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PIECES OF EVIDENCE FOR THE CONSUMPTION OF ALCOHOLIC BEVERAGES

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Abstract: *As the labor law regulations do not provide specific rules regarding the field and the methods of collecting evidence, the civil law is applicable. The paper reads the methods to address when voluntary alcohol poisoning issue must be solved. It highlights the conditions of admissibility of evidence, the clinical manifestations associated with the consumption of alcohol, the preliminary investigation under labor law, and the legal measures which the employer is entitled to take in such situations*
Key words: *alcohol consumption, labor law, evidence gathering*

The Romanian civil legislation does not know a unitary regulation in the field of evidence and proofs. So the labor law does not contain specific rules on the evidence field or on the methods of collecting it. The rules of the civil law on the matter are therefore applicable; in this respect are the articles 276 and 278 of the Law no.53/2003[1].

The voluntary alcohol poisoning, being a situation *de facto*, can be proven by any evidence provided by law, including: documents (minutes of observation and control, security records, statements of the concerned person or of other participants in the verification of the consumption of alcoholic beverages), witnesses, confession, interrogation and expertise (we assess the utility of this evidence due to the phenomenon of elimination of alcohol from the body, only when using the procedure for securing the evidence which is regulated by the provisions of the New Code of Civil Procedure) .

In order to be used, the evidence must fulfill certain conditions of admissibility; they must be legal (i.e. not prohibited by the material or procedure law), relevant, useful and conclusive; the court, in the virtue of its active role, is compelled to administer any piece of evidence that it considers necessary for the proper resolution of the case.

In assessing the probative material given, there must be taken into account that, as demonstrated in the doctrine and in the jurisprudence, the clinical manifestations associated with the consumption of alcohol (failures of coordination and speech, specific dizziness etc.) can be determined also by accidental ingestion of other substances, most often from the environment where the employee operates.

Under these circumstances, during the preliminary investigation that is required, according to art.251 of Law no.53/2003, we consider that such possibilities must be analyzed and removed, with arguments, even though the employee does not invoke them because of the state he is in or because he just does not know them. In this way, the measures imposed can be legally taken and this fact demonstrated, in case of litigation, otherwise all the measures will be affected by the absolutely nullity[2].

A great attention should be paid to exactly surprising the factual situation in which the finding of the factual situation took place whereas from the legal point of view, to circumvent any controls undertaken at the workplace or the employee's refusal to submit to such control are not equivalent to the consumption of alcoholic beverages, as obviously as this situation might be assessed. In these cases, the employee's attitude must be examined in terms of discipline, through its actions or inactions, and depending on them, specific measures must be taken.

To remove any confusion and suspicion in establishing and proving the employees' alcohol poisoning, we appreciate as necessary, the introduction in the labor legislation, of the procedure established for the consumption of alcoholic beverages by drivers of vehicles and the sorting of the employees at the working place, through the method of dosing the alcohol in the expired air and, *in case of positive results, the employee is compelled to give some biological samples*.

We appreciate that in the absence of legal provisions in this respect, the parties from an employment relationship can negotiate through their representatives such clauses in the Collective Work Agreements or in the Regulations of Internal Procedure. The existence of these clauses has both preventative and probative role in case of litigation.

We rally to some reputed authors[3], who claimed the necessity of adapting the institution of evidence in our legislation, to the scientific and technical progress. The updating and the modernizing of the regulation of the institution of evidence, from the internal law, were imposed, but only after a serious exam of experience passed by other countries.

But beyond the scientific aspects of proving the alcohol poisoning, we believe that, regarding the employment relationships, two aspects are very important to the employers: the legal merits of sanctioning the alcohol consumption at work and / or of performing the labor process while being intoxicated with alcohol and proving to the employer the voluntary alcohol poisoning, as factual basis for the disciplinary sanction.

The legal merits of sanctioning the alcohol consumption at work and / or of performing the labor process while being intoxicated with alcohol. The consumption of alcohol at the workplace or performing work being intoxicated with alcohol is manifested above all as a state of danger in the normal way of developing work relationships. We are entitled to believe that in terms of labor relations it is not necessary to produce an accident at work for the employer to consider potentially harmful and dangerous the employee's state of intoxication with alcohol, during the normal working schedule. Given the general effects of alcohol poisoning, mentioned at the beginning of our article, it can be easily inferred a decrease in the normal efficiency of the employee in his work performance which he has undertaken to provide under the employer's supervision and in exchange for a wage. Consequently, in the case when the intoxication with alcohol produces its general, scientifically proven effects, we are in the situation of a partial failure of the individual contract of employment.

Moreover, independent of the effect produced concretely by the use of alcohol on an employee or another, the employer's tolerance towards the alcohol poisoning during the normal work schedule (whether it comes to the consumption of alcohol before or during the normal work schedule), creates a state of potential danger in relation to all its employees.

We are thus in a position to identify the legal measures which the employer is entitled and has the opportunity to take in such situations.

We consider that the most effective and easy method for the employer is to stipulate in the rules of internal procedure, the voluntary alcohol intoxication during normal work schedule as a serious misbehavior. The legal merits of such a regulation are given by the provisions of art.257 and 258, in conjunction with the rights of the employers[4], lit. e and of article 10 of the Law no.53/2003 – The Labor Code, as subsequently amended and supplemented.

We consider that regulating it as a serious misbehavior represents the most effective solution for the employers both from the formal point of view, and in terms of concrete penalty measures.

From the formal point of view, the employer is covered by the legal basis for the most serious measure he

[1] Law no. 53/2003, The Labor Code, amended and republished in 2011, published in the Official Gazette no 345, May 18th 2011
[2] Drumea,, MihneaClaudiu, 2008, *Dreptul muncii [Labor law]*, Constanta: Europolis Publishing House, p. 160
[3] V.M. Ciobanu, *Theoretical and Practical Treaty of Civil Procedure*, vol.II, Ed.Naţional, Bucharest 1997, p.151.
[4] Drumea,, MihneaClaudiu, 2008, *Dreptul muncii [Labor law]*, Constanta: Europolis Publishing House, p. 78

might take as a penalty against the guilty employee. The employer may apply the termination of employment for reasons related to the employee [5], finding a disciplinary violation, committed with guilt by the employee; this misbehavior is regulated in accordance with the provisions of art.247 of the Labor Code. Regulating the voluntary alcohol poisoning as a serious misbehavior, creates the legal basis for the employer, even as a subsidiary of penalizing such behavior, with maximum harshness, and protects him from a possible allegation of the employee, on the grounds of a disciplinary misbehavior, of gradual nature.

In terms of concrete measures of sanctioning, such a regulation gives to the employer the possibility of doing "possible acts of mercy" with the benefit of the provisions from art.250 of the Labor Code, choosing, on grounds of the art.250 letters d) and e); for example, for him to opt for an easier disciplinary sanction, without his general right of hardly penalizing a certain behavior, pursuant its disciplinary prerogative, to be affected. In a case like this, we do not take into consideration the principle of non-discrimination, stipulated by Article 5 of the Labor Code, since the employer must be able to prove objectively the differences between different employees, based on the art.250, previously mentioned.

We believe that regulating the alcohol poisoning during the normal work schedule, as a serious misbehavior does not imply, obligatorily and unambiguously, the mandatory penalty stipulated by the art.252, paragraph 1 letter f). The employer is detained with carrying out the prior disciplinary research, provided to art.251 and with proving in time and within the time limits provided for the disciplinary research, prior to the employee's guilt.

The efficiency and the facility of the regulation do not reside from its uniqueness, but from the fact that it is based on those prerogatives and rights recognized ab initio by the employer, through the labor law. According to art.241 of Law no.53/2003- the Labor Code, as subsequently amended and supplemented, the employer is the only one able to draw up internal rules. The intervention of the Union and of the employees' representatives has just an advisory role. The only requirements that have to be respected by the employer and that can attack the regulations developed by the internal rules are the ones of respecting the legally recognized rights of the employees.

We do not in the least exclude the possibility that such a regulation should be stipulated separately in the collective agreements[6]. We believe that this regulation has, above all, a declaratory role in that social dialogue partners recognize that they adhere to the same set of principles regarding the enforcement of labor relations.

Also, the effectiveness of such measures depends on the ease with which necessary changes can be brought, in which case the provision from the internal rules is obviously more advantageous both to the employer and to the employees, given the provisions from art. 260, in corroboration with the art. 259 of the Labor Code.

[5] Drumea,, MihneaClaudiu, 2008, *Dreptul muncii [Labor law]*, Constanta: Europolis Publishing House, p.97
[6] The law for social dialogue, no 62/2011