Employment Update

A few laps away from being fired for absenteeism: a looming repeal?

30th December 2019

Regarding the Ruling of the Plenary Session of the Constitutional Court of 16 October 2019

Following the ruling of the Plenary Session of the Constitutional Court on 16 October 2019 (RA 2960/2019) rejecting, although not unanimously, the question of unconstitutionality raised by a Barcelona Social Court in relation to Article 52.(d) of the Workers' Statute, insofar as it allows for the termination of employment relationships on grounds of absenteeism resulting from the worker's short-term intermittent illnesses, whether or not they have led to the issuance of official medical leave reports, many critical comments have been raised, and it has even been stated by those who in all likelihood are in office in Spain, that one of the first measures will be to repeal that provision.

We will not go into the reasons that have justified the lawfulness of the provision against those who maintain that it contravenes the right to health protection and that if there is justification for the absences and the state of health is in danger, dismissal for that reason segregates, dissuades the worker from the right to health care and is based only on the very existence of the illness.

What is interesting is to note some practical comments, based on real cases, which serve to draw attention to and, if necessary, analyse whether it is in the interest of the companies to put on stage one of the longest extinguishing rights that they still hold, and which has all the traces of being repealed next year.

The first thing that must be stressed is that the provision in question, with some modifications, has been in force for almost 40 years. In fact, the Workers' Statute, which was established by Law 8/1980, of 10 March (BOE of 14-3), already regulated the possibility of a termination of the employment contract due to worker absenteeism (art. 52 d). It is not, therefore, a rule set in motion by the famous labor reform of 2012 (the only change is that absenteeism has since been measured in relation to the worker concerned and not by comparison with all the workers on the staff), but a longstanding precept that, until the time the STC was issued, had never been deemed unconstitutional.

In order to facilitate the reader's work, we reproduce the content of the current Article 52(d) of the Worker's Statute:

"The contract may be terminated: (...) d) For absences from work, even justified but intermittent, reaching twenty percent of the working days in two consecutive months provided that the total of absences from work in the previous twelve months reaches five percent of the working days, or twenty-five percent in four discontinuous months within a twelve month period.

For the purposes of the preceding paragraph, absences due to legal strike for the duration of the strike, the exercise of activities of legal representation of workers, occupational accidents, maternity, risk during pregnancy and lactation, illnesses caused by pregnancy, childbirth or lactation, and paternity shall not be counted as absences from work, leave and holidays, illness or accident not at work when the leave has been agreed by the official health services and has a duration of more than twenty consecutive days, nor those motivated by the physical or psychological situation resulting from gender violence, accredited by the social services of care or health services, as appropriate. Nor shall absences due to medical treatment for cancer or serious illness be counted".

Without a doubt, the interpretative difficulties encountered by companies are focused on providing answers to these questions, among others:

Can punctuality be included and should only full-time absences from work be considered?

How can the exclusion of absences due to "serious illness" be solved when the company does not know the causes of the medical leave?

How are absences calculated in the short and long term?

How are the four discontinuous months counted, from date to date or by calendar months?

Can periods of temporary disability be calculated for the short period of two months and also for the long period, or would the principle of non bis in idem be infringed?

Must the absences be immediate to the termination decision or within the previous year?

In what line have the social courts been handing down?

In response to the above questions:

1.- Can punctuality be included and should only full-time absences from work be considered?

Only absences understood as non-attendance at work during the entire day are considered, since article 52.d) of the WS refers exclusively to absences from work. Therefore, absences from work on time should be excluded, whether due to entering work late at the beginning of the working day, or leaving work before the end of the same, or even being temporarily absent during the same (for all of them, RSC Andalucía, Sevilla, 19-5-16 [RS 1402/2015] and RSC Madrid, 22-4-16 [RS 167/2016]).

2.- How can the exclusion of absences due to "serious illness" be solved when the company does not know the causes of the medical leave?

In business practice, this question is not usually raised. However, and as was resolved in the procedure that gave rise to the RSC Aragón 2-5-2018 (RS 2011/2018) an intermediate solution would be to express in the extinct communication that *"Likewise, we are not aware that their medical leave is due to a specific illness, since the diagnosis is not reflected in the parts delivered to the company, nor has any medical report been provided that proves that the absences are due to a serious illness. If you have a serious illness, you must prove it during these fifteen days of notice, if it exists the dismissal would be without effect. Serious illnesses are those reflected in the R.D. 1148/2011, of 29 July"*.

3.- How are absences calculated in the short and long term? (absences from work during working days considering the 2 months in which there must be 20%)?

Let's look at four examples:

Scenario A. SCJ, 5-3-2019 (RCUD 2518/2017):

In the termination letter with effect from 1-7-2016, 10-17 March 2016 and 25-28 April 2016 are charged as absences due to illness, constituting 25% of the working days in two consecutive months.

Scenario B. SCJ, 19-3-2018 (RCUD 10/2016):

On 14th February 2014, the company notified the applicant of a letter of objective dismissal of the same date, on the basis of justified but intermittent absences from work, specifically from 18 November 2013 to 2 December 2013 and from 3 January 2014 to 10 January 2014, that he was on medical leave for common contingencies and that, applying the temporary period from 18 November 2013 to 17 January 2014, he had to work a total of 43 days and was absent for 18, which represents 41,8 % of his days.

Scenario C. SCJ Madrid, 22-4-2016 (RS 167/2016):

In the dismissal that took place on 19-12-13, the period between 12-4-13 and 12-6-13 was taken into consideration. In two consecutive months, the number of working days amounted to 46, and the actor did not provide services during this period for 11 working days (23.91%), having been on leave due to temporary incapacity derived from common illness from 12-4-13 to 16-4-13 (diagnosis of "Infectious gastroenteritis."), from 22-4-13 to 26-4-13 (diagnosis of "Infectious Respiratory ARI") and from 10-6-13 to 12-6-13 (diagnosis of "Infectious Gastroenteritis"), i.e. intermittently, with interruptions or discontinuities, with absences exceeding 20% of the working days.

Scenario D. SCJ nº 3 Burgos, 5-8-2019 (autos 163/2019):

In dismissal with effect from 25-1-2019, from 2-2-2018 to 1-4-2018, 9 full days out of 39 working days have been missed, which is 23.07%, thus exceeding the 20% threshold provided for by law.

4.- How are absences calculated in the long term (in 12 months, should there be 5% absence)?

Four examples clarify the answer:

Scenario A. SCJ, 5-3-2019 (RCUD 2518/2017):

And in the last twelve months from the termination (1-7 16), in addition to the absences from 10 to 17 March 2016 and from 25 to 28 April 2016, due to illness, which constituted 25% of the working days in two consecutive months, there are also absences due to illness from 29 September to 2 October 2015, constituting 6.64% of the working days.

Scenario B. SCJ, 19-3-2018 (RCUD 10/2016):

In dismissal with effect from 14/2/2014 and taking as reference the period from 18/1/2013 to 17/1/2014, taking into account that he should have worked 225 days, these 18 days represent 8% of the total.

Scenario C. SCJ Madrid, 22-4-2016 (RS 167/2016):

It is necessary to calculate the second section, reaching 5% of the working days, within the year prior to the date of the dismissal that took place on 19-12-13, so that the period to be counted is not, as the iudex a quo states, between 12-4-12 and 12-4-13 (36 working days that represent 13.09%), but between 19-12-12 to 19-12-13, in which absences do not exceed 5% of the working days, (11 working days that represent 4%).

Scenario D. SCJ nº 3 Burgos, 5-8-2019 (autos 163/2019):

In dismissal with effect from 25-1-2019, in the period between 26-1-2018 and 25-1-2019, of 246 working days, the worker has not attended his job for 24 full days because he is in an IT situation, which is 9.75%, having exceeded the threshold of 5% provided for by law.

5.- How are the four discontinued months counted? From date to date or by calendar months?

The four (not less) discontinued months are to be counted not by calendar months, but from date to date. As stated in the SCJ, 4-2-2019 (RCUD 1113/2017): "It would not be valid to appreciate the fact that the withdrawals occurred during three intermittent months, not four, computed from date to date. The actor missed work because of his IT status during the following periods: 3-11 February 2015; 21-22 May 2015; 21-26 October 2015; 28 October-6 November 2015".

6.- Can periods of temporary disability be calculated for the short period of two months and also for the long period, or would the principle of non bis in idem be infringed?

No principle is violated. The same absences can be counted for the short and long term (SCJ, 19-3-2018; RCUD 10/2016).

7.- Must the absences be immediate to the termination decision or within the previous year?

It is the unit of one year, counting from the dismissal backwards, during which the circumstances that the precept regulates must have occurred. The 12 months of total time to be taken into account is a single time that must be counted from the dismissal backwards, to take two of them consecutively in which 20% of the absences are reached, in a total of absences from work in that same time of twelve months, of at least 5% of the working days (SCJ 28-1-2019; RCUD 667/2017).

8.- In what line have the social courts been handing down?

It is interesting to note that the Courts, High Courts of Justice and Supreme Court have mainly agreed with the companies in their assessment of objective dismissal based on absenteeism, although on some occasions the origin of the dismissals has been revoked, as the existence of serious illnesses or sick leave unequivocally connected with a situation of disability that could not be considered for these purposes has been estimated, or by rectifying the way in which the calculation of absences from work had been carried out.

By way of conclusion. The recent ruling of the Plenary Session of the Constitutional Court has endorsed the validity of objective dismissal for absenteeism resulting from repeated sick leave. Although it is the least invoked objective cause by the companies of those reported in Article 52 of the WS, when used, demonstrating the concurrence of the parameters for its implementation, it is the one that has presented the least litigation.

To obtain the calculation of the percentage of the absenteeism rate, the legal modules of reference are represented by the working days in the 12 months prior to the objective dismissal and in the 2 consecutive and 4 discontinuous months considered within those 12 months. And the 2 months or the 4 months are to be counted from date to date from the start day of the medical leave of each chosen month, not by calendar months.

The calculation of the 5% annual percentage is obtained from (i) total working days according to the work calendar and (ii) days of justified absences from work.

You can read the full sentence for more information.

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