

# Procedural aspects of patrimonial liability in Romanian labour law

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## **Abstract**

*In this study, the procedural aspects regarding the way of applying the patrimonial liability to labour law will be analysed. The non-regulation of a procedure in this matter by the legislator represents a legislative lacuna that can be corrected either by de lege ferenda by amending the Labour Code, or by the social partners according to the legal provisions in the matter. In this study, solutions in this regard will be presented.*

**Keywords:** *patrimonial liability, labour law, procedural aspects, de lege ferenda proposals.*

**JEL Classification:** K31

## **1. Brief introduction**

Patrimonial liability is an important component of legal liability under labour law<sup>2</sup>.

Regulated by art. 253-259 of the Labour Code, the patrimonial liability includes aspects related to both the employee's liability and the employer's liability.

Regarding the main aspect of patrimonial liability, respectively the position of the employee before the employer, art. 254 para. (1) of the Labour Code establishes that employees are held liable by way of patrimony in accordance with the rules and principles of contractual civil liability for material damage to the employer by fault of and in connection with their work.

Therefore, the patrimonial liability in labour law is based on the norms and principles of contractual civil liability, having the specificities of labour law.

We define employees' patrimonial liability as a form of contractual civil liability, with specific labour law elements, whereby employees are required to remedy the damages drawn by fault on employers in connection with the execution of the employment contract<sup>3</sup>.

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<sup>2</sup> For patrimonial liability, see Al. Țiclea, *Tratat de dreptul muncii – Legislație. Doctrină. Jurisprudență*, 10<sup>th</sup> edition, updated, Universul Juridic Publishing House, Bucharest, 2016, p. 913-960, I. T. Ștefănescu (coordinator), *Codul muncii și Legea Dialogului Social. Comentarii și explicații*, Universul Juridic Publishing House, Bucharest, 2017, pp. 484-490.

<sup>3</sup> Al. Țiclea, *Tratat de dreptul muncii... op. cit.* p. 914.

## 2. Procedural aspects of patrimonial liability

A. The applicability of patrimonial liability is outlined in general terms in the Labour Code.

The legislator did not establish the procedural framework in which the patrimonial liability will apply.

According to art. 254 para. (3) of the Code, "if the employer finds that their employee caused damage due to his or her work, they will be able to require the employee, by means of a fact-finding and damage assessment report, to recover the value thereof, by agreement of the parties, within a time limit which shall not be less than 30 days from the date of communication".

In the article mentioned above, it is established that the *employer finds* the damage caused by their employee, but without specifying how this fact-finding is done.

It is an issue that fundamentally differentiates patrimonial liability from other forms of liability in labour law, such as disciplinary liability.

The lack of legal provisions in the field of patrimonial liability may be justified by the fact that the legislator has taken into account that such acts by which one party is producing patrimonial damages to the other party are rarer than disciplinary misconduct.

In these circumstances, the question arises as to how the applicability of patrimonial liability is made procedurally in the conditions in which the legislator is silent on this matter?

The internal regulation establishes at art. 242 the minimum elements to be found in its contents<sup>4</sup>.

Among these elements, the procedural provisions regarding patrimonial liability are found lacking.

However, we believe that the employer may introduce a procedure on patrimonial liability in the internal regulation, since art. 242 of the Code establishes at let. h) that the internal regulation may also include modalities for the enforcement of other specific legal or contractual provisions.

On the basis of this legal text, we believe that the employer may introduce in the internal regulation, after prior consultation of the employees, some other provisions regarding the patrimonial liability procedure.

Obviously, the patrimonial liability procedure may be the subject of collective bargaining between the employer and the employees, and can be

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<sup>4</sup> According to art. 242 of the Labour Code, the internal regulation includes at least the following categories of provisions: a) rules on the occupational protection, hygiene and safety at workplace; b) rules on the observance of the principle of non-discrimination and the removal of any form of violation of dignity; c) the rights and obligations of the employer and of the employees; d) the procedure for solving individual claims or complaints of employees; e) concrete rules on labour discipline in the unit; f) disciplinary misconduct and applicable penalties; g) rules on the disciplinary procedure; h) means of enforcement of other specific legal or contractual provisions; i) criteria and procedures for the professional evaluation of employees.

materialized in an appendix to the collective labour agreement concluded at different levels.

Last but not least, we point out that issues of patrimonial responsibility can be negotiated at individual level by the employee with his/her employer through personal negotiation, which is especially important for professions where employee liability is higher, as there is a great risk that patrimonial liability becomes incident during the execution of the employment contract.

However, we mention that individual bargaining in the field of patrimonial liability is very rare in practice.

**B.** An important procedural element is the way of investigating the damages created by employees for the purpose of enforcing patrimonial liability.

Regarding this, we believe that the rules governing the way of investigating disciplinary misconduct as laid down in the Labour Code and in the matter of disciplinary liability in art. 252 para. (2) and subsequent, respectively by empowering a person to carry out the investigation.

It is not excluded that the employer also designates a commission to carry out the investigation in order to pursue patrimonial liability.

Can it be the same commission that investigates disciplinary misconduct? Strictly formal, no, a separate body should be established, but for practical reasons it is possible that if the complex issues investigated are clearly confined, the same commission may be assigned to deal, on the one hand, with the disciplinary line, and on the other hand, with the patrimonial line.

We are of the opinion that this commission should include a representative of the legal department, a representative of the human resources department of the unit and a person in the accounting department.

It is possible for the committee to include other specialists who are not in the unit, because there is no legal text to ban it<sup>5</sup>.

The Commission or the person empowered, may be established by the employer on a permanent or temporary basis, in the last case for each individual event<sup>6</sup>.

Regarding the convocation, we consider that the legal provisions governing the disciplinary liability are applicable, thus, according to art. 251 paragraph (1) of the Labor Code, the employee will be summoned in writing by the person empowered by the employer to carry out the investigation, specifying the subject, date, time and place of the interview.

In the report submitted to the employer, separate proposals will be made for disciplinary liability and for patrimonial liability.

The commission, which has the duty of investigating the offence which may entail the patrimonial liability of employees, has to decide on the following issues:

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<sup>5</sup> See I. T. Ștefănescu, *Considerații practice cu privire la cercetarea disciplinară prealabilă a salariaților*, „Revista Română de Dreptul Muncii”, no. 6/2017, p. 19, which also applies to the patrimonial liability of employees.

<sup>6</sup> *Ibidem*.

- a) the circumstances in which the offence was committed
- b) the extent of guilt of the employee,
- c) if the offence occurred or not in relation to the job
- d) if the damage does not fall within the normal risk of the job.
- e) the value of the damage (prejudice)
- f) the causal relationship between the employee's offence and the damage caused.

During the investigation, the employee may be represented, at his/her request, by a lawyer or a trade union member.

After the investigation, the commission submits to the employer the proposal regarding the application of the patrimonial liability for the employee or, if the conditions are not fulfilled, the decision not to proceed with sanctioning the employee.

If the conditions for employer's patrimonial liability are fulfilled, the commission will, in accordance with the legal provisions, send the fact-finding report and submit it to the employer for approval.

**C.** The fact-finding report issued by the employer does not have a specific legal content, being a unilateral document of the employer, written in the form of a proposal (a negotiation) whereby the employer invites the employee to consent to the payment of the money representing the coverage of the caused damage.

We are of the opinion that the fact-finding report must necessarily include: the event that caused the damage to the employer, the employee responsible for the damage, the value of the damage (in order for the legal provisions regarding the fact-finding report to be applied, the damage should not exceed the value of 5 gross national minimum salaries in the economy), the way in which the damage (following an instalment plan) will be recovered, so as not to violate the legal provisions in the field that set a rate of one third of the net monthly salary.

The fact-finding report must also enclose the record of findings in relation to the damage in which all the elements which led to the proposal for sanctioning the employee (as highlighted above) are to be found, similar to the situation of disciplinary investigation.

**D.** When the employer causes material damage to the employee, the latter has the right to require the employer to repair the damage. If the employer and the employee do not reach a consensus, obviously the employee is free to proceed with an action in court.

### 3. Conclusions

The patrimonial liability, although a fundamental component of liability under labour law, which concerns both the employees and employers, is not regulated by the legislator in procedural terms, this being a lacuna of labour law.

To supplement this, the social partners may set up a commission, including the disciplinary investigation commission, which may also acquire competences in

the field of patrimonial liability, and establish the procedure for determining the damage and inflict the penalties.

Provisions on the enforcement of disciplinary liability in procedural terms may be regulated by:

- the internal regulation by the employer according to art. 242 let. h) of the Labour Code;
- collective bargaining, so the patrimonial liability procedure would be an appendix to the collective labour agreement;
- individual negotiation (very rare in practice), the provisions on the applicability of this legal institution to be included in the employment contracts.

Finally, we consider that the regulation of procedural aspects in the field of patrimonial liability may constitute a proposal for a *de lege ferenda*, in the sense of inserting these aspects into the Labour Code.

### **Bibliography**

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4. Law no. 287/2009, republished, (Civile Code), as subsequently amended and supplemented.
5. Law no. 53/2003 (Labor Code), with subsequent modifications and completions, as subsequently amended and supplemented.