciplinary procedure (the rules are also often not regulated). If the procedure is consistent with good morals, the use of a concern review should be permissible. Examining the position of the review body, or its members, within the framework of employment law in the legal order of the Slovak Republic is also key in the context of the concern investigation. Taking into account the usual wording of the concern regulation, this is a professional department of the concern or a body outside the concern but established by the

[40] The legal interpretation does not further develop the issue of data protection concerning the status of concern review but focuses on the consideration of the underlying procedural employment law issues. Undoubtedly, however, the defined scope of the powers of the group investigators should also be examined in light of their authorization to obtain the personal data of the employees under investigation during the investigation.

concern (the members are even nominated from several countries in order to achieve the highest possible objectivity and at the same time independence from the local employer). It is thus a conglomerate set up by a business entity distinct from the local employer. As a rule, in the conditions of the Republic of Slovenia, this constituent entity is set up under the legislation of another state (this entity does not have the status of an employer towards employees in the field of individual employment relations, but it assesses their behavior within the framework of the concern review and decides de facto on their employment relationship). Drawing on the practice of many employers, within their internal processes, there is no delegation of authority (members of the review bodies are not employees; therefore, delegation pursuant to § 9 of the Labor Code is impossible). However, neither is there any use of the institute of representation (local employers grant no powers of attorney to members of the review body pursuant to § 22 et seq. of the Labor Code). In order to be able to consider at all that someone other than the employer should act concerning the employee, the possibility of representation by proxy (the local employer would authorize the review body/members of the review body to take certain actions in the context of the concern review) comes into consideration. The question is whether such a procedure would contradict the very purpose of this investigation, which should be independent of the local employer. Given the professionalism of the concern review, we do not perceive that this procedure would undermine the objectivity of the Concern Review.

Although we have focused on dealing with the actions of the review body/its members concerning local staff and appear to have found a solution, it is necessary to address whether such procedure is necessary. Indeed, there are also views that there needs to be some legal relationship between the local employer and the review body/members or the entity that established the body. Simply stated, legality of proceedings can be ensured either under delegation or representation. If we do not view the concern review as a legal procedure, or a proceeding in which some legal action is taken against the employee, it would seem that there is no need for a representation regime. It is, of course, necessary that if members of the review body have access to various information, they enter workplaces, that their particular activities are carried out under the law. In practice, neither the review body nor its members usually impose any consequences on the employees of the local employer. Although the conclusions of their investigations are recommendatory (and even if they are binding, compliance with the legislation shall be assessed by the local employer), the consequences are always drawn by the local employer. However, it is not excluded that the employer may make use of representation for specific legal actions, e.g., also in connection with termination of employment (in practice, this often happens in the case of serious misconduct by the employee, where the employee is dealt with by a lawyer, e.g., in connection with termination of employment).

As mentioned above, the established institution of the concern review in our legislation raises several controversial issues concerning the process and the outcome of the concern review. It may be noted that any acts in the context of a concern review which are like a legal act and which are carried out against an employee of a local employer may be challenged as having been carried out by an entity which is not entitled to carry out those acts, which would consequently also raise the question of the validity of the employment sanctions imposed. The result of a concern investigation is a conclusion as to whether or not the employee of the local employer has violated the provisions of the relevant internal company regulations, which derive from the group regulations. The concern investigators/reviewers draw up a final report which is sent from the group, as a rule, to the personnel department of the local employer with a request for appropriate labor law sanctions under the local labor law. This procedure often creates a complicated situation for the local employers and uncertainty, as they do not know how the investigation was conducted and whether the evidence presented is insufficient. They have to decide whether to impose an employment sanction. Should the employee object to the sanction imposed or the invalidity of the termination of employment (should the employer proceed to do so), he or she is objecting to the invalidity against the employer, not the concern. Since the representatives of the local employer are, in the vast majority of cases, not present when the concern's investigation is carried out (due to their possible local connection with the employee under investigation), objectively, the employer is concerned about the imposition of employment sanctions based on a procedure – the concern review – in which it was not involved as an employer (or its employees, who are so involved under their job classification). However, he shall accept the outcome of the investigation. It is not that the additional investigation is not desirable because of the rules of the concern review. A further investigation into the employee's misconduct might be an option if the breach of the concern's rule also constituted a breach of the local employer's internal company rule. In the context of the procedure itself, this could be seen as a process for assessing the employee's breach of work discipline. In practice, a company review often results in the employee being warned of a breach of the obligations arising from the company rules, which form part of the employer's internal policies, and, if the findings of the company review are serious, it is usually possible to agree with the employee to terminate the employment relationship. The form of unilateral termination of employment by the local employer rather evokes the notion of risk of questioning the whole process leading to the termination of employment. However, we consider that if the concern review is set out in the employer's internal policies under the generally binding regulations, as we have indicated above (and taking into account that there is no legal regulation of either disciplinary proceedings or concern review in the LC, the basic principles of the Labor Code, the principle of reasonableness, compliance with good morals), the results of the concern review, as well as the evidence from the investigation (if obtained under the legislation), should be relevant facts and evidence also in the event of litigation.

In addition to situations in which the employee's position appears to be hindered, in practice, there are situations in which senior employees, in particular managers, abuse their position and cause great harm to the employer, whether it is damage to reputation, disclosure of important information, e.g., information relating to production processes, the composition of a substance, or dissemination of misleading information about the employer, engagement in activities of a competitor through relatives, etc. It seems that either a concern review or disciplinary proceedings against these employees tend to be unsuccessful since these are violations which, although ‚visible' or well-known, often cannot be proved. In such situations, the employer is the weaker party (as there is usually also a great deal of damage to the employer due to such actions by employees).

3 SIGNIFICANCE AND NATURE OF SETTING UP THE EMPLOYER'S REMUNERATION SYSTEM

3.1 Employee assessment

Imposition of a suitable and adequate sanction under labour law should, in our opinion, depend on an appropriately chosen and objective method of assessing the employee's actions, which should be regulated in the relevant internal company regulations, for example, in the rules of work or organisational regulations. As part of the assessment process, it should be regulated who is authorised to assess the employee's behaviour and the performance of their work tasks (usually it is their direct superior, a senior employee who is aware of performance or non-performance of work tasks and possibly the reasons for their non-performance). The approach to the assessment should be objective and in accordance with the principle of equal treatment, good morals and the prohibition of abuse of rights. In order to impose the relevant sanction under labour law, it is crucial to set up an appropriate framework for assessing employee behaviour/actions and the level of performance of work tasks by the employee, so that it is subsequently possible to in fact start a disciplinary process with the employee. Without establishing the rules and setting up the process of assessing the employee work, it is not possible to proceed objectively with awarding or reducing or not awarding extra-legal monetary benefits to employees.

Above all, in the absence of a detailed system in the area of reduction or non-awarding the maximum levels of individual above-tariff wage components, the problem of unequal treatment of employees may arise. At the level of employers, the issue of assessing the actions and performance of tasks by the employee is set more "sensitively" in the case of extra-legal/above-tariff components compared to the level assumed by the Labour Code for the purposes of employment termination by notice or immediate termination of the employee (by a more sensitive approach of the employer, we mean a higher degree of acceptance of certain actions of employees, which although representing a breach of duty by the employee, may not have a fundamental impact on not awarding or on substantial reduction of the relevant above-tariff wage component). For the purposes of awarding individual above-tariff wage components, a greater freedom of assessment of the employee's actions is usually applied than in the case of a formalised termination of the employment relationship. For other purposes (for example, career advancement, rotation of senior employees, internal interviews), a different approach to assessment of the employee's actions may be applied, which is regulated in other internal company regulations.

The employers usually create different degrees of the expected level of fulfilment/non-fulfilment of the work tasks by the employees, as well as the expectations in relation to the fulfilment of work duties. In the case of non-fulfilment, or violations by the employees, individual "warnings" (letters of reprimand) are addressed to the employees after assessment, the service of which is subsequently taken into account in awarding or reducing one of the above-tariff wage components representing a sanction under labour law against the employee for failure to fulfil or insufficient fulfilment of assigned work tasks or for insubordination. The more generally and vaguely these levels of fulfilment/non-fulfilment of work tasks are defined by the employer and the less quality goes into the employer's formulation of terms for awarding or reducing above-tariff wage components or employee bonuses within the remuneration system, the sooner the problem of either unauthorised non-payment of a part of the employee's wage directly or in comparison with other employees will arise, constituting the problem with compliance with the principle of equal treatment. Depending on the specific above-tariff wage component, both forms of non-fulfilment of work tasks by the employee or their violation can be taken into account, that is, for example, in the case of a specific form of above-tariff wage component tied to, for example, the relevant calendar year, insubordination and insufficient performance of work tasks may be the reason for its reduction.

In practice, the employers most often set up a three-level system for evaluating the actions of their employees, in which the highest level represents such serious actions of the employee, which correspond to the possibility of issuing a warning against insubordination or unsatisfactory work performance by the employee that results in the employee's termination. Since the award of the above-tariff wage component is set as a motivation, the first level of assessment is an award for behaviour of the employee, which shows the signs of above-standard performance of work tasks, a loyal approach to execution of work duties. The first and third levels consist of several tiers so that the assessment and subsequent sanctioning is appropriate and fair.

Subsumption of the employee's actions and their overall behaviour at the workplace and attitude to work do not depend only on the nature of the duty breached by the employee, but also on the number of repetitions the employee has committed the breach in a certain reference time frame. The individual levels of assessment of the employee's actions thus intertwine when, for example, breach of duty is normally assessed at the basic or medium level, but with a greater number of repetitions in a short period of time it represents a more serious action on the part of the employee due to the number of repetitions and the loss of the preventive nature of the sanction originally imposed under labour law, which will move the assessment to a more strictly assessed level. The extent to which the employer formulates a description of the performance of work tasks by the employee and their expected behaviour at individual levels already depends on the employer. In principle, two basic approaches can be encountered in the application practice. Either the individual levels of assessment of the employee's actions and behaviour include only the ranges of situations defined in the work regulations as minor or serious insubordinations or as unsatisfactory performance of work tasks, while subordination to a specific level depends on the consequences of the employee's breach of duty, its specific substantive nature and the number of repetitions of the breach of duty, or these individual levels of assessment of the actions and behaviour of employees also contain a description of their expected behaviour and attitude to work, and in case of non-fulfilment, a certain form of sanction is imposed in the form of not awarding or reducing one of the above-tariff wage components as a form of K.O. criteria.

Assessment of the employee's actions and behaviour is carried out on a monthly basis, or on the basis of the reference period for which the relevant above-tariff wage component or bonus is awarded, while the person authorised to carry out the assessment is usually a senior employee pursuant to § 9 (3) of the Labour Code. A simplified example of the definition of a three-level assessment system, including the expected behaviour of the employee, can be designed as follows:

The first level/degree of assessment is based on the fact that the employee performs work beyond the basic expectations, for example, actively comes up with ideas for improving the working environment, sets an example of observing work discipline for others, on the second level, the employee meets all the requirements necessary for the performance of their work, including all internal organisational norms and work standards (this category of employees is granted those above-tariff wage components that are consequently not awarded at the third level of assessment) and at the third level of assessment, the employee does not meet the standard requirements related to performance of their work and also engages in insubordination. A more detailed description is then defined, especially in the case of larger employers, depending on determination of internal requirements for the employee's cooperation with other employees or the employee's personal approach to work performance. It is important to note that the assessment of the employee and the setting of the employer's expectations must be reasonable. The employer must set expectations in such a way that they correspond to the employees' job positions, are within the employer's discretion, are not based on the need for the employee to work overtime, or beyond the scope of their type of work, and only then receive incentive compensation. If the employee voluntarily develops an activity beyond the requirements imposed on them and the employer accepts and possibly appreciates such approach of the employee, the financial evaluation of the employee should be adjusted outside of the basic three levels of assessment, which we have given as a simplified example.

Table 1 Performing tasks and observing work discipline

	3rd level Non-standard	**2nd level Basic**	**1st level Above-standard**
PERFORMING TASKS AND OBSERVING WORK DISCIPLINE			
The degree of fulfilment of requirements that are based on the normal content of work (labour consumption standards, defects in manufactured products), solving exceptional situations (sudden production flow suspension), performance of operational tasks, compliance with work discipline (absence from work, behaviour at the workplace, fulfilment of instructions, and so on)	The employee does not fulfil their normal duties and/or their work does not reach the required quality. The employee avoids everything. The employee makes mistakes and it is necessary to warn them often. Violates company standards. The employee shows no interest in improving their work performance. The employee has a lax approach to fulfilling work duties.	The employee meets the requirements related to the position. Their behaviour does not show violation of work discipline. The employee occasionally or exceptionally makes mistakes (in relation to the quality of work or the fulfilment of duties), but these are not serious, the employee can solve them independently without the need for reprimands. In the case of a concern expressed in relation to the person of the employee, the effort to improve is always visible.	The employee performs their work very well, knows how to detect a problem and proactively solves it, also helps other colleagues in solving problems. The employee does not violate work discipline, has a positive influence on discipline, sets an example for others. You can rely on the employee in unusual or critical situations.

Continuation of Table 1

	3rd level Non-standard	**2nd level Basic**	**1st level Above-standard**
INITIATIVE, STABILITY, TEAMWORK			
Stability of work performance, active communication with the relevant superior, colleagues. Proactive approach, creativity, striving for improvement. Teamwork. Conflict resolution.	The employee does not inform sufficiently in advance about problems that occur at the workplace, for example, about absence from work and circumstances, which may affect the operation, or teamwork if the employee works in a team. The employee behaves inappropriately in the team (is a disruptive element, disrupts the atmosphere), disrupts the work of other colleagues/ superiors. The employee tends to be argumentative.	The employee informs about important facts in advance (for example, about absence from work, immediately informs their superior in the case of unforeseen circumstances). The employee occasionally takes initiative, but it is not the normal standard of their work. The employee does not interfere with the authority of the superior and the work of colleagues. They do not create conflicts. The employee is a team player and understands the necessity of cooperation.	The employee demonstrates a high degree of initiative, which manifests itself in a significant positive impact on company results. The employee offers improvements that have a positive impact for the company. The employee respects superiors as well as their colleagues. The employee has the ability to bond the team and is the one who offers solutions to the team in the case of exceptional situations. The employee approaches change positively and influences other team members. The employee has a position of informal authority within the team.

Source: Own processing.

Different levels of assessment of the employee's actions and behaviour subsequently correspond to different types of documents delivered by the employer, the legal nature of which is diverse, if the employer does not decide to issue a warning against insubordination or against performance/non-performance of assigned tasks to the employee in the form of an oral interview. Many employers often create their own system of "warnings" or rather "reprimands", which they deliver to the employees when the prerequisites for insubordination or unsatisfactory performance of work tasks are met, but they do not reach such an intensity or character that they can be used for the event of employee termination. In most cases, these are various letters of reprimand, cease and desist, "drawer" notices of misconduct, which do have/may be relevant for fulfilling the conditions for imposing some of the sanctions under labour-law, for example, in the area of employee compensation, but the employer cannot or does not want to use them for the purpose of terminating the employment. Such documents/reprimands are not regulated by the Labour Code or other relevant labour regulations and they depend only on the internal environment of employers, what system they choose and what effects this system will have on the employees. However, it is primarily necessary to resolve the legal nature of documents that are not relevant for the purpose of terminating the employment. We believe that these "warnings/reprimands" can be considered as the so-called factual actions by which the employer either exercises their right to alert the employee to the proper and responsible performance of the work tasks within the framework of their disposition authority pursuant to § 1 (2) of the Labour Code and/or it is the fulfilment of a substantive legal condition based on the agreed awarding terms, or non-awarding of above-tariff wage components pursuant to § 119 (3) of the Labour Code, if such link exists between the employee's actions and the award or reduction of any of the above-tariff wage components. The mere subordination of an employee's actions to one of the established assessment levels does not in itself cause any consequences in relation to the employee's position, especially in the area of remuneration, if there is no connection to any of the above-tariff wage components. This also applies to cases of the so-called drawer notices/reprimands, which have an educational, motivational function of warning by the employer rather than a repressive function. By default, these documents, which do not affect the employee's rights (except for those that should be relevant for the purpose of terminating the employment relationship with the employee), are not included in the employee's personal file, or are there only for a certain reference period, which is relevant for the purpose of paying the relevant above-tariff wage component or some form of bonus.[41]

3.2 Provision and formulation of claimability of monetary performance

Perhaps a more detailed explanation of why we consider the employee assessment system to be so important, assuming its transparent and predictable application, is that in practice employers often award various above-tariff benefits,

41 At individual employers, one can find different forms of such factual acts of the employer contained in various documents (in German companies, for example, different types of the so-called reprimands are used in the German equivalent of *"die Ermahnung"*, in which the employee is warned against insubordination or unsatisfactory work performance without direct connection to their termination or to the above-tariff wage component.

rewards, under the fact that when making a decision to award them, they simply state that this monetary performance is non-claimable. Many employers and senior employees believe that if they state in the terms for awarding above-tariff wage components that this above-tariff wage component is non-claimable and its award or amount depends solely on the employer's or senior employee's decision, they will avoid the need for any justification, why they grant this component of wages to the employee in some cases, and in others they do not grant it at all or they grant it in a certain amount. However, such approach has its cracks (at the same time, it should be noted that the conclusions stated in the publication were based on specific factual situations and decisions and decisions in other cases may lead to different conclusions) not only in the wake of decisions of the competent bodies controlling the observance of labour relations, but also in the wake of decisions of the courts, therefore, it is necessary for employers to design the remuneration system consistently. Based on these decisions, it can be concluded that the more general and vague the terms of awarding above-tariff wage components or reducing the leave are, the more problems may arise in the sense that initially "non-claimable" benefits become claimable in the wake of the decisions. The employee can claim the payment of any of the above-tariff wage components through the court, as the employee will be justified in believing that the employee has a legal right to its payment.

In the application practice, a discussion has been going on for a longer period now about the need to negotiate conditions or substantive legal criteria under which above-tariff wage components (various bonuses, rewards, etc.) are granted to employees. The employers tend not to negotiate such conditions in the case of above-tariff wage components that are not directly linked to quantified work performance by the employees, or to determine them on a general basis as part of a recognition of one's "*approach to work*", "*conscientious performance of work tasks*", "*flexibility and efficiency in performance of work tasks*", etc.

The legislation does not specify the nature and scope of the terms that the employer should agree on with the employees in the employment contract or with the relevant trade union body in the collective agreement. The provision of § 119 (3) of the Labour Code only states that "*in the terms of wage, the employer shall agree, in particular, on the forms of remuneration of the employees, the amount of the basic wage component and other components of benefits awarded for work and the conditions of their provision*". Thus, although the provision in question does not require the employer to agree on specific terms of provision of individual wage components, it does require the employer to agree on some terms with the employee. If the employer has decided on no terms for provision with the employee, for example, does not agree on the above-tariff wage component, not even in a general way in the sense of the above (that is, by deciding to leave general vague references to the flexibility of the employee's actions and its assessment by the senior employee without further specifying the same), the employee may come to a subjective feeling that for providing this above-tariff wage component, there is no quantifiable or qualitative condition imposed linked to performance of their work, and standard performance of work on their part is sufficient. The above-tariff wage component has thus assumed, as it were, the form of the basic wage component paid out according to the extent of the time worked or the performance achieved under the provisions of § 119 (3) of the Labour Code. Such conclusion can be drawn from some court decisions, while it is also necessary to take into account the factual circumstances of individual cases (although the cited court conclusions cannot be considered an automatic approach to the creation and provision of above-tariff wage components, the trend of court conclusions should prompt employers to specify the conditions for setting up their remuneration systems). We may or may not agree with the stated conclusion, we consider it necessary to mention this trend.

It is questionable whether such conclusions are applicable to all cases where the employer will use a very general "formula" when paying above-tariff wage components, or will not use such formula at all, and the circumstances of the specific case will be such that, in a possible dispute, the court would decide that the employer's procedure is correct. However, since there are several court decisions that deal with the question of claimability of above-tariff wage components, we consider it necessary to mention them so that employers can anticipate potential problems when remunerating employees.

We also find the debate about the fact that the employer cannot unilaterally provide the employee with any monetary benefits (usually bonuses), because this wage condition was not agreed upon, interesting. On the one hand, one can perceive the need to comply with a mandatory provision that requires wage conditions to be agreed upon. On the other hand, if the employer unilaterally provides monetary benefits in addition to, beyond the legal framework, beyond the framework agreed in the employment contract or collective agreement, and actually improves the wage conditions of the employee, it may subsequently be sanctioned by the labour inspectorate for non-compliance with the Labour Code. It would be interesting to have a discussion about whether the employer should be sanctioned for such practices (or the courts would decide that such performance becomes automatically claimable).

Specific situations that may arise in the area of remuneration are based on the duality of legal approval of negotiating wage conditions in a collective or employment agreement. For example, the employee alone cannot influence the remuneration system in the collective agreement and specific wording, for example, defining the above-tariff wage components, may differ in quality. Therefore, since the employee cannot influence the negotiated wage conditions and the conditions for their award in the above situation, we believe that it would be possible to consider (also taking into account the protection of employees as a weaker entity in the employment relationship) the use of § 17 (3) of the Labour Code, in case the remuneration system is not validly agreed upon. The employee cannot be held liable for invalidity that the employee did not cause themselves, and thus the employee should have the opportunity to demand payment of benefits that were not provided to them, as the basis for their payment (the remuneration system in the collective agreement) is considered invalid. In relation to the above, we refer to the finding of the Constitutional Court of the Slovak Republic[42], in which the Constitutional Court of the Slovak Republic expressed itself relatively unambiguously on the mandatory consideration of the increased labour-law protection of the employee represented by § 17 (3) of the Labour Code modified in the form of compensation for damages to such employee, when the Court stated that *"The legal assessment of the collective agreement and the plaintiff's right to compensation pursuant to § 17 (3) of the Labour Code after declaring the collective agreement invalid remained disputed. The procedure for entering into collective agreements is established by a special regulation (§ 231 (2) of the Labour Code). This regulation is the Collective Bargaining Act. Pursuant to § 2 thereof, the collective agreements regulate individual and collective relations between employers and employees and the rights and obligations of the parties. They can be concluded by relevant trade union bodies and employers, or their organisations. Corporate collective agreements are entered into between the relevant trade union body and the employer.... The collective agreement is an act of labour law and, based on a legally valid court decision determining its invalidity, in the opinion of the Supreme Court of the Slovak Republic, it then correctly concluded that this invalidity cannot be detrimental to the plaintiff, since, as the Court had proven, she did not cause the invalidity herself and correctly obliged the defendant to compensate the plaintiff for the damage that she incurred as a result of the invalid collective agreement. From the provision of § 17 (3) of the Labour Code it follows that invalidity applies to all labour-law acts — unilateral and bilateral legal acts concluded with the employer by the employee themselves, as well as legal acts concluded with the employer by the relevant trade union body representing all employees, as it imposes on the employer the obligation to compensate the employee for damages that arose as a result of an invalid legal act in general, without any exclusion of certain*

42 Finding of the Constitutional Court of the Slovak Republic of October 03, 2012, case no. I. ÚS 501/2011.

legal acts (for example, those concluded with the employer by the relevant trade union body). ....The Court of Appeal correctly, in the opinion of the Supreme Court of the Slovak Republic, also pointed to the Article 2 sentence two of the basic principles of the Labour Code, according to which the exercise of rights and obligations arising from labour relations must be in accordance with good morals; no one may abuse these rights and obligations to the detriment of the other participant in the employment relationship or co-employees. The evidence did not prove that the defendant did not know about the conclusion of the collective agreement. On the contrary, as the Court of Appeal stated above, this contract was valid for the defendant until it was determined to be invalid. If the appellant agreed with the decision of the court of first instance, which justified its rejection with the fact that the defendant's performance would result in unjust enrichment on the part of the plaintiff, the appellate court considers it necessary to state the following. Pursuant to § 222 (1) of the Labour Code, if the employee unjustly enriched themselves at the expense of the employer or if the employer unjustly enriched themselves at the expense of the employee, they must surrender the enrichment. Pursuant to § 222 (2) of the Labour Code, unjust enrichment for the purposes of this law is a material benefit obtained by performance without legal grounds, performance due to an invalid legal act, performance carried out on legal grounds that have ceased to exist, as well as material benefit obtained from dishonest sources. Material benefit acquired through performance from an invalid act under labour law is, under certain circumstances, unjust enrichment. However, if the employee suffered damage as a result of the invalidity of the act under labour law, in accordance with § 17 (3) of the Labour Code, the employer is liable for this damage. The liability for unjust enrichment arises only if the material damage from an invalid act of labour law does not represent damage to the employee. Obligations from unjust enrichment also have a subsidiary nature in labour relations, which means that the obligation to surrender unjust enrichment is imposed only if the prerequisites for liability for damage are not met. If the employee suffered damage as a result of an invalid legal act, the obligation to surrender unjust enrichment does not arise. If the employer compensates the employee for this damage, it is not a matter of performance without a legal ground - the legal ground here is the responsibility for the damage... The labour law theory repeatedly emphasises the protective function of the labour law, the protection of the weaker party is still the basic and most important goal pursued by labour law, in its essence it is the raison d'etre for the existence of the labour law code itself and the subsequent legislation. And precisely in accordance with its protective function, the labour regulation (even its theory) does not distinguish between a void and an invalid legal act in terms of the legal consequences. This means that for the possibility to claim damages in accordance with § 17 (3) of the Labour

Code, it is irrelevant whether the legal act is considered invalid or whether it is null (non-existent). In labour law, the employer's responsibility for damage is based on objective responsibility, where the element of fault is not required as a prerequisite. In accordance with the above, the liability for damage caused to the employee as a result of an invalid legal act is also constructed. From the diction of the cited § 17 (3) of the Labour Code ("... if they did not cause the invalidity themselves"), it follows that the invalidity of a legal act can be to the detriment of the employee, only if the invalidity of the legal act is caused by the employee exclusively themselves in the presence of full fault on their part. In other words, if the employee suffered damage as a result of an invalid legal act, the employer is fully liable for it, even if they caused the invalidity of the legal act even in part, in the extreme case, even if the damage was caused objectively without the fault of the employee, namely the condition that other prerequisites for liability are met."

The legal conclusion of the Constitutional Court of the Slovak Republic cited above complements an interesting judgment of the Bratislava III District Court[43],,which even more strongly supports the increased labour law protection of the employee by referring to the decision of the Constitutional Court of the Slovak Republic. *"Pursuant to § 17 (3) of the Labour Code, the invalidity of a legal act cannot be detrimental to the employee, if the employee did not (exclusively) cause the invalidity themselves. In order for the court to award the employee compensation for damages from an invalid legal act, the prerequisites for the emergence of a liability relationship must be cumulatively met, namely (i) the existence of an invalid legal act 21 Cpr 4/2021 11, (ii) the occurrence of damage, (iii) a causal connection between the invalid legal act and the occurrence of damage and (iv) fault that is not exclusively on the part of the employee. However, this liability relationship does not arise on the basis of a breach of contractual agreements but is based on pre-contractual liability (culpa in contrahendo), that is, the prerequisite for its emergence is liability for illegal errors in the creation of a legal act (for unlawfully causing the invalidity of a legal act). When assessing the question of whether one of the parties to the agreement caused its invalidity themselves, one cannot without further proceed from the conclusion that the invalidity of a bilateral legal act cannot be caused by only one of its participants, since the consent of both parties to the agreement is always required. Such interpretation would essentially exclude the application of § 17 (3) of the Labour Code without further ado in the case of all bilateral legal acts, and this provision would thus lose its intended meaning (purpose), because both parties always cooperate in bilateral legal acts. The correct interpretation should then be considered, according to which the invalidity of a bilateral legal*

[43] Decision of the District Court Bratislava III as of 11 April 2022, file no. 21 Cpr 4/2021 (not yet valid).

act cannot occur only as a result of ordinary participation in its conclusion, but it is always necessary to examine the circumstances of the specific case, how the parties participated in the creation of its content requirements, in particular, which of them and how contributed to the fact that this act is affected by a defect that causes its invalidity. The party to the agreement, whose participation in entering into the same consisted only of simply accepting the proposal of the other party, could not cause the invalidity of this contract. It is true that a collective agreement is a bilateral legal act, which is concluded in favour of the employees, and in the process of its conclusion, the employee's right to collective bargaining is exercised (although the employees cannot exercise this right personally, but only through the relevant trade union body, that is, a third party), but despite the above, the subjects of the collective agreement as a legal act are still only the employer and the trade union (and not the employee). The existence and content of this legal act is based on the autonomous status of the contractual partners and on the principle of freedom of contract. Employees are thus only the addressees of the provisions of the collective agreement as a source of law to which its normative character applies. Concluding the above, the court also considered that the assumption of a liability relationship regarding the culpability for the invalidity of the legal act, which was not caused solely by the employee themselves, was fulfilled. Therefore, the plaintiff did not fully cause the invalidity of the provision of the collective agreement on their own, and therefore the plaintiff cannot be harmed thereby."

3.3 Adjustment of wage conditions and the achieved wage

In practice, there are situations when employees subjectively believe that some above-tariff wage component belongs to them. The solution to such situation could be, it seems, simple and actually leads to a conclusion that the employer needs to agree on conditions for the awarding, or non-awarding of individual components of the employee's wage so as not to create a state of legal uncertainty in which the employee or the employer would interpret the criteria for provision of those components differently. At the same time, however, it is necessary to draw attention to the fact that the more general the conditions for awarding the above-tariff wage component, the greater the scope for interpretation, and the employer may also find themselves in a situation of violation of the principle of equal treatment or violation of the prohibition of discrimination in relation to § 119a of the Labour Code or § 13 (1) to (3) of the Labour Code, or be suspected of abuse of rights by the employer in differential awarding of above-tariff wage components to employees in a comparable situation.

In practice, it is not uncommon for an employee to suffer reduction or denial, for example, of a personal bonus, despite the fact that no one warned the employee that during the calendar month, or otherwise specified period, the employee did something wrong, did not comply with any of the work duties, etc., while the employee worked the same way as before, but in a specific calendar month, the relevant above-tariff wage component was not granted or was reduced. The employer or their senior employee often do not have at their disposal any relevant rubric on the basis of which they decided not to grant/reduce some above-tariff wage component, and they often cannot justify it objectively.

We would like to draw attention to conclusions of the courts that dealt with such situations. The situation in question was that the employer insufficiently set the conditions for awarding above-tariff wage components with vague wording about flexibility and approach to work, while the employee was not informed of any deficiencies in the monitored period, she was not criticized for anything, and despite this, the above-tariff wage component was reduced. In subsequent examination of the case, the courts concluded that *"since the employment contract does not specify the variable wage component in more detail, and the conditions for the payment of this wage component or its reduction are not determined in any way, this lack of specification of the conditions of entitlement to this wage component must be borne by the employer, and therefore, the employee is basically entitled to this right."*[44] *"In the labour law, the weaker position of the employee as a contractual party to the labour relationship is generally recognised. With the possibility of interpreting the legal acts of the participants in the employment relationship in several ways, the above implies the obligation to use the interpretation in favour of the weaker party, that is, in favour of the employee. In the case of an employment contract containing an agreement on a variable wage component in a specific amount without any specification of the conditions of entitlement to this wage component, two interpretations of such agreement come into consideration. First, that this wage component belongs to the employee on a regular basis, as long as the employee fulfils their work duties in the normally required scope and quality, and if any lacking in work justifies withdrawal of this component, or a part thereof. In principle, this is a wage reduction option. Or the second interpretation of this agreement comes into consideration, that the said wage component belongs to the employee only when performing work duties above the normally required scope or quality, that is, that the payment of this component, or a part thereof, is justified only by performance of work above the normally required scope or quality. In principle, this is an additional payment option. Of the listed options for interpretation of the disputed employment contract, the first interpretation*

[44] Ruling of the Zvolen District Court of November 11, 2014, case no. 17 Cpr 4/2014-57 (upheld by the Ruling of the Regional Court in Trenčín of February 03, 2015, case no. 17 CoPr 2/2015).

is clearly in favour of the employee, that is, that the variable component belongs to the employee, unless there are deficiencies in the performance of their work that allow reduction of this wage component. In favour of this interpretation, the fact emphasised by the district court also proves that the employee was also paid bonuses in addition to the basic and variable wage components, that is, the component is, by its nature, an additional payment expressing a positive assessment of the employee's performance. It is then not logical that the employee's wage should be made up of two components with identical purpose of positive assessment of the employee, that is, providing an option for paying a higher wage, but the variable wage component should be evaluated in this case as an option of negative assessment of the employee, that is, an option of wage reduction, allowing, together with rewards, to evaluate the employee's performance comprehensively, in terms of both above-average and below-average performance. Finally, the ambiguities of the employment contract drawn up by the employer cannot be the burden of the employee."[45]

It follows from this court decision the it is the employee who is preferably protected in the employee/employer relation. Since this is a decision on a specific matter, it is not excluded that the courts would proceed in this way in other cases of awarding/not awarding a bonus/reward. In the cited decision, the District Court further states that in situations where specific conditions for the payment of the variable wage component are not established, the wording of the employment contract is unclear and incomprehensible, and the employer should be a more informed and well-funded entity compared to employees, since the employee is considered to be the weaker party in the labour law relationship and, therefore, this lack of formulation of the terms of awarding the above-tariff wage components in the employment contract shall be borne by the employer. Subsequently, this allows us to state that even if the employer believes that it is a non-claimable part of the employee's salary, depending on the former's decision, general and formal wording may cause it to become part of the so-called "achieved wage" of the employee.

Neither the Labour Code, nor any other labour law regulation mention the term "achieved wage" of an employee. Since the courts have worked with this term, due to the absence of a legal definition and taking into account the conclusions of the courts mentioned above, when it is not clear whether the above-tariff wage components (which may be tied to the possible imposition of a labour law sanction on the employee) belong to the framework of the earned wage. Therefore, we will try to deal with the concept of the achieved wage.

If we are to come to some definition of the content of the term "achieved wage" and base it on legal theory and judicial conclusions, we must first deal with the term wage, with the aim of excluding all possible monetary benefits that are not

[45] Ruling of the Regional Court in Trenčín of 03 February 2015, case no. 17 CoPr 2/2015.

provided by the employer for performance of work, despite the fact that they are as such designated by the employee or employer. As an example that this concept is not easy to grasp, we can cite, for example, the so-called 13th or 14th wage, which can be, from the point of view of the terms of its award, not only part of the employee's wage conditions in accordance with § 119 (3) of the Labour Code, and thus be tied to performance of work, but in some cases, its nature is exclusively that of a social benefit, the provision of which is linked to fulfilment of criteria other than performance of work.

The definition of the term wage can be derived from the relevant provisions of § 118 of the Labour Code as both a positive and negative definition. Pursuant to § 118 (2) of the Labour Code, the wage is defined by a positive enumeration of general defining features *as monetary payment or payment of monetary value (wages in kind) provided by the employer to the employee in exchange for work.* It is also necessary to consider § 118 (3) of the Labour Code, when the wage is further considered to be *"payment provided by the employer to the employee in exchange for work on the occasion of their work anniversary or life anniversary if it is not provided from the profit after tax or from the social fund.* Subsequently in its § 118 (2), the Labour Code does not consider wage to fall under *a payment of wage compensation, severance pay, retirement benefits, travel allowances including non-claimable travel allowances, contributions from the social fund, contributions to supplementary pension savings, contributions to employee life insurance, income from capital gains (shares) or bonds, tax credit, compensation of income during temporary incapacity for work of the employee, supplements to sickness benefits, compensation for emergency work, monetary compensation under § 83a (4) of the Labour Code, other benefits provided to the employee in connection with employment according to the Labour Code, special regulations, collective agreement or employment contract, which are not wages and other benefits provided by the employer to the employee from profit after tax.* The stated negative definition of wages in the Labour Code is not enumerative in nature, therefore the expansion of monetary benefits provided to employees, which in practice will not be considered as wages is admitted, provided that they do not conflict with the positive definition, that is if, for example, the employee and the employer have agreed on performance that is related to work performance, but it is not be included in the wage terms (consequently in the achieved wage), this will be a violation of the Labour Code and such agreement is invalid.

The legal interpretation of the issue of the achieved wage aims to achieve legal certainty for the employee, under what wage terms the employee actually performs dependent work in relation to application of the agreed wage conditions in the employment contract or a collective agreement. Identification of wage terms falling within the content of achievable wage subsequently gives an answer to their legal claimability in terms of the stated approaches of the courts. That is also why we tried to look for certain legal solutions of how it would be possible to approach the interpretation of the mentioned term with regard to protection of employees under labor law.

Despite the given definition of the term wage in the wording of the Labour Code, the definition of the term "achieved wage" is more complex, and it is not possible to arrive at a generally binding interpretation. The definition of the term "achieved wage" will be individual in nature and will depend on the specific remuneration system of the relevant employer. Under the wording of the relevant section of the Labour Code, the term "achieved wage" is mentioned only in connection with overtime work, work on public holidays and night work. The provision of § 121 (1) of the Labour Code states that *"for working overtime, the employee is entitled to the achieved wage and a wage benefit in the amount of at least 25% of the average earnings"*. Provision of § 122 (1) of the Labour Code assumes that *"for performance of work on a public holiday, the employee is entitled to the achieved wage and a wage benefit of at least 50% of their average earnings"* and for work at night, pursuant to § 123 (1) of the Labour Code "in addition to the achieved wage, for night work the employee is entitled to a wage benefit of at least 20% of the minimum wage". At the same time, such premise is also a justification for why the legislator does not legally provide a generally binding interpretation of the term "achieved wage", unlike, for example, in the case of an employee's average earnings in accordance with § 134 of the Labour Code, precisely with regard to diversity of remuneration systems and wage forms applied by employers.

The content of the term "achieved" will represent a qualitative feature of individual wage components, or wages as such, respecting the definition of the term wages under the Labour Code, that is, the concept of "achieved" should be seen as necessary primarily from the point of view of determining the legal claimability of the wage range. Not only the courts, but also the labour inspectorate have dealt with the concept of the achieved wage.

Adding the attribute "achieved" to the employee's wage, or to its individual components, could cause legal claimability of these benefits considered as wages, as the supervisory authority also stated. At the same time, it should be noted that the labour inspectorate based their decision on an assessment of the specific circumstances of the case and its conclusions cannot be generalized to all cases. *"By fulfilling the specified facts or conditions, the employee will be entitled to a specific form of monetary (wage) remuneration."* Under the term achieved wage, we must perceive all payments related to the time of work, for example, for the period of overtime work, for the period of work on a public holiday and the like. The specific amount of the achieved wage then depends on the agreed wage specified in the employment contract and other wage components, which are claimable, which constitute wage benefits under the Labour Code, or those agreed in the collective agreement or in the employment contract. However, under certain circumstances, legally "non-claimable" wage components may also be included in the achieved wage, if the employee is entitled to any of them by performing overtime work, or by performing night work or working on a public holiday, or those in which the employer has set out the award conditions in an insufficient manner and the employee can legitimately believe that the employee is entitled to their payment." [46]

"The combination of words 'achieved wage', therefore, expresses the fact that the employee is entitled to all payments to which the employee is entitled for the work performed according to the agreed wage conditions. The above generally applies to, for example, the time of performing work, that is, for overtime work, work on a public holiday, work in the time of night or for performance of work in which the employee is entitled to wage compensation for difficult work and also any above-tariff wage components in accordance with the established criteria pursuant to § 119 (3) of the Labour Code. The term "bonus" (understood in the above context as the above-tariff wage component) is not regulated by the Labour Code. If the provision of such motivational wage component is agreed as part of the wage terms, the conditions for the provision of such wage component must also be part of the agreed wage terms. Therefore, if the above-tariff wage component (bonus) is agreed in the form of a percentage of the employee's achieved tariff wage, so that in the event of meeting the agreed conditions for the emergence of entitlement to this wage component, its amount is calculated from the achieved monthly wage, the basis for this calculation is also the achieved wage for overtime work." [47]

It is necessary to state in this context that the basic and determining factor affecting the scope, and thus the amount of the achieved wage, will be the wage system applied by a specific employer, that is, the determination of the conditions for obtaining a certain component of the wage and thus the definition of the content of the term achieved wage will depend on the agreement between the employee and the employer, or employee representative in accordance with § 43 of the Labour Code (wage terms must be agreed in the employment contract or collective agreement). In principle, and that is also confirmed in professional literature, we could say that the range of wage forms granted by the employer is

[46] Opinion of Bratislava Labour Inspectorate no. 7732/14-2.3

[47] Opinion of the Department of Labour, Social Affairs and Family no. 11508/2014-M_OPV 21619/2014-437.

directly proportional to the range of achieved wages.[48] From the point of view of the remuneration system applied, the achieved wage is then each component of the wage appertaining to, or belonging to the employee for an hour of overtime work, work on a public holiday or night work. Identification of the wage claim should be carried out in principle for each hour of overtime work, work on public holidays and night work, while it must be based on legal claimability of the wage payment in relation to the work performed in connection with the fulfilment of the established criteria for creation of the claim, provided that they are defined. With regard to the above, it is necessary, both from a legal and a practical point of view, to assess and evaluate each employer strictly individually, taking into account the diversity of remuneration systems and wage forms applied by employers, or the diversity of criteria, the fulfilment of which establishes the emergence of a legal right to the provision of wage components, while the formulation of individual provisions governing claimability of wage components, following legitimate interests of individual employers, will also be essential. Its content can fully materialize only if all the stated facts are taken into account and the employee's legal wage claims can be fully provided to them.

From the practical point of view, a situation may arise where it is not clear whether certain wage payments within the remuneration system are also claimable in relation to overtime work, work on public holidays and night work. Wages defined in forms other than the basic wage may be, due to positive definition pursuant to § 118 (2) of the Labour Code, diverse and, in principle, should meet the attribute of a monetary payment or payment of monetary value provided by the employer to the employee in exchange for work. The employee is entitled to the basic wage component, also called in remuneration systems the tariff wage, as soon as the agreed type of the work is performed. The tariff component of the wage can, therefore, be considered an inseparable part of the achieved wage. In the simplest wage systems applied by employers, when the employee is remunerated only with the basic (tariff) wage, this is logically the only component of the achieved wage, due to the absence of any other wage forms (other wage components).

However, the so-called above-tariff (bonus) wage components (wage forms) are also regularly present at employers'. Their legal claimability may depend on different criteria depending on the type of the employer. In the case of industrial enterprises, it can be criteria in the form of work productivity, efficiency or the fulfilment of set goals, it can be, for example, an additional payment according to the work assessment, wage benefit for work on Saturday and Sunday, various

48 TOMAN, J. 2014. *Individual Labour Law: General Provisions and Employment Contract*. Bratislava : Friedrich Ebert Stiftung, 2014. p. 56.

forms of personal additional payments according to the cost and performance of the employer and employees, etc. When assessing above-tariff components, we must then proceed from the fact that the performance of work is tied to the assessment of the fulfilment of these criteria. For example, productivity within the scope of overtime work may not be as important to the employer as that the work is completed within the framework of the work shift schedule without the need for overtime. Therefore, only productivity achieved outside of overtime can be evaluated and rewarded with a bonus component. In such cases, it is not possible to include these wage components in the achieved wage because the employee is not entitled to them when performing overtime work, but only when performing work within the work shift schedule. A different situation occurs with night work in multi-shift operation, where productivity (evaluated without productivity achieved during overtime work) is achieved and met even during properly established night shifts, night work. For the sake of completeness, in the case of the mentioned criteria and on condition that the employer has a working time schedule in continuous operation and the established weekly working also runs during holidays, wage forms linked to productivity will be part of the achieved wage even for work on a public holiday.

In principle, above-tariff wage components can be linked to the general criterion of "work performance" in the form of, for example, "*the employee is entitled to a bonus component of the wage in the amount of 0.25 euros for each hour of work performed*" or linked to the creation of the right to basic wage under an established percentage. In these cases, these wage components will also be part of the achieved wage, because the right to them arises from the performance of work in general, and thus also overtime work, work on holidays and night work, or from the creation of the right to basic wage in the formulation *"the employee is entitled to a bonus component of the salary in the amount of 10% of the basic wage"*. In the case in question, the achieved wage for one hour can be identified as a share of the sum of all wage components for the given month and the sum of hours worked (excluding hours of overtime).

Another frequent component of wages is the wage component for regular attendance, often called "attendance bonus". This component of the salary can be linked, for example, to regular attendance in relation to shifts scheduled within the established weekly working hours. Once again, the situation arises that this wage form is not part of the earned wage for overtime work, but this will not apply to night work and in continuous operation when the employer schedules working hours even on holidays. The award of attendance bonus is based on the number of days the employee is present at work and its withholding, or reduction, is tied to the existence of a specific violation of the employee's obligation to be present at the workplace during working hours.

In practice, we come across another interesting tool within the employer's remuneration system, which we present for its specific use in case of violation of a specific obligation of the employee, while its use is not directly linked to the fulfilment of the classic obligation to be present at work with reference to § 81 (b) of the Labour Code. Therefore, if the employer decides to apply malus or clawback to any of the above-tariff wage components, we believe that in the above-mentioned case, it is no longer possible to talk about ineligibility to be awarded this above-tariff wage component, but about the fact that such above-tariff wage component is claimable by the employee, retroactive recovery, using the principle of malus or clawback compensation, can be applied only to reduction of this component. Compared to the attendance bonus, the malus and clawback will lead to a specific violation of the obligation falling in the area of compliance and integrity, so malus and clawback are, therefore, applicable to a longer reference period compared to the attendance bonus, where the reduction of the above-tariff wage component is manifested exactly in the specified reference period of a calendar period (specified by a fixed beginning and end) and represents a special mechanism of access to reduction of the above-tariff wage component intended, as a rule, for specific groups of employees. *"However, a question relevant from the point of view of the asserted claim is the fact that in the case of deferment of part of the bonus in the amount of 40% - the deferred part is subject to application of provisions on malus bonus in accordance with the Remuneration Policy of the bank, a. s., as indicated in the letter addressed by the legal predecessor of the defendant to the plaintiff on July 28, 2016. However, in the dispute, the defendant did not claim or prove to the court that they decided to apply the provisions on the malus bonus, that is, that the defendant proceeded in accordance with the provisions of Part III. Variable wage component X. Remuneration principles according to the CRD Directive III. point 12.3 of the Remuneration Policy, namely that the board of directors decided to adjust – reduce or not pay the bonus due to the existence of the criteria contained in point 10 of this internal regulation. The defendant's argumentation regarding the cancellation of the bonus as a whole by the decision of the board of directors of December 19, 2016, however, logically excludes considerations of the use of the bonus malus provisions for the deferred part of the bonus – as long as the defendant claims that the plaintiff's claim to the bonus is not given (by virtue of the cancellation of the board's decision to award entitlement to a bonus), in the case of a deferred part of the bonus, it is not possible to decide on its reduction or non-payment, such decision is considered only in the case of recognition of the existence of a bonus entitlement by the employer."*[49]

[49] Ruling of the Ružomberok District Court of 02 July 2021, case no. 3 Cpr 27/2020.

The correct identification of the employee's wage terms from the point of view of their legal claimability, their direct connection with the performance of the employee's work or with regard to the adjustment of their award conditions, has a fundamental impact on the calculation (determination) of the employee's achieved wage. The scope and amount of the wage achieved, therefore, depends on identification of the wage entitlement within the applied wage system at a specific employer and, in principle, for each hour worked for which the employee is entitled, while it must be based on claimability of wage payment in relation to the work performed in connection with the fulfilment of the established criteria for the emergence of the claim. Incorrect identification of individual wage components can lead (and from the evidence from practice, regularly leads) to a violation of the relevant labour law regulations and a subsequent sanction for the employer. Ultimately, however, it leads to a violation of the employee's right to fair remuneration when performing overtime work, when performing work on a holiday or night work. This is understandably related to the possibility of imposing monetary sanctions on the employee, as these will primarily depend on the nature and purpose of the individual components of the employee's wage, considering their wording in the employment contract or collective agreement, and subsequently admitting shortening/reduction or reduction of those wage components, taking into account the reasons and consequences of duties violated by employees.

4 IMPOSITION OF SANCTIONS UNDER LABOUR LAW

The variability of imposing sanctions under labour law for insubordination/ unsatisfactory work performance by the employer is not as great as it might seem at first glance. No labour law regulation defines sanctions under labour law; their definition in this publication is, therefore, perceived purely academically. In the framework of the present publication, we perceive the termination of employment as one of the sanctions under labour law, as it is related to the disciplinary process, which has certain mechanisms and tools for dealing with negative employee behaviour and, therefore, the termination of employment is also viewed from this perspective. In principle, we can recognise only the following types of labour law sanctions:

- notification of insubordination / call on unsatisfactory work performance;
- termination of employment (not perceived as a typical sanction, but rather a result of certain negative employee action);
- leave reduction under § 109 (3) of the Labour Code, exclusively in the case of an unjustified missed work shift (working day) by the employee;
- non-payment of wage compensation for work on a holiday, which also refers only to an unexcused missed work shift under § 122 (4) of the Labour Code;
- adequate monetary compensation paid by the employee for not remaining with the employer during the notice period (§ 62 (8) of the Labour Code);
- adequate monetary compensation paid by the employee for non-compliance with the so-called non-competition clause (§ 83a (5) of the Labour Code);
- and reduction or non-recognition of above-tariff wage components depending on the agreed wage terms and the conditions for their recognition under § 119 (3) of the Labour Code.

Imposition of various sanctions under labour law appears to be a key answer to the question of whether it is possible to impose different labour law sanctions, including termination of employment, to employees for the same action (event) of insubordination / inconsistent performance of work tasks. A situation of cumulation of various labour law sanctions imposed by the employer is often encountered. For example, the employer decides to shorten the employee's leave for unjustified skipping of a work shift under § 109 (3) of the Labour Code and, at the same time, reduces their personal bonus for three calendar months justified with the need to secure their replacement during their absence and the costs incurred thereby, bad influence on other employees, etc. Although such action by the employer is not excluded explicitly in the legislation, we believe that each case should be assessed individually, and the employer should take into account adequacy of the sanctions imposed. In application practice, most employers (those who have adopted compliance policies, including codes of conduct) do not apply more than one labour law sanction for one action, which should also emphasise the social and motivational dimension of the sanction imposed.

As part of the disciplinary process, the key question is what goal the employer wants to achieve by imposing a sanction under labour law. In most cases, the imposed labour law sanction should be educational in nature. Therefore, punishing an employee too severely may cause the opposite, i.e., the employee may also develop a sense of injustice. While, as evidenced by application practice, an appropriately imposed sanction is motivational in nature and serves as a future deterrent (for not only the affected employee) against violating the existing labour law obligations and ensures that their behaviour corresponds to the corresponding standard determined by the employer's internal company regulations and relevant labour law regulations, an inappropriately imposed sanction can and probably will be counterproductive. Limiting the imposition of concurrent sanctions for individual actions is typical for public branches of law.

The Czech Supreme Court also dealt with the issue of simultaneous imposition of a sanction and termination of employment. A situation arose when the employer reduced the employee's leave for negative behaviour and, at the same time, immediately terminated the employee (unexcused missed work shift). Based on the opinions of the courts, the mere termination of employment by the employer is not considered to be imposition of a labour law sanction, although the employee can subjectively assess it this way and, therefore, such combination is permissible. The Supreme Court of the Czech Republic considered "whether the cumulation of sanctions is permissible, namely, the immediate termination of employment under § 55 (1) (b) of the Labour Code" and leave reduction. In this context, the Supreme Court of the Czech Republic[50] stated that *"the principle that the same person can be affected for the same action only once (ne bis in idem) is a principle of the public law that is attached primarily to criminal and administrative law, possibly affecting these proceedings, concerning the same deed and the same person. Its application to punitive or disciplinary proceedings is questionable for the time being. Transfer of the mentioned principle (institute) into labour law (even if only into the regulation governing sanctions against the employee under labour law) can thus appear problematic. However, the aforementioned cannot affect the relationship between the immediate termination of employment and reduction of leave. As it follows from the Labour Code and the express wording of provisions*

[50] Ruling of the Czech Supreme Court of August 29, 2019, case no. 21 Cdo 2296/2018.

of § 48 (1) thereof, immediate termination of employment is one of the methods of terminating the employment by the employer, which the Labour Code permits. At the same time, its § 55 (1) lays down the conditions under which the employer (if the employer so decides) can proceed with this method of terminating the employment. The fact that the employment may be terminated immediately (among other things) also if the employee has violated their obligation arising from legal regulations relating to work performed by the employee in a particularly gross manner does not change the fact that this is one of the ways to terminate employment (although the employee may also feel it as a certain sanction for having violated their duties in a particularly gross manner). On the other hand, the leave reduction for an unexcused missed shift (working day) represents the employer's sanction for breaching the employee's obligation resulting from legal regulations relating to the work performed by them, that is, to perform work in predetermined working hours at the employer's workplace [cf. § 38 (1) (b) of the Labour Code]. At the same time, it depends on the employer's decision whether to shorten the leave or not. In the same way, it is exclusively within the employer's remit whether the employer shortens the leave in the extent of one day, two days or three days for one day missed [cf. § 223 (2) of the Labour Code]". Although the court was primarily concerned with the possibility of concurrent leave reduction and immediate employment termination (and does not perceive termination as a sanction), it is important to state that within the framework of labour relations, concurrent sanctions for one and the same action (behaviour) are not excluded, as it is the case in public law.

Termination of employment does not in itself represent a labour law sanction for the employee's breach of duty or unsatisfactory performance of work tasks, as we have stated several times but, purely academically for the purposes of this publication, we perceive it as a certain sanction within the disciplinary process. The termination of employment may be perceived as the employer's right implemented under § 2 of the basic principles of the Labour Code[51] consisting of the employer's decision that the employer no longer wishes to employ such employee. In the event of employment termination, rather than a labour law sanction, it is a decision not to remain in a private law relationship because the employer has lost trust in the contractual partner in the sense that this partner will continue to fulfil their obligations arising from the existence of the employment contract in connection with § 81 (a) of the Labour Code properly and responsibly.

Taking into account the aim of the publication, we will focus on the institute of leave reduction, non-payment of wage compensation in the event of a missed

[51] The employer is entitled to select the employees freely in the required number and structure and to determine the conditions and manner of exercising this right, unless this law, a special regulation, or an international treaty to which the Slovak Republic is bound, stipulates otherwise.

work shift before and after a public holiday (these sanctions are directly regulated in the Labour Code) and monetary sanctions that are not directly regulated in the Labour Code and mainly consist of non-recognition of various variable wage components.

4.1 Cease and desist letter/final reprimand in the case of breach of work discipline

According to prevailing opinion, a cease and desist letter (whether for breach of work discipline or a final reprimand on unsatisfactory work performance) does not have the nature of a legal act (although the author may believe that it is a legal act). Consequently, it can be concluded that no legal consequences arise for the employee upon the warning served. The legal qualification thus tends to characterize it as a de facto act of the employer, by which it fulfils a substantive condition laid down by the legislation for the possibility (not the obligation) of subsequent valid employment termination if there is a repeated breach of duty on the part of the employee or failure to improve performance of their work tasks within a specified reference period. The employer's cease and desist letter is thus regarded as a substantive prerequisite for valid employment termination, not a legal act. The possibility of its review by a court is, therefore, also questionable, particularly if it is a condition for termination of employment or the non-award or reduction of a certain component of pay or an additional component of pay (remuneration, bonus, benefit).

Since the Labor Code does not associate a nullity clause with a written warning/cease and desist letter, and since a written warning is not seen as a legal act (and therefore, the nullity clause is irrelevant), it is questionable whether it is even necessary to examine whether the warning can be expressed in oral or implied form. However, suppose the cease and desist letter /final reprimand is also a substantive prerequisite for termination of employment. In that case, it can be argued that if the statutory procedures for the subsequent validity of the termination of employment are to be followed, the cease and desist/final reprimand should be in writing. This conclusion may be relevant even if the document is the basis for other purposes, namely the imposition of an employment sanction. This is because the employer shall have relevant evidence (in any litigation) based on which it can demonstrate why it has acted in a certain way in the disciplinary procedure and why it has imposed a particular sanction (of course, it may use other evidence, but we consider that it does not have such an option for a valid termination of employment and shall comply with the statutory procedure).

There is also a question related to the obligation to deliver employer's documents concerning the establishment, change and termination of employment, or the establishment, change and termination of the employee's obligations arising from the employment contract, enshrined in § 38 para. 1 of the Labor Code.[52] The employer's written cease and desist concerning a breach of work discipline, final reprimand for unsatisfactory work performance, if viewed through the lens of the broader concept of a legal act, may be considered a document that falls within the meaning of § 38 para. 1 of the Labor Code. Therefore, the cease and desist letter/ final reprimand in question should be in a written form. This conclusion can be maintained even if we assume it is a substantive condition since we perceive that it is a document which changes the content of the employment relationship (e.g., for remuneration) or only at the end of the employment relationship. We consider that § 38 para. 1 of the Labor Code is drafted broadly and does not only apply to the service of documents like a legal act.

Furthermore, it should be pointed out that the validity of the employer's fulfilment of the substantive condition of six calendar months, which both statutory provisions stipulate (both for the assessment of repeated minor breaches of work discipline by the employee and unsatisfactory performance of work tasks, which has not been remedied even within the specified period by the employer with a notice served in the last six calendar months), is limited. At the end of this period, if the employment relationship is not terminated, although the notice remains on the employee's personnel file, the employer can no longer validly terminate the employment relationship with the employee by giving notice.[53]

On the other hand, this does not prevent the employer from taking such action if the employer uses the employee's written breach of labor discipline or the written challenge for unsatisfactory performance of work tasks to implement other labor law institutes and takes them into account for a period longer or shorter than the six calendar months provided for a valid termination of the employment relationship pursuant to § 63 of the Labor Code. Usually, these written breaches of labor discipline are taken into account when the employee applies for an increase in the employer's tariff grade, for example, reducing the various above-tariff wage components on a calendar month basis or even other bonuses assessed on a calendar-year basis.

52 ŽUĽOVÁ, J. Pracovnoprávna úprava doručovania a možnosti jej elektronizácie *[Labour law regulation of service of process and possibilities of its electronicisation]*. In *Súčasný stav a nové úlohy pracovného práva*. In *Current state and new tasks of labour law: Dies Iuris Tyrnavienses – Trnavské právnicke dni: New Europe-challenge and expectations: international scientific conference* : 22-23 September 2016, Trnava. Prague : Leges Publishing House, 2016. pp. 244-259.

53 See also ŽUĽOVÁ, J. – KUNDRÁT, I. 2020. Service of documents in the context of employment during employee quarantine. In *The Central European Journal of Labour Law and Personnel Management is an international scientific journal.* 2020, vol. 3, no. 1, pp. 77-88.

In addition to issuing a cease and desist regarding a breach of work discipline or final reprimand for unsatisfactory work performance, the employer may impose, depending on the employee's internal environment, a further employment sanction for such specific conduct, which will depend on the nature of the obligation breached by the employee, the number of repetitions of the breach of that obligation, the nature of the unsatisfactory work result, and, of course, an assessment of the circumstances in which the employee's conduct occurred. It may be stated in general terms that the nature of the employee's work activity and job classification, in particular, is relevant to assessing what employment sanction will be imposed, in addition to other circumstances. For most employers, the less replaceable, difficult to fill or more responsible the job and activity, the more severe the sanction. Interchangeable work activities and job positions are mostly characterized by a generic job designation corresponding to a different setting for sanctioning employees.

Informal documents/conversations

Different assessment levels of the employee's conduct and behavior are consequently matched by the different documents delivered by the employer, the legal nature of which varies. For example, suppose the employer does not decide to issue a cease and desist letter regarding breach of work discipline, e.g., a final reprimand for employee's insubordination in performance of the tasks entrusted to them. In that case, an oral interview is often used in practice. Although the oral interview or the misconduct discussion is not regulated in the Labor Code, it is common. For many employers, it is also regulated procedurally in various regulations and forms part of the disciplinary procedure.

Many employers often create their system of "warnings" or rather "reprimands" which they deliver to employees when the prerequisites of breach of work discipline or unsatisfactory performance of work tasks are met, but which do not reach such intensity or character that they can be used in the eventual termination of employment. In most cases, these are various cease and desist letters, reprimands, and "informal" notices of misconduct, which, although they are/may be relevant for the fulfilment of the conditions for the imposition of one of the labor law sanctions, e.g., in the area of remuneration of employees, the employer cannot or does not want to use them for termination of the employment relationship. Such documents/reprimands are not regulated by the LC or any other relevant employment regulation. It is up to the employers' internal environment, what system they choose, and what impact this system will have on the employees (of course, it shall not be an employer's conduct that would be inconsistent with the law or not in compliance with good morals). However, the primary issue to be resolved is the legal nature of such documents, which have no relevance to termination of employment. We consider that these ‚cease and desist/reprimands' can be regarded as the so-called de facto acts by which the employer either exercises its right to draw the employee's attention to proper and responsible performance of their work tasks within the scope of its discretionary power pursuant to § 1 para. 2 of the Labor Code and the fulfilment of a substantive legal condition based on the agreed conditions for the granting or non-granting of above-tariff wage components pursuant to § 119 para. 3 of the Labor Code if such a link exists between the employee's action and the granting or reduction of one of the above-tariff wage components. Mere subordination of an employee's conduct to one of the established grading levels does not have any consequences for the employee's position, particularly in remuneration, if there is no link to any of the above-tariff pay components. This is also true in the case of informal warnings, which have an educational, motivational function of alerting the employer rather than a punitive function. By default, these documents do not affect the employee's rights (except for those which are intended to be relevant for terminating the employment relationship with the employee)[54], are not filed in the employee's personnel file or are filed there only for a certain reference period which is relevant for paying the employee the relevant above-target component of the wage or some form of bonus[55].

4.2 Leave reduction

Shortening of the leave pursuant to the Section 109 (3) of the Labour Code can be seen as a labour-law sanction that can be imposed exclusively for the insubordination by an employee, which is committed when the employee misses a work shift (working day) without an excuse. Unexcused absences of shorter parts of individual work shifts are added up.

The employer decides whether a work shift is unjustifiably missed after consultation with the employee representatives (see the Section 144a (6) of the Labour Code), and if they do not work for the employer, the employer decides exclusively (Section 12 of the Labour Code). They can be shortened pursuant to the Section 109 (6) of the Labour Code to the employee all types of leave (for the calendar year, for its proportional part, for days worked, additional leave).

[54] See ŽUĽOVÁ, J. 2021. *Výber zamestnancov: právne úskalia obsadzovania pracovných miest. [Selection of employees: legal pitfalls of filling jobs]*. Bratislava : Wolters Kluwer, p. 78.

[55] Various employers have different forms of such factual actions of the employer contained in different documents (e.g., in German companies, different equivalents of the so-called "reprimands" in the German equivalent of "*die Ermahnung*" are used, in which the employee is warned for breach of work discipline or unsatisfactory performance of work tasks without a direct link to the termination of employment or the extra-pay component.

"In this context, the Court of Appeal emphasises that the reason for shortening the leave is unjustified missed work shifts by the employee (absence), when the employer may or may not shorten the leave. The employer is obliged to carry out the legal qualification of an unexcusedly missed work shift in agreement with the representatives of the employees (note: according to the current legislation, a negotiation is sufficient). In the event that the employer does not have employee representatives, the employer itself is entitled to assess whether it is an excused missed work shift or an unexcused missed work shift and may or may not shorten the employee's leave. The employer is entitled to shorten the employee's leave by 1-2 days for each unexcusedly missed work shift."[56] It is necessary to emphasise the fact that the courts assess the employee's absence separately also in relation to the possible application of a sanction in the form of shortening the leave, not only in proceedings for the invalid termination of the employment relationship immediately or by notice.

Shortening of the leave as a common institution is also confirmed by another court decision. *"The law also took into account the reasons for which it is possible to shorten each employee's leave, that is, not only leave for the calendar year, but also leave for days worked and additional leave. Such an extremely serious fact, which allows the shortening of any type of the leave, is an unjustified missed work shift, while the unjustified absences of individual shorter parts of work shifts are counted for this purpose. The employer can shorten the employee's leave by 1 to 2 days for each unjustified work shift. The decision whether the employer proceeds with shortening the employee's leave is expressly a matter of the employer's free and independent discretion. The Labour Code also contains statutory reasons, upon fulfilment of which the leave is automatically shortened, regardless of whether the employer has the opportunity to make a dispositive decision about whether or not to shorten the leave. Pursuant to the aforementioned rule, for every 21 missed working days, the employee's leave for the calendar year is reduced by 1/12, if the employee did not work for serving a prison sentence; for the execution of detention, regardless of whether the employee was legally convicted, or was acquitted, or was granted a pardon or the crime was amnesty, or was not criminally responsible for the crime committed, or the criminal prosecution was stopped."*[57]

Shortening of the leave pursuant to the Section 109 (3) of the Labour Code assumes the employee's unexcused absence from work, but it is not directly

[56] Decision of the Regional Court Prešov as of 13 March 2018, file no. 13 CoPr 2/2017. In the cited legal sentence, the competence of the employee representatives is incorrectly stated, according to the Section 144a (6) of the Labour Code, the employer negotiates with the trade union, rather than arguing, whether it is an unjustified missed work shift. However, the legal opinion of the court stated in the relevant context does not change this.

[57] Decision of the Regional Court Nitra as of 27 September 2017, file no. 5 CoPr 4/2016.

related to the employer's decision whether, in addition to shortening the leave, the employer decides to terminate the employment relationship with the employee through notice, immediate termination, agreement or not to terminate the employment relationship at all. The employer must assess all the circumstances of a specific case so that the employee's unjustified absence from work (reasons, duration, etc.) can be perceived as a disciplinary violation (serious or minor) for the subsequent termination of the employment relationship.

Shortening the leave does not automatically mean that the intensity of the insubordination is such that the employment relationship can be validly terminated by the employer's termination or immediate termination. The court also evaluated such a situation. *"In the case under review, it was proven by the evidence that the plaintiff violated work discipline by taking the one-day (05 June 2002) leave, despite the fact that the employee only reported it by phone and it was not indisputably proven in the proceedings, in view of the ambiguous statements of the participants and witnesses, that such practice was tolerated in the defendant's company, however, the Court of Appeal correctly assessed this insubordination as foreseeable in labour relations, regulated by the Labour Code, with a sanction directly responding to such insubordination in the Section 109 (2) of the Labour Code. Although it is possible to agree with the claim of the appellant that the said legal provision states such a procedure in the case of unexcused absence (shortening the employee's leave by 1 to 2 days) as the disposition (possibility) of the employer to use this sanction, the Court of Re-Appeal agreed with the conclusion of the Court of Appeal that one day of unexcused absence is not such a serious breach of work discipline, given the plaintiff's job description and function, that would result in an exceptional way of termination of the employment, such as immediate termination of the employment."*[58]

The basic premise for the application of shortening of the leave is thus the causality consisting in whether or not the employee has unjustifiably missed the work shift (working day) in the length of at least one work shift (or whether the sum of the shorter parts of the missed individual work shifts represents at least one full missed the employee's work shift in the length determined by the shift calendar, or pursuant to the Section 90 (4) of the Labour Code, in which case the employer could apply the sanction in question.

What can be perceived as an unjustified absence from work was assessed by the courts. *"Unexcused absence of an employee is when the employee does not fulfil their work duties arising from the employment relationship during the agreed working hours due to absence at the agreed workplace and if the absence is not caused by*

[58] Decision of the Supreme Court of the Slovak Republic as of 29 September 2008, file no. 5 Cdo 74/2008.

their proven incapacity for work, taking leave in accordance with the Labour Code, awarding unpaid work time off or legal impediment to work.”[59]

“Unexcusedly missed shift, for the purpose of shortening of the leave, means a working day that the employee did not work, while it must be an unjustified missed work. If the employee did not work only part of the work shift in this way, it is not a case of not working a working day. However, unexcused absences of shorter parts of the shift are added together, and the employer can shorten the employee’s leave for each entire missed shift resulting from the addition of these individual parts.”[60]

However, the employee’s absence from work on days when the employee did not know and could not have known that the employee was supposed to be present at the workplace cannot be considered an unjustified missed work shift. *“From the above-mentioned documents, only the fact that the defendant worked as a driver and part of his work, in accordance with Part V, Part A, Point 8, also included carrying out activities related to the maintenance of the company vehicle (cleaning the vehicle, technical maintenance, vehicle repairs, administrative work related to with driving the vehicle), but it is not stated at what time and at what intervals these activities need to be carried out, whether they are carried out between the services of individual drivers, since two drivers drive one vehicle, whether this maintenance is carried out by each driver after the end of the work trip, respectively the other driver who goes to work. Therefore, the plaintiff did not even have the opportunity to know when and if he has a planned business trip and whether it is necessary to carry out the mentioned activities. Since the employer did not know whether the temporary incapacity for work of the plaintiff had already been terminated by the attending physician, the plaintiff had no justified reason to believe that he should exceptionally start work even during the weekend, that is, on Saturday or Sunday, since it was obvious that he did not even have the defendant no work activities scheduled.”*[61]

Through their decision-making activity, the courts create a legal framework for the disciplinary process in such a way that the termination of the employment relationship is supposed to represent a means of ultima ratio on the assumption that the employee has committed such a serious action that cannot be tolerated any longer and for all other less serious actions the employer must/can use motivation or repression, for example, sanction in the form of shortening the leave. *“The plaintiff only exercised her right to protect her own health in the event of a sudden and serious deterioration in her health condition that occurred during*

[59] Decision of the Regional Court Nitra as of 28 November 2019, file no. 8 CoPr 6/2018 or cf. the Decision of the Supreme Court of the Slovak Republic as of 29 October 2010, file no. 5 Cdo 95/2009.

[60] Decision of the Regional Court Nitra as of 27 September 2017, file no. 5 CoPr 4/2016.

[61] Decision of the Regional Court Nitra as of 27 September 2017, file no. 5 CoPr 4/2016.

working hours and which deterioration in her health condition required surgery, when she sought medical help, medical advice, while the closest to the operation was a pharmacy, where the pharmacist is also authorised to provide basic medical assistance and medical advice. In this case, the employee's obligation to be present at the workplace comes into conflict with the employee's right to life, the right to preserve human dignity and the right to health protection, while we are of the opinion that in such a collision, the employee's obligation to be at the workplace should give way to the more important right of the employee to protect health and the right to preserve his human dignity. And in such a way that the implementation of the right to protect the employee's health cannot be a reason for the immediate termination of the employment relationship, taking into account the specific factual circumstances present in this case. The action of the plaintiff consisting of leaving the workplace in the event of a sudden deterioration in the plaintiff's health does not reach the intensity of a gross insubordination, which could justify the termination of the employment relationship immediately. On the contrary, the Labour Code allows the defendant to use other, less strict ways of drawing the consequences of such an action, for example shortening the plaintiff's leave by 1 to 2 days, or the defendant had the opportunity to warn the plaintiff of the insubordination, which would establish, in the event of a repeated violation, the possibility of the defendant to terminate the employment relationship with the plaintiff by termination."[62]

The occurrence of the insubordination due to a violation of the obligation to be present at the workplace during working hours and, subsequently, the imposition of a possible labour-law sanction must be assessed with an emphasis on the specific circumstances of the case, for example, special working conditions of the employee at the time when the situation occurred, which the employer assessed in the above manner. For example, the courts did not consider the situation as insubordination when the employee did not have the opportunity to announce their objective need to leave the workplace for reasons on the part of the employer. For example an extraordinary situation arises and the employee, despite their obligation based on the Section 81 (b) of the Labour Code to be at the workplace at the beginning of working hours, to use working hours for work and to leave it only after the end of working hours reflected in the employer's internal company regulations (for example, work rules or code of ethics, various directives on the registration of presence at the workplace) does not have the possibility to request the employer for consent to their short-term or long-term departure (despite the conclusion of an agreement on the use of the employee's private mobile phone). *"At the same time, according to the Court of Appeal, it was necessary to take into account the fact that the plaintiff had no way to ask for permission from her superior*

[62] Decision of the Regional Court Trnava as of 16 April 2019, file no. 9 CoPr 8/2018.

to leave her workplace when there was no telephone in the workplace. In the proceedings, it was proven that the defendant agreed with the plaintiff to use her private phone for business purposes for a flat fee of EUR 75,00, but it cannot be concluded from the above that the fact that the plaintiff did not have her private phone with her represents a violation of her work duties. The plaintiff claimed and proved that she had left her mobile phone at home that day, which can be considered a common situation that happens. If the defendant decided to save their costs and not to ensure the operation of telephone equipment (whether landline or mobile) and resolved the telephone connection by agreeing with the employee on the use of a private telephone for work purposes, the employer itself introduced the possibility of a situation where the employee will not be able to contact the employer by telephone from for the reason that you for example, the employee forgets their personal phone, or it breaks down, or the employee just forgets the charger, which are quite common situations. If the defendant's operation was equipped with either a landline or a mobile phone, which would still be in operation, the possibility of a telephone connection would be ensured to a much greater extent. If the defendant required the plaintiff to be available on the phone, it was their duty to create sufficient conditions for her to do so (by securing a company phone), while the agreement on the use of a private phone for work purposes does not replace the fulfilment of this obligation. Therefore, the court of first instance correctly concluded that if the defendant and the plaintiff agreed on the use of the employee's private mobile phone for work purposes, this cannot subsequently be to the detriment of the plaintiff if she forgot her private phone and could not call for help from the workplace or report an occupational accident, or the defendant's need to leave the workplace. At the same time, the defendant has not demonstrated in any way how the situation would have changed if the plaintiff had notified the defendant by phone in advance of the need to leave the business for a short time, apart from the fact that the defendant would have known about it."[63]

Examining whether there was an unjustified absence of an employee from the work is a relatively frequent question in court proceedings, when the court assesses the intensity of the insubordination in order to determine the validity of the termination of the employment relationship. Since unexcused absence is also related to the shortening of the leave, we present several court decisions, the subject of which was the investigation of absence at work and which are factually interesting.

When assessing the situation, whether there was an unjustified absence of a work shift or a part of it, the employer's actions will not stand up if the employer determines the maximum permissible time during which the employee can draw an obstacle to work on their part, with the justification that it is the necessary time

[63] Decision of the Regional Court in Trnava as of 16 April 2019, file no.5 CoPr 8/2018.

for the realization of the fact approved by law nature of the obstacle at work on the part of the employee (note – the employer determined the time period during which the employee can use the obstacle – examination/treatment of the employee in a medical facility, while not based on any objective indicators and taking into account the situation in medical facilities, we can state that the determination of time limits objective limits is also unrealistic). *"The disputed fact between the parties was whether, in the given case, it was a question of compliance with the scope of work leave established by law - the necessary time. The defendant's idea of two hours is purely a subjective assessment. The burden of proof was on the defendant. The court does not know what specific facts the defendant was basing themselves on when the defendant set a time of one hour to take over the medical documentation from the doctor and one hour to move from the physician's office to the workplace, to change into work clothes. Dealing with patients, examinations, their diagnosis, treatment, prescription of medicines and other requests of patients are fully within the competence of the physician, who themselves organises these activities according to their needs, the defendant did not explain to the court on the basis of which fact the general practitioner should have one hour designated to fulfil the request the plaintiff – their employee, these organisational issues could be the subject of an agreement between the defendant and the company physician as part of their mutual cooperation, it is not possible to order the physician, so it is not possible to demand such equipment from the plaintiff. However, the defendant did not substantiate their claim objectively. In the same way, the determination of the time of one hour for the transfer from the physician to the workplace remains only at the level of a subjective statement, it does not take into account the time when the plaintiff actually received the medical documentation from the physician, the distance from the bus stop, the public transport bus timetable regarding the route from the physician to work, the duration of the journey itself in by bus, arrival from the bus stop to the workplace. The document presented by the defendant – the passenger's card proves that no entry was made on it on the given day, but the bus transportation itself is not excluded. This evidence did not establish the plaintiff's breach of duty. The court believes that the defendant has a simplified and general idea of the duration of the necessary time, which rather indicates a purposeful minimisation of this time in their favour, in order to meet their needs. It should be noted that the plaintiff took over the medical documentation on the basis of the defendant's instructions for the purpose of performing a preventive check-up with the company doctor. The plaintiff undoubtedly complied with this instruction. In the proceedings, it was undisputed that the plaintiff arrived at the workplace at 11:46 a.m. as can be seen from the plaintiff's attendance record for the month of November 2017. The delay or absence is only at the level of the defendant's claim, which, however, is not based on an objective fact. The* *court notes that the plaintiff's violation of work discipline was not proven, therefore this reason for dismissal is not in accordance with the law."*[64]

An important moment for the purpose of shortening the leave is also the counting of unjustified missed shorter parts of individual work shifts, especially if it is not a matter of whole hours or half hours, from which the absence could be accurately calculated (even when rounding off the employee's total unjustified absence from work). Standard calculation through personnel systems is based on rounding to the nearest whole half hour in relation to the shift calendar (working time schedule) of the employee pursuant to the Section 90 (4) of the Labour Code. However, this is only possible for employees who do not have a special working time schedule based on counting working time by the minute, in this case the personnel system would record the absence in minutes. Consequently, a potential problem of unequal treatment arises for the employer (if there are different attendance systems at their workplaces), because employees with half-hour rounding, in total, will achieve an unjustified missed work shift earlier than those employees with minute records, who may not achieve an unjustified missed work shift at all, and the shortening of their leave will not happen at all. In this regard, we believe that the personnel registration system may round time periods on a half-hourly or hourly basis for the purposes of recording the presence of an employee at the workplace, but for the purposes of applying the Section 109 (3) of the Labour Code, however, the actual time of arrival/departure of the employee should also be recorded, that is, a real electronic trace of the employee's presence at the workplace, from which the extent of the employee's unjustified missed work shift can actually be determined. This principle also forms a base for short-term repeated unjustified absences from work shifts (the employee is regularly late to the workplace for a few minutes), which are also not rounded up to half-hours for the purpose of filing a warning for minor insubordination, but the actual time of the employee's arrival/departure is written in the warning to/from the workplace, by which the employee committed minor insubordination.

When shortening the leave, the employer should strictly consider what criteria for assessing the shortening of the leave in its internal environment will be set not only in relation to the obligation to comply with the principle of equal treatment of all employees, but also in relation to the possible number of repetitions of unexcusedly missed work shifts by employees, and the reference period, in which they commit such an act. Provision of the Section 109 (3) of the Labour Code primarily does not require such legal regulation from the employer in internal company regulations, but given the differences in the circumstances of individual cases, a certain uniform regulation within the employer would be expected. The

[64] Decision of the District Court Ružomberok as of 03 September 2019, file no. 3 Cpr 10/2018.

rules for cutting leave should not be arbitrary and capricious, but built on an objective basis.

It is questionable here whether the employer in each particular case can choose between shortening of one or two working days or must have pre-defined rules. This requirement is not directly established by the Labour Code, and therefore under the conditions that it can justify its actions, the employer could always approach the choice in a specific case. The employee should have the right to know the reasons for shortening the leave. Since the Labour Code allows a choice between one day and two days, it is to be considered whether the employer will apply a higher penalty only in case of repeated violations. If the employer proceeds to shorten the leave, this information should be provided to the employee, unless the rules have been set so that the employee receives information about an unjustified missed work shift as well as information about the shortening of the leave by one day. If this is not the case, the employee should have the right to know if their leave is shortened and to what extent. If this reduction has an impact on the use of leave that has already been determined, this use should be cancelled (so as not to overuse).[65] However, these rules should also be based on the basic distinction between insubordinations by the employees and possibly other actions that do not acquire such intensity, or they will have a different legal qualification, for which it is not possible to proceed with shortening the leave, since this is only possible for the objectively stated material reason of violation of work discipline by the employee. *"The court considers that the awarding of absence for deficiencies in the performance of work duties is not a procedure in accordance with the Labour Code, and the employer has other tools to deal with the unsatisfactory performance of work tasks by employees than the additional reporting of absences in attendance. Above all, the defendant could demonstrably warn the plaintiff about these shortcomings (in writing) and state possible consequences consisting in the possibility of termination of the employment relationship by termination, or immediate termination of employment. In view of the above facts, the court came to the conclusion that the defendant did not prove the existence and thus the justification of the plaintiff's reported absences and therefore considers the plaintiff's claim for compensation of wages for unused leave of an unabated length to be reasonable. For unused leave, the employee is entitled to a wage compensation in the amount of their average earnings."*[66]

From the point of view of the application practice, it is crucial how an unjustified missed work shift is taken into account when shortening the leave, that is,

[65] TOMAN, J. 2019. In ŠVEC, M. – TOMAN, J. et al. *Labour Code. Act on Collective Bargaining. Commentary.* Bratislava : Wolters Kluwer, 2019. pp. 1020-1021.

[66] Decision of the District Court Bratislava III as of 10 February 2021, file no. 44 Cpr 25/2017.

what is the reference period for assessing this unexcused missed work shift for the employee's relevant labour-law claim. Provision of the Section 109 (7) of the Labour Code[67] and the judicial practice based on it establishes a single limitation for determining this reference period, that is, that an unjustified missed work shift can only be taken into account for the employee's labour-law entitlement to leave for the relevant calendar year, that is, in the calendar year in which the unexcused missed shift occurred, or their sum. *"However, the Court of Appeal notes that the leave to which the employee was entitled in the relevant calendar year can only be shortened for reasons that arose in that calendar year. Using the interpretation rule a contrario, it is therefore clear that an employee's leave cannot be shortened in the relevant calendar year for reasons that occurred in the previous calendar year, or for reasons that will occur in the next calendar year."*[68] The Czech court ruled similarly. *"However, we cannot agree with the Court of Appeal in that if the plaintiff had 7 unexcused working days and the defendant shortened their leave by 3 days for each unexcused working day, then the plaintiff no longer has any right to compensation for wages from the claim for 16.5 days of leave did not occur. The Court of Appeal itself states that for the year 2014, the plaintiff had 5 unused leave days left, which were transferred to them in 2015. Given that – as stated above – the leave for the calendar year is reduced exclusively for the time missed in this calendar year (for the purpose of shortening the leave, when adding up the missed periods, the period from 1 January to 31 December of the calendar year for which the leave is granted is taken into account), it is not possible to reduce the leave for which it was incurred for an unexcused shift(s) missed in the calendar year 2015 claim in 2014."*[69]

Some employers even shorten this assessment period to six calendar months, depending on the connection with the period of awarding above-tariff wage components on the basis of six calendar months. Given that the period set in this way can be perceived as more advantageous for employees, even taking into account the Section 1 (6)[70] of the Labour Code, such rules can be considered valid and in accordance with Labour Code.

In the practical application of the shortening of the leave, it is necessary for the employer to set the conditions for shortening it depending on its internal environment, because in the end it can create an even worse situation than before the

[67] The leave to which the right arose in the relevant calendar year is reduced only for reasons that arose in that year.

[68] Decision of the Regional Court Nitra as of 27 September 2017, file no. 5 CoPr 4/2016.

[69] Decision of the Czech Supreme Court as of 29 August 2019, file no. 21 Cdo 2296/2018.

[70] In the labour-law relations, the conditions of employment and the working conditions of the employee can be adjusted more advantageously than those regulated by this law or another labour-law regulation, if this law or another labour-law regulation does not expressly prohibit it or if it does not follow from the nature of their provisions that they cannot be deviated from.

sanction in question is applied. Indeed, if the employer without any rules shortens the leave from the first month of the relevant calendar year, while it is an employer who, during the course of the calendar year, applies collective leave taking pursuant to the Section 111 (2) of the Labour Code, may find themselves in a situation where, for the period of collective leave, the employer will have to apply an obstacle to work on their part in accordance with the Section 142 of the Labour Code against employees who no longer have free leave days (because the employer has already shortened the employees' leave so significantly that the employees do not know about it also cover mass leave taking). It is questionable whether, with such a procedure, those employees whose leave was not shortened will not be in a disadvantageous position (although they will receive wage compensation, but those employees whose leave was largely shortened will also receive wage compensation, but under a different title, than in fact those employees who had unexcused absences they get).

From the practical point of view, the shortening of the leave is only relevant if, for example, plans to terminate the employment relationship with the employee at the relevant time, for example, immediately pursuant to the Section 68 (1) (b) of the Labour Code and in this way the employer at least reduces the costs associated with the necessity of its reimbursement pursuant to the Section 116 (3) of the Labour Code, since the employee does not have time to take it by the time the employment relationship ends (of course, the employee's unjustified absence must be proven).

A more significant use of shortening of the leave is questionable. As already indicated above, numerous reductions in leave time can cause problems. Therefore, it appears to be an effective tool to apply it to a reasonable extent on a smaller scale (if we also perceive the purpose of the leave as relaxation for the employee and subsequent better performance of work).

In all other cases, the applicability of this labour-law sanction is questionable. It is possible to see a benefit* in the fact that even if the employer shortens the employee's leave pursuant to the Section 109 (3) of the Labour Code and for the period of collective leave, the employer will grant the employee an obstacle to work on their part pursuant to the Section 142 of the Labour Code (we assume that no other reasons for absence from work can be applied to the employee and the provision of the Section 112 (1) of the Labour Code does not apply), so the employer saves at least on the lower value of the average earnings that will be paid to the employee during this period (we also assume that serious operational reasons pursuant to the Section 142 (4) of the Labour Code[71] could be applied to

[71] Regarding the possibility of applying serious operational reasons according to the Section 142 (4) of the Labour Code and their relationship to taking leave, we refer to ŠVEC, M. – OLŠOVSKÁ, A. 2022. *Kurzarbeit and other obstacles to work on the part of the employer*. Bratislava : Wolters Kluwer, 2022. p. 56 et seq.

this period at all, because in another case of obstacles to work on the part of the employer, it is in basically unimportant, since the value of the obstacle to work on the employer's side is the same as the employee's leave average). Quite often, therefore, we encounter a situation where the employer shortens the leave from the first calendar month of the calendar year and then of course cannot let the employee use it for the period of mass leave taking, because the employee does not have enough "free" leave days (if we take into account the fact that, especially in in the production sphere, employees are blocked for the period of collective leave from 18 days or more). From the above, we can conclude that the scope for shortening the employee's leave is not great, and the motivational element of such a sanction is then rather questionable.

As already mentioned, the shortening of the leave pursuant to the Section 109 (3) of the Labour Code is possible for all three types of leave, that is, the leave for the calendar year or its proportional part, leave for days worked and additional leave. The practical level of reduction thus consists in determining the total entitlement to leave depending on the individual types of leave and then deducting the relevant number of days (1 to 2 days) depending on the employer's decision for each unexcused missed work shift. In this sense, the employer can also reduce the employee's total leave entitlement, which has accrued to the employee depending on the individual types of leave, while none of the provisions of the Labour Code stipulate any minimum limit of the maximum permissible shortening, that is, the shortening is possible until the employee's total entitlement, which accrued to the employee for the relevant calendar year, is used up (the Labour Code limit is set only when the leave is shortened pursuant to the Section 109 (1) of the Labour Code[72]). The shortening is not affected if the employee has already used up part of their total leave entitlement in the meantime, because the shortening is made from the employee's total potential maximum entitlement for the relevant calendar year and in the case of application of the shortening when a certain part of the employee's holiday from their total entitlement is used up at the same time, the provision of the Section 117 of the Labour Code in connection with the Section 131 (2) (g) of the Labour Code[73] is applied. Thus, a situation may arise where an employee has used up several days of leave, but as a result of shortening the leave, the employee has no entitlement to leave. For the leave taken in this way, the

[72] Section 109 (4) of the Labour Code: When shortening the leave according to paragraph 1, an employee whose employment relationship with the same employer lasted for the entire calendar year must be granted a leave of at least one week, and a juvenile employee of two weeks (note – shortening, for example, due to incapacity for work, parental leave).

[73] After making the deductions according to paragraph 1, the employer can deduct from the wage only the wage compensation for the leave to which the employee has lost the entitlement, or to which the employee was not entitled

employee must return the wage compensation provided, and even the employer is entitled to unilaterally deduct such an amount from the salary pursuant to the Section 131 (2) (g) of the Labour Code.

The mentioned procedure of shortening the leave only in the relevant calendar year (for absence in the calendar year in question) is also confirmed by the court decisions. *"When shortening the leave for an unexcusedly missed shift(s), an employee whose employment relationship with the same employer lasted for the entire calendar year must be granted a leave of at least two weeks. However, the retention of this minimum amount of leave applies exclusively to the employees whose employment lasts for the entire calendar year (note that the Slovak Labour Code does not have such a legal arrangement), in which the missed time is assessed and in which any reduction occurs, that is, the period from 01 January to 31 December (cf. Section 223 (3) of the Labour Code). If the employee's employment relationship does not last for the entire calendar year and the employee is only entitled to a proportional part of the leave, this leave may be shortened in its entirety precisely because the employment relationship did not last the entire calendar year. Given that the legal regulation of the leave is constructed mainly in relation to the "calendar year", it also applies – as follows from the provisions of the Section 223 (6) of the Labour Code, that the leave per calendar year is shortened exclusively for the time missed in this calendar year. Therefore, for the purpose of shortening the leave, when adding up the missed periods, the period from 01 January to 31 December is based on the calendar year for which the leave is granted (in which the right to the leave, which is shortened) arose."*[74]

Similarly, this principle of shortening is also used for the purposes of other labour-law regulations, for example, of the Act on the Civil Service of Professional Soldiers[75]. The court decided on the obligation to compensate wages for the used-up leave. *"In the calendar year 2018, the defendant actually used up 20 days of their entitlement to a 42-day leave, but the defendant's leave for the calendar year 2018 was shortened due to an unexcused absence in the performance of state service for a total of 42 days, that is, in the entire scope of entitlement to leave for the calendar*

[74] Decision of the Czech Supreme Court as of 29 August 2019, file no. 21 Cdo 2296/2018.

[75] Cf. Section 111 (6) to (8) of the Act on the State Service of Professional Soldiers: *"(6) For one day of unexcused absence of a professional soldier in state service, the leave is shortened by two days; unexcused absences of less than one working day are added. (7) Unexcused absence of a professional soldier in civil service is considered to be a) absence of a professional soldier in civil service, which cannot be excused for the reasons specified in this Act or in a special regulation, b) the time from the discovery of the performance of civil service under the influence of narcotic substances, psychotropic substances or alcohol until the end of the usual working hours. (8) If the reason for shortening the leave specified in the paragraphs 1, 2, 5 or in the paragraph 6 occurs after the leave to which the professional soldier was entitled the professional soldier is obliged to return the salary that was paid to them for the part of the leave to which the professional soldier was not entitled."*

year 2018. In view of these facts and with reference to the cited provision of the Section 111 (8) of the Act No. 281/2015 Coll. the defendant is obliged to return to the plaintiff the salary that was paid to the defendant for 20 days of used up leave, in the total amount of EUR 458.18, which amount results from the specification of the claim generated by the SAP information system. The defendant has not yet paid this claim to the plaintiff, not even partially."[76]

However, in the event that the employer requests the return of the wage compensation for the leave or its part, to which the employee has lost the right as a result of the application of shortening of the leave by the employer pursuant to the Section 109 (3) of the Labour Code, is the subject of the court proceedings, it is necessary to explicitly define this claim and prove its existence, otherwise the court will not grant the employer this claim for the return of wage compensation (referring to the employee's payslips is not sufficient). *"Regarding the asserted claim for compensation for the shortened leave, which the defendant has already used up and to which the defendant has lost the right, the Court of Appeal agreed with the legal assessment of the claim by the court of first instance. It should be noted that the plaintiff, in relation to the claim for the return of paid compensation for overused leave, stated in the lawsuit only the fact that the defendant used up 20 days of leave, the plaintiff proceeded to reduce her used up leave, to which the defendant lost the right, in the amount 20 days for used leave, the plaintiff's claim amounts to EUR 873.97. The defendant was sent a request to pay the arrears; the defendant did not pay the arrears. As evidence regarding this claim, the plaintiff presented a letter dated 10 February 2020, which represents a call for payment of this arrears. At the hearing, the plaintiff insisted on the claim for the return of the paid wage compensation for the overused leave; the plaintiff did not specify this claim in more detail. After the court in this part rejected the plaintiff's claim for failure to prove the claimed part of the claim, in the appeal the plaintiff pointed out that their claims result from the submitted pay slips of the defendant for the period from October to December 2019 in the Absences section – summary/year is stated 20 days for the leave. It is therefore clear from these documents that the defendant used up 20 days of leave for the year 2019, or until the day the defendant stopped going to work. That is why the defendant´s used-up leave, to which the defendant lost the right, was shortened. It follows from the aforementioned legal provision that the plaintiff in the lawsuit did not properly prove the relevant facts justifying the asserted claim for the return of the paid wage compensation for the overused leave. Mere factual allegations in the lawsuit do not justify awarding such a claim. During the first-instance proceedings at the hearing, the plaintiff did not prove their asserted claim with any evidence, therefore the court acted correctly when, after a factual discussion of part of this claim, it*

[76] Decision of the District Court Ružomberok as of 01 April 2021, file no. 3 Cpr 24/2019.

rejected the claim for compensation of wages for overused leave. From the lawsuit, and even from the assessment of the means of procedural attack and defence, there are no circumstances that would verify the asserted claim, with which the plaintiff would prove their claim."[77]

4.3 Non-payment of wage compensation for the work on a public holiday

We can also consider non-awarding wage compensation to an employee who missed a shift before, during or after a public holiday as a certain monetary sanction.

Pursuant to the Section 122 (3) of the Labour Code, the employee who lost wage (if it was not a public holiday, the employee would have worked) for the public holiday, is entitled to the wage compensation or wage, if the employee is remunerated with a monthly wage (the employee is entitled to nothing if the holiday falls on a day on which the employee would not work, for example, in the case of a normal working week, the holiday falls on the weekend, or if the working time is unevenly distributed, the employee has on this day planned day off).

Pursuant to the Section 122 (4) of the Labour Code, the wage compensation for a public holiday or wage pursuant to the Section 144 (3) of the second sentence does not apply to an employee who unjustifiably misses a shift immediately preceding or immediately following the public holiday, or a shift ordered by the employer for a public holiday, or part of one of these shifts. With regard to the immediately preceding change and the immediately following change, one can ask whether it is a change in the previous and following 24 hours or just a direct follow-up. For example, the 01 September is a public holiday. Pursuant to the Section 95 of the Labour Code, it is based on the rotation of shifts, when the first holiday shift is the shift of the 01 September is from 6:00 a.m. to 2:00 p.m., then from 2:00 p.m. to 10:00 p.m. and from 10:00 p.m. to 6:00 a.m. (02 September). It can be assumed that the immediately preceding change in this case is the change from 10:00 p.m. to 6:00 a.m. from the 31 August to the 01 September and immediately following is a change from 6:00 a.m. (02 September) to 2:00 p.m. (02 September). Therefore, if the employee did not come to the morning shift on the 31 August from 6:00 a.m. to 2:00 p.m. it does not appear that this change is immediately preceding the public holiday.[78]

Provision on non-payment of wage compensation pursuant to the Section 122 (4) of the Labour Code thus states that the wage compensation does not belong to

[77] Decision of the Regional Court Prešov as of 12 April 2022, file no. 17 CoPr 3/2021.

[78] TOMAN, J. 2019. In ŠVEC,M. – TOMAN, J. et al. *Labour Code. Act on Collective Bargaining. Commentary*. Bratislava : Wolters Kluwer, 2019. p. 1116 et seq.

an employee who missed a work shift before, during or after a public holiday, but who was not supposed to work during the holiday (did not have a scheduled work shift). At the same time, the Section 122 (4) of the Labour Code directly refers to the Section 122 (3) of the Labour Code, second sentence, which deals with the situation when an employee does not work on a holiday that falls on their usual working day and is remunerated with a monthly salary, and the employee is not entitled to compensation for this day, but to their salary. If an employee works on a holiday, the employee is not entitled to a wage compensation, but to a wage and wage benefit from working on a public holiday (or paid compensatory time off).

On the basis of the above, we believe that non-payment of wage compensation in accordance with the Section 122 (4) of the Labour Code comes into consideration if the employee did not work during the holiday – nor was the employee supposed to work (if it was not a public holiday, the employee would have worked), the employee lost wage, the employee is entitled to compensation for this day pursuant to the Section 122 (3) of the Labour Code, but since the employee had an unexcused absence the day before (all or only part of the shift) or the day after the public holiday, the employee is not entitled to compensation.

If the employee is ordered to work during the public holiday, no action is taken pursuant to the Section 122 (3) of the Labour Code, and therefore the employee is entitled to wages and wage benefits for working on holidays (or paid compensatory time off) pursuant to the Section 122 (1) and (2) of the Labour Code. Therefore, if the employee were to miss a work shift before or after a public holiday, we cannot proceed pursuant to the Section 122 (4) of the Labour Code. For the day of work on a public holiday, the employee would be entitled to the wage and the corresponding wage benefit, not the wage compensation. If an employee misses a work shift during a public holiday (part or all), when the employee was supposed to work, then the employee will not be entitled to wage and wage benefits for working on a public holiday (for the whole shift or only a part), but it is not proceeded pursuant to the Section 122 (4) of the Labour Code.

4.4 Monetary sanctions

As already stated, the Labour Code does not regulate typical monetary sanctions for the employees who have had certain negative behaviour. To solve the situation of the insubordination or unsatisfactory performance of work tasks, the Labour Code offers the possibility of a written warning/written notice and subsequently termination of the employment relationship. Since these tools for maintaining and motivating a certain quality of work performance among employees are insufficient and ineffective, the application practice extends to the development of various reward systems, within which they try to set the awarding and withdrawal of certain monetary benefits depending on what kind of work performance employees achieve (if it is reduced, we can talk about unsatisfactory performance of work tasks) and how they generally approach the fulfilment of work duties (in the case of a lax approach, we can talk about the insubordination).

In order to set up different remuneration models, it is necessary to start from the principle that the wage conditions must be agreed either in the employment contract or in the collective agreement (Section 43 (1) (d) of the Labour Code and Section 119 (2) of the Labour Code). At the same time, it is necessary to proceed from the Section 119 (3) of the Labour Code, according to which in the wage conditions the employer shall agree in particular the forms of remuneration of employees, the amount of the basic wage component and other components of benefits provided for work and the conditions of their provision. The basic component of the wage is the component provided according to the time worked or the performance achieved.

Setting up such a remuneration model that also takes into account a certain disciplinary process is complicated, mainly because labour legislation for this area does not actually exist, and therefore it is necessary to proceed from the basic principles of the Labour Code as well as from the condition so that the monetary sanctions are appropriate, they did not show a contradiction with good morals and that employees were guaranteed legal remuneration. Therefore, the employer must be careful when designing the remuneration models, and in the case of negotiating the remuneration model in the collective agreement, caution is also required on the part of the social partners.

When creating remuneration models, most employers work with various components that are beyond the tariff wage[79] and within which they could have the opportunity to award or not to award the employee a variable wage component in addition to the tariff, depending on the employee's behaviour and performance. Therefore, we will take a closer look at such a remuneration model and the conditions under which such a model could work.

Since in the presented publication we mainly deal with the area of sanctioning employees, we will take this fact into account when formulating opinions on the creation of remuneration models (in the event that, within the framework of remuneration models, we were to examine the possibility of providing various monetary

[79] The Labour Code does not know the concept of the tariff wage. Tariff wage, in the sense of the prevailing application practice and depending on the employer's remuneration system, means the basic wage component according to the Section 119 (3) of the Labour Code (for time worked or performance achieved). As a rule, it is expressed in monthly or hourly terms. Tariff wages are used in employers' wage systems, which are based on the classification of work activities into tariff classes according to the complexity of the work performed and taking into account the principle of comparable wages for comparable work.

benefits as certain benefits, benefits beyond the legal framework, conclusions with regard to the possibility of their unilateral provision by the employer, they should not be as strict as they are when formulating opinions on the issue of non-awarding monetary benefits as a certain form of sanction against the employee).

In connection with employees' breach of duty or unsatisfactory performance of work tasks, the employers often resort to reducing variable wage components, also because their essence in the employer's remuneration system is to fulfil a motivational role and their recognition is to be the result of the employee's efforts to achieve high-quality performance work duties, which is understandably opposed to their non-fulfilment. If we simplify the approach of the employers, it would seem pointless if the employer did not seek to reduce the variable wage components, if the employee committed an action that is possible, for example, characterised as the insubordination. Recognition of the full amount of the additional tariff component, for example, in the specific calendar month in which the employee's negative behaviour occurred, would then contradict the logic and purpose of the established remuneration system at the employer.

4.4.1 Conditions of the optionality of providing an above-tariff wage component

Awarding the above-tariff wage component is usually an effective and frequent tool for motivating employees, and in the form of its reduction or complete non-recognition, it basically represents the most common way of imposing a labour-law "sanction" on the part of the employer.

In practice, above-tariff wage components are set differently, basically they can be divided into two groups: the first group consists of above-tariff wage components, which have set conditions for their award (these are different variable components, the award of which depends, for example, on a certain volume of work performed, whether percentage of defectiveness of produced parts, etc.) and the second group consists of those above-tariff components that are set in general and their recognition depends on the employer's decision (we can also call them benefits, rewards for simplicity). Setting the conditions for awarding above-tariff wage components in the case of the need to achieve certain results is easier, since the objective criterion is precisely the value of the employee's achieved/unachieved performance, the number of pieces produced, etc. Therefore, these above-tariff components are often part of the assessment of the achievable wage, as their presumption of recognition is basically dependent on the objective value. On the other hand, it is precisely the above-tariff wage component linked exclusively to the employer's decision that do not have such an objective element and may (may not) cause questionable situations.

The application practice perceives the provision of various forms of above-tariff wage components (benefits) as a problem-free setting so that their provision depends exclusively on the decision of the employer (or senior employee). We can perceive the provision of benefits and rewards as a tool that allows us to introduce monetary sanctions for the employees. Simplified wording of the provision of above-tariff wage components with the addition that the employer or the senior employee decides on the awarding and amount, may cause problems in practice and may even be considered part of the wage and therefore to be claimable. Therefore, it is necessary to take this fact into account when designing remuneration models. Therefore, in the process of setting up the remuneration system, employers must consider to what extent each above-tariff wage component has certain functions (motivational, oriented towards the consistency of compliance with obligations in the field of the occupational health and safety, etc.) and to what extent they want these above-tariff components to represent forms of labour-law sanctions.

The court decisions mentioned below confirm a significant advance in the perception of the creation of the employer's remuneration system. To a certain extent, the principle of unilateral decision-making by the employer on various rewards, non-claimable wage components is being abandoned, and the courts are inclined to formulate the requirement of a more detailed, more specific setting of the conditions for awarding or not awarding above-tariff wage components at employers. Courts increasingly emphasise the employee's right to know (unequivocally) what, when and why the employee must perform in order to achieve certain agreed wage conditions. The unpredictability of the employer's decision (and the strict wording about the non-claimability of certain monetary benefits) on the provision of monetary benefits gives way to a certain extent to the requirement for specific and objectively set remuneration conditions, and in the event that they are not set in this way, the courts prefer the claimability of monetary benefits and the onus is on to prove the contrary by the employer.

To a certain extent, the judicial practice advances the unproblematic perception of the setting of various benefits and monetary rewards by employers as "non-claimable" wage components to a more rigid position. Even depending on the agreed terms of its payment to the employee, the above-tariff wage component may be part of the employee's guaranteed earned wage, if the employer inappropriately sets the conditions for its provision and determines the qualitative or quantitative level of the criteria, depending on the fulfilment of which it will be provided. In this way, we must perceive a different assessment of the monetary payment that belongs to the employee for the performance of dependent work of a certain quality under the given criteria and, in particular, the fact of how this monetary equivalent is agreed upon and subsequently achieved, and the monetary payment provided for the prevention of non-conforming behaviour by the employer (there will be no violation of internal company regulations). The employers should therefore be aware that the imposition of monetary (contractual) sanctions as such does not exist in the labour law in view of the labour-law protection of the employee (that is, that a "price list" is drawn up for breaching the employee's obligations or unsatisfactory performance of work tasks), but we could consider that it is not excluded, for example, reflecting possible insubordination into the awarding of above-tariff wage components, for example, in the form of their reduction or complete non-recognition. In the case of reduction or non-recognition of the above-tariff wage component for unsatisfactory work results, the situation is less complicated, because in most cases the employers can objectively set the conditions under which the above-tariff component belongs (for example, in the case of setting a certain standard of labour consumption, achieving a certain product quality etc.), and thus in case of failure to achieve them, it will not be recognised.

The employee is not entitled to any financial benefit or remuneration for work performed as a flat-rate entitlement from the Labour Code or other relevant labour-law regulations, but this does not mean that they cannot be agreed upon, or provided. The employee is entitled to receive the monetary equivalent for the work performed, which the Labour Code in the Section 43 (1) (d) calls wage conditions, the structure, nature and conditions of awarding of which are to be determined in a legal manner (that is, in accordance with the Section 119 (3) of the Labour Code, to be agreed in the employment contract or collective agreement). *"The Labour Code does not exclude various forms of rewards, bonuses, personal assessments that are intended to motivate the employee. The provision of incentive wage forms can be regulated by the employer in a collective agreement or in an internal regulation, for example, in work regulations, wage regulations, special premium regulations, etc. However, the Labour Code does not recognise the right to reward. Such a conclusion also follows from decision-making practice, according to which "the recognition of bonuses is not legally enforceable and their non-payment in itself cannot be considered a penalty or sanction".*[80]

On the basis of the above, the employee does not have a mandatory right to any specific reward, monetary benefit or certain above-tariff component[81], which the employee believes should belong to the performance of their work, or which the employee believes the employee would like to have paid. The specific types of

80 Decision of the Supreme Court of the Slovak Republic as of 16 December 2008, file no. 2 Mcdo 19/2007.

81 For the purposes of this publication, which is focused on the area of the private sector, we will use the term above-tariff wage components for various monetary payments that are provided beyond the legal framework, which in practice can also be referred to as rewards, benefits, etc.

various wage components that go beyond the legal framework and the conditions for their award must be agreed with the employer (in the employment contract or agreed in the collective agreement), including possible rules for reducing or not awarding it. In this case, none of the contracting parties (employer or employees) can act autonomously or unilaterally. In principle, the Labour Code does not determine any material legal conditions for the agreement of specific above-tariff wage components, or the conditions of their recognition. The entire mentioned area of the content of the employment relationship is left to the agreement of the employer and the employee (or to the relevant trade union body), while it is assumed that the needs of the employer are taken into account (the nature of wages, the importance of remuneration, emphasis on the motivational or punitive component of remuneration, etc.). The attractiveness of an appropriately set remuneration system is important for both current and potential employees.

It can be concluded that the Labour Code does not establish any complex rules for the design of remuneration models, but it establishes minimum requirements. The mandatory provisions of the Labour Code, which define the concept of the wage and the basic wage component, are important, and at the same time, it is necessary to respect the principles of remuneration corresponding to the prohibition of discrimination, compliance with the principle of equal treatment and compliance with good morals. The stated provisions on the concept of wages can thus be perceived as a certain negative definition of above-tariff wage components and the conditions for their awarding, and the stated principles as frameworks for the agreement of subjects of labour relations on above-tariff wage components.

Despite the fact that the employers, when creating an above-tariff component, often state in the conditions of its awarding that it represents a “non-claimable” wage component, and at the same time, determine its criteria in an incorrect way or do not set criteria at all (they do not even determine the purpose of providing this above-tariff wage component), nor the above-tariff set in this way the wage component with a “miracle formula” may not, according to court decisions, be sufficient to make it a non-claimable wage component and that the employee cannot successfully claim it. Therefore, it is important how to formulate the ineligibility of a certain wage payment. The employer should explicitly state in the conditions for awarding the above-tariff wage component, upon the occurrence of what behaviour of the employee (specific calculation of violated obligations or unsatisfactory performance of work tasks, for example, by reference to the provisions of the work order or other internal company regulations) or the occurrence of what situation the assessment of the reduction of this above-tariff component will occur; it should further determine the degree of intensity of the action and the nature of the employee’s culpability, which will fall within the scope of assessment, who and how will assess the employee's breach of duty, evaluate their performance, and who will decide on the possible reduction or non-recognition of this above-tariff wage component and in what way the employee will have the opportunity to dispute the employer's decision, and at the same time it is important when and how the employee will find out to what extent and why a certain above-tariff component of their salary will be reduced.

The key element (at least based on current court practice) appears to be the differentiation of the claimable and non-claimable wage component, linked to the decision of the competent employer body according to the internal company structure or the decision of the relevant senior employee. The employer must therefore consider for themselves whether it will be an above-tariff component, which is highly flexible and depends exclusively on their subjective decision (with the acceptance of the stated risk), while it does not matter for what reason the employer comes to the conclusion about reducing the above-tariff wage component, or what factors will be to watch. Or the employer chooses a combination of determining the conditions for its recognition and subsequently wants to verify their fulfilment in a certain form, which will ultimately presuppose their decision. In this sense, the decision can have different legal effects depending on the moment of its adoption and the optionality of its adoption. In the application practice, it is possible to encounter cases where the above-tariff wage component is set in such a way that the verification of its fulfilment is ensured automatically at the relevant level of management and when the set values are reached, the full amount is paid to the employee, while on the basis of an optional decision of the employer, it can be decided not granted in a specific month (if the decision is not taken, the above-tariff component is automatically paid). Or there are also cases when the employer's decision has a constitutive nature, that is, despite the fulfilment of the stipulated conditions, the employee will not be paid, because the employer's decision on its payment, which may or may not be accepted, will not be accepted. In this second case, the employer's decision has the character of one of the conditions for its recognition, while in the first case it represents only a procedural legal condition.

"According to the settled jurisprudence of the courts in disputes about the payment of wages or part thereof, it is decisive whether the prerequisites for the emergence of entitlement to it resulting from the wage regulation or collective agreement or employment contract or other contract are met. It is necessary to examine whether the defendant's proposal applies to the wage component that the employer is obliged to provide to the employee (claimable component of the wage) or to the wage component to which the claim arises only on the basis of a special decision of the employer to award it (it is a non-claimable part of the wage). The non-claimable

wage component is characterised by its optional nature, which is lost only by the employer's decision to award it to the employee. In the mentioned case, such a decision of the employer has a constitutive effect. Whether the employer accepts the said decision or not and what the content of the decision will be, in the case of the optional wage component, depends exclusively on the employer's consideration. It is necessary to distinguish the moment when the non-claimable wage component decided by the employer becomes the claimable wage component."[82]

As part of determining the conditions for awarding the above-tariff wage component, it is thus possible in both cases (legal nature of claimable and non-claimable above-tariff wage components) to set/agree any criteria for their award (obviously subject to compliance with the provisions of the Section 119 (3) of the Labour Code). In the case of a non-claimable above-tariff wage component (so that we can consider it as such), the fulfilment of other criteria must be linked to their verification and final confirmation by the competent authority or the head of the employer.

In this case, however, one must be aware of whether it will only be a declaratory check of the fulfilment of the conditions for its award (that is, the relevant manager or the employer's authority only verifies the fulfilment of other established conditions, while after their verification they do not have the opportunity to decide that such an above-tariff wage component granted to the employee will not be) or their cooperation has a constitutive effect in relation to the awarding of the above-tariff component (despite successful verification of the fulfilment of the other conditions set, they have the option, on the basis of other reasons or without reasons, not to grant such an above-tariff component to the employee or to reduce it). *"The defendant stated in their response to the lawsuit that the bonuses were a non-claimable wage component; they depended on the performance of the plaintiff and their amount was subject to approval by the board of directors. The board of directors approved the payment of bonuses to the plaintiff only for the month of February 2014, for the following months, the plaintiff's bonuses were neither paid nor approved. The plaintiff did not effectively deny the defendant's claims, according to which the bonuses are non-claimable and dependent on performance and are approved by the board of directors. For that reason, the court considers it indisputable that the bonus as one of the wage components was not claimable."*[83]

A different situation occurs if the employer sets objective conditions for awarding the above-tariff wage component, and, at the same time, stipulates that these conditions must be verified by the relevant senior employees or the competent

[82] Decision of the District Court Bratislava III as of 10 February 2021, file no. 44 Cpr 25/2017.
[83] Decision of the District Court Trnava as of 23 June 2021, file no. 18 Cpr 6/2014.

authority of the employer. This decision of theirs, according to the judgment of the court, is only of a formal nature and after the employees have fulfilled the conditions set for the recognition of the above-tariff wage component, it is not possible to decide on their non-recognition by the employer.

From the above, it follows that in case the conditions of the above-tariff wage component are set, according to the court's reasoning, it is not relevant whether the award decision has a constitutive or declaratory effect, the monetary payment belongs to the employee. On the other hand, according to the court's considerations, if the conditions for awarding the above-tariff wage component are not established and its award will depend only on the employer's decision, or the relevant senior employee, such a procedure can be perceived as general and subjective, and the monetary benefits can be perceived by the court as claimable. It can be stated simply that the design of the remuneration system at the employer is difficult and even when trying to set the monetary payments correctly, the employer is not sure how the court would decide in a possible lawsuit.

It therefore appears to be crucial what legal nature the employer themselves gives to the employer's decision, especially in connection with the determination of the conditions for awarding the above-tariff wage component and verifying their fulfilment. If the employer determines, for example, specific, objectively verifiable conditions for their recognition without being bound by the employer's decision and the internal company situation (or if the decision is only of a procedural nature), the above-tariff wage component should be paid out automatically after they are fulfilled (for example, achieving a certain quality or quantity of the employee's actions – volume of funds, repetitions of the work operation, etc.).

However, if for example, the conditions are set depending on the facts, the creation and assessment of which is subjective in nature (approach to work, flexibility in the performance of tasks, etc.), conditions can also be set objectively (as a certain handbook, what is required of an employee, these conditions do not have the same character as in automatic provision of monetary benefits), but their fulfilment is subject to examination and subsequent decision of the employer, and the nature of the employer's decision already has a constitutive effect, because the employer themselves creates the conditions for its payment (evaluates the employee's actions during the selected period, etc.), so the payment of the above-tariff component of the employee's wage does not occur automatically, but only after the adoption of the employer's constitutive decision. The question arises whether the employer themselves determines certain objective elements in the general formulation of the conditions, for example, in the form of imposing a warning on the insubordination, which will be the basis for the employer to conclude that the employee did not perform the tasks in the expected way, or leave the overall assessment solely to their subjective assessment.

The court decided on awarding the above-tariff wage component to the employee in the form of the so-called share wage depending on the amount of the fully paid surcharge for the ticket during the performance of the inspector's control activities on the train (if, for example, passengers bought train tickets directly on the train or additionally within a specified period based on an agreement written with the passenger). The employee demanded the payment of this share of wages from the employer on the grounds that the employee had repeatedly performed their work according to the employer's instructions, yet it was not paid to them on the grounds that the employee could not have influenced whether the passenger would additionally pay this surcharge on the basis of a written agreement. *"From this point of view, it is particularly important to distinguish whether the requested performance represents a wage claim, which the employer is obliged to provide if the employee fulfils the agreed prerequisites and conditions (whether it is a so-called claimable wage component), or whether it is a wage component for which a claim arises – regardless of the fulfilment of other agreed prerequisites and conditions for its provision – only on the basis of a special decision of the employer on its award (whether it is a so-called non-claimable wage component). The Court of Appeal must also be convinced that when considering the wage component requested by the plaintiff, it must be taken into account that the application of the claimable or non-claimable incentive wage components expresses the incentive and motivational function of wages consisting in the connection of a certain form of wage with the employee's work performance. The dependence of the wage on the desired performance of work in the expected quantity and quality is then expressed by establishing the prerequisites that must be met in order for the employee to receive this wage component. From the point of view of the degree of concreteness of their content, the adjustment of these assumptions varies widely, from the establishment of absolutely specific, objectively measurable and quantifiable goals to the very generally postulated promise of rewards (incentive components of wages), for example, for long-term achieved high-quality work results, when the circumstance of whether the employee receives a reward (incentive wage component) depends on the assessment of the achieved work results based on the consideration of the relevant senior manager and their decision has constitutive significance in this sense. On the other hand, the prerequisites for the creation of the right to the incentive wage component can go only after the establishment of absolutely specific, objectively measurable and quantifiable goals and the determination of the specific amount of remuneration promised to the employee in the event of their achievement, when determining the amount of this part of the wage is already a matter of simple arithmetical calculation. In such a case, if the real prerequisites for the creation of the claim are fulfilled, the decision of the relevant senior employee to award the reward must be considered only* *as a formal confirmation of these prerequisites, not as a real prerequisite itself, and in this sense the said decision has only a declaratory meaning.*"[84]

In the case of determining the conditions for awarding the above-tariff wage component based on the employer's decision, or the competent authority of the employer according to its internal organisational structure, or relevant senior employee, we bring to the attention of the two key elements relevant to the possible emergence of the employee's claim. This decision must be taken by an authorised entity capable of acting in labour-law relations pursuant to the Section 9 of the Labour Code, while this decision in the sense of the above can be agreed as a material legal condition for the emergence of the employee's right to pay the above-tariff wage component or not (depends on the exact wording of the conditions pursuant to the Section 119 (3) of the Labour Code). For the purposes of assessing the valid action on behalf of the employer in individual and collective labour-law relations, we proceed from the Section 9[85] and 10[86] of the Labour Code, which establish the circle of persons and the extent of the scope of their action on behalf of the employer, including the possibility of excluding the onset of legal effects of action on behalf of the employer when acting in excess.

The statutory authority/member of the statutory authority acts on behalf of the employer – a legal entity, and this individual acts personally on behalf of the

[84] Decision of the Czech Supreme Court as of 10 May 2011, file no. 21 Cdo 810/2010. Similar legal conclusion can be found in the decision of the Czech Supreme Court as of 21 November 2011, file no. 21 Cdo 2545/2010 or in the Decision of the Czech Supreme Court as of 08 November 2004.

[85] The Section 9 of the Labour Code states: "*(1) In the labour-law relations, the statutory body or member of a statutory body performs legal acts for the employer, which is a legal entity; the employer, who is a natural person, acts personally. Employees authorised by them can also perform legal actions instead of them. Other employees of the employer, especially the heads of its organisational departments, are authorised as the employer's bodies to perform legal acts on behalf of the employer resulting from their functions determined by organisational regulations.*
(2) The employer may authorise other employees in writing to perform certain legal acts in the labour-law relations on their behalf. The scope of authorisation of the authorised employee must be specified in the written authorisation.
(3) Senior employees of the employer are employees who, at individual levels of the employer's management, are authorised to determine and assign work tasks to the employer's subordinate employees, organise, manage and control their work and give them binding instructions for that purpose."

[86] The Section 10 of the Labour Code states: "*(1) Legal acts of statutory bodies or members of statutory bodies and authorised employees (Section 9 (1) and (2)) bind the employer, who acquires rights and obligations based on these acts.*
(2) If a statutory body or a member of a statutory body or an authorised employee exceeded their authority by a legal act in the labour-law relations, these actions do not bind the employer if the employee knew or had to know that this statutory body or a member of the statutory authority or an authorised employee exceeded their authority. The same applies if the legal act was performed by an employee of the employer who was not authorized to do so by his position, nor was he authorized to do so."

employer – a natural person. Regardless of the fact whether it is a natural person or a legal entity, either employees authorised by them (pursuant to the Section 9 (2) to the extent of a written authorisation) or other employees of the employer can act on behalf of these persons, and therefore perform legal acts in employment relations. In particular, the head of the employer's organisational units – to the extent of their competences/authorities/resulting from the functions determined by the organisational regulations.[87]

Although the decision on recognition, or on the non-recognition or reduction of the above-tariff wage component is not perceived as a legal act, by analogy we will proceed from the employer's action, which is given for the area of action with legal consequences.

In the mentioned cases, the possibility of action pursuant to the Section 9 of the Labour Code (statutory body or authorised employee, or an employee to whom it results from the organisational integration) assumes the implementation of actions with an impact on the employee, while the person's authority to act on behalf of the employer is based on the cited legal provisions of the Section 9 and the Section 10 of the Labour Code, which the drawing up of a decision on awarding an employee's wage component without a doubt fulfils. In this case, the model for awarding the above-tariff wage component is mostly set up in such a way that the internal company regulation contains the name of the above-tariff wage component and the conditions for its award, while the employer's decision in the form of a letter or notice drawn up for the relevant frame of reference is delivered to the employee. While it can be assumed that if the employer already makes such a notification to the employee (either the employer themselves or someone who is authorised to act on their behalf), it is assumed that the employee has fulfilled the conditions for awarding the above-tariff wage component and the employer cannot revoke their decision, because the employee's claim has already constituted. If the decision was made by an entity that is not authorised to do so, or if an authorised entity were to make a mistake, and the employee was paid an above-tariff wage, and the employee was in good faith, the employee has the right to retain this fulfilment (we must take into account the Section 35 of the Labour Code and the existence good faith in the interpretation of a legal act)[88], while it will not be unjustified enrichment according to the Section 222 of the Labour Code. In the labour-law relations, the obligation to return the unjustified enrichment acquires a specific modification - with regard to the corrective of good morals and the

87 TOMAN, J. 2019. In ŠVEC,M. – TOMAN, J. et al. *Labour Code. Act on Collective Bargaining. Commentary*. Bratislava : Wolters Kluwer, 2019. p. 173 et seq.

88 Legal acts expressed otherwise than in words are interpreted according to what their manner of expression usually means. In doing so, the will of the person who made the legal act is taken into account, and the goodwill of the person to whom the legal act was intended is protected.

protection of good faith of the employee, even in the case of an unjustified/incorrectly paid sum of money by the employer. If the employee accepted the monetary amount (payment) in good faith, because the employee did not know and could not have known, and also could not have assumed from the circumstances, that it was a payment without a legal reason on the part of the employer (unauthorised wage part) or intended for payment without justification, paid by mistake, the employee is not obliged to return this part of the wage to the employer and can keep it.[89] It would be contrary to good morals and an abuse of law if the employer would automatically deduct the alleged unauthorised amount from the employee's salary in the next calendar month. The wage paid is protected by the so-called good faith of the employee. If, based on the circumstances of the case, it can be assumed that the payment of the amount was not a clear excess on the part of the employer (for example, an error in moving the decimal point, or if the salary was paid twice to the employee's bank account) and the amount of money paid will be adequate, especially in a situation where the employer does not pay the employees the same amount of money every month (with regard to personal assessment, bonuses, the amount of the economic result), the good faith of the employee will be protected and the employee does not have to return such an additional amount of money paid to the employer. A relevant reason can be, for example, the payment of increased amounts, which are decided, for example, by the financial director of the company. As regards the statutory body of the company or an employee who, according to the organisational order (structure), is authorised to deal with personnel and economic issues and who decided on the awarding of above-tariff wage components, this increased amount of money cannot be demanded from the employees, even if the rest of the management would not agree to it. A request or automatic deduction of a sum of money from an employee's wage would be contrary to the relevant provisions of the Labour Code, as well as to the protective function of labour law, and therefore also contrary to good morals, and it would even be possible to consider the abuse of law.[90]

In the proceedings in question, the court considered the employee's right to be paid an extraordinary performance bonus, which was granted to the employee based on the decision of the employer's competent body and about which the employee was informed, but which was not subsequently paid to the employee, while the employer argued that the decision of the employer's body was invalid due to a violation of internal company regulations. "*The language of this letter undoubtedly shows the expressed will of the employer to grant the employee a bonus. The decision to grant a bonus has a constitutive effect and it depends solely on the will*

[89] Decision of the Czech Supreme Court, file no. 21 Cdo 264/2016 as of 23 February 2017.
[90] Cf. finding of the Czech Constitutional Court file no. I. ÚS 2434/11 as of 02 November 2011.

of the employer whether the employer accepts such a decision or not; the employer themselves evaluates the fulfilment of the performance criteria that were given in advance. The court notes that the right to a bonus was granted based on the decision of the board of directors – the statutory body of the defendant's legal predecessor, which was authorised to perform legal acts on behalf of the employer in the labour-law relations in accordance with the provision of the Section 9 (1) first sentence of the Labour Code, that is, it is a legal action of the employer. The board of directors is a statutory body of a joint-stock company that manages the company's activities and acts on its behalf in accordance with the provisions of the Section 191 (1), (2) of the Commercial Code. The competence of the statutory body, in this case the board of directors, includes both decision-making on matters within the company, but also the company's actions externally towards the third parties. The way in which the statutory body is authorised to act on behalf of the company results from the law as well as from the founding document of the company, while it is entered in the Business Register. This procedure is binding for the company's external actions towards the third parties. In legal actions of the employer in the labour-law relations, this method of action must be fulfilled in order to produce legal effects against the employee. In the given case, the court considers that these legal requirements for the employer's actions in deciding to award the bonus to the plaintiff have been complied with."[91]

However, in connection with the aforementioned decision, it is important to take into account the existence of the mandatory provision of the Section 10 (2) of the Labour Code, which, in comparison with the classic legal regulation of proceedings for legal or natural persons, which are usually commercial companies and which is regulated by the Labour Code, provides the employee with higher legal protection as the weaker subject of the employment relationship. The very application of the Section 10 (2) of the Labour Code as an exceptional situation comes into consideration in a situation in which a statutory body or a member of a statutory body or an authorised employee exceeded their authority and the employer would not be bound by these actions if the employee knew or had to know that there was an act in excess, as defined below of the aforementioned are tied to the agreed type of work by the employee. In principle, the statutory body is entitled to all legal acts in the labour-law matters even without a special authorisation. Legal acts by which the affected entities exceeded the authorisation burden the employer and do not bind them only in cases where the employee knew or had to know that the authorisation had been exceeded. The burden of proof lies with the employer, who must prove that the employee actually had knowledge of the excess of authority, or objectively had to know about such a fact. In broader

[91] Decision of the District Court Ružomberok as of 02 July 2021, file no. 3 Cpr 27/2020.

contexts, such acts must also be looked at through the prism of good morals and the eventual validity of the legal act must be assessed.[92]

In the application practice, there are cases when the relevant departments or directly leading employees of the employer notify the employees that the conditions for the payment of the relevant above-tariff wage component have been met and subsequently negate such a decision with another notice, or, despite the notification, do not pay the relevant above-tariff wage component. Quite often, such a situation occurs in connection with a change in the staffing of various leading positions of employees, when the new leader wants to set their own ideas in internal company processes and does not want to respect the decisions from the previous period. Subsequently, various justifications are constructed, which are addressed to the employees in the sense that the employees should have known that the previous management could not make such a decision, or they should have known that, despite the notification, the conditions were not met, etc. and thus there will be no payment of monetary benefits.

From a formal legal point of view, in our opinion, some subjective assumption or obtaining information from unofficial sources that such an action took place and suffered from the defect in question is not sufficient. In this case, for the application of the Section 10 (2) of the Labour Code is required either to be linked to the agreed type of work of the employee (the employee learned or could have learned this information directly while performing dependent work or performing work tasks for the employer) or from their inclusion in the internal organisational structure or the performance of other tasks for the employer than those assigned to them resulting from the concluded employment contract (for example, obtaining information from the performance of activities for a natural or legal person in the position of employer based on other types of contractual relationships, for example, under commercial law). *"The court did not agree with the objection of lack of good faith on the part of the plaintiff – according to the defendant, she should have been aware of the flawed decision of the board of directors on awarding the bonus, of the contradiction of the bonus approval process with the company's internal management regulations. Pursuant to the provisions of the Section 10 (2) of the Labour Code, if the statutory body exceeded its authority by legal act in the labour-law relations, in that case these actions do not bind the employer on the condition that the employee knew or must have known that the statutory body exceeded its authority. The defendant claimed that there was no approval of this legal act – the decision of the board of directors to award a bonus to the plaintiff by the supervisory board, and that the plaintiff should have, or must have known. However, this fact was not proven in the proceedings, the burden of proof regarding*

[92] DOLOBÁČ, M. 2019. In ŠVEC,M. – TOMAN, J. et al. *Labour Code. Code on Collective Bargaining. Commentary.* Bratislava : Wolters Kluwer, 2019. p. 173 et seq.

proving this fact was on the defendant. The court notes that the plaintiff did not have any competences in the management of the company due to her duties as Director of Corporate Banking (at the time the bonus was granted), it was not clear in the dispute that she was a member of the board of directors, or of the supervisory board of Sberbank Slovensko, a. s., it was not her duty to know the regulations governing the management of the company, relations between the company's bodies, established restrictions and to comply with them. The plaintiff was an employee of the defendant on the basis of a concluded employment contract, in connection with the agreement on its change, that is, it was her duty, according to the employer's instructions, to perform work personally according to the employment contract during the specified working hours and to observe work discipline (Section 47(1)(b) of the Labour Code)."[93]

In practice, situations arise when the above-tariff wage component of the employee is not agreed in the employment contract or collective agreement with the relevant trade union body, but the employer decides on its awarding. Making such a decision by the employer is capable (interpreted in favour of the employee as the weaker party of the employment relationship) to cause legal effects that are approved by the legal order. Most often, these are the situations where only the basic wage component is agreed upon in the employment contract, while the employment contract contains a reference to the employer's internal regulations, in which the most common forms of bonuses are regulated. In case of interest, the employers refuse to pay these bonuses on the grounds that, for example, the employer has financial difficulties and they argue that the employee does not have such a remuneration component agreed in the employment contract. *"The court did not find a contradiction between the decision to award an extraordinary performance bonus and the employment contract. If only the basic wage component was negotiated in the wage conditions, this does not conflict with the employer awarding the employee a variable wage component as well. This is a consensus on the issue of wage conditions between the participants in the employment relationship, specifically their agreement on the variable wage component concluded in the given case in an implicit manner, as follows from the Extraordinary Performance Bonus program – its acceptance by the employer, notification to the plaintiff, its implementation and subsequent assessment of the criteria by the employer and the awarding of a bonus to the plaintiff. Even the very name of the reward "extraordinary performance bonus" indicates that it represents the employee's motivation for increased, extraordinary work performance that goes beyond the normal course of things and is not a guaranteed component of the reward, when its award is dependent on the assessment of the employee's performance by the employer."*[94]

[93] Decision of the District Court Ružomberok as of 02 July 2021, file no. 3 Cpr 27/2020.
[94] Decision of the District Court Ružomberok as of 02 July 2021, file no. 3 Cpr 27/2020.

The defined purpose of providing the above-tariff wage component subsequently has an impact on its assessment from the point of view of mutual interaction with the basic wage component of the employee, that is, the employer cannot unreasonably reduce or withhold the above-tariff wage component of the employee on the grounds that their basic wage component is already high, if the employer has defined the purpose of the existence of the above-tariff component in another way, for example, as an above-tariff wage component provided to the employees for the performance of tasks beyond their standard provision of work tasks. In addition, compared to a citation from a court decision, such an approach by the employer would also violate the provisions of the Section 119 (3) of the Labour Code, when this assumes that the basic wage component is provided for time worked or performance achieved; however, the mutual level of interaction (if we also take into account the premise of the achieved performance) would have to be explicitly adjusted in the conditions of awarding any additional wage component. If the employer has not established such a ratio in relation to the basic and above-tariff wage components, the employer cannot demand the inclusion of extraordinary or above-standard performance of work tasks within the award of the basic wage component, since it represents the basic framework of work tasks that the employee must perform in a defined working time, quality or quantity so that the employee does not commit actions that can be assessed as unsatisfactory performance of work tasks or insubordination and for which the employee is entitled to the basic wage component according to the Section 119 (3) of the Labour Code. *"To the objection that remuneration for extraordinary tasks and performance of overtime work was included in the basic wage of the employee, the court notes that in terms of the provision of the employment contract of the senior employee concluded between the legal predecessor of the defendant as an employer and the plaintiff as an employee in the item: Wage conditions, the amount of the basic wage is stated with the fact that the amount of wage also takes into account possible overtime work in accordance with the provisions of the Section 121 (2) of the Labour Code, while the remuneration of extraordinary tasks in the basic salary does not follow from the aforementioned provision of the employment contract. The fact that it was an extraordinary task emerged from the very name of the Extraordinary Performance Bonus program adopted by the employer, as well as from the nature of the work performed by the plaintiff within the ongoing sales transaction. It must be emphasised that the plaintiff performed the mentioned work activities resulting from the Extraordinary Performance Bonus program beyond the scope of her work as the Director of Corporate Banking. This was the performance of extraordinary activities connected with an ongoing sales transaction, and not the standard performance of overtime work in the position of Director of Corporate Banking. Therefore, this objection could not be taken into account."*[95]

[95] Decision of the District Court Ružomberok as of 02 July 2021, file no. 3 Cpr 27/2020.

However, in the same way, in the sense stated above, the originally agreed "legally non-claimable" above-tariff wage component will become "legally claimable" if the employer does not determine (does not agree) with the employee in the employment contract or collective agreement with the relevant trade union body the quantitative or qualitative criteria for its award (that is, the employer does not set any indicators for it being awarded). In this sense, the legal requalification of such an above-tariff wage component is borne by the employer.[96] Consequently, the effort to use such an above-tariff wage component as a sanction against the employee, for example, for insubordination is unfeasible, because such a condition of reducing or not awarding the above-tariff wage component was not agreed with the employee and the value of the above-tariff wage component should be awarded in the entire agreed amount. Since courts decide specific disputes, the conclusions of court decisions are not generally binding and always depend on the specific formulation of the conditions of the above-tariff wage component as well as on the specific situation of the employer. *"The Court of Appeal considered the legal opinion of the court of first instance to be incorrect, in the sense that the variable wage component is not claimable, based on which, it considered the plaintiff's claim to be unfounded, which the plaintiff applied for additional payment of the variable wage component for the relevant period. The Court of Appeal stated that with regard to the legal definition of wages, it can be stated that the employer can agree with the employee as part of the wage arrangements in the employment contract, in addition to the basic wage, other variable or irregular components of the wage that are claimable and belong to the employee after the fulfilment of the agreed conditions. Thus, everything that the Labour Code (Section 118 (2)) does not exclude in connection with the term wage can be considered a wage. The variable wage component can be agreed upon differently between the employer and the employee. The district court's conclusion that the variable wage component is non-claimable is incorrect, because the employer's obligation to pay it to the employee does not arise at all and is therefore non-claimable only in cases where the employer and the employee have not agreed on its payment in the employment contract, setting specific indicators, or it is not determined in the collective agreement, or unless the employer has determined it in its internal standards. In this case, the non-claimable variable wage component is changed to a claimable one."*[97]

---

[96] See Chapter 1 and interpretation of the decision of the Regional Court in Trenčín as of 03 February 2015, file no. 17 CoPr 2/2015.

[97] Decision of the Regional Court in Trenčín as of 25 February 2014, file no. 6 Co 316/2013. In the case in question, the plaintiff demanded additional payment of the variable wage component as part of the wage compensation provided in case of invalid termination of the employment relationship pursuant to Section 77 et seq. of the Labour Code. However, the court reasoned that it was based on the actually paid wages of the employee in the relevant period and when the plaintiff had the impression that the plaintiff was wrongly paid wages in the relevant period, the plaintiff should have claimed it in the relevant period and in a separate lawsuit, not in another type of lawsuit and for other purposes.

4.4.2 Possibilities of reduction, non-payment of the above-tariff wage component

After explaining how it is possible to introduce the above-tariff wage components in the remuneration system, we will also pay attention to when it is possible not to award or reduce this component, which can be perceived as a sanction for the employee. At the same time, we present the court decisions that can be used as a basis for designing the principles of forming a remuneration system. Due to the lack of legal regulation in the area of creating remuneration systems, and taking into account that the opinions of the courts are based on specific factual situations, the opinions of the authors when processing the issue of financial sanctions of employees do not tend to convince of correctness, but they represent basis for a possible solution to the awarding of financial sanctions and basis for discussion. In connection with the application of a labour-law sanction in the form of a reduction of above-tariff wage components, it is necessary to receive two more essential factors, namely the employer's interest in the actual application of the above-tariff wage components in relation to the purpose and conditions that were agreed upon for their award and the very formulation of the conditions for awarding above-tariff wage components in question.

Defining the purpose of the above-tariff wage component in the employment contract or collective agreement or determining their conditions is not sufficient in itself to establish a legal premise for the use of the agreed requirements in the interest of the employer in reducing or not awarding the above-tariff wage component. For the purposes of effective and legally relevant application of the remuneration system, it is not sufficient in itself that the employer, in accordance with the Section 119 (3) of the Labour Code, agrees on the conditions for awarding the above-tariff wage components in the employment contract or collective agreement, but that these conditions for awarding the above-tariff components (or the process of their fulfilment and verification of fulfilment) will actually be applied to the employees. This means that the employer will verify the fulfilment of each and every condition agreed upon for awarding a specific above-tariff wage component and, depending on their non-fulfilment, will subsequently reduce these above-tariff wage components to the employees or not award them at all. Therefore, the employer must, during the duration of the employment relationship, realistically apply the conditions for awarding the above-tariff wage components and use them to differentiate the assessment of employees for the work performed, depending on the nature of the agreed conditions. In the opposite case (that is, the employer has agreed according to the Section 119 (3) of the Labour Code, the conditions for awarding the above-tariff wage components, but in fact does not demand their compliance from the employees, does not enforce them and does not even verify their fulfilment) becomes obsolete and the above-tariff wage component changes its legal nature by the employer's factual actions, which simultaneously constitutes the right of the employee to legitimately expect its payment without reduction and depending on the agreed conditions, if the employer did not apply these conditions for a long time and paid the above-tariff wage component as a flat rate regardless of the agreed conditions for its award. *"Based on the evidence provided, it seemed unlikely to the court that if the defendant was dissatisfied with the plaintiff's work performance as claimed by the managers and the witness (that he did not mow, did not do winter maintenance, did not go to the boiler room), that this fact would not be reflected by the managers in the amount of bonuses, as it follows from the bonus scheme of the defendant as of 15 January 2017. From the above, the court concludes that in the case of bonuses agreed between the parties to the dispute in the employment contract (item 5. Wage conditions), it was not an optional component of the wage as intended by the Labour Code in the provision of the Section 119 (3). Although the defendant submitted a bonus scheme, the evidence presented did not reveal the fact that the defendant would actually apply this bonus scheme in relation to the plaintiff during the duration of their employment, that is, that the managers would assess the performance of the plaintiff's work tasks on a monthly basis, then approve and award differentiated remuneration according to the performance of work tasks. It follows from the payslip that during the duration of the employment relationship, the defendant paid the plaintiff a flat monthly salary in the gross amount of EUR 510.00, so this fact confirms the claim of the plaintiff that when the employment relationship was established, the plaintiff requested salary conditions such that he had a net salary of EUR 1,000.00 per month, while it follows from the payslip that the actual net salary of the plaintiff was a flat rate of EUR 1,000.55 net per month."* [98] Thus, if the employer's will initially consisted in trying to negotiate an above-tariff component of the employee tied to certain qualitative or quantitative elements and subsequently from its application dropped it for various reasons, that is, the employer stopped applying the above-tariff wage component in the agreed scope and character and in fact transformed it by their actions into a flat-rate payment similar to the guaranteed wage component of the employee, it is possible, in the opinion of the court, to come to the conclusion that the employer changed their will during the duration of the employment relationship with the employee. Since this is an action that does not contradict the mandatory provisions of the Labour Code and the employer's action clearly resulted in action in favour of the employee as the weaker party of the employment relationship, despite the fact that the employer could have acted

[98] Decision of the District Court Bratislava III as of 10 February 2021, file no. 44 Cpr 25/2017.

differently based on the agreed conditions of awarding wages, it is necessary to reach a conclusion about legal approval of this action by the employer and changing the legal nature of the agreed above-tariff wage component of the employee to a legally claimable one without being bound by the originally agreed conditions of its award. *"At the same time, the interpretation of the expression of will can only aim at clarifying its content, that is, at finding out what was actually expressed. Using the interpretation of the expression of will, it is not possible to "replace" or "supplement" a will that the participant did not have at the decisive time or that the participant did have, but did not express it."*[99]

The definition of the conditions for awarding the above-tariff wage components according to current court practice completes the legal regulation contained in the Section 119 (3) of the Labour Code, especially with regard to the recognition of the basic wage component. Given the fact that in the case of above-tariff wage components, it is an adjustment of the remuneration conditions, which is not regulated by the Labour Code, it is up to the employee and the employer, or to the relevant trade union body, how they will establish the conditions for awarding above-tariff wage components in the labour or collective agreement, including the process of their assessment.

For the purposes of formulating the conditions for awarding the above-tariff wage components according to the Section 119 (3) of the Labour Code are thus relevant exclusively to the conditions agreed in the employment contract or collective agreement, regardless of the fact whether, for example, non-fulfilment of the conditions for its award was the fault of the employee or the employer, or whether one of them or both exercised their right granted by the relevant labour-law regulations, unless such correlation to the payment or non-payment of the above-tariff wage component was agreed upon. If, for example, for the purpose of paying some half-yearly bonus, it is agreed that the employee should work a certain number of shifts, it is important to agree whether these will be actually worked shifts or other periods that are considered for other purposes to be counted for the purposes of "worked shifts" worked for example, obstacles to work or other periods according to the Section 144a (1) of the Labour Code. Therefore, the employer cannot reduce the above-tariff component of the employee's salary if its value was tied to the application of obstacles to work on the part of the employee or the employer, if such a condition for reduction was not agreed upon, and vice versa, the employee cannot demand that the period of their own absence from work be taken into account due to an obstacle to work on the part of the employer, if such offsetting was not agreed upon for the purposes of calculating

[99] Decision of the Supreme Court of the Slovak Republic as of 22 February 2008, file no. 5 Cdo 205/2007.

the above-tariff wage component and the actual working of work shifts by the employee was required to fulfil the condition). To a certain extent, this is a deviation from the usual approach, which is promoted mainly by the representatives of employees, who demand that the employee is not sanctioned when awarding above-tariff wage components due to the use of legally recognised claims, for example, excused absence from work due to important personal obstacles on the part of employees according to the Section 141 of the Labour Code, etc. On the other hand, this approach also corresponds to the application practice, which already today, especially in production companies, negotiates an above-tariff wage component linked to the presence of the employee at work, which is shortened even for the period of drawing up the mentioned obstacles at work on the part of the employee.[100] *"If the plaintiff also reasoned that the court should distinguish the reason for which the plaintiff was absent from work at the relevant time, that is, whether it was absence from work due to obstacles to work on the part of the employee or the employer, that is, the plaintiff or the defendant, the court maintains the opinion that this was legally irrelevant for the purposes of assessing the possibility of reducing annual bonuses in accordance with the cited provision of the wage directive in question, since according to the wording of this wage directive, any absence from work, with the exception of absence due to taking a leave for recovery, which exceeds in more than 20 working days a year, is considered the reason for which it is necessary to reduce the aliquoted annual wage bonus. The court considers that it is necessary to approach this wage claim as a non-claimable form of wage in the sense that it is up to the employer to determine the conditions in the employment contract or in the collective agreement, of which the salary directive in question is a part, and for the fulfilment of which the employee will then be entitled to such a wage component, which is not a basic component, and in this sense, it is necessary to look into such a claim."*[101]

In connection with the above-mentioned legal interpretation for the adoption of a decision on awarding/not awarding the above-tariff wage component to an employee, the same premise is also applied in the case of assessing the fulfilment of the agreed conditions according to the Section 119 (3) of the Labour Code for awarding the above-tariff wage components. Although in this case it is not about the implementation of a legal act, but a factual act, for the purposes of which we can apply the Section 9 and the Section 10 of the Labour Code, the analogous application of the procedure in the labour-law relations is also permissible in the

[100] In the past, it was claimed that attendance bonuses (reward for 100% employee presence at work in the relevant calendar month) violate the principle of equal treatment and acting in accordance with good morals, as they sanction the employee for using legal rights. The given example of a court decision violates this dogma.

[101] Decision of the District Court Zvolen as of 09 February 2022, file no. 10 Cpr 5/2021.

implementation of factual acts. We must realise that the Labour Code or other labour-law regulation does not regulate the mechanism of review of factual acts carried out in labour-law relations, but given the importance of the labour-law institutes in which these factual acts are carried out, we should allow an analogy in relation to the Section 9 and the Section 10 of the Labour Code and provide the labour-law protection to the weaker subject in the form of an employee (of course in analogy to the Section 17 (3) of the Labour Code).

As part of the verification of the fulfilment of the conditions for awarding the above-tariff wage components, it is necessary, as in other cases, that persons authorised to act on behalf of the employer and that the method of verification of these conditions be objective in nature without subjective elements questioning the result of such a decision by the employer. In the above sense and on the basis of the stated starting points for the purposes of the Section 9 and the Section 10 of the Labour Code, it will be persons for whom such activity results from the nature of the work or their functional position with the employer or persons acting on behalf of the employer also towards third parties. In principle, however, from the point of view of the application practice, it will be employees who fulfil the substantive legal prerequisites of the so-called of a senior employee according to the Section 9 (3) of the Labour Code, while it does not have to be exclusively about employees who are functionally included in the organisational structure of the employer and designated in it as senior employees. From the point of view, the definition of the Section 9 (3) of the Labour Code is the identification of the senior employee determined by the nature of their activity, that is, that these employees *"are employees who, at individual levels of the employer's management, are authorised to determine and impose work tasks on the employer's subordinate employees, organise, manage and control their work and give them binding instructions"*. As long as these employees are authorised to manage and control the performance of the employees' work, by the nature of the matter they are also authorised to carry out the fulfilment or non-fulfilment of work tasks and work instructions for purposes other than just assessing the insubordination by employees or unsatisfactory performance of work tasks. Therefore, without the need to create special rules in internal company regulations, these employees can also verify the fulfilment of the conditions for awarding additional tariff components or their non-fulfilment for the purpose of imposing a labour-law sanction in the form of their reduction. *"If the plaintiff reasoned that the assessment of the premium indicators should have been carried out by another employee of the defendant, namely W. Á. Á., who was most recently their direct superior, or that the employer should have performed it themselves, and if this did not happen, the defendant should be entitled to the bonus in full, the court did not agree with this legal opinion of the plaintiff, when, on the one hand, it does not directly follow* *from the wording of the wage directive in question who specifically should perform this assessment of the bonus indicators , but from the logic of the matter, the court considers that the assessment of the fulfilment of the bonus indicators cannot be up to the employee concerned, but this should be carried out by the superior employee of that employee, which also indirectly results from the submitted form, which was intended to serve the assessment of the premium indicators in question, where it is stated "the assessment was carried out by the professional director or department head" and there is also a box "approved by: general director". Of course, the court does not rule out that in the event that such a senior employee does not have sufficient documents to assess the fulfilment or non-fulfilment of the relevant premium indicator, they could request documents from that employee, but in principle, in the case of a direct superior, they should have enough information to be able to assess such a fact themselves without another person."*[102]

Regardless of the legal status of the person who will carry out such a control of the fulfilment of the conditions, it is necessary for this person to act in accordance with the principle of equal treatment and good morals in their decision-making and, based on an objective approach, reach a conclusion about the fulfilment or non-fulfilment of the conditions for their awarding. Although the aforementioned case did not involve the conclusion of an employment relationship, the court in the proceedings assessed the position of the player as the weaker entity in an employment relationship similar to the position of an employee in an employment relationship, and therefore the conclusions from the court decision are also applicable for the purposes of employment relationships. *"The court does not question the expertise, experience, or knowledge of coach Mr. B. in the field of handball, however, cannot allow that part of the plaintiff's remuneration, on which the plaintiff is dependent for existence, was conditioned by the defendant on the momentary mood of a third person – in this case the coach. The court emphasises that if the payment of the variable part of the reward to the player is to be based on a purely subjective and arbitrary proposal of a third party, such a contractual arrangement is undoubtedly contrary to good morals. It is understandable that the coach of the team can perceive a heavy loss in V. as a "shame", but his feeling of disappointment cannot in any case be the decisive criterion for paying or not paying the variable part of the reward to the plaintiff. Since the disputed contractual agreement was drawn up by the defendant, the court interpreted it in accordance with the Section 266 (4) of the Commercial Code at the expense of the defendant, so that the payment of the variable part of the player's monthly remuneration is conditional on the coach's proposal based on objective and therefore predictable indicators for the player (plaintiff), when a different interpretation of this contractual arrangement*

[102] Decision of the District Court Zvolen as of 09 February 2022, file no. 10 Cpr 5/2021.

would, in the opinion of the court, be contrary to good morals. In terms of constant jurisprudence, when interpreting the content of a legal act, it is necessary to proceed in such a way that the legal act is interpreted in favour of its validity, not invalidity (the so-called preference of interpretation in favour of the validity of the legal act). Based on this, the court came to the conclusion that the content of the disputed contractual agreement should be interpreted in accordance with the Section 266 (4) of the Commercial Code as mentioned above, thus not applying the provisions of the Section 39 of the Civil Code on the absolute invalidity of a legal act."[103]

It is therefore up to the employer or their senior employees that, in the event that they proceed to reduce the above-tariff wage components of the employees, they should be able to clearly state the reasons for this reduction in the decisive period under consideration and that they should be able to carry the burden of proof not only for the implementation of the reduction itself, but also for the amount, in which they reduced it to the employee or did not award this above-tariff wage component at all. Otherwise, they will not be able to objectively demonstrate why and to what extent they applied this labour-law sanction. The form and method of assessment will depend on the nature of the above-tariff wage components, the terms of which are the subject of the assessment (in the case of monthly paid above-tariff wage components, it will mostly be a check based on written documents of the employee's presence at the workplace, the fulfilment of individual and group goals, in the case of annual or of the semi-annually paid above-tariff wage components, a personal interview is conducted with the employee, including the provision of feedback on his work.

[103] Decision of the District Court Trnava as of 28 April 2017, file no. 23 Cb 33/2016. For the context from the Decision *"Despite the fact that in the present case, the player's contract between the parties to the dispute was concluded in 2013, that means before the effective date of Act No. 440/2015 Coll. on Sports, it is necessary to perceive that the relationship between the defendant and the plaintiff had the character of a dependent activity as defined by the Labour Code in the provision of the Section 1 (2). Although the contract was concluded as an unnamed contract according to the Section 269 (2) of the Commercial Code, while the parties agreed in the Art. IX item 9.1. thereof on the legal regime of the Commercial Code, it is important from the court's point of view to take into account the position of both parties (respecting the contractual freedom of the parties) and to take into account the position of the plaintiff as the weaker party when assessing the content of the contractual arrangements. If in accordance with the Art. VI item 6.4 of the player's contract as a condition for the payment of a variable part of the reward as an appreciation of the plaintiff's sports activity by the coach's proposal, such a proposal of the coach (as a condition for the payment of the variable part of the reward) must not be arbitrary, but must be based on justified and relevant indicators. If the variable part of the remuneration is not paid to the player based on the arbitrary decision of the coach, who therefore does not give the club a proposal to pay the variable part of the remuneration to the player, the subsequent action of the club is undoubtedly contrary to good morals and does not enjoy legal protection, especially in situations where the player is in a disadvantaged position vis-à-vis the club (similarly to an employee vis-à-vis an employer), as the player is dependent on the payment of bonuses for their existence."*

4.4.3 Retroactive claim for the payment of the above-tariff wage components

In contrast to the given examples of the employee's goodwill, which is protected as part of the correction of good morals and the employee's labour-law protection, in the case of an unauthorised or incorrect payment of the above-tariff wage component of the employee by the employer, we must also deal with the special situation when the employee demands pay-up of part or all of the above-tariff wage components. An important element that is emphasised in the cited court decisions is the nature of the employee's actions, that is, whether and when such a pay-up is demanded at all and what is the argument (that is, whether it is only an incorrect calculation of the above-tariff wage component and its pay-up, or whether it contradicts the fulfilment/non-fulfilment of the conditions for its award). Court conclusions to a large extent facilitate the procedure when examining such a situation, where they determine a relatively simple procedure of subsequent steps leading to the conclusion of whether or not there was a correct/incorrect payment of the above-tariff component of the employee's salary. In a specific case, the court assessed the employee's right to being paid of the material incentive paid for overtime work (not a wage benefit for overtime work), which was agreed in the employment contract as an above-tariff wage component. The relevance of the aforementioned decision lies in the formulation of obligations towards both parties to the dispute, namely towards the employee, who must prove and substantiate their claim with specific documents proving its origin (a general statement of the employer's breach of duty is not sufficient) and, at the same time, the obligation towards the employer, who must prove that if the employer did not pay the above-tariff wage component in a specific decisive period, the employer must be able to bear the burden of proof, for what reasons, such non-payment occurred and if the conditions for its payment were set, how the employer assessed their fulfilment and what conclusion the employer reached (specific circumstances of the employee's failure to fulfil their obligations). "*In the next proceedings, the Court of Appeal ordered the court of first instance to chronologically reconcile from the beginning of the relevant period /since the plaintiff applies for paying up the variable wage component/, the way in which the indicators of material stimulation of the petitioner were determined in the period preceding the period when they were part of the amended employment contract (that is, whether they were part of the collective agreement, internal directives) and subsequently it will be the subject of the fulfilment of the burden of proof on the part of the defendant, as the employer, to prove, in relation to each individual month in the relevant period, which specific indicator the plaintiff did not meet and what specifically this failure consisted of, in causal connection with which the variable component of their wage was cut.*

Subsequently, it will be up to the court to assess whether the plaintiff has carried the burden of proof in this regard and to assess the justification for cutting the variable component of the plaintiff's salary in the relevant period."[104] However, such a premise of the employer's mandatory procedure is simultaneously correlated with the employee's right (obligation) to claim their right to an objective assessment of their work performance and thus also to claim their right to pay the total amount of the above-tariff wage component, which was reduced according to their subjective opinion. If the employee did not do so, it is considered that the employee did not dispute such actions of the employer and cannot retroactively demand payment of the unpaid wage in the form of a reduced above-tariff wage component, including in the event of raising a statute of limitations objection. If the employee has an objection to the verification of the fulfilment of the substantive legal conditions for awarding the above-tariff wage component, the employee is required, according to the conclusions of the court practice, to demand the protection of their rights in real time and not as part of the proceedings for invalidity of the termination of the employment relationship, arguing that it should come to determine the higher value of the wage compensation, because at the relevant time she should have been paid a higher above-tariff wage component, which the employer unjustifiably reduced. *"The plaintiff justified their claim based on the fact that the variable wage component and material incentives were not paid to them in full, but in the opinion of the court, it was the plaintiff's duty to specify their reservations in this regard, so that the court could assess whether the defendant complied with the law and internal directives expected procedure for paying material stimulation. The court is of the opinion that if the plaintiff had reservations about the incorrect assessment of the performance of their work tasks, the plaintiff had the opportunity to inform their employer about it at the time when the incorrect assessment occurred. If the plaintiff did not do so, the plaintiff could describe these specific data in the lawsuit, or transfer them during the proceedings. Only in this way could the court assess whether the reduction of the second component of the variable wage for non-fulfilment of specific tasks was justified or not, without the plaintiff's claim this was not possible. For these reasons, the court rejected the claim due to lack of proof of claim."*[105]

Taking into account the employee's own actions and their subjective attitude towards the protection of their own rights (for example, if the employee believes that there has been an unauthorised reduction of their above-tariff wage component) is thus decisive from the point of view of protecting their legitimate interests during the duration of the employment relationship, while in the case of

[104] Decision of the District Court Trenčín as of 13 February 2017, file no. 21 C 44/2010.
[105] Decision of the District Court Trnava as of 13 February 2017, file no. 21 C 44/2010.

such an action the employee would nor should legal protection testify in the case of a possibly filed lawsuit for pay-up of reduced premiums retroactively or for other purposes, for example, calculation of wage compensation in case of invalid termination of employment. Thus, an employee who does not claim their rights and by their actions actually approves the employer's course of action, cannot demand a change in the employer's actions, which the employee did not dispute before at all, when implementing a completely different labour law institute. *"In connection with the unfavourable outcome of the dispute for the plaintiff, it is necessary to emphasise the actions of the plaintiff themselves. J. the plaintiff without any reservations for the entire duration of the sued period, that is, from March to September XXXX, did accept payslips, paid wages, while plaintiff claimed the wage pay-up in court almost three years after the termination of the employment relationship, so it is necessary to state that such an attitude of the plaintiff deviates from the usual model of behaviour, since in in the event that the plaintiff had doubts about the correctness of the calculation of their salary, there is no reasonable reason why such claims should only be asserted after such a long period of time and not directly at the time when the plaintiff's salary was paid, moreover, if the plaintiff had the opportunity to continuously check the monthly statements of hours worked, as this was stated by the witness F. D. in his testimony, the credibility of which the plaintiff did not question."*[106]

Conceptually, in the cases mentioned, it is the same approach as the court practice chose in the case of an "inactive" employer when applying the agreed conditions for awarding above-tariff wage components, who does not verify the fulfilment of these agreed conditions and the above-tariff wage component has changed into a regularly paid wage component in absolute amount. A negligent employee or an employee who did not deal with the protection of their rights by contradicting the incorrect fulfilment of the conditions for awarding above-tariff wage components or improper reduction of above-tariff wage components that belonged to them cannot claim them retroactively, including taking into account any objection of limitation. *"In the event that the plaintiff considered the bonuses to be claimable, the plaintiff could have asserted their claim through the courts and demanded paying up of wages from the defendant. The plaintiff did not claim such a claim in a separate proceeding, and even in this proceeding, it did not clearly follow from the plaintiff's submissions that the plaintiff would also assert a claim for pay-up of bonuses."*[107]

Such a principle of taking into account the employee's actions in the case of their subjective feeling of the employer's wrongdoing when providing above-tariff wage components is also maintained by the courts for the purposes of other

[106] Decision of the District Court Košice II as of 19 September 2019, file no. 37 Cpr 1/2012.
[107] Decision of the District Court Trnava as of 23 June 2021, file no. 18 Cpr 6/2014.

labour-law institutes, for example, determination of compensation of the employee's wages in the event of invalid termination of the employment relationship. For comparison, we also present the court's considerations in this area. *"The court determined the average earnings as the earnings that were billed to the plaintiff by the defendant as gross wages for the individual months of the decisive period. From the payslips issued by the defendant, the content of which the plaintiff did not deny, it follows that in the individual pay months of the decisive period, the plaintiff was not paid the bonuses and the plaintiff did not claim their payment in court, except that after the delivery of the immediate termination of the employment relationship, the plaintiff called on the defendant to pay up the wage. For that reason, the court did not consider the bonus as a wage component in the methodology for calculating the average wage for the purposes of wage compensation. The plaintiff claimed that it was not their duty to determine the average wage, and this duty follows to the employer pursuant to the Section 134 of the Labour Code. However, the plaintiff was not burdened with any unreasonable burden of proof in calculating the amount of their claim for compensation of wages themselves, as the plaintiff objectively had or could have had a document on the paid wages, or the plaintiff could have asked the defendant to issue them such a document and the plaintiff could have calculated the amount of the claim themselves. If the plaintiff claims that the plaintiff claimed this wage pay-up by demanding wage compensation calculated including bonuses, the court emphasises that it is necessary to distinguish between wages and wage compensation. If the plaintiff applied for wage compensation by determining it also taking into account the bonuses to which the plaintiff was entitled, this does not mean that by this submission the plaintiff also claimed the right to a wage pay-up. The subject of this proceeding was not a dispute over the payment of wages and the assessment of any unpaid wage claims for work performed. The subject of the proceedings is only a decision on the right to compensation for wages due to the invalid termination of the employment relationship. If the plaintiff was of the opinion that their wage should have corresponded to the amount specified in the employment contract, that is, their wage, including bonuses, should have been settled and paid, nothing prevented the plaintiff from asserting this claim in a separate proceeding. Due to the fact that the subject of evidence in the proceedings for compensation of wages is limited to the settled wages, from which deductions of levies and income tax are made, the court did not consider it economical to provide additional evidence (the evidence would be beyond the scope of this proceeding), which was proposed by the plaintiff in connection with claiming the wage pay-up. In addition, the plaintiff did not even properly assert such a claim in the proceedings, so that it is clear whether the plaintiff is demanding the wage pay-up at all."*[108]

[108] Decision of the District Court Trnava as of 23 June 2021, file no. 18 Cpr 6/2014.

4.4.4 Malus and clawback as a special monetary sanction

Some employers, especially those belonging to multinational corporations, conglomerates, companies involved in financial transactions, and consultancy, have set certain peculiarities in the remuneration of their employees concerning senior positions. For some companies, the remuneration conditions of these positions are similar to the remuneration of members of statutory bodies, supervisory boards, etc. (i.e. bodies whose regime operates within the framework of commercial relations). The remuneration system includes an incentive component, i.e. under what conditions employees are entitled to various above-target components of pay, and a punitive component, i.e. under what conditions when there is a breach of the rules by the employee, these above-target components are reduced or not awarded. Concerning ethics/compliance/integrity rules, which higher-ranking employees or managers violate, they can be seen as a specific monetary employment sanction, the so-called malus and clawback.

Malus and clawback constitute a specific mechanism for granting or deducting above-target wage components or recovering them from employees, provided they are so agreed upon. They are seen as specific components of pay (bonuses, remuneration) that do not belong to lower positions, and the conditions for their payment are specific in that they are due to employees if the employer assesses the employee's behavior as being in line with ethical rules (compliance, integrity). For example, if the employee's assessment is positive, the employee is entitled to the full amount of the cash benefit in the case of a malus' cash benefit. However, suppose there is ‚faulty' behavior. In that case, the cash benefit is reduced or not awarded (remuneration systems often contain rules on the percentage by which the remuneration is reduced for a specific violation of the rules).,

Given that remuneration systems are heterogeneous, malus and clawback generally cannot be defined and occur in conjunction with various above-fee components of the wage. As regards the reference period, based on the experience of application practice, these are various forms of bonuses paid on a calendar year or half-year basis for the employer's economic or productive results. At the same time, their non-payment or payout, respectively, is impossible. In the case of the latter, either the employee is paid the cash benefit but is subsequently assessed to have acted in breach of the ethical rules (malus), or the employer requires the employee to repay the cash benefits already paid (clawback)[109].

[109] The mechanism of malus and clawback is described in more detail in the following subsections.

Thus, a specific labor law sanction in connection with the violation of the rules of the Code of conduct/compliance and integrity rules for managers/high-ranking employees is usually the application of an adjustment (reduction or non-payment) of the employee's above-target component of the wage concerning Section 119 Subsection 3 of the Labor Code in the form of a so-called malus. It is not uncommon for an employer to request the reimbursement of an already paid extra wage component due to a detected violation of the rules in question by the employee (clawback). We see this same procedure as very problematic because if we proceed from the legislation of the Labor Code, we do not find a basis for accepting this institute. Rather, we perceive it as a kind of (possibly) contractual penalty which cannot even be negotiated in employment relations (the Labor Code does not recognize such an instrument and, taking into account Section 18 of the Labor Code, which establishes the limits of contractual types, such an agreement cannot be concluded). In the context of the application of the clawback, there is a debate as to whether, if the employee does not return the monetary consideration, damage to the employer or unjustified enrichment arises. The question also arises as to whether the employee, despite believing that the consideration is due to him/her, would be unjustly enriched or whether the unjust enrichment is on the employee's side. Given the previous, we hold that the clawback procedure is inconsistent with our employment law.

Consequences of non-compliance with the code of conduct/compliance and integrity rules are also applied to regular employees. However, they are not applied through malus and clawback (as a special bonus is usually set for senior positions, which does not belong to regular employees, as it is based on the increasingly demanding nature of the position, and as senior employees are also expected to meet a higher standard of compliance with ethical rules, this fact is also taken into account in the remuneration systems). These breaches may take the form of either a restriction on progression within the tariff system, which employers with an ethics/compliance system generally have in place or an adjustment to the above-tariff wage component provided monthly (even though, in both types of employees, such conduct by the employee may lead to the imposition of a warning of breach of work discipline by the employer). In cases of violation of these rules by high-ranking employees or senior managers (usually the first and second management levels below the statutory body, or managers outside the traditional organizational structure with precisely assigned work tasks, most often in the area of control), the application of the malus and clawback system is a specific rule of the remuneration system. The specificity of remuneration stems from the fact that high-ranking management employees are generally not included in the tariff remuneration system and have a contractual salary agreed upon with the employer (individually in the employment contract). The malus and clawback mechanism is one of the employer's tools (the most common one) to impose a monetary employment sanction on these employees for violating the code of conduct/compliance and integrity rules. Traditional "tariff" employees tend to have greater variability and several above-target wage components (as opposed to high-level employees). So, a monetary employment sanction can be imposed in several ways concerning each type of above-target wage component (most often in a monthly reference period). Unlike high-level employees, formal compliance with the ethics rules is not as strictly evaluated in determining the monetary sanction.

Although it is a system of remuneration of senior/senior employees, which is quite often used in the Slovak Republic's legal order, its consistency with the relevant provisions of the Labor Code is questionable, according to some opinions. A certain problem relates to the possibility of negotiating individual wage conditions in an agreement, which usually forms an annex to the employment contract. It is, therefore, questionable whether this procedure is compatible with the meaning of § 18 of the Labor Code. Usually, these agreements form separate annexes to the employment contract to negotiate wage conditions. Therefore, they could be seen as an agreement on wage conditions as a further question arises (as we have indicated in general terms concerning financial penalties) whether the very setting of these remuneration terms, which constitute wage terms under §§ 118 and 119 of the Labor Code, is consistent with the requirement of quality and quantity of their negotiation under § 119 para. 3 of the Labor Code.

Most often, the legal basis for the possibility of applying the malus and clawback system is an arrangement to the employment contract, which employers implement in the form of an annex to the employment contract (in particular, the final provisions of such an ‚annex' state that it is a document negotiated only to apply the special remuneration system). However, the so-called malus, clawback, despite being bilaterally agreed on terms in an annex to the employment contract, has certain shortcomings in that a change in the remuneration system is possible not only based on a change in objective facts (e.g., a change in the remuneration system which is not based on a unilateral decision of the group or the employer (if internal policies regulate the remuneration), but even based on the documents which regulate the remuneration system and which derive from the group's regulations (a change in the group's regulations which occurs outside the will of the employer and the employee will also change the terms of the remuneration system), should be regarded as null and void in such a case, in fact, only based on a unilateral decision of the group or the employer (if the group's internal policies regulate the remuneration system), particularly in cases where the remuneration system would also be seen as a sanctioning instrument. If the system were set up merely to award some monetary benefits without any reduction or disallowance, the question of validity could be treated more leniently. Even if the wage conditions are to be agreed upon (in the employment or collective agreement), and if we are talking about extra-fee wage components, about benefits, i.e. monetary benefits that exceed the basic and statutory benefits, we could discuss the extent to which the conditions for granting them, for reducing them, shall be agreed. If we consider that the wage condition has been agreed upon in our case in the form of an annex to the employment contract), but the more specific conditions are derived from a document whose wording cannot be influenced by the employee, whether there has been an agreement on the wage condition (the employee does not influence its content). From this perspective, one could consider nullity. However, if at the same time we take into account the fact that these are benefits which are above the required statutory framework, the employee has agreed to the remuneration set in this way, whether the considerations could not lead to the conclusion that this is a valid negotiation of remuneration, a bonus, especially if such an arrangement would be in the case of high-ranking employees, whose financial evaluation (basic) is at a high level. They have a much broader possibility to negotiate the terms of employment than the employees in lower positions. Each case should therefore be considered on an individual basis.

Since the payment terms are to be negotiated, it also considers the protective function of labor law. Although the employee has agreed to a special payment system, taking into account the conclusions of the courts that we have referred to when setting pay systems, one may be concerned that if the existence of special terms of pay (beyond the statutory framework, admittedly) would depend on the decision of only one party to the employment relationship, in this case, the employer (possibly even the concern), one should be cautious.

In connection with the special remuneration system under review, another problem arises (often this is the practice of application) for employers belonging to a concern who believe that the mere designation of a wage condition in the employment contract utilizing the formulation of a bonus (most often a global annual bonus) is sufficient to meet the substantive conditions for negotiating a wage condition as required by law, on the basis that the regulation of the terms of this bonus is determined by the concern's regulations (which cannot be influenced by the employee in any way). § 119 para. 3 of the Labor Code requires the employer to agree with the employee on the wage conditions themselves and the conditions for granting them. If the employer agrees with the employee only on a certain type of monetary remuneration over the basic remuneration and the terms of that remuneration are set unilaterally in the employer's internal policies or in a concern regulation which cannot be influenced even by the employer, there are opinions that there is practically no agreement concerning that monetary remuneration. The conditions of payment or non-payment/shortening of this cash benefit do not depend on the agreement of the employee and the employer. However, they are unilaterally regulated by the employer in an internal company regulation or by an entity outside the employment relationship in a concern regulation, according to its preferences, the economic performance of the concern, etc. Such a practice may be seen as missing the requirement to agree on the wage conditions pursuant to § 119 para. 3 of the Labor Code. As already indicated, it appears problematic to clarify what is considered to be the conditions of provision and to what extent they are to be specific and whether, indeed, in the case of the above-tariff components, the various bonuses, they cannot be set in such a way that the employer also has the possibility of deciding on them autonomously. Suppose, in the case of such a monetary benefit, a reference is made in the employment contract to the employer's internal policy/company regulation. In that case, it could also be considered that this implies fixing the wage terms at the time of agreeing on such a wage term in the employment contract and that it can only be changed with the agreement of the employee concerned. A unilateral change in the terms and conditions of remuneration should therefore have no relevance for the award or non-award of the employee's premium component of pay in the original form, which was in force at the time of the negotiation of that premium component with the employee. In the light of the previous, therefore, the agreement to apply the malus and clawback system in the remuneration of senior/senior staff in the manner described can also be regarded as inconsistent with the Labor Code, contrary to § 119 para. 3 of the Labor Code (as already indicated, if an internal or concern regulation only regulates the granting of certain extra-fee components and at the same time there are no situations of being reduced or not granted, and the employee does not object to this system, an implied agreement and the consistency of the procedure with the Labor Code can be considered; since the publication deals with the issue of the imposition of financial penalties, the unilateral determination of financial penalties based on wage conditions alone cannot be considered to conform with the Labor Code).

The application of malus and clawback under the special remuneration system is mostly used in the context of bonuses awarded to employees for the company's economic performance, combining economic indicators with the requirement to comply with the Code of conduct/Compliance and Integrity Principles as one of the conditions for the payment of this bonus (over and above the basic and contractual remuneration). In practice, employers often try to justify these bonuses by arguing that they are not a wage condition that needs to be negotiated under § 119 para. 3 of the Labor Code while emphasizing the non-claimability of these bonuses. Such arrangements also regularly include an informative statement that the legal non-claimability is not affected by the fact that the wage condition has been paid to the employee repeatedly based on the criteria laid down for its award. The employers thereby declare that the prior action of paying the bonus does not transform the bonus into a legally claimable bonus and that the employee shall satisfy the conditions for its award in each relevant assessment period, including the absence of action triggering the application of the malus or clawback.

BIBLIOGRAPHY

1. BARANCOVÁ, H. 2017. *New technologies in labor relations.* Praha : Leges, 2017. 192 p. ISBN 978-80-7502-253-0
2. BARANCOVÁ, H. et al. 2017. *Labour Code. Comment*. Bratislava : C. H. Beck, 2017. 1424 p. ISBN 978-80-8960-353-4
3. BARANCOVÁ, H. et al. 2019. *Slovak labor law*. Bratislava : Sprint2, 2019. 664 p. ISBN 978-80-8971-048-5
4. BARANCOVÁ, H. – SCHRONK, R. 2004. *Labour Law*. Bratislava : Sprint, 2004. 648 p. ISBN 80-89085-28-8
5. BĚLINA, M. et al. 2010. *Labour Law*. Praha : C. H. Beck, 2010. 576 p. ISBN 978-80-7400-186-4
6. ČERNÁ, J. – STACHO, Z. – MIKLE, L. 2021. *Dynamic transformation of tourism.* Częstochowa : Oficyna Wydawnicza Stowarzyszenia Menedżerów Jakości i Produkcji, 2021. 97 p. ISBN 978-83-63978-94-5
7. FRUMAROVÁ, K. 2021. Internal regulations, their "external" effects and other problematic aspects. In *Acta universitatis carolinae iuridica.* vol. 66, no. 2, pp. 23-35. ISSN 0323-0619
8. HLADÍKOVÁ, V. – MADLEŇÁK, A. 2022. Netholism and Technological Interference as Manifestations of Communication in the Digital Environment. In *Studies in Media and Communication*. 2022, vol. 10, no. 1, pp. 74-82. ISSN 2325-8071
9. KLIEŠTIK, T. (ed.) 2020. Globalization and its socio-economic consequences: sustainability in the global-knowledge economy. Žilina : Žilinská univerzita v Žiline, 2020. pp. 1-6. ISSN 2261-2424
10. KUPEC, V. – PISAR, P. 2021. Auditing and Controlling as a Tool for SME Marketing Risk Management. In *Marketing and Management of Innovations*, 2021, no. 1, pp. 225-235. ISSN 2218-4511
11. LACLAVÍKOVÁ, M. – RAK, B. 2021. Labor camps and performance of work – forced labor, obligation, penalty (normative basis). In *Forum Iuris Europaeum: journal for legal science: Zeitschrift für die Rechtswissenschaft*. 2021, vol. 9, no. 2, pp. 61-72, ISSN 2644-4364.
12. MADLEŇÁK, A. – ŽUĽOVÁ, J. 2019. *The right to privacy in the context of the use of social media and geolocation services.* Budapešť : Wolters Kluwer Hungary, 2019. 147 p. ISBN 978-963-295-900-9
13. MEŇOVSKÝ, I. 2005. *Code of ethics as a tool for building corporate culture* [online]. Available at: <http://www.epi.sk/odborny-clanok/Eticky-kodex-ako-nastroj-budovania-podnikovej-kultury.htm>.

14. MÉSZÁROS, P. 2015. The apparent education of the weaker party as a reason for its discrimination. In *Discrimination in contract law.* Trnava : Typi Universitatis Tyrnaviensis, joint workplace of the University of Trnava in Trnava and Vedy, publishing house of the Slovak Academy of Sciences, 2015. pp. 213-220. ISBN 978-80-8082-835-6
15. PAVLŮ, D. 2016. Managerial decision-making from the point of view of ethics. In *Modern management* [online]. 2016, no. 6. Available at: <https://modernirizeni.ihned.cz/c1-65339740-manazerske-rozhodovani-z-hlediska-etiky>.
16. RAK, P. 2021. Internal guidelines. In *Legal debates on-screen 3. [electronic document]: private law section.* Banská Bystrica : Publishing house Matej Bel University Belianum, 2021. pp. 187-194. ISBN 978-80-557-1933-7
17. RAK, P. – ČIEFOVÁ, M. 2021. Legal and linguistic specifics of the employment contract in the context of the development of the labor market. In *International relations 2021: Current issues of the world economy and politics: collection of scientific papers from the 22nd international scientific conference.* Bratislava : Publishing house EKONÓM EU Bratislava, 2021. pp. 595-603. ISSN 2585-9412. ISBN 978-80-225-4904-2
18. RAK, P. – RAKOVÁ, K. 2021. Social media and the workplace. In *Social Dilemma 2021. New approaches to knowledge management and protection on the Internet: peer-reviewed collection of contributions of the interdisciplinary international scientific conference held on November 5, 2021 in Brno*. Brno : Právní institut, 2021. p. 7-14. ISBN978-80-908357-0-2
19. SÝKORA, M. 2018. *Compliance programs (not only) in the Czech Republic.* Praha : Wolters Kluwer, 2018. 304 p. ISBN 978-80-7552-667-0
20. ŠVEC, M. – OLŠOVSKÁ, A. 2022. *Kurzarbeit and other obstacles to work on the part of the employer.* Bratislava : Wolters Kluwer, 2022. 192 p. ISBN 978-80-5710-450-6
21. ŠVEC, M. – RAK, P. – HORECKÝ, J. 2021. *Internal regulations. Work order and other related regulations.* Bratislava : Wolters Kluwer, 2021. 200 p. ISBN 978-80-5710-422-3
22. ŠVEC, M. – TOMAN, J. et al. 2019. *Labour Code. Collective Bargaining Act. Comment.* Bratislava : Wolters Kluwer, 2019. 2196 p. ISBN 978-80-5710-422-3
23. TOMAN, J. 2014. *Individual labor law: General provisions and employment contract*. Bratislava : Friedrich Ebert Stiftung, 2014. 391 p. ISBN 978–80–89149–42–1
24. URBAN, J. 2017. *Code of ethics: a management tool or a bunch of phrases*? [online]. Available at: <https://ebschool.cz/eticky-kodex-nastroj-rizeni-nebo-snuska-frazi>.

25. ZAUŠKOVÁ, A. et al. 2022. Current state and prediction of the future of digitization as a part of industry 4.0. In *Serbian Journal of Management*. 2022, vol. 17, no. 1, pp. 111-123. ISSN 1452-4864
26. ZAUŠKOVÁ, A. – KUBOVICS, M. – ŠČEPKOVÁ, S. 2022. Digitalisation in industry 4.0. In MIHAJLOVIĆ, I. (eds.) *Possibilities and barriers for Industry 4.0 implementation in SMEs in V4 countries and Serbia*. Bor : Univerzitet u Beogradu, 2022. pp. 372-407. ISBN 978-86-6305-121-8
27. ZORIČÁKOVÁ, V. 2022. Contractual penalty in labor law? A brief reflection on the agreement on monetary compensation in § 62 par. 8 and § 83a par. 5 of the Labor Code. In *Societas et Iurisprudentia: international online scientific journal*. 2022, vol.10., no. 1, pp. 66 – 86. ISSN 1339-5467
28. ŽUĽOVÁ, J. 2016. Labor regulation of delivery and possibilities of its electronicization. In *Current state and new tasks of labor law: Dies Iuris Tyrnavienses-Trnava law days: New Europe-challenge and expectations: international scientific conference: 22-23 September, 2016, Trnava*. Praha : Leges, 2016. pp. 244-259. ISBN 978-80-7502-177-9
29. ŽUĽOVÁ, J. 2021. Conclusion of an employment contract for the use of electronic communication. In *Employee in the Digital Environment: reviewed Proceedings of Papers of the Scientific Conferenc*e. Košice : University of P. J. Šafárik in Košice, 2021. pp. 89-96. ISBN 978-80-574-0068-4
30. ŽUĽOVÁ, J. 2021. *Selection of employees: legal pitfalls of filling jobs*. Bratislava : Wolters Kluwer, 2021. 120 p. ISBN 978-80-571-0324-0
31. ŽUĽOVÁ, J. – KUNDRÁT, I. 2020. Service of documents in the context of employment during employee quarantine. In *Central European Journal of Labour Law and Personnel Management: international scientific journal*. 2020, vol. 3, no. 1, pp. 77-88. ISSN 2644-4917
32. ŽUĽOVÁ, J. – MINČIČOVÁ, M. 2021. *Assessment of health and psychological fitness for work (in the conditions of the Slovak Republic).* Praha : Leges, 2021. 116 p. ISBN 978-80-7502-518-0
33. ŽUĽOVÁ, J. – MINČIČOVÁ, M. 2021. On the relationship between two legal regulations governing the issuance of medical reports on health fitness for work. In *Societas et Iurisprudentia: international online scientific journal*. 2021, vol. 9, no. 1, pp. 107-121. ISSN 1339-5467

The reference to the cited court decisions is given directly in the text of the publication.