

DISCIPLINARY LIABILITY OF THE EMPLOYEE FOR NON-PERFORMANCE OR IMPROPER PERFORMANCE OF HIS/HER JOB DUTIES UNDER THE UKRAINIAN LEGISLATION

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Abstract. At present, the category of job duties of the employees becomes especially relevant. This is due to the transformation of views on the organization of the labour process, relations between the parties of the employment agreement. Job duties are the key element of the enterprise's internal work schedule, and their proper performance by the employees is an important condition for the successful business of their employers. An unambiguous interpretation of the relevant concepts and categories of the institution of disciplinary liability, legal certainty in the nature of non-performance or improper performance of job duties, in qualifying the reasons for such non-performance as valid, excluding the fault of the employee, are very important. The authors concluded that the employee's job duties as the object of disciplinary misconduct, which is the ground of disciplinary liability, could be considered as obligations connected with performance of the job function specified in the employment agreement. To certain categories of employees the duties to comply with moral and ethical norms, which is due to the position held or work performed, could also be considered as job duties. To avoid litigation, as well as abuse by both the employee and the employer, the employee's job duties should be consolidated in his/her job description and other local regulations of the enterprise. In order to apply to the employer the legitimate disciplinary sanction for non-performance or improper performance of his/her job duties, a set of the following conditions should be met: the violation should relate only to those duties which are part of the employee's job function or follow from the enterprise's internal work schedule and which the employee should be duly informed about. Non-performance

or improper performance of the job duties should be the culprit, committed without good reason intentionally or negligently.

Keywords: job duties, job function, job description, disciplinary misconduct, employee's fault.

INTRODUCTION

Transformation of views on the organization of the labour process, the relations between the parties of the employment agreement require more attention to the categories of job duties of the employees. The proper performance of the employees' job duties is an important condition for the successful economic activity of their employers. The efficiency of work of the enterprise largely depends on the conscientious performance of their duties by all employees and each of them individually. Job duties are the key element of the enterprise's internal work schedule. Discipline is an integral part of its work. Labour legislation does not consolidate the list of acts that are considered as violations of labour discipline. Exceptions are applied to the state officials, judges, prosecutors and those who are subject to disciplinary statutes or regulations. Therefore, in order to establish a disciplinary misconduct, it is important to determine the scope of the employee's job duties. An unambiguous interpretation of the relevant concepts and categories of the institution of disciplinary liability, legal certainty in the nature of non-performance or improper performance of job duties, in qualifying the reasons for such non-performance as valid, excluding the fault of the employee, are very important.

There is common practice for courts to recognize a dismissal of the research and teaching staff member as lawful due to the employee's absence at work on a day when he/she has no training. The court did not take into account the plaintiff's reference to the fact that he was engaged in scientific and methodological work at that time, as the plaintiff did not receive the approval of the head of the department and did not provide evidence of visiting the library at that time. Such legal uncertainty in the issue on the performance by the lecturer job duties other than training creates grounds for different abuses by the employer. All this indicates the relevance of the chosen theme.

Characteristic features of the disciplinary liability in labour law were thoroughly described in monographic study of P.S. Lutsyuk (2017), features of general and special disciplinary liability were analysed by K.V. Kovalenko (2008). T.V. Kolyesnik (2016) studied in her monograph the provision of labour discipline in the market economy. Problems of theory and practice of legal liability in labour law of Ukraine were analysed by E.Yu. Podorozhnyi (2016) and legal liability and other coercive measures in labour law were analysed by M.I. Inshyn, V.I. Shcherbyna, I.M. Vaganova (2012). O.M. Yaroshenko (2020) studied the internal work schedule as a labour law category.

At the same time, the development of the law enforcement practice necessitates a comprehensive study of the problem of non-performance or improper performance of job duties as a ground for disciplinary liability.

The object of the study is the legal relations arising in the process of bringing the employee to the disciplinary liability for non-performance or improper performance of his/her job duties. The subject of the study is the disciplinary liability of the employee for non-performance or improper performance of his/her duties under the legislation of Ukraine.

The purpose of the study is to define the problems in understanding the essence and legal nature of job duties, non-performance or improper performance of which is the ground for disciplinary liability.

MATERIALS AND METHODS

The methodological ground of the study are general and specific scientific methods of scientific knowledge. Thus, by the general methods the norms of the labour legislation of Ukraine regulating the application of disciplinary sanctions to the employees were analysed. By the logical and semantic method the conceptual apparatus of the researched sphere was deepened. The application of the system and structural method provided an opportunity to study the disciplinary liability as a holistic legal phenomenon and to determine its specific features and general features. The appeal to the methods of classification, grouping, system and structural and system and functional methods allowed to determine the specifics of legal regulation of disciplinary liability in modern labour law, to explore the types of disciplinary liability of the employees in labour law as a complex phenomenon. The comparative legal method was also used to compare the legal regulation and practice of disciplinary sanctions for non-performance or improper performance of their job duties under the legislation of Ukraine.

The normative legal acts of Ukraine and the case law on the researched problem were analysed in detail.

RESULTS AND DISCUSSION

As it is well-known, the ground for disciplinary liability is a disciplinary misconduct as a culpable failure or improper performance of the employee's job duties. Therefore, first of all, we will clarify the concept of job duties. In general, legal duties as a category of law are the component of legal regulatory structure and the instrument of legal regulation. Legal duties, firstly, should be included in the normative legal act; secondly, to become mandatory; thirdly, to act as a means of regulating public relations and the scale of assessing the behaviour of the relevant subjects of law.

In the etymological sense, the term "duty" means a set of actions assigned to anyone and unconditional to perform. That is, duty is a conditioned need for a certain behaviour.

In the general theory of law (Vasylev, 1976), duty is considered as an existing measure of proper behaviour in society, which is characterized by the following features: firstly, duty is a social category; secondly, it reflects proper behaviour; thirdly, the boundaries of duty are set: type, scope of behaviour, time, place, etc.; fourthly, duty arise in connection with the volitional and conscious activity of people; fifthly, duty is a multilevel category; and sixthly, duty is a part of social norm.

The employee's job duties as a subject of labour law determine the degree of proper behaviour of an individual who has entered into the employment relations and acts within

the legal relations that has arisen. Therefore, job duties should be performed within the framework of the labour relations.

O.M. Ruzayeva offers the following definition of job duties as a branch legal category. The employee's job duties are a measure of specific behaviour of an individual who has voluntarily entered into the labour relations with the employer that meets the legal requirements and provides for the possibility of coercion in the form of legal liability for an offense (Ruzayeva, 2017).

The author separates such qualifying features of the employee's job duties:

- the employee's job duties are always realized within the labour relations;
- the employee's job duties are formally fixed in the normative legal act;
- the employee's job duties means the duty and the need to comply with the normatively prescribed model of behaviour in the process of functioning of labour relations;
- the employee's job duties are personalized and, as a rule, individualized;
- the job duties as a measure of proper behaviour are always present in the functioning of labour relations;

non-performance or improper performance of the job duties could result in application of legal liability measures.

Some authors divide the employee's job duties in such groups as compliance with labour discipline, proper performance of job functions, ensuring the necessary quality and efficiency of work, compliance with general rules of conduct (care for the employer's property), systematic improvement of their business (professional) skills (Prymenenye, 1980). However, if we consider job duties as an object of disciplinary misconduct, which is the ground for disciplinary liability, it is difficult to agree with the proposed division. After all, observance of the labour discipline presupposes conscious and exact performance by the employee of all job duties assigned to him/her and observance of the established restrictions and prohibitions.

Legal duties are consolidated in the sources of law. The employee's main (statutory) job duties are normatively consolidated in the codified normative legal act of Ukraine – the Code of Labour Laws of Ukraine (hereinafter – the Labour Code). Article 139 of the Labour Code "Duties of the Employees" states the following: "The employees should work honestly and conscientiously, timely and accurately comply with the orders of the owner or his/her authorized body, comply with the labour and technological discipline, labour protection regulations, take care for the owner's property, with whom the employment agreement has been concluded" (Kodeks zakoniv pro pratsiu Ukrainy, 1971).

In some laws dealing with certain institutions of labour law (for example, labour protection) or the peculiarities of labour regulation of certain categories of the employees (for example, state officials) these duties are more specific.

Thus, Article 8 of the Law of Ukraine "On State Service" (Pro derzhavnu sluzhbu, 2016) sets the main duties of state officials:

- 1) to comply with the Constitution and laws of Ukraine, act only on the ground, within the powers and in the manner prescribed by the Constitution and laws of Ukraine;
- 2) to adhere to the principles of state service and rules of ethical conduct;
- 3) to respect human dignity, prevent violations of human and civil rights and freedoms;

- 4) to treat the state symbols of Ukraine with respect;
- 5) to use in obligatory way the state language during performance of his/her job duties, prevent discrimination against the state language and counteract possible attempts to discriminate it;
- 6) to ensure, within the limits of the powers granted, the effective performance of the tasks and functions of state bodies;
- 7) honestly and professionally to perform his/her duties and the terms of the contract for state service (in case of conclusion);
- 8) to execute decisions of state bodies, orders (instructions), instructions of heads, provided on the ground and within the powers provided by the Constitution and laws of Ukraine;
- 9) to comply with the requirements of legislation in the field of preventing and combating corruption;
- 10) to prevent the emergence of real, potential conflicts of interest during the state service;
- 11) constantly to increase the level of his/her professional competence and improve the organization of official activities;
- 12) to keep state secrets and personal data of persons that became known to him/her in connection with the performance of his/her official duties, as well as other information that is not subject to disclosure in accordance with the law;
- 13) to provide public information within the limits specified by the law. In addition, it is noted that state officials also perform other duties specified in the regulations on structural units of state bodies and job descriptions approved by the heads of state service in these bodies, and contracts for state service (in case of conclusion).

In accordance with part 1 of Article 61 of the Law of Ukraine "On State Service", the state official is obliged to perform the duties specified in Article 8 of this Law, as well as:

- 1) does not allow acts incompatible with the status of state official;
- 2) to show a high level of culture, professionalism, endurance and tact, respect for citizens, management and other state officials;
- 3) to take care of state property and other public resources.

As we can see, the work in the state body and the implementation of the relevant organizational and administrative or advisory functions necessitates the observance by state officials of the prohibitions and restrictions imposed by the regulations. After all, the violation of certain categories of state officials of their duties directly related to the implementation of tasks and functions of the state body, significantly damages the authority of the state and undermines public confidence in the official and the state body as a whole.

In the drafts of the Labour Code of Ukraine, the range of job duties assigned to the employee was more extensive in comparison with the effective Labour Code. For example, Article 22 of the draft of the Labour Code of Ukraine dated December 27, 2014 N 1658 (revised to the second reading) (Trudovyi kodeks Ukrainy: proekt, 2015) provides the following: personal and conscientious performance of his/her duties under the employment agreement; observance of the labour discipline and the enterprise's internal work schedule; fulfilment of the established labour standards and tasks of the employer; compliance with the labour

protection standards; careful treatment of the employer's property; immediate notification of the employer about the threat to the life and health of the employees, the preservation of their property; notification of the employer about the reasons for absence at work; respect for the honour, dignity and other personal non-proprietary rights of the employer; compensation for damage caused to the employer's property by wrongful acts in the course of job duties; non-disclosure of state or commercial secrets and other information protected by the law.

Thus, rule-making practice shows examples of statutory job duties of the employees, which are manifested in the need to take certain actions or refrain from certain behaviour. If we analyse them, we can see that each job duty, in fact, contains a specific requirement to adhere to the normative legal act model of behaviour in the functioning of labour relations, which involves subjecting the employee to the labour discipline rules and the internal work schedule rules.

The internal work schedule rules, which define the basic rights and duties of the parties, take central place in the system of regulations governing labour discipline. The enterprise's internal work schedule rules mean local document that provides legal regulation of internal work schedule of the enterprise, which provides a system of labour relations in the labour collective of the enterprise in the process of work and promotes the exercise of rights and duties of all participants.

The employees' duties could also be consolidated in technological and job instructions, instructions on labour protection, fire safety, and other regulations. The employer has the right to issue orders concerning the duties of separate employees. Such orders and directives are binding if they do not contradict the regulations, as well as regulations of the head of the enterprise. The employer's orders and instructions are not normative acts, but could be classified as the law enforcement acts. The head in his/her orders and instructions could not go beyond the regulations. Failure to comply with orders and instructions of the employer is a violation of labour discipline (Yaroshenko, 2020).

But, the employee should be familiar with all these duties. Thus, paragraph 29 of the Resolution of the Grand Chamber of the Supreme Court dated May 29, 2019 in case N 452/970/17 states that the employer could not blame the employee and bring him/her to the disciplinary liability in case of failure to perform duties not due to the employment agreement and about which the employee was not properly informed (Postanova Velykoi Palaty Verkhovnoho Sudu, 2019).

The job description is the most common and detailed source of the employee's job duties. The employee should guide it in his/her daily work with the employer. After all, the requirements of the employer to perform work not provided for in the job description, the employee often tends to consider as an abuse of position or law, rather than legal action. Such an employee's protest often escalates into the open conflict with the employer. Typically, such confrontation ends in dismissal for non-performance of job duties (Dyban, 2019).

In general, there are two approaches to the legitimacy of the employer's requirement for the employee to perform duties not provided in the job description. According to the first approach, if the requirements of the employer are based on the employment agreement, i.e. the condition of the job function, they should be classified as absolutely legal, regardless

of whether the employee's job duties are consolidated in his/her job description or not. The employer objectively does not have the opportunity to anticipate all possible jobs for a particular job function. Therefore, failure to mention some of the employee's job duties in the job description could not justify denying the latter. The job function and job duties of the employee result in a stable relation with each other. Job duties arise not by themselves and not simply by the will of the employer, but primarily by virtue of the mandatory employment agreement. And, only the last circumstance legitimizes the right of the employer to give the employee additional instructions not provided by the job description, which corresponds to the employee's duty to perform these instructions. According to this approach, the employer recognizes the right to give instructions to the employee within the contractual job function (Kovalev, 1980). This leads to the conclusion that the job description is optional in terms of defining the employee's job duties.

In contrast, there is an approach according to which the employee's activities become his/her job duty due to its consolidation in job description (Soifer, 1977). Just this approach found support in judicial practice, as to the Supreme Court's legal opinion, for non-performance or improper performance of the functional duties not provided in the job description, there are no grounds for disciplinary action and reprimand. Thus, on December 10, 2019 the Supreme Court as a panel of judges of the Third Judicial Chamber of the Civil Court of Cassation considered in a preliminary hearing in writing the case of PERSON_1 to KZOZ "Kharkiv Regional Clinical Drug Hospital", chief physician of KZOZ "Kharkiv Regional Clinical Hospital" PERSON_3 on cancellation of the order on imposition of disciplinary action.

The court found that the plaintiff worked as the head of the drug department of Kharkiv Regional Clinical Drug Hospital, and was acquainted with the job description.

The order of the chief physician of Kharkiv Regional Clinical Drug Hospital of May 15, 2017 "On Imposition of Disciplinary Sanctions" reprimanded the head of the drug department for violation of the labour discipline on the ground of the act of April 21, 2017 to verify compliance with sanitary conditions at the drug department violation of labour discipline. It was noted that the results of inspection of compliance with sanitary legislation at the drug department in treatment and prevention facilities established by the order of the Ministry of Health of Ukraine revealed systematic and prolonged violations of sanitary norms and rules, resulting from improper compliance of functional duties, as well as the consequences of non-compliance with the order of the chief physician of February 3, 2017 "On Strengthening Control to Ensure Proper Sanitary and Hygienic Condition of the Hospital Department".

The courts found that according to the plaintiff's job description, the plaintiff's direct job duties did not include ensuring the sanitary and hygienic condition of the department, which was entrusted to the senior nurse of the department.

In addition, the act on the ground of which the impugned order was issued contains contradictory information and was signed by the head of the drug department, who was currently on additional leave.

The courts also found that providing the manipulation room with a hygrometer, the absence of which was cited as grounds for disciplinary action against the plaintiff, was not part of the plaintiff's job duties.

At the same time, the Regional Committee of Kharkiv Regional Trade Union of Healthcare

Employees of Ukraine objected to the employer's decision to impose disciplinary sanctions, pointing out that the lack of a hygrometer in the manipulation room could not be incriminated to the plaintiff as a disciplinary offense as the issues of material support of the hospital are within the competence of the head of the health care institution. In addition, the plaintiff's determination of improper compliance with paragraphs 1.1, 4.16, 4.18, 3.1 of the job description of the head of the drug department as one of the grounds for bringing the latter to the disciplinary liability is incorrect, as none of them directly defines the plaintiff's duty to ensure sanitary rules at the department.

In view of the above mentioned, the Supreme Court agreed with the conclusions of the courts on the existence of grounds for satisfaction of the claim in the absence of sufficient evidence of the plaintiff's misconduct in gross breach of labour discipline, which could be grounds for disciplinary action and reprimand, as the evidence provided by the plaintiff was not refuted.

By the decision of the Supreme Court dated December 10, 2019, the decision of Moscow District Court of Kharkiv dated February 28, 2018 and the decision of the Court of Appeal of Kharkiv region dated July 20, 2018 were left unchanged (Daidzhest, 2020).

Another example is the Resolution dated September 7, 2020 in the case N 761/20961/19. The court found that the employee was hired on January 2, 2019 with a free work schedule and the right to perform his duties remotely. By the order dated April 19, 2019 he was dismissed for systematic non-performance without good reason of the duties imposed on him (failure to provide written reports). The Supreme Court dismissed the cassation appeal and the appellate court's decision to declare the dismissal illegal and reinstatement unchanged, as the assistant director's job description did not require the assistant director to provide written reports on his work, which did not indicate non-fulfilment by the plaintiff of his official duties in connection with failure to provide information on the work performed (Postanova Verkhovnoho Sudu, 2020).

Special mention should be made of the Supreme Court's ruling dated October 20, 2020 in case N 676/2489/19, in which the Supreme Court expressed the well-established opinion that dismissal for absenteeism of the employee, whose work place is not properly recorded or tied to the employer's office, will be illegal. Accordingly, if the job description and other regulations do not determine the duty to be present at particular work place, the absence of the employee is not reliable evidence of absenteeism (Postanova Verkhovnoho Sudu, 2020).

In this context, we should mention the recently adopted resolution of the Cabinet of Ministers of Ukraine "Some Issues of Organization of Work of State Officials and Employees of State Bodies during the Martial Law" dated April 12, 2022 N 440 (Postanova Kabinetu Ministriv Ukrainy, 2022). Paragraph 1 of this Resolution stipulates that during martial law for the state officials and the employees of the state body who are on the territory of Ukraine, by decision of the head of the state service in state body could be introduced remote work if there are organizational and technical capabilities to perform their duties. And paragraph 3 stipulates that the state official or the employee of the state body could be subject to disciplinary action in accordance with the law in the case if during the working hours in Ukraine he/she is outside the work place without a decision of the head of the state service referred to in paragraph 1 of this resolution, or abroad excepting the business trip, arranged in the prescribed manner.

Compliance with the job duties is directly ensured by the coercive measures – the possibility of applying appropriate sanctions to the employee in case of disciplinary misconduct. The effective labour legislation does not contain a definition of “violation of labour discipline” or “disciplinary misconduct”, as well as the concepts of “disciplinary liability” and “labour discipline”, which creates a number of problems in science and practice. Thus, we should agree with V.I. Shcherbyna, who notes that due to the fact that within the labour legislation it is impossible to provide for all disciplinary offenses (this could not be done even in the rules of internal work schedule rules), first of all, it is necessary to define clearly the concept of labour discipline and disciplinary misconduct (Inshyn, 2012).

Judicial practice defines a disciplinary misconduct as a culpable non-performance or improper performance of the employee’s job duties. Leading Ukrainian scholars in the field of labour law believe that a disciplinary offense should be understood as an offense, which is expressed in the non-performance (or improper performance) of the employee’s duties through the fault of the employee (Inshyn, 2012) determined by the norms of labour law, statutes, regulations, collective employment agreement (Kovalenko, 2008).

In our opinion, V.I. Shcherbyna gave the most complete definition of the concept of “disciplinary misconduct” under which this concept should be understood as “illegal, culpable (intentional or negligent) act (action or inaction) of the employee, encroaching on the established legal order relations with the employer by non-performance or improper performance of the employee his/her duties, abuse or excess of rights, violation of prohibitions or restrictions” (Vidpovidalnist, 2014).

Amendments to the labour legislation in connection with the reception by the Labour Code of Ukraine the anti-corruption norms have led to the emergence of certain categories of the employees to whom the legislator has established a list of duties, restrictions similar to those for state officials, namely:

- a) the requirement to provide information about their own and family members’ income, property;
- b) the duty to report a real or potential conflict of interest;
- c) not to take actions and not to make decisions in the conditions of real conflict of interests;
- d) a ban on participation in the activities of management and control bodies of a commercial organization;
- e) to carry out business activities;
- f) open and have accounts (funds), valuables in foreign banks, etc.

So, it is necessary to state the expansion of the content of the concept of disciplinary misconduct, which should be understood not only as non-performance or improper performance of the job duties in sense that follows from Article 21 of the Labour Code of Ukraine, but also as non-compliance with the public law requirements of a state to persons holding relevant positions in the state organizations and institutions.

We have already drawn attention to the fact that the subject of disciplinary liability is the employee who violated labour discipline during performance of his/her job duties. However, when it comes to corruption offenses, we are dealing with a special subject foreseen by the relevant law (Vyshnovetska, 2019). According to paragraph 3 of Part 1 of Article 3 of the Law of Ukraine “On Prevention of Corruption” dated October 14, 2014 N 1700-VII (Pro

zapobihannia koruptsii, 2014), persons who for the purposes of this Law are equated to the persons authorized to perform the functions of state or local government are persons who permanently or temporarily hold positions related to the performance of organizational and administrative or administrative and economic duties, or specially authorized to perform such duties in legal entities of private law, regardless of organizational and legal form, as well as other persons who are not officials and who perform work or provide services in accordance with the agreement with the enterprise, institution, organization – in the cases provided by this Law. Thus, the subjects of disciplinary liability for corruption offenses in the labour relations are officials, i.e. persons who hold positions related to the performance of organizational or administrative functions in the performance of their professional duties under the employment agreement. These are, in particular, duties to manage the workforce, the production activities of individual employees at the enterprises, institutions or organizations, regardless of ownership.

As we have already mentioned, conscientious performance of duties by the employee is one of the requirements for the employee in the process of performing his/her job function. It is considered conscientious to perform job duties in strict accordance with the requirements for the performance of work, in compliance with the rules and regulations established by the job descriptions, job qualifications, instructions and requirements for labour protection and other documents governing the employee's job function, in compliance with the effective internal work schedule rules in the organization. (Svitlana V. Vyshnovetska, 2021). Thus, conscientious execution presupposes strict observance of the norms of the effective legislation, timely execution by the employee of the lawful orders, orders of the employer and rules operating at the enterprise.

For certain categories of the employees it is mandatory to adhere to the rules of moral conduct due to the position held or the work performed. This applies to judges, prosecutors, state officials and educators. Failure to comply with such norms, immoral behaviour not only at work but also in everyday life is the ground for bringing such an employee to disciplinary liability up to dismissal. In other words, for certain categories of the employees a disciplinary offense is a violation not only of job duties, but also of moral and ethical norms. Thus, in accordance with Part 1 of Article 64 of the Law of Ukraine "On State Service" (Pro derzhavnu sluzhbu, 2016), for non-performance or improper performance of official duties defined by this Law and other regulations in the field of state service, job description, as well as violation of ethical conduct and other violation of official discipline, a state official shall be subject to disciplinary liability in accordance with the procedure established by this Law. And according to part 2 of Article 65 of this Law, violation of the rules of ethical conduct of state officials, as well as non-performance or improper performance of official duties, acts of public authorities, orders (instructions) and instructions of managers adopted within their powers, are classified as disciplinary offenses.

The court should establish not only the fact of non-performance of the employee's duty, which is part of his/her job duties, but also the possibility to perform this duty in a particular situation, i.e. to establish the guilt of the employee and the causal link between the employee's failure to perform the job duties and the negative consequences of such a violation. For example, paragraph 4 of Article 40 of the Labour Code determines absenteeism not just the

fact of absence at work, but absence at work without good reason. Good reasons are those that exclude the guilt of the employee.

There is no full list of valid reasons for absence at work in the labour legislation of Ukraine, so in each case the assessment of the seriousness of the reason for absence at work is based on specific circumstances. Of course, these should be significant circumstances that prevented the employee from coming to work and could not be eliminated by him/her. Judicial practice is important in this matter. In particular, the Resolution of the Supreme Court in the panel of judges of the First Judicial Chamber of the Civil Court of Cassation dated November 9, 2021 in case N 235/5659/20 states that: hours continuously or in total during the working day without good reason (for example, unauthorized use without leave with the employer of days off, regular leave, leaving work before the end of the employment contract or the period that the employee have to work as assigned after higher or secondary special education institution). Thus, the decisive factor in resolving the issue of legality of dismissal for absenteeism is not only to establish the fact of absence of the employee at work for more than three hours during the working day, but also to establish the reasons for absence (Postanova Verkhovnoho Sudu, 2021).

According to the settled case law, the reason for the employee's absence at work could be considered valid if attendance was prevented by significant circumstances that could not be remedied by the employee, including: illness of the employee or his/her family, force majeure, including natural disasters (earthquakes), floods, snowfalls), emergencies (catastrophes, accidents), problems in the field of public utilities, call to the bodies to which attendance is mandatory (court, prosecutor's office, etc.), the application of criminal proceedings (detention, arrest, etc.). Thus, in the case N 754/16137/15-ts the Supreme Court noted that "good reasons for absence from the work place should include such circumstances as natural disasters, illness of the employee or his/her family members, irregular transport work, employee participation in rescuing people or property, refusing to transfer illegally and failing to return to a new job. The following cases are not considered as absenteeism: absence of the employee not at the enterprise, but at the work place; refusal of illegal transfer; refusal of work that is contraindicated due to the health conditions, not determined by the employment agreement, or in conditions dangerous to life and health; not going to work after the expiration of the notice period for termination of the employment agreement at the initiative of the employee" (Postanova KTSS VS, 2018).

Deciding whether the reasons for the absence of the employee dismissed under paragraph 4 of Article 40 of the Labour Code of Ukraine, the court should proceed from the specific circumstances and take into account all the evidence provided by the parties. Thus, in case N 554/9493/17 the Supreme Court noted that the components of a disciplinary misconduct are: actions (inaction) of the employee; breach or improper performance of duties assigned to the employee; employee fault; the existence of a causal link between actions (inaction) and violation or improper performance of the job duties imposed on the employee, failure to prove at least one of these elements precludes the presence of disciplinary misconduct.

According to the case file, the employer on the day of absence of the employee at work – March 3, 2020 – drawn up the act N 1 on the absence of the plaintiff at work "without warning and without good reason" with signatures of the head of the therapeutic department and

acting senior nurse of the therapeutic department. This act records only the fact of absence of the employee at work.

The wording in the order “without good reason” was not confirmed, as in the case file there is no evidence that the employer fulfils the duty to determine the reasons for absence of the employee at work in a manner not prohibited by law, such as sending letters, emails, phone calls and other means of communication.

This shows that the statement of the employer “without good reason” is unsubstantiated, as the act was drawn up, certifies only the fact of absence from work, and the reasons for absence from work by the employer were not clarified (Postanova Verkhovnoho Sudu, 2020).

It is the employer’s liability to obtain explanations from the employee. For the employee, the provision of explanations is the right, so he/she could refuse to provide them without giving reasons. In this case, the fact of refusal should be duly recorded: a refusal to provide an explanation shall be drawn up.

CONCLUSIONS

So, summarizing the above mentioned, we believe that the employee’s job duties as an object of disciplinary misconduct, which is the ground for disciplinary action, could be considered as duties associated with the performance of the job function specified in the employment agreement. For certain categories of employees, the duty to comply with moral and ethical norms, which is due to the position held or work performed, could also be considered as job duties.

It is debatable whether the employer could require the employee to perform those duties that are not reflected in his/her job description. We believe that if the job duties are provided in the employee’s job description and he/she is properly acquainted with it, the employer has the right to demand their performance, and for non-performance or improper performance of such duties could impose disciplinary action on the employee. After all, it is a question of obligatory observance of the established legal instructions. That is, the duties that the employer requires of the employee should be stipulated in the employment agreement and the employee should be properly informed about them. However, if these duties are not reflected in the job description, the analysis of case law shows that for non-performance or improper performance there are no grounds for disciplinary action against the employee. The employee could not be subject to disciplinary action for failure to perform duties he/she was unaware of or those not specified in the employer’s regulations. To avoid litigation, as well as abuse by both the employee and the employer, the employee’s job duties should be consolidated in his/her job description and other local company records.

In order for a disciplinary sanction to be imposed by the employer for non-performance or improper performance of his/her duties, the following set of conditions should be met: the breach should relate only to those duties which are the part of the employee’s job function or follow from the internal work schedule rules and which the employee should be duly informed about. Non-performance or improper performance of the job duties should be the culprit, committed without good reason intentionally or negligently.

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