

P. A. BUSHCHENKO,

Candidate of Legal Science, Assistant Professor,
Assistant Professor of Labor Law Department of
Yaroslav Mudryi National Law University

I. A. VETUHOVA,

Candidate of Legal Science, Assistant Professor,
Assistant Professor of Labor Law Department of
Yaroslav Mudryi National Law University

THE DISMISSAL ACCORDING TO THE p. 7 art. 40 OF THE LABOR CODE OF UKRAINE: THEORY AND PRACTICE OF APPLICATION

The article discusses theoretical and practical issues concerning the grounds and procedure for dismissal of paragraph 7 of article 40 of the Labor code of Ukraine for the appearing intoxicated, under the influence of drugs or other toxic substances employee at work. The historical aspect of the development of labor legislation and judicial practice in relation to regulation of the specified grounds of dismissal are considered. For upgrading labor legislation under the termination of the employment contract, conclusions were drawn and suggestions were given.

Keywords: emergence at work in a state of intoxication, working time, suspension from work, dismissal.

Problem setting. The labor law allows termination of the employment contract by the employer for the employee appearance at work drunk, in a condition of drug or toxic influence. The employer must establish the time and place of occurrence in this state, to submit evidence, and to remove the employee from work if the dismissal of an employee on this basis. The article raised the possibility of termination of the employment contract by paragraph 7 of Art. 40 Labor Code of Ukraine taking into account the individual employee, working conditions, its discipline, etc.

Analysis of basic research. Scientific research of this issue took place in the works of Bugrova L. Y., Hliyevskoyi N. V., Goncharova G. S., Shvets N. M., Yaroshenko O. M. etc.

The purpose of the article is to study the order of dismissal of an employee for appearing at work drunk, under the influence of drugs or toxic substances and analysis of the ratio of the current labor legislation with the latest draft Labor Code of Ukraine.

Article's main body. Probably no one has ever reliably know when the alcohol came to our World and people began to drink alcohol. For more than a century alcohol accompanies the person all his life and in trouble and in joy. In our society, the advertising of alcoholic beverages in the media excites the joy of drinking daily and the glamour of its drinking is an integral brand on television screens and in the cinema. This fact needs no proof.

However, for centuries people know that alcohol is harmful to health, not to mention the grief associated with its use. We must not forget that drinking could negatively affect the social life of man in General and his career in particular.

That's why Ukrainian legislation provides a wide range of sanctions for alcohol abuse, which in any case is not pleasant and is always threatened by some unfavorable consequences. The dismissal of an employee from work is an example. Thus, the appearance at work drunk, the influence of drugs or toxic substances (hereinafter intoxicated) is a gross violation of job duties and as a consequence may lead to violations of labor protection, industrial accidents, reduced productivity of work and others. In addition, the employee being in this state prevents other workers properly perform their employment duties. With a view to preventing workers being intoxicated during the performance of their employment duties, labor law, as a last resort, provides dismissal. In paragraph. 7, Art. 40 of the Labor Code of Ukraine (the Labor Code) clearly stated that the reason dismissal of an employee is his «appearance at work drunk, under the influence of drugs or toxic substances».

However, this does not mean that the labor legislation in the former USSR did not react to the appearance of the employee at work intoxicated. Such questions find their solution at the level of by-laws. So, in clause 56, section VII, «Discipline» Model of internal regulations for industrial enterprises, approved by human's labor

commissary of the USSR on July 19, 1927 No. 185 noted the following: «It is forbidden to bring all sorts of heady drinks to work ...». In paragraph. 57, it was stated that «drunk people not to allow the enterprise and identified employees at work should be immediately removed by administration» [4, p. 88].

However, this does not mean that the labor legislation in the former USSR did not react to the appearance of the employee at work intoxicated. Such questions find their solution at the level of by-laws. So, in clause 56, section VII, «Discipline» Model of internal regulations for industrial enterprises, approved by human's labor commissary of the USSR on July 19, 1927 No. 185 noted the following: «It is forbidden to bring all sorts of heady drinks to work ...». In paragraph. 57, it was stated that «drunk people not to allow the enterprise and identified employees at work should be immediately removed by administration» [4, p. 88].

A similar ground for termination of employment contract provided in the Labor Code of Russian Federation (pp «b» p. 6 of art. 81), the Republic of Belarus (p. 7, art. 42) Republic of Kazakhstan (p. 9 Art. 52) and The employment contracts act of the Republic of Estonia (part 4 art.88). This foundation provided in the draft Labor Code of Ukraine (Book 2 Chapter 5 paragraph 5 p. 3, Art. 92) (p № 1658 from 12.27.2014. adopted at first reading 11.05.2015) (the draft LC). It noted that the Labor Code of some countries does not provide of individual grounds for dismissal of an employee by the appearance at work drunk, and assigned it to a gross violation of labor discipline, which is the ground for termination of the employment contract. As example the Labor Code of Azerbaijan Republic (Art. 70) Labor Code of the Republic of Lithuania (p. 2 part. 3 art. 136), Labor Code of the Republic of Armenia (paragraph. 2, Art. 121) [1; 2; 3].

Attention is drawn to the fact that the appearance at work drunk as Grounds for dismissal in the Labor Code of the Republic of Uzbekistan and Georgia is absent. There were no grounds for such dismissal in the Code of Russian Federation 1918, 1922 [4, p. 79].

However, this does not mean that the labor legislation in the former USSR did not react to the appearance of the employee at work intoxicated. Such questions find their solution at the level of by-laws. So, in clause 56, section VII, «Discipline» Model of internal regulations for industrial enterprises, approved by human's labor commissary of the USSR on July 19, 1927 No. 185 noted the following: «It is forbidden to bring all sorts of heady drinks to work ...». In paragraph. 57, it was stated that «drunk people not to allow the enterprise and identified employees at work should be immediately removed by administration» [4, p. 88].

In paragraph 18 of the Model rules of internal labor regulations for workers and employees of state, coop-

erative and public enterprises and institutions approved by the resolution of Council of People's Commissars of the USSR of 18 January 1941 it was provided that appearance at work in a drunken state, and alcohol consumption is prohibited [5].

It should be noted that in paragraph 26 of these rules, it was observed that workers who were found at work in a drunken state was treated as truants. Thus, in the above-mentioned legal act was first equated persons, which appeared to work intoxicated to truants.

Further this provision is reflected in p. p. «in» p. 23 Model rules for internal labor order for workers and employees of state, cooperative and public enterprises and institutions, approved the resolution of the State Committee of the USSR Council of Ministers for labor and wages in coordination with All-Union Central Council of Trade-Unions of January 12, 1957 [6, Sec. 164–170] and in p. 25 of the Model rules of internal labor regulations for workers and employees of enterprises, institutions, organizations, approved by the decree of the State Committee of the USSR Council of Ministers for labor and wages in coordination with All-Union Central Council of Trade-Unions dated 29 September 1972, [7], where it was also noted that truancy is absence from work without valid excuse within all working day, and also considered as truants that workers and employees who were at work in a drunken state.

Later in part 1, paragraph 15 of the Model rules of internal labor regulations for workers and employees of enterprises, institutions, organizations, approved by the decree of the USSR State Committee for labor and social Affairs in coordination with All-Union Central Council of Trade-Unions from July 20, 1984 № 213 was envisaged that the administration of enterprises, institutions and organizations are obliged to organize the registration of attendance at work and leaving the workplace in part 2 of this paragraph, it was stated that the employee who appeared at work intoxicated, not be allowed to work in whole working day (shift) [8].

You should pay attention to the fact that during the third codification of labor legislation in the former USSR, which occurred in 1970–1972, appearance at work intoxicated, has not found its consolidation as an independent basis for dismissing the employee. So, the violation of labor discipline was equal to the absenteeism without valid reason in p. 4, article 17 primary labor legislation of the USSR and Union republics [9] and, accordingly, in p. 4, article 40 of the Labor code of the Ukrainian SSR [10].

Later in the early 80-ies of XX century in the former USSR has begun an active reform of the labor legislation in the direction of tightening labor discipline. In this regard, in paragraph 8 of the resolution of Council of Ministers of the USSR trade unions Central Committee from July 28, 1983, No. 745 specified that appearance at

work drunk or drinking alcohol in the workplace must be considered a gross violation of labor discipline. The point was made that in the dealing with these negative phenomena it is necessary to increase the disciplinary and material responsibility of workers and employees, for which it has been proposed that the termination of the labor contract at the initiative of administration as an independent reason for the appearance of the worker or the employee at work in an intoxicated condition [11]. For its development, the decree of the Presidium of the Supreme Council of the USSR on August 12, 1983 [12] The edition of Art. 17 of Principles was amended and supplemented by paragraph 7, which provided appearance at work intoxicated as an independent ground for dismissal of an employee initiated by the administration. According to the Decree of the Presidium of Supreme Council of USSR of 21 December 1983 was amended Art. 40 Labor Code, which was supplemented by new paragraph 7 of the same content [13].

Further in connection with the restructuring of economic management and the appearance of new methods of management, as well as the spread of the shameful phenomenon as drug addiction or substance abuse necessitated the introduction of amendments to the labor legislation to strengthen labor discipline. Thus, the Presidium of the Supreme Council of USSR on February 4, 1988, paragraph 7 of Art. 17 Principles was outlined in the new edition, which included the dismissal for appearance at work not only drunk but also in the influence of drugs or toxic substances [14]. In this development also Presidium of the Supreme Council of the USSR on May 27, 1988 has amended to p. 7, Art. 40 Labor Code.

Thus, since 1988 and now the edition of paragraph 7 of art. 40 Labor Code acts, which allows the employer on his own initiative to dismiss employees for appearance at work drunk. It should be mentioned that there are certain disadvantages in issues of application in practice, despite such a long time being specified grounds in labor legislation.

An incorrect interpretation of p. 7, Art. 40 of the Labor Code is due to the fact that employers are not aware of concepts such as the appearance of an employee drunk, under the influence of drugs or toxic substances are not aware of the meaning and order of suspension the employee from work in this case, what evidence may confirm the appearance of an employee at work, what features are the order of dismissal according to p. 7, Art. 40 of the Labor Code and other labor legislation.

As noted earlier, in p. 7, Art. 40 of the Labor Code states that the reason for dismissal is an appearance at work drunk. Difficulties to ascertain the concept appearance at work drunk due to the fact that in practice the place of actual performance of labor function employee does not always equal to his place of employment (contract conditions of employment) and workplace (part of

production conditions in which the employee performs his work duties), which assigned to employee by the employer according to p. 3 art. 29 of the Labor Code. Based on the content p. 7, Art. 40 of the Labor Code the emergence of employee to work drunk is, in our opinion, the employee's appearance in this state on the territory of the enterprise or other enterprises in the same area or on the territory of enterprise, located in any area in the workplace, as well as other any object where the employee is obliged to perform their work functions on behalf of the employer or according to the employment contract or internal labor regulations. This is with regard to the place of appearance.

Great importance is the determining the time of occurrence employee to work drunk. It should be noted that the current wording of paragraph. 7, Art. 40 of the Labor Code have no focus on working time.

However, jurisprudence and scholars in the area of labor law all agreed that the dismissal for the appearance at work drunk should only take place during working hours. Thus, the appearance of an employee to work drunk should be identified at time when he is obliged to perform his work duties according to the employment contract, internal labor regulations, shift schedules, orders of the employer. Moreover, no matter whether he performs its duties within the framework of his working time or beyond, but by order of the employer (irregular, overtime, shifts, etc.). Note that the appearance at work drunk and will be considered when an employee came to work sober, but during the working time used the alcohol, drugs or toxic substances. Attention is paid to it in judicial practice. In particular, it was noted, courts should bear in mind that these grounds may be dismissed by the appearance of employees at work drunk, the influence of drugs or toxic substances at any time of the day, regardless of whether they were suspended from work or continue to perform work duties, deciding claims for reinstatement persons which an employment contract terminated by p. 7, Art. 40 Labor Code. Time for work over the established total duration is considered working for the employee with irregular working day (p. 1 p. 25 decree of the Supreme Court of Ukraine of 06.11.1992 p. 9 number «On judicial practice of consideration of labour disputes») [15, C. 200]. This judicial practice is reflected in the draft of LC of Ukraine (clause 3 part 1 article 92).

However, it must be kept in mind that the appearance of worker drunk at the enterprise, the workplace outside working hours should be considered as coming employee on the enterprise, the workplace and therefore can not serve as the basis for his dismissal according to p. 7 Art. 40 of the Labor Code. Such occurrence may be considered as violation of labor discipline in individual cases, if this is provided for in separate regulations, rules of internal labor regulations, collective agreement.

For example, in paragraph 12 of the Rules of the internal labor regulations for employees of the Kharkov theatre of musical Comedy for 2014 provided the following: the workers stay in the theater after 45 minutes after the end of evening performances, concerts and rehearsals is not allowed without exclusive permission of the administration of the theatre; theater workers being drunk in office space and the auditorium is not allowed, and p.2.3.7 the Collective agreement of PJSC «Turboatom» in 2016 prohibited to bring any alcoholic beverages or drug substances on the territory of the enterprise. The appearance at work in a state of remaining alcoholic intoxication is not subject in our opinion, to the scope of p. 7, Art. 40 of the Labor Code. We support in this issue G. S. Goncharova [16, C. 11,12] and judge of the Kharkiv Appeal court, Guz L. E. [17] who concluded that the appearance of the employee in the state of residual alcoholic intoxication is not subject to section 7 of article 40 of the Labor code based on the judicial practice. However, there is the opposite point of view in the legal literature, where the appearance at work in a state of residual intoxication is a ground for dismissal [18].

There was some difficulty finding causes a question regarding the work of the employees in a state of intoxication, which set irregular working hours. The Plenum of the Supreme Court gave an explanation about this: «Time for work over the established total time it considered working for employees with irregular working day» (part 1 paragraph 25 Decree) [18]. In our opinion this statement of the Supreme Court Ukraine should be applied considering the fact that the amount of workers with irregular working day defined not only the working hours but also range of responsibilities and volume of work performed (workload). (P. 1 Recommendations on the procedure for granting additional annual vacation for the special nature of work for employees of with irregular working day approved by the Ministry of Labor and Social Policy of Ukraine of 10.10.1997 p. Number 7) [19]. On this basis if the employee works on the terms of irregular working hours, perform duties while in the enterprise in a drunken state, can be dismissed by paragraph 7 of article 40 of the Labor code. However, it should be borne in mind that the employee's location at work in an intoxicated state, when he does not (should not) work, (the receipt of wages, vacation vouchers, gym, etc.), can not cause his dismissal on this basis.

An employee can be dismissed whether he was suspended from work or continue perform his work duties for the appearance at work drunk, under the influence of drugs or toxic substances indicated in the abovementioned decree of the Supreme Court of Ukraine. This statement, in our opinion, not based on the requirements of the labor legislation. For the first time in court practice provisions was 42 years ago, claim. 12 decree of the

Supreme Court of the Ukrainian SSR on April 27, 1974 №4 «On the courts practice in application the Labor Code of the USSR» [20, P. 105]. that the employee can be dismissed for the appearance at work drunk no matter whether he was suspended from work or continued to perform his work duties.

Further, this explanation was contained in p. 12 of the Resolution of Supreme Council of the USSR with the same edition from 30 March 1984 No. 2 «On some issues of application of the Code of Laws on Labor of the USSR by the courts» [21, Sec. 84]. This provision contained in the same edition of For today in part 1, p. 25 of Resolution of the Supreme Court of Ukraine from 06.11.1992 number 9 «On the practice of judging by courts labor disputes».

In this regard, special attention should be paid to this phenomenon as the suspension of an employee who is in a drunken state. The question arises whether this explanation the provisions of the labor legislation at the time of its occurrence and whether it is relevant for today. Indeed, until 1992, art. 46 of the Labor Code did not provide for any right of the employer to suspend the employee from work and the possibility of its application could be only in the cases provided for by-law and with the mandatory order of the competent authorities for the employer. However, mentioned above typical rules of internal labor regulations obliged the employer to organize the employees, recording their attendance at work and leaving work, providing labor and production discipline and not to allow drunk employees to work and to discharge them from the enterprise (p. 57 of the Rules of 1927). In article 3 of the Decree of the Presidium of the Supreme Council of the Ukrainian SSR from June 22, 1972 «On measures to strengthen struggle against drunkenness and alcoholism» [22] emphasized the need to dismiss workers who are on the enterprise in a drunken state. In particular, it was noted that foremen, masters, heads of sections, departments, shifts and other business executives who allow drinking of subordinate employees in the production of alcoholic beverages, and don't take measures to suspension from work persons who are intoxicated are brought to disciplinary responsibility and in cases envisaged by law to penal responsibility. Subsequently foremen, supervisors, shifts, departments, and other leaders involved in drinking alcohol with their subordinate employees at work or not taking measures for suspension persons from work in a state of intoxication, or hiding cases of drinking alcohol or appearance of their subordinate workers at work in a drunken state are subject to administrative penalty as fine from fifty to one hundred rubles according to paragraph 4 of the Decree of the Presidium of the Supreme Council of Ukrainian SSR №280-X1 20.05.1985 «About measures on strengthening of struggle against drunkenness and alcoholism, the elimination of brewing». Thus, as we see, the

legislator strongly requires to the heads of enterprises, institutions, organizations suspending from work that employees who came to work drunk.

Since 1995, article 46 of the Labor Code entitles the employer to dismiss the employee in case of his appearance at work drunk. However, we believe it is not only the right but also the duty of the employer. This conclusion follows from part 2 of «Labor protection Act» which imposes a duty to supervise the performance according to occupational safety requirements on employers. Direct norms formulated in specific legal acts that prohibit the admission of persons to work with the symptom of intoxication. For example, par. 46 of «Safe electric machinery Order» [23]. Therefore, in our opinion, the employer may not subsequently dismiss him by paragraph 7 article 40 of the Labor code if he did not suspend the employee from work, which was in a state of intoxication and continued to perform their duties until the end of the shift. In our point of view if the employee has not been suspended from work in this case, it should be considered as Employer silently agreed to the further implementation of the employee's work function, despite attention to his drunkenness. Later such employee may be brought to disciplinary action. Scientific literature stressed the necessity in art. 46 of the Labor Code providing for the employer's obligation to dismiss the employee who came to work drunk [18, C. 118].

It should be noted that attention is focused more carefully in the latest draft of Labor Code of Ukraine (link) on the issues of dismissal of employees from work, in particular, article 72 of Book 2 Chapter 4 paragraph 2 contains the definition of where a temporary exclusion of the employee to his duties under the labor contract is understood as a suspension. It was emphasized that the Labor Code of Ukraine established grounds of suspension from work. Suspension of the employee could be with pay completely or in part or without preservation of salary and suspension from work issued by employer's decree (direction), which must be immediately familiarized against signature by the employee. In addition, the order of suspension of employees to work in certain cases provided for individual articles of draft of the Labour Code of Ukraine. Article 73 Book 1, Chapter 4, section 2 of the draft of LC of Ukraine deserves Special attention, from our point of view, which addresses the procedure for the suspension of the employee who is in a state of alcoholic, drug or other intoxication. As you can see in the draft of the LC of Ukraine there is no such thing as «a drunken state» and contained a new term «alcohol intoxication.» It is very important that this Article establish an obligation of the employer to dismiss an employee who is in a state of alcoholic, drug or other intoxication. In addition, the use of the term «being intoxicated» instead of the term «a drunken state» put an end to the dispute on legal literature over demarcation

of concepts such as «prevention of work» and «suspension from work» [24, C. 261].

Article 73 Book 1 Chapter 4 Section 2 of the draft of the LC of Ukraine puts an end to the dispute in relation to remaining symptoms of intoxication, consolidating situations while the employees suspended from the work. However, the question of the suspension procedure is not resolved, as well as executives of the enterprise entitled to suspension is not defined in the draft the LC of Ukraine, setting new rules for suspension of employees from work in connection with the appearance intoxicated. Shvets N. M. drew attention to the absence in the legislation of the procedure of suspension of the employee from work (p. 48) [25, Sec. 45–52], at the time, commenting on article 46 of the Labor code of Ukraine. We consider it appropriate to establish a procedure for the suspension of the employee from work is not at state level, but locally, particularly in the internal regulations of enterprises, institutions, organizations.

In our view the introduction of the General definition of «suspension» in the draft of LC of Ukraine and the appearance of the article, which regulates the peculiarities of dismissal of employees in connection with emergence at work in a state of alcoholic, narcotic or other intoxication should be considered as a progress. However, unfortunately, the draft of the LC of Ukraine secured the rescission of the employment contract in article 92 of Book 2 Chapter 5 paragraph 5 in the same wording as it set out in paragraph 7 of article 40 of the Labor Code. From our point of view this suggests that in the future will be dominated by the function of punishment in the labor legislation, which absolutization is not a virtue of labor law in the context of the welfare state. We could see the function of punishment because the dismissal is permitted for one-time emergence at work in a state of alcoholic, narcotic or other intoxication. We Believe, the practice of dismissal of employees will continue to be assigned to this basement, which has developed 49 years ago in the former USSR, when the only tool in the fight against alcoholism was considered a «crackdown». The origins of such judicial practices were founded in the 60th years of the last century. Thus, according to p. 3 Resolution of the Plenum of the Supreme Court on September 26, 1967 № 6 «On increasing the role of the courts in observance of labor legislation and strengthening of labor discipline in enterprises, institutions and organizations», which stated that the courts should keep in mind that according to the law the administration has the right to dismiss a worker for truancy and at one-time committing of the violation of labor discipline in compliance with the established procedure [26, P. 237] As in the former USSR absenteeism was mentioned as a particularly significant reason for termination of the employment contract, the appearance at work in a drunken state started to qualify for the external similar-

ity as truancy. This practice, as noted above, was enshrined in paragraph 26 of the Model rules of internal labor regulations for workers and employees of 1941, and then in article 17 of the fundamentals of labor legislation and all Labor Codes of the former Union republics, including in Ukraine. Thus, clarification of the Supreme Court of the USSR on the possibility of dismissal of an employee for a single absence from work was applied to dismissal for the appearance of an employee being in a drunken state.

Analysis of labor legislation and judicial practices on issues of dismissal for appearing at work drunk which given above brings us to the idea of limiting the right of the employer for dismissal at the specified grounds. At the same time it is hardly possible completely agree with the proposal to transfer to the employment law in force in many Western systems of labor law norms that alcohol intoxication entails dismissal only with the ordinary (systematic, repeated, etc.) implementation of this offense. Thus disciplinary dismissal is possible for a number of grounds in Spain, among which is the usual alcoholism and drug addiction if they have a negative impact on performed work [27, S. 56, 57]

A local practice of some employers in Canada who make a commitment to introduce them to special rehabilitation programs instead of dismissals of the workers can not be applied in Ukraine, [28, C. 74]. We can not agree with A. M. Kotova-Smolenska, who believes that the specified grounds for termination of employment contract is advisable to convert from the general to specific, which may be applied to certain categories of workers [29, S. 85–88]. It seems that the development of national employment law in addition to the above should proceed from the following considerations towards restrictions on termination of the employment contract by the employer for the employee appearance at work drunk. The subject of disciplinary authority makes the choice of disciplinary sanctions. Therefore, the employer is not required to terminate an employment contract with an employee anytime when he was at work under the influence of alcohol, drug or toxic substances (as opposed to the removal from work). The dismissal of on this ground could be considered clearly justified when the following availability of features are. Firstly, it can be work features that require high discipline of employees (production, storage and transportation of explosive materials, etc.). Secondly, it is personal abilities of the employee, pointing to his penchant for drinking. Thirdly, it is the specific situation in the workplace when the dismissal of any employee will become especially important with the aim of general prevention. In all other cases, it will have the advantage of the function of punishment at the termination of the employment contract in connection with the appearance of an employee being drunk. It is interesting that before the Oc-

tober Revolution of 1917, did not exist such problem as dismissal for the appearance of the employee in a drunken state at all. Charter on industrial labor is proof of this, which did not provide for such dismissal grounds. The truth is in art. Charter 67 was provided among the reasons for termination of employment contract «a stupid employee behavior if it threatens to property interests of the company or the personal security of any of the persons of enterprise management or those who supervise the workers.» It was provided and «appearance at work in a drunken state.» Among the possible violations of the order in the company Charter. However, the legislator of that period didn't consider the indicated violation of labor discipline as grounds for termination of employment contract [30, S. 184–195]. And the appearance on the enterprise or work drunk, carrying of drinking alcohol for the first time drawn a reprimand, and the second time the dismissal during the NEP of former USSR according with the table of penalties for workers and employees of industrial enterprises, approved in 1929. Circular of the people's Commissar of labor of the USSR dated 8 March 1929, No. 103 explained further. If being at work drunk for the first time entails a reprimand, the work in a drunken state at particularly appropriate mechanisms that threaten the integrity of the enterprise or the life and health of employees may result a dismissal immediately [31, Sec. 590].

Conclusion and prospects of development. From our point of view, the emphasis should be placed not only on punishment, but also on the production order and on effective system of incentives in question to overcome such a shameful phenomenon as the appearance of an employee drunk and creation of normal organization of work which is required on each enterprise, institution, organization. Today, employees' main element of the motivational mechanism is a salary, as it is the only source of livelihood and basic material welfare of their families. So perfect organization of labor remuneration in the enterprise, on the one hand is a pledge of successful development of labor potential, and on the other – efficient operation of the enterprise, institution or organization. The salary was, is and will be a driving force in the future that encourages the employee to properly perform their work duties, increase productivity, improve their qualification skills relate to assigned labor tasks responsibly. Of course, such formulation of the question requires some changes in philosophy and psychology of the employer who owns the means of production.

Therefore, I think that the state is obliged to find legal means of influence on the employer, which would have led him to the solution of questions concerning the creation of normal labor organization regarding the realization of fair forms and systems of remuneration of labor at enterprises, institutions, organizations irrespective of form of ownership, activity and industry sector.

The employee will no longer desire to appear at work intoxicated or drink alcohol while performing their job duties at the enterprise under such conditions of work. Therefore, we think that the state must find the following legal means of influencing to the employer that would

encouraged him to resolve issues concerning the establishment of normal work regarding the implementation of fair forms and systems of a payment in enterprises, institutions, organizations regardless of their ownership kind activity and industry sector.

SOURCES

1. Трудовой кодекс Российской Федерации : от 30.12.2001 № 197-ФЗ, введ в действие с 01.02.2002 / Российская Федерация. Законы. – Волгоград ; М. : Изд-во ВолГУ : Либрис, 2002. – 225 с.
2. Трудовой кодекс Республики Беларусь : с изм. и доп., внесен. Законом Респ. Беларусь 8 янв. 2014 г. – Минск : Нац. центр правовой информ. Респ. Беларусь, 2014. – 256 с.
3. Töölepingu seadus vastu võetud 17.12.2008 [Электронный ресурс]. – Режим доступа: <https://www.riigiteataja.ee/akt/13120899>.
4. Кодекс законів про працю : систематизований і кодифікований збірник чинних законів, постанов і об'їжників про працю. – Х. : Питання праці, 1929. – 327 с.
5. Типовые правила внутреннего трудового распорядка для рабочих и служащих государственных, кооперативных и общественных предприятий и учреждений : постановление РНК СРСР // СП СРСР. – 1941. – № 4. – Ст. 63.
6. Кодекс законів про працю Української РСР : офіційний текст із змінами на 15 червня 1965 р. та з додатками систематизованих матеріалів. – К. : Вид-во політ. л-ри України, 1965. – 438 с.
7. Об утверждении типовых правил внутреннего трудового распорядка для рабочих и служащих предприятий, учреждений, организаций : постановление Совета Министров СССР // Бюллетень Госкомтруда СССР. – 1972. – № 12.
8. Об утверждении типовых правил внутреннего трудового распорядка для рабочих и служащих предприятий, учреждений, организаций : постановление Госком СССР // Бюллетень Госкомтруда СССР. – 1984. – № 11.
9. Основи законодавства Союзу РСР і союзних республік про працю : Закон СРСР від 23.11.1989 № 810-I // Відом. Верхов. Ради СРСР. – 1970. – № 29. – Ст. 265
10. Кодекс законів про працю України : затв. Законом УРСР від 10.12.1971 № 322-VIII // Відом. Верхов. Ради УРСР. – 1971. – № 50. – Ст. 375.
11. О дополнительных мерах по укреплению трудовой дисциплины» // СП СССР. – 1983. – № 21. – Ст. 116.
12. Про внесення змін і доповнень до законодавчих актів Союзу РСР про працю : Закон СРСР від 12.05.1991 № 2151-I // Відом. Верхов. Ради СРСР. – 1983. – № 33. – Ст. 507.
13. Про внесення змін та доповнень до Кодексу Законів про працю Української РСР : Указ Президії Верхов. Ради УРСР від 21 груд. 1983 р. // Відом. Верхов. Ради УРСР. – 1984. – № 1. – Ст. 3.
14. Про внесення до законодавства Союзу РСР про працю змін та доповнень, пов'язаних з перебудовою управління економікою : Указ Президії Верхов. Ради СРСР від 4 лют. 1988 р. // Відом. Верхов. Ради УРСР. – 1988. – № 6. – Ст. 95.
15. Постанови Пленуму Верховного Суду України із загальних питань судової діяльності та в цивільних справах // Бюлетень законодавства і юрид. практики України. – 2004. – № 11. – 352 с.
16. Гончарова Г. С. Пити чи курити: відчуй правову різницю / Г. С. Гончарова // Юрид. газета. – 2004. – № 8(30). – С. 11, 12.
17. Гузь Л. Е. Подготовка некоторых категорий гражданских дел к слушанию и особенности их рассмотрения / Л. Е. Гузь. – Х. : Харьков юрид., 2001. – 240 с.
18. Проблеми правового регулювання відсторонення працівників від роботи за законодавством України : монографія / І. О. Лосяця, С. М. Прилипко, Д. В. Трубіцин, О. М. Ярошенко. – Х. : Вид-во ФІНН, 2011. – 224 с.
19. Рекомендації щодо порядку надання працівникам з ненормованим робочим днем щорічної додаткової відпустки за особливий характер праці : затв. наказом М-ва праці та соц. політики України від 10.10.1997 № 7 // Людина і праця. – 1997. – № 12.
20. Про практику застосування судами Кодексу Законів про Працю УРСР : постанова Пленуму Верхов. Суду Укр. РСР від 27 квіт. 1974 р. № 4 // Рад. право. – 1974. – № 9. – С. 105.
21. Збірник постанов Пленуму Верховного Суду Української РСР, 1962–1984 роки. – К. : Політвидав України, 1985. – С. 84.

22. Про заходи посилення боротьби проти пияцтва і алкоголізму : Указ Президії Верхов. Ради Укр. РСР від 22.06.1972 // Відом. Верхов. Ради УРСР. – 1972. – №26. – Ст. 221.
23. Правила безпечної експлуатації електроустановок : затв. наказом Держ. Комітету України по нагляду за охороною праці від 06.10.1997 №257 // Офіц. вісн. України. – 1998. – №3. – Ст. 118.
24. Глевська Н. В. Поява на роботі у стані сп'яніння як підстава відсторонення працівника від роботи / Н. В. Глевська // Проблеми законності : акад. зб. наук. пр. / відп. ред. В. Я. Тацій. – Х. : Нац. юрид. акад. України, 2009. – Вип. 104. – С. 258–263.
25. Швець Н. М. Відсторонення працівника від роботи за появу в нетверезому стані / Н. М. Швець // Проблеми законності : акад. зб. наук. пр. / відп. ред. В. Я. Тацій. – Х. : Нац. юрид. акад. України, 2009. – Вип. 106. – С. 45–52.
26. Сборник постановлений Пленума Верховного Суда СССР 1924–1977. Часть 1. – М. : Изд-во «Известия Советов Народных Депутатов СССР», 1980. – 318 с.
27. Киселев И. Я. Трудовой договор: вопросы найма и увольнения (обзор зарубежного опыта) / И. Я. Киселев. – М. : НИИ труда, 1997. – 228 с.
28. Профсоюзы на капиталистических предприятиях (организационная структура, формы, методы и направления деятельности) / отв. ред. С. А. Ершов. – М. : Наука, 1991. – 232 с.
29. Ограничение права работодателя на прекращение трудового отношения. – М., 2003. – С. 85–88.
30. Бугров Л. Ю. Увольнение работников в случаях появления на работе в состоянии алкогольного, наркотического или иного токсического опьянения / Л. Ю. Бугров // Известия вузов. Правоведение. – 2009. – №4. – С. 184–195.
31. Курс российского трудового права. Т. 3: Трудовой договор / науч. ред. тома Е. Б. Хохлов. – СПб. : Изд-во П. Асланова «Юрид. центр Пресс», 2007. – 656 с.

REFERENCES

1. Trudovoy kodeks Rossiyskoy Federatsii ot 30.12. 2001 №197-FZ. vvod v deystviye s 01.02.2002 [The Russian Federation Labor Code on 30.12. 2001 №197-FZ, entering into force on 01.02.2002]. *Rossiyskaya Federatsiya. Zakony – Russian Federation. Laws Volgograd* ; M. : Izd-vo VolGU : Libris. 2002 [in Russian].
2. Trudovoy kodeks Respubliki Belarus : s izm. i dop.. vnesen. Zakonom Resp. Belarus 8 yanv. 2014 [The Labour Code of the Republic of Belarus: rev. and ext., submitted. Law Rep. Belarus January 8. 2014]. – Minsk : Nats. tsentr pravovoy inform. Resp. Belarus [in Russian].
3. Töölepingu seadus vastu võetud 17.12.2008 Retrieved from: <https://www.riigiteataja.ee/akt/13120899>
4. Kodeks Zakoniv pro pratsiu Systematyzovanyi i kodyfikovanii zbirnyk chynnykh Zakoniv, postanov y obizhnykiv pro pratsiu. – «Pytannia pratsi» [the Labour Code codified and systematized collection of existing laws, regulations and circulars of pratsiu. – «The issue of labor»Я]. 1929 [in Russian].
5. *Tipovyie pravila vnutrennego trudovogo rasporyadka dlya rabochikh i sluzhashchikh gosudarstvennykh kooperativnykh i obshchestvennykh predpriyatiy i uchrezhdeniy: postanovleniye RNK SRSP [Model internal regulations for workers and employees of state, cooperative and public enterprises and institutions: the decision RNA SRSP]. SP SRSR. №4. – St. 63 [in Russian].*
6. Kodeks zakoniv pro pratsiu Ukrainskoi RSR. [Labor Code of the Ukrainian SSR]. *Ofitsiyniy tekst iz zminamy na 15 chervnia 1965 ta z dodatkamy systematyzovanykh materialiv. – Official text with changes on June 15, 1965 and applications systematized materials. Vydavnytstvo politychnoi literatury Ukrainy. Kyiv [in Ukrainian].*
7. Ob utverzhdenii tipovykh pravil vnutrennego trudovogo rasporyadka dlya rabochikh i sluzhashchikh predpriyatiy. uchrezhdeniy. organizatsiy: postanovleniye Soveta Ministrov SSSR [On approval of the standard rules of the internal labor regulations for workers and employees of enterprises, institutions, organizations: decision of the Council of Ministers]. *Byulleten Goskomtruda SSSR. – Bulletin of the USSR State Committee 1972. – №12 [in Russian].*
8. Ob utverzhdenii tipovykh pravil vnutrennego trudovogo rasporyadka dlya rabochikh i sluzhashchikh predpriyatiy. uchrezhdeniy. organizatsiy: postanovleniye Goskom SSSR [Approval of the standard rules of the internal labor regulations for workers and employees of enterprises, institutions, organizations: decision of the State Committee of the USSR]. *Byulleten Goskomtruda SSSR – Bulletin of USSR State Committee. 1984. – №11 [in Russian].*
9. Osnovy zakonodavstva Sojuzu RSR i sojuznykh respublik pro pracju: Zakon SRSR vid 23.11.1989 №810-I [Fundamentals of the USSR and Union Republics on the work of the USSR Law of 23.11.1989 №810-I]. *Vidomosti Verkhovnoji Rady SRSR – Data Supreme Council of the USSR. 1970. №29. St. 265 [in Ukrainian].*
10. Kodeks zakoniv pro pracju Ukrajiny: zatverdzhenyj Zakonom URSSR vid 10.12.1971 №322-VIII [The Labor Code of Ukraine, the Ukrainian SSR approved the Law of 10.12.1971 №322-VIII]. *Vidomosti Verkhovnoji Rady URSSR. – Data Supreme Council of the USSR. 1971. №50, St. 375 [in Ukrainian].*

11. *O dopolnitelnykh merakh po ukrepleniyu trudovoy distsipliny [On additional measures to strengthen labor discipline]*. SP SSSR. 1983. №21. St. 116 [in Russian].
12. Pro vnesennja zmin i dopovnenj do zakonodavchykh aktiv Sojuzu RSR pro pracju: Zakon SRSR vid 12.05.1991 №2151-I [On amendments and additions to the legislation of the USSR on the work of the USSR Law of 12.05.1991 №2151-I]. *Vidomosti Verkhovnoji Rady SRSR – Data Supreme Council of the USSR*. 1983. №33. St. 507 [in Ukrainian].
13. Ukaz Prezydiji Verkhovnoji Rady URSS vid 21 ghrudnja 1983 «Pro vnesennja zmin ta dopovnenj do Kodeksu Zakoniv pro pracju Ukrajinskoji RSR» [Decree of the Presidium of the Supreme Soviet of 21 December 1983 «On making changes and amendments to the Labor Code of the Ukrainian SSR»]. *Vidomosti VR URSS – Data Supreme Council of the USSR* 1984. №1. – St. 3 [in Ukrainian].
14. Ukaz Prezydiji Verkhovnoji Rady SRSR vid 4 ljutogho 1988 «Pro vnesennja do zakonodavstva Sojuzu RSR pro pracju zmin ta dopovnenj, pov'jazanykh z perebudovuju upravlinnja ekonomikoju» [Decree of the Presidium of the Supreme Soviet of 4 February 1988 «On Amendments to the legislation of the USSR labor changes and amendments related to the restructuring of economic management»]. *Vidomosti VR URSS. – Data Supreme Council of the USSR* 1988. №6. St. 95 [in Ukrainian].
15. *Bjuletenj zakonodavstva i jurydychnoji praktyky Ukrainy. – 2004. №11: Postanovy Plenumu Verkhovnogho Sudu Ukrainy iz zaghaljnykh pytanj sudovoji dijajlnosti ta v cyvilnykh spravakh [Bulletin of the law and legal practice in Ukraine. – 2004. – №11: Resolution of the Supreme Court of Ukraine on general issues of judicial and civil matters]*. 352 [in Ukrainian].
16. Ghoncharova Gh. S. (2004) Pyty chy kuryty: vidchuj pravovu riznyciju [Drink or smoke, feel the legal differences]. *Juryd. Ghazeta – Legal. newspaper* №8(30).11,12 [in Ukrainian].
17. Guz L. E. (2001) *Podgotovka nekotorykh kategoriy grazhdanskikh del k slushaniyu i osobennosti ikh rassmotreniya [Preparation of certain categories of civil cases for hearing and consideration of the characteristics of their]*. Kharkiv. Izd.-vo «Kharkov yuridicheskij» [in Russian].
18. Losycja I. O., Prylypko S. M., Trubicyn D. V., Jaroshenko O. M. (2011) *Problemy pravovogho rehuljuvannja vidstoronennja pracivnykiv vid roboty za zakonodavstvom Ukrainy: Monohrafija [Problems of legal regulation of workers from dismissal under the laws of Ukraine: Monograph]*. Kharkiv: Vydavnytstvo «FINN» [in Ukrainian].
19. Rekomendacij shhodo porjadku nadannja pracivnykam z nenormovanyim robochym dnev shhorichnoji dodatkovoji vidпустky za osoblyvyj kharakter praci, zatv. nakazom Ministerstva praci ta socialjnoji polityky Ukrainy vid 10.10.1997 №7. [Recommendations on the procedure for providing workers with irregular working day annual additional leave for special nature of work, approved. by the Ministry of Labour and Social Policy of Ukraine of 10.10.1997 №7]. *Ljudyna i pracja. – Human and Labor* №12 [in Ukrainian].
20. Pro praktyku zastosuvannja sudamy Kodeksu Zakoniv pro Pracju URSS: postanova Plenumu Verkhovnogho Sudu Ukrajinskoji RSR vid 27 kvitnja 1974 №4 [On the practice of courts of the Labor Code of the USSR: Resolution of the Supreme Court of the Ukrainian SSR of 27 April 1974 №4]. *Radjansjke pravo – Soviet law* №9. 105 [in Ukrainian].
21. *Zbirnyk postanov Plenumu Verkhovnogho Sudu Ukrajinskoji RSR, 1962–1984 [Collection of resolutions of the Supreme Court of the Ukrainian SSR, 1962–1984]*. Kiev. Polityvdav Ukrainy. 1985 [in Ukrainian].
22. Pro zakhody posylennja borotjby proty pyjactva i alkogholizmu: Ukaz Prezydiji Verkhovnoji Rady Ukrajinskoji RSR vid 22.06.1972 [On measures to strengthen the fight against drunkenness and alcoholism: Presidium of the Supreme Council of the Ukrainian SSR 06/22/1972]. *Vidomosti VR URSS – Data Supreme Council of the USSR* 1972. №26. St. 221. [in Ukrainian].
23. Pravyla bezpechnoji ekspluataciji elektroustanovok, zatv. nakazom Derzhavnogho Komitetu Ukrainy po naghjadu za okhoronoju praci vid 06.10.1997 №257. [Safe Use of Regulations, approved. State Committee of Ukraine for Labor Protection of 10.6.1997 №257]. *Ofic. visn Ukrainy – Official Bulletin of Ukraine* 1998. №3. St. 118 [in Ukrainian].
24. Ghlevsijka N. V. (2009) Pojava na roboti u stani sp'janinnja jak pidstava vidstoronennja pracivnyka vid roboty [Appearance at work drunk as a ground employee dismissal from work]. *Problemy zakonnosti – Problems of legality* V. 104. 258–263 [in Ukrainian].
25. Shvecj N. M. (2009) Vidstoronennja pracivnyka vid roboty za pojavu v netvezozomu stani [Dismissal of an employee working for appearing drunk]. *Problemy zakonnosti – Problems of legality* V. 106. 45–52 [in Ukrainian].
26. *Sbornik postanovleniy Plenuma Verkhovnogho Suda SSSR 1924–1977 Chast I. [Collection of decisions of the Plenum of the Supreme Court of the USSR 1924–1977. Part I]*. Izd.-vo «Izvestiya Sovetov Narodnykh Deputatov SSSR. Moskva. 1980 [in Russian].
27. Kiselev I. Ya. (1997) *Trudovoy dogovor: voprosy nayma i uvolneniy (obzor zarubezhnogo opyta) [The employment contract: hiring and firing issues (review of foreign experience)]*. Moskva. NII truda. [in Russian].

28. Ershov S. A. (Eds.) (1991) *Profsoyuzy na kapitalisticheskikh predpriyatiyakh (organizatsionnaya struktura, formy, metody i napravleniya deyatel'nosti)* [Trade unions in capitalist enterprises (organizational structure, forms, methods and activities)]. Moskva. Nauka [in Russian].
29. *Ogranicheniye prava rabotodatelya na prekrashcheniye trudovogo otnosheniya* [Limitation of rights of the employer to terminate the employment relationship]. Moskva. 2003. 85–88 [in Russian].
30. Bugrov L. Yu. (2009) *Uvolneniye rabotnikov v sluchayakh poyavleniya na rabote v sostoyanii alkogol'nogo, narkoticheskogo ili inogo toksicheskogo opianeniya* [Dismissal of workers in cases of appearance at work in a state of alcoholic, narcotic or other toxic substances]. *Izvestiya vuzov. «Pravovedeniye»*. 4. 184–195 [in Russian].
31. Khokhlov E. B. (2007) *Kurs rossiyskogo trudovogo prava*. [Course of Russian labor law]. *Trudovoy dogovor – Employment contract*. Vol. 3. Spb.: Izd-vo R. Aslanova «Yuridicheskiy tsentr Press» [in Russian].

П. А. БУЩЕНКО

кандидат юридических наук, доцент, доцент кафедры трудового права
Национального юридического университета имени Ярослава Мудрого

І. А. ВЕТУХОВА

кандидат юридических наук, доцент, доцент кафедры трудового права
Национального юридического университета имени Ярослава Мудрого

ЗВІЛЬНЕННЯ ЗА п. 7 ст. 40 КЗпП УКРАЇНИ: ТЕОРІЯ І ПРАКТИКА ЗАСТОСУВАННЯ

У статті розглядаються теоретичні та практичні питання щодо підстави та порядку звільнення за п. 7 ст. 40 КЗпП України за появу працівника на роботі у нетверезому стані, у стані наркотичного або токсичного сп'яніння. Розглянуто історичний аспект розвитку трудового законодавства та судової практики стосовно регулювання вказаної підстави звільнення. Зроблені висновки та надані пропозиції щодо вдосконалення трудового законодавства при припиненні трудового договору.

Ключові слова: поява на роботі в нетверезому стані, робочий час, відсторонення від роботи, звільнення.

П. А. БУЩЕНКО

кандидат юридических наук, доцент, доцент кафедры трудового права
Национального юридического университета имени Ярослава Мудрого

И. А. ВЕТУХОВА

кандидат юридических наук, доцент, доцент кафедры трудового права
Национального юридического университета имени Ярослава Мудрого

УВОЛЬНЕНИЕ ПО п. 7 ст. 40 КЗоТ УКРАИНЫ: ТЕОРИЯ И ПРАКТИКА ПРИМЕНЕНИЯ

В статье рассматриваются теоретические и практические вопросы относительно оснований и порядка увольнения по п. 7 ст. 40 КЗоТ Украины за появление работника на рабочем месте в нетрезвом состоянии, в состоянии наркотического или токсического опьянения. Рассмотрен исторический аспект развития трудового законодательства и судебной практики в отношении регулирования указанного основания увольнения. Сделаны выводы и даны предложения по совершенствованию трудового законодательства при прекращении трудового договора.

Ключевые слова: появление на работе в нетрезвом состоянии, рабочее время, отстранение от работы, увольнение.