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SOME PROBLEMATIC ISSUES OF DISMISSAL OF THE EMPLOYEE DUE TO HIS/HER APPEARANCE AT WORK IN A STATE OF INTOXICATION

Abstract. The article deals with the general theoretical and legal aspects of the dismissal of an employee due to his/her appearance at work in a state of intoxication. Numerous scientific publications on this issue have been researched. It is noted that in today's conditions, there are some problematic issues regarding the dismissal of an employee due to his/her appearance at work in a state of alcoholic intoxication, which is the basis for an increase in the number of court cases in this area.

The author emphasizes that it is in the case of signs of alcoholic intoxication that the employer has the right to dismiss the employee under paragraph 7 of Art.40 of the Labour Code of Ukraine. It is emphasized that before dismissing an employee, the employer is obliged to take appropriate action. It is brought to your attention that despite judicial practice and the norms of national legislation, in modern conditions, there are still some issues unresolved by legislators regarding the dismissal of an employee who is at work in a state of intoxication.

The article uses the official statistical data of the Social Insurance Fund of Ukraine for 2022 (as of 31.01.2023). It is confirmed that the level of industrial injuries caused by intoxication is quite high.

It is observed that the urgent issue remains the development of projects and improvement of normative legal acts on the prevention of injuries and violations of labour discipline, in particular, caused by problems due to the appearance at work of an employee in a state of alcoholic intoxication.

The scientific viewpoint that a separate regulatory legislative act that would provide the procedure for determining the facts of an employee's appearance in the...
workplace is urgently required is supported. After all, in the current legislation, there is no regulatory legal act to identify the facts of the employee's appearance at work in a state of intoxication by documenting the suspicion in the form of a prehospital examination of appearance and behaviour, drawing up the results of this examination.

General conclusions were made that the current legislation in this area needs reform, as well as proposals for improving legal regulation.

**Keywords**: Constitution of Ukraine, drunkenness, alcoholic intoxication, drug intoxication, toxic intoxication, dismissal, suspension.

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ОКРЕМІ ПРОБЛЕМНІ ПИТАННЯ ЗВІЛЬНЕННЯ ПРАЦІВНИКА У ЗВ’ЯЗКУ З ПОЯВОЮ НА РОБОТІ В НЕТВЕРЕЗОМУ СТАНІ

Анотація. У статті досліджуються загальнотеоретичні та правові аспекти звільнення працівника у зв’язку з появою на роботі в нетверезому стані. Досліджена низка наукових публікацій щодо цієї проблематики. Наголошується, що в умовах сьогодення виникають окремі проблемні питання щодо звільнення працівника у зв’язку з появою на роботі у стані алкогольного сп’яніння, що є підставою збільшення кількості судових справ у цій сфері.

Автор акцентує увагу, що саме у разі ознак алкогольного сп’яніння роботодавець має право звільнити працівника за п.7.ст.40 КЗпП України. Підкреслюється, що перш ніж звільнити працівника, роботодавець зобов’язаний вчинити відповідні дії. Звертається увага, що незважаючи на судову практику та норми національного законодавства, у сучасних умовах все ж таки залишаються невирішені законодавцями окремі питання щодо звільнення працівника, який перебуває на роботі в стані сп’яніння.

У статті використовуються офіційні статистичні дані Фонду соціального страхування України за 2022 рік (станом на 31.01.2023 р.). Встановлено, що рівень виробничого травматизму, спричиненого нетверезим станом, достатньо високий.

Наголошується, що нагальним питанням залишається розробка проектів та удосконалення нормативно-правових актів з профілактики травматизму та порушень трудової дисципліни, зокрема спричиненних проблемами у зв’язку з появою на роботі працівника у стані алкогольного сп’яніння.
Підтримується точка зору вчених з приводу того, що є нагальна потреба у доопрацюванні та прийнятті окремого нормативно-правового акту, який би визначав механізм виявлення фактів появи працівника на робочому місці. Адже у чинному законодавстві відсутній нормативно – правовий акт щодо виявлення фактів появи працівника на роботі в нетверезому стані шляхом документування підозри у формі домедичного обстеження зовнішнього вигляду та поведінки, оформлення результатів цього обстеження. Зроблені загальні висновки, що чинне законодавство у цій сфері потребує реформування, а також надані пропозиції щодо вдосконалення правового регулювання.

Ключові слова: Конституція України, нетверезий стан, алкогольне сп’яніння, наркотичне сп’яніння, токсичне сп’яніння, звільнення, відсторонення.

Statement of the problem. The Constitution of Ukraine guarantees every citizen protection against unlawful dismissal (Part 6 of Art. 43) [1]. Please be aware that to provide this assurance, a number of conditions for terminating the employment contract have been fixed. But it must be remembered that it is possible to terminate labour relations only if there are legal grounds, the list of which is enshrined in the Labour Code of Ukraine.

In the field of labour law, the institution of termination of an employment contract was and remains one of the most important, as evidenced by the large number of labour disputes regarding the recognition of dismissal as illegal. Employers continue to commit a number of egregious errors when enforcing the articles of the Labour Code of Ukraine, which can be used to explain a sizable number of labour disputes including appeals of reprimands or dismissals.

Taking into account the fact that there are certain problematic issues regarding the dismissal of an employee due to the appearance at work in a state of alcoholic intoxication, which is the reason for the increase in the number of court cases on this issue, we believe: there is an urgent need for a comprehensive study and analysis of judicial practice.

Analysis of the recent research. The issue of termination of labour relations and, in particular, the termination of an employment contract on the initiative of the employer has always been the focus of scientists. Various aspects of the legal regulation of the grounds for termination of an employment contract or suspension from work for reasons of appearance at work in a state of intoxication, a state of narcotic or toxic intoxication were studied by the following scientists, namely: H.M. Kardashevska, O.M. Yaroshenko, N.E. Movmyha, I.O. Mezentseva, H.M. Pancheva and others. However, today there are some problematic issues with the procedure for dismissal of an employee in connection with the appearance at work in a drunken state, which requires further scientific research.
The purpose of the article is to conduct a study of some procedural aspects of the dismissal of an employee in connection with the appearance at work in a drunken state and the analysis of judicial practice in this area.

Presentation of the main material. First of all, we note that the employer has the right to dismiss an employee on his own initiative only if there are general or additional grounds provided for by labour legislation. Among the international documents, the ILO Convention No. 158 on the Termination of Labour Relations on the Initiative of Employers of 22.06.1982 is of paramount importance. We also pay attention to the fact that the content of Art. 40 and Art. 41 of the Labour Code of Ukraine as a whole meets the requirement of the ILO Convention No. 158 on Termination of Labour Relations on the Initiative of Employers (1982), according to which labour relations cannot be terminated, unless there are legal grounds for such termination related to the abilities and behaviour of the employee or caused by industrial need [2].

As noted above, an employment contract concluded for an indefinite period, as well as a fixed-term employment contract before the expiration of its validity, may be terminated by the employer only in the cases provided for in Art. 40 of the Labour Code of Ukraine. One of the grounds for termination of the employment contract on the initiative of the employer is the appearance of an employee at work in a state of intoxication, in a state of narcotic or toxic intoxication (paragraph 7 of Art. 40 of the Labour Code of Ukraine [3].

It is important to emphasize that in paragraph 25 of the Resolution of the Plenum of the Supreme Court of Ukraine on the Practice of Consideration by the Courts of Labour Disputes dated November 6, 1992, No. 9, it is stated that when resolving claims for reinstatement at work of persons whose employment contract was terminated under paragraph 7 of Art. 40 of the Labour Code of Ukraine, the courts must bear in mind that on these grounds, employees may be dismissed for appearing at work in a state of intoxication, in a state of narcotic or toxic intoxication at any time of the working day, regardless of whether they were suspended from work or continued to perform labour duties. For employees, who have irregular working day hours, the period spent at work more than its established period is considered as working hours [4].

Depending on the substances, the use of which is caused by intoxication, it is divided into the following: alcohol intoxication, narcotic intoxication and toxic intoxication. Please note that the current labour legislation does not answer how these concepts should be understood. Thus, in a scientific publication, O.S. Steblinska draws attention to the fact that from a medical point of view, alcoholic intoxication is defined as a mental state of a person that arises as a result of excessive consumption of alcoholic beverages (alcohol intoxication), which leads to physiological, mental, vegetative and neurological disorders. In addition, the
author notes that intoxication is the mental state of a person at the time of committing an offence or crime caused by the use of alcohol, drugs or other intoxicating substances, which is characterized by a weakening or increase in the intellectual and volitional sphere of a person's mental activity, which does not exclude sanity [5, P. 859].

The literature also notes that intoxication is a mental state of a person caused by the use of alcoholic beverages, narcotic drugs or other intoxicating substances [6, P. 861].

Obviously, work in this state often leads to violations of labour protection rules, accidents, manufacturing of defective products, errors in performing complex tasks, etc.; the employee interferes with the work of other persons who are nearby. But it must be borne in mind that the very fact of appearing at work in this state is already a violation of labour discipline, regardless of the occurrence of harmful consequences. The legislation provides for the release of this category of workers as a justified offence to prevent accidents and injuries at work, accidents and causing material damage to enterprises.

It is necessary to agree with scientists who emphasize that the appearance at work in a state of intoxication: firstly, is a gross violation of labour discipline; secondly, it leads to violations of labour protection rules, an accident, errors when performing complex tasks; thirdly, an employee in such a state prevents others from performing their labour duties, puts them at risk [7, P. 61]. In our opinion, this can lead to serious consequences both for the employee himself and for other employees, as well as material losses to the employer. Therefore, it is extremely important to prevent the negative consequences that can occur due to the intoxication of the employee in the workplace. It is also important to remember that in this case, it is necessary to detect and properly record the drunken state promptly.

Separately, it is necessary to dwell on the issue of determining the characteristic signs of alcoholic intoxication. After all, when an employee appears drunk in the workplace, the question arises: how to determine the characteristic signs of alcoholic intoxication and prove the presence of a person under the influence of these harmful drinks. Because the Labour Code of Ukraine does not contain a clear list by which it is possible to determine whether a person is under the influence of alcoholic intoxication.

It should be emphasized that in practice, the Instruction on the procedure for detecting signs of alcohol, drug or other intoxication in drivers of vehicles or being under the influence of drugs that reduce attention and reaction speed, approved by the order of the Ministry of Internal Affairs of Ukraine, the Ministry of Health of Ukraine No.1452/735 dated on 09.11.2015, which stipulates that the signs of alcohol intoxication are the following: the smell of alcohol; impaired coordination of movements; impaired speech; pronounced intertwining of the fingers; a sharp change in the colour of the skin of the face; behaviour that does not correspond to the situation [8].
It is in the case of the above signs that the employer has the right to dismiss the employee under paragraph 7 of Art. 40 of the Labour Code of Ukraine, but it should be taken into account that before dismissing an employee, the employer is obliged to take appropriate actions [3]. First of all, provide yourself with evidence of the appearance of an employee at work in a state of alcoholic intoxication. Acts, medical reports, etc. can be obtained for confirmation.

It should be emphasized that to determine that a person is in a state of alcoholic intoxication should be a specialist, but some signs allow you to suspect this fact. Until all the facts are clarified, the employer must issue an order and suspend the employee from his duties.

Thus, judicial practice confirms that the Supreme Court decided that a medical examination to establish the fact of alcohol consumption and intoxication is carried out in specialized offices of narcological dispensaries (departments) by psychiatrists-narcologists or in medical institutions by psychiatrists-narcologists and doctors of other specialities who have been trained. The court decided that the medical examination by the doctor of the regional state clinical narcological dispensary meets the requirements for such medical examinations, at a time when the act drawn up in the medical centre is not adequate evidence [9].

Please note that the absence of a medical report does not indicate an improper fixation of such a fact. As the lawyer H. Lysenko notes, if the employee refused a medical examination, it is necessary to fix it in the act and with the help of explanations of witnesses, to offer the employee to independently undergo an examination to identify the state of intoxication. In case of aggressive behaviour of the employee, the lawyer advises calling the police and the ambulance, which will be able to record the fact of the offender's behaviour and his/her condition. After all, this will be additional evidence in court in favour of the employer [10].

It is important to remember that passing a medical examination is the right of the employee. Therefore, the employee should not be forcibly taken to a medical institution. As lawyers emphasize, referring to the judicial practice in this area, when considering cases of resumption of work in the event of dismissal for a gross violation, including for being in a state of intoxication, in practice they are not limited to checking the content of written acts provided by the enterprise, but they hear witnesses in court hearings, including those who signed acts [10].

By the way, it should be noted that when drawing up an act on establishing the fact that employees are at work in a state of intoxication, it is necessary to indicate: the date and time of its drawing up; the place of drawing up indicating the address, workplace or other places where the offender was found; position and full name of the persons who draw up and sign the act; external signs of intoxication, for example, a sharp smell of alcohol, speech and coordination disorders, extreme talkativeness, behaviour that does not correspond to the situation, threats, etc.;
request to undergo a medical examination at a health care institution regarding the state of intoxication (in case the employee refuses to undergo an examination, indicate this in the act; request to the employee to provide explanations; indications of special technical means (if they were used); the employee whose signature is drawn up (in case he refuses to indicate this).

Then it is necessary to demand from the employee a written explanation of the reason for appearing at work in this state.

The next step is to draw up an official (report) note on the suspension of an employee from work in connection with being at work in a state of intoxication, in which it is necessary to describe the circumstances in which the employee was found in such a state and proposals for his suspension or dismissal.

In actuality, there are instances where an employee declines to offer written justifications and signs a document attesting to their intoxication instead. Therefore, in this situation, it is necessary to draw up an act of refusal to provide written explanations. Since the appearance of an employee at work in a state of intoxication or other state is actually a violation of labour discipline, during the relevant investigation following Part 1 of Art.149 of the Labour Code of Ukraine, the employer must demand written explanations from the violator of labour discipline before applying a disciplinary sanction [3].

However, if there is a trade union body at the enterprise, it is necessary to obtain the consent of the trade union body for dismissal. But for this purpose, it is necessary to hold a meeting at which the trade union must give consent to the termination of the employment contract with the employee on the grounds provided for in paragraph 7 of Art. 40 of the Labour Code of Ukraine. It should also be taken into account that during the martial law, the Law of Ukraine "On the Organization of Labour Relations under Martial Law" No. 2136-IX dated 15.03.2022 (Part 2 of Art.5), hereinafter referred to as the "Law No. 2136", which establishes the condition that for the period of martial law, the provisions of labour legislation do not apply in the part of relations regulated by Law No. 2136-IX [11].

The next step on the part of the employer is the issuance of an order for the imposition of a disciplinary penalty in the form of dismissal (based on paragraph 7 of Art. 40 of the Labour Code of Ukraine) not later than one month from the date of detection of the offense, not taking into account the time of the dismissal of the employee due to temporary disability or vacation, but not later than 6 months from the date of the offense. The employee must be familiarized with the dismissal order under the signature. If the employee refuses to sign, an appropriate act is drawn up by the commission.

In turn, it should also be emphasized that the dismissal of an employee for being intoxicated is the right of the employer, and not the obligation to dismiss for a single gross violation. The employer may limit itself to reprimanding such an
employee. According to Art. 46 of the Labour Code of Ukraine, the suspension of employees from work by the employer is allowed, in particular, in case of appearance at work in a state of intoxication, a state of narcotic or toxic intoxication.

The last stage that should be carried out in the dismissal procedure is the need to make a final settlement with the employee and give him a copy of the dismissal order and a properly executed employment history book.

As the lawyer H. Lysenko rightly emphasizes, the employer must take all measures to properly familiarize the employee with all the documents that are drawn up concerning him regarding the fact of being in a state of intoxication. In case of refusal of the employee to sign the documents, it is necessary to draw up the relevant acts, and in case of impossibility to hand over or familiarize. It shall send a registered letter with a description to the address indicated in the employee's personal card, or to all known addresses [10].

The employer must remember that not only the act must be properly executed, but also the order of dismissal of the employee under paragraph 7 of Art.40 of the Labour Code of Ukraine. After all, as the case law confirms, employers do not pay attention to this fact and dismiss employees in violation of the requirements of the current legislation, which gives rise to an employment dispute between the employee and the employer. It is worth giving an example of judicial practice, in particular, the decision of the Kirovskyi District Court of Kirovograd City dated May 26, 2021 (Case No. 404/7279/20). Thus, the plaintiff appealed to the court with a claim for reinstatement at work as a plumber, the cancellation of the Order on Dismissal for Appearing at Work in the State of Intoxication, the recovery of average earnings during a forced absence, the recovery of moral damage of UAH 50,000. Thus, according to the explanations of the representative of the defendant, who does not recognize the claims, the basis for issuing the order is the act of finding a person in a state of alcoholic intoxication at the enterprise, the memo of the Chief Engineer and the memo of the Chief Mechanic. The plaintiff substantiates his claims by the fact that this order is illegal since he was dismissed in violation of the requirements of the current legislation, based on the following: the Order does not specify the time when the drunken state was detected. The court found that the plaintiff did not have these signs of intoxication. The court considers the arguments of the defendant's representative that the plaintiff had the opportunity to leave the territory of the enterprise as a position of protection from his arguments. Precisely because the plaintiff did not have the opportunity to leave the territory of the enterprise, since there were no grounds, namely the order on suspension from work, because the plaintiff was informed about the suspension by the defendant orally. The court upheld the claim in part and decided to reinstate the plaintiff to the position of plumber [12].

Attention should also be paid to the fact that it is difficult to appeal the decision to dismiss an employee under paragraph 7 of Art.40 of the Labour Code of
Ukraine. Thus, in the Decision of the Chervonozavodskyi District Court of Kharkiv City (Case No. 646/8187/21) dated 10.05.2023, in substantiating the claim, the plaintiff indicated that he was dismissed from the post of motor vehicles (special vehicles) based on paragraph 7 of Art. 40 of the Labour Code of Ukraine. The plaintiff argued that no prior consent had been obtained for his dismissal of the primary trade union organization, as well as following Part 3 of Art. 149 of the Labour Code of Ukraine, when choosing the type of recovery, the defendant had to take into account the fact that he worked flawlessly for 13 years and had no recovery and his actions did not cause any damage to the property and interests of the defendant. In addition, the plaintiff applied for the renewal of the term for applying to the court with a valid claim, referring to the fact that he does not have a legal education, is not aware of the expiration of the procedural terms, at the time of dismissal did not have a decision that entered into force in the case of an administrative offence and was on Sick Leave: from 25.11.2021 to 03.12.2021. As a result, the court determined that the defendant's acts to dismiss the plaintiff following paragraph 7 of Art.40 of the Labour Code of Ukraine are legal, the dismissal order provides specific facts regarding the plaintiff's stay at work in a state of intoxication. The Court considers that the plaintiff's reference to the fact that he is legally uninformed waited for the entry into force of the decision in the case of an administrative offence to bring him to justice under Part 1 of Art.130 of the Code of Ukraine on Administrative Offenses, and then he was on outpatient treatment, which cannot be recognized as a valid reason for missing the deadline. The plaintiff's arguments that the defendant has not obtained prior consent to his dismissal from the primary trade union organization of which the plaintiff is a member are groundless. The court also considers that dismissal for appearing for work in a state of alcoholic, narcotic or toxic intoxication applies to the employee, regardless of whether he was previously brought to disciplinary responsibility and whether public penalties were applied to him. At the same time, the fact of being in a state of intoxication at the workplace by the plaintiff has not been refuted. Therefore, the court considers that the plaintiff's claims are not subject to satisfaction for unreasonableness [13].

Therefore, following the current legislation, not agreeing with the decision on dismissal, the employee has the right to apply with a reasoned application to the employer with a request to cancel the order and renew it at work. In addition, in case of refusal to renew, the dismissed employee has the right to apply for the resolution of the labour dispute to the court.

It is also advisable to note that in the event of the appearance of an employee at work in a state of intoxication, an internal investigation is often conducted to clarify all the circumstances of the appearance of an employee in such a state, the degree of his guilt, and appropriate evidence to substantiate the employer's position.
on dismissal under paragraph 7 of Art.40 of the Labour Code of Ukraine. For such an official investigation, a special commission may be established at the enterprise.

It should also be emphasized that if an employee is intoxicated during the performance of his/her work duties, the employer has the right to bring disciplinary responsibility, in particular, to reprimand him/her, as well as to dismiss him/her from work. It should be noted that the application of disciplinary sanctions is possible not only in the case when the employee came to work in a state of alcoholic intoxication but also when he consumes alcoholic beverages during the work process. We emphasize that an employee who consumes alcohol, for example, a few minutes before the end of the working day, is also considered to be grossly violating labour discipline and is responsible for it.

As noted above, the employee's drunkenness or narcotic (toxic) intoxication can be confirmed both by a medical report and other evidence to which the court must give an appropriate assessment. But, as evidenced by judicial practice, in particular, the Resolution of the Supreme Court in Case No. 640/17224/15-у dated 23.01.018 clarified that a drunk employee can be dismissed without undergoing a medical examination [14].

The literature emphasizes that the use of alcohol by employees is often the cause of accidents, including serious ones with fatal consequences. We also draw attention to the fact that the main organizational cause of the accident is not only a violation of the requirements of the occupational safety instructions but also the victim's alcohol intoxication, etc. Thus, as of 2022, 92 people were injured at work while intoxicated (1.9% of the total number of injured in Ukraine), which is 1 person more compared to 2021. At the same time, 43 people were injured with fatal consequences [15].

Scientists who studied the problematic aspects in this area drew attention to the fact that the state of intoxication as a generalized legal concept can be a sign of the act and the person responsible, which significantly increases the degree of social danger of the perpetrator and increases the responsibility of this person. The issue of the lack of a method for identifying gross violations of labour discipline by the business entity and preventing accidents, even fatal ones, is still a problem, according to scientific studies. Thus, it is noted that this was the basis for the development of a joint draft Order of the Ministry of Economy of Ukraine and the Ministry of Health of Ukraine on Approval of the Instruction on the Procedure for Identifying the Facts of the Employee's Appearance at Work while Intoxicated, in the State of Narcotic or Toxic Intoxication [16, P. 57].

**Conclusions.** Despite the relevant judicial practice and the norms of national legislation, in modern conditions, the problem of dismissal of an employee who is at work in a state of intoxication remains unresolved by legislators. In this regard, we believe that the current legislation does not define a procedure for identifying the
facts of the appearance of an employee at work in a state of intoxication, in a state of narcotic or toxic intoxication by documenting suspicion in the form of a medical examination of appearance and behaviour, drawing up the results of this examination, which is an urgent need for revision and adoption of the relevant regulatory legal act.

Thus, it should be noted that according to the current legislation, the employer must prove the presence of alcoholic intoxication in the workplace (paragraph 7 of Art. 40, Art. 46 of the Labour Code of Ukraine, Part 2 of Art. 13 of the Law of Ukraine "On Labour Protection", Art.179 of the Code of Administrative Offences of Ukraine). In our opinion, the current legislation in this area needs to be reformed. After all, the Labour Code of Ukraine and some other regulations do not solve all the problems that arise when an employee is dismissed for appearing in an alcoholic state. Therefore, the urgent issue remains the development of projects and improvement of regulations for the prevention of injuries and violations of labour discipline, in particular, caused by problems in connection with the appearance at work of an employee in a state of alcoholic intoxication.

In light of the aforementioned, we believe that it is essential to strengthen the employer's liability for violations of labour protection laws to prevent accidents and injuries at the workplace, specifically: for failing to ensure control over employee compliance with labour protection requirements and employee non-compliance with labour discipline in the performance of their labour duties. Because not only the employee's life is in danger, but also the lives of others.

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