

Investigation in Disciplinary Proceedings and the Employee's Right to Defence

Brief Overview:

Serbia's Labour Law requires employers to respect employees' right to defence in disciplinary proceedings that may lead to dismissal. Although the Law does not formally regulate investigative procedures, employers must collect evidence lawfully and provide employees with a written warning specifying the grounds for dismissal, relevant facts, and evidence. Employees must be given at least eight days to respond, and employers must consider their defence before making a final decision. Failure to respect these procedural safeguards may result in unlawful termination of employment.

Practice Group:

Labour and Employment

Full Article:

The Labour Law does not recognise an investigative procedure aimed at identifying a breach of work duty or non-compliance with work discipline by an employee. The concept of an investigation, in the procedural law sense, is characteristic of criminal proceedings, while labour legislation does not prescribe a separate procedure or rules according to which an employer should establish facts and collect evidence of a breach before issuing a warning to an employee.

However, since the warning must be based on specific facts and evidence, it is clear that the employer must first take certain steps to establish and obtain them. This is precisely where the question of the limits of such actions arises, given that the Labour Law does not regulate the manner in which the employer obtains these facts and evidence, nor does it prescribe which actions the employer may undertake before serving the warning on the employee. Nevertheless, the employer's freedom to collect facts and evidence cannot be interpreted so broadly and absolutely as to allow the procedure to be conducted in a manner that would deprive the employee of, or render meaningless, the right to defence.

Procedure in the Event of a Breach of Work Duty or Non-Compliance with Work Discipline

An employer may terminate the employment contract of an employee who, through their own fault, commits a breach of work duty or fails to comply with work discipline. In order to lawfully terminate an employment contract on these grounds, the employer is obliged to comply with the procedure prescribed by law.

International Labour Organization Convention No. 158 concerning Termination of Employment at the Initiative of the Employer provides that the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before they are provided with an opportunity to defend themselves against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

Based on this provision, the employee's **right to defence** is guaranteed by law. The purpose of this procedure is to clarify all relevant facts and circumstances and determine whether there are grounds for

termination of the employment contract or for the imposition of one of the less severe measures, such as temporary suspension from work without salary compensation, a fine, or a warning with a threat of dismissal.

The employer is obliged to **warn the employee in writing of the existence of grounds for termination of the employment contract** and allow the employee a period of **at least eight days** from the date of service of the warning to respond to the allegations contained therein. The warning is served in the manner prescribed for serving a decision on termination of the employment contract.

The essential elements of every warning are **the grounds for dismissal, the facts and evidence** indicating that the conditions for dismissal have been met, and the **period** within which the employee may respond to the warning.

Given that the employee is being held accountable for a disciplinary offence that may result in termination of the employment contract, the employer must specify all the circumstances of the case so that the employee can respond to the allegations. In this regard, the employee must be informed of the time, place and manner in which the breach of work duty or work discipline was committed. In the case of a breach of work duty, establishing the employee's fault is of particular importance, since fault is a prerequisite for the existence of this ground for dismissal.

Investigative Actions Before the Initiation of Disciplinary Proceedings

Before serving the warning on the employee, the employer must have facts and evidence indicating a possible breach of work duty or non-compliance with work discipline. Information about a possible breach most commonly comes from the employee's immediate superior, but it may also come from another employee, internal control, a client, a business partner, or from the employer's business documents and records.

In order to verify such information, the employer may obtain statements from other employees, examine business documents, records and video recordings, verify data from its information systems, and examine other evidence relevant to the specific case.

All actions undertaken by the employer for the purpose of establishing facts and collecting evidence must be carried out lawfully, with due respect for the employee's rights and dignity.

Employee's Statement Before Service of the Warning

Before serving the warning, the employer is not prohibited from speaking with the employee and requesting a statement regarding a specific incident. However, such a conversation should serve the purpose of establishing facts, **rather than exerting pressure on the employee, intimidating them, or reaching a predetermined conclusion regarding their responsibility.**

Of particular importance is the manner in which the employee's statement will subsequently be used. If the employer intends to rely on a particular statement as evidence, its content must be reliably documented – for example, in minutes of the meeting or in a written statement by the employee. Otherwise, the employer's mere reference to the content of a conversation with the employee, without other evidence corroborating it, cannot be considered reliable evidence in disciplinary proceedings.

A statement provided by the employee during the "investigation" cannot replace their right to respond, after receiving the warning, to the specific grounds for dismissal and the evidence on which the employer relies.

The employee's statement **cannot subsequently become grounds for dismissal if the facts arising from that statement were not previously included in the warning and the employee was not given an opportunity to respond to them and, if necessary, engage professional assistance.** The decision on termination of the employment contract must remain within the scope of the facts stated in the warning itself.

The procedure preceding the service of the warning, or the "investigative procedure", must not constitute a stage at which the employee's responsibility has already been conclusively established, with the subsequent warning serving merely as a formal step in disciplinary proceedings.

Employee's Right to Defence

The employee's right to defence is not exhausted by the mere service of the warning and the granting of a period for responding to it. It also entails the employer's obligation to consider the employee's allegations and assess their significance in relation to the facts and evidence available to the employer before making a final decision.

In their response, the employee sets out the allegations and circumstances they consider relevant to the specific case, on the basis of which the employer can properly and fully establish the facts, assess whether there has been a breach of work duty or non-compliance with work discipline, and determine whether there are mitigating circumstances justifying the imposition of one of the less severe measures instead of dismissal.

The Labour Law does not prescribe an obligation to provide evidence together with the warning, but only to specify such evidence, as has also been confirmed in case law. If the employee has been given an opportunity to respond to the grounds for dismissal, the purpose of the warning has been fulfilled. However, merely specifying the evidence is not sufficient if the employee has not been given an opportunity to become acquainted with the content of that evidence and to respond to it. In such a case, the employee is deprived of the right to defence, rendering the termination of the employment contract unlawful.

The identity of the grounds for dismissal stated in the warning and in the decision on termination of the employment contract is of particular importance for the exercise of the right to defence. In this regard, in judgment Rev2 3966/24, the Supreme Court took the position that the grounds for dismissal stated in the warning and those stated in the decision on termination of the employment contract must be identical. Otherwise, the employee cannot respond to the actions attributed to them, thereby violating their right to defence, which is protected by law.

The Boundary Between the Employer's Freedom to Collect Evidence and the Employee's Right to Defence

The absence of statutory regulation of the procedure preceding the service of the warning does not mean that the employer has unlimited freedom to collect facts and evidence. The actions undertaken by the employer must be carried out lawfully, with respect for the employee's rights, and the prior establishment of facts must not constitute a predetermined decision regarding the employee's responsibility, nor render the employee's right to defence meaningless.

Author: Milana Milojević Counsel at PR Legal, milana.milojevic@prlegal.rs