

[HEALTH – SOCIAL PROTECTION - PENSIONS]

Alcohol at work: an employer may submit an employee to a breathalyzer test outside of the company premises

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An employee may be submitted to a breathalyzer test to evidence that he or she is under the influence, provided that the duties and the inebriation of this employee cause a threat for people and goods and if the modalities of the control provided by the internal rules allow the employee a possibility to challenge the results, regardless to the fact that, for technical reasons, the control is performed outside of company premises.

The French Labour Code is particularly strict regarding alcohol at work: it is strictly banned... unless it is wine, beer, cider or perry ! (art. R4228-20 of the French Labour code). Furthermore, the possibilities for an employer to declare an outright – and motivated – ban on alcohol has only been added by a 2014 amendment to this article.

That being said, one will understand it is particularly complex to deal with the case of employees who are inebriated at work due to the absorption of alcohol outside of work: they do not breach the rather permissive rules regarding alcohol at work, and yet their situation puts at risk their safety and their colleagues’.

In such case, employers are caught between two major - and conflicting – principles: on one side, their duty to ensure the safety of people (beginning by their own employees) and on the other, the prohibition of unjustified restrictions of individual freedoms (in this case, the right to privacy incarnated by the right to drink alcohol outside of work or during breaks).

The use of breathalyzer tests appears as a good mean to detect problematic cases and to give an employer a ground to stop an employee suspected of inebriation. However, since an employer is not a police officer its’ use is very tightly framed by the courts.

In the present case, a highway concession-holder company had dismissed a road worker for serious misconduct further to a positive breath test. The employee, who was on call, had showed up to work in an apparent inebriation state. His superior had asked him to submit to a breath test, which was performed at the police station – the employer’s breathalyzer being on maintenance. The test was witnessed and the employee did not ask for a counter-expertise.

The company’s internal rules provided for the modalities of the control which were silent about the place of the breath test. These modalities were respected in the present case. However, the company had also adopted a “charter” with an appendix entitled “How to face acute or occasional alcohol abuses” which provided that breathalyzers were not meant to evidence misconducts.

The employee challenged the validity of the breathalyzer test results – which were the grounds of the dismissal – by claiming that the charter prohibited the employer from using the results to dismiss him and that the procedure had not been respected in his case.

Although the employee was successful in appeal, the French supreme court quashed and remanded the case, on the ground that the charter was not legally binding and that the breath test could be used since:

- The function of the employee justified it (the employee was to drive a company vehicle on a highway open to traffic); and
- The internal rules allowed such test, with modalities allowing to challenge the result.

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