Employment Update

Are emails documentary evidence in an employment lawsuit?

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About Judgment of the Cantabrian High Court of Justice dated 30 January 2019

In today's world, it is a daily phenomenon that the parties to employment lawsuits present, within the field of documentary evidence, the printing of e-mails in order to prove certain facts and, therefore, support the legal theses that are defended. This is due to the massive use of emails as a means of communication in the company and, therefore, as a working tool for employees.

Those days are long gone when the private documents presented in the employment lawsuits were constituted mostly by crossed correspondence via postal service or hand delivery with its corresponding receipt. In the same way that the judicial resolutions of the then Labour Court, Central Labour Court and Supreme Court were referred to the parties in the process and came in onion paper support, then replaced by common paper and now come through computer support.

In this regard, article 90 of the Regulatory Law of Social Jurisdiction allows the parties to use any means of evidence at their disposal, regulated by law, including procedures for the reproduction of speech, image, sound or files and means of reproduction of data. And article 384 of the Civil Procedure Law regulates "the instruments that allow archiving, knowing or reproducing words", data, figures and mathematical operations carried out for accounting or other purposes, means of evidence mentioned in article 299.2 of the Civil Procedure Law.

On the other hand, and as a different means of evidence, article 94 of the Regulatory Law of Social Jurisdiction regulates the documentary evidence that also appears under the title "Private Documents" in article 299.1.3º of the CPL.

Well, it is a notorious fact that the forensic practice has been admitting, as a means of evidence in the Social Courts, the communications made through electronic mail. However, it is one thing that this type of evidence can be analysed and evaluated in the instance by the Magistrate, before whom the evidence is taken with all the guarantees, in accordance with the principle of immediacy, and another very different thing that the emails can be qualified as reliable documentary evidence, for the purposes of a factual review proposed by way of section b) of article 193 of the Employment Procedural Law.

This introduction refers to the judicial doctrine contained in the **Judgment of the Cantabrian High Court of Justice dated 30 January 2019** (RS 845/2018) which, in response to a request for review of the facts declared proven in the judgment of the Social Court, on the basis of the e-mails in the proceedings, the Territorial Court rejects it, stating verbatim that "e-mail is not documentary evidence". It then states that:

a.- The email is legal in the proof of supports or instruments (art. 90.1 and 384 Civil Procedure Law) although in some cases it has been qualified as a private document that has to be validated judicially and thus making possible that whoever affirms its falsification, could resort to the criminal order (art. 86.2 Regulatory Law of Social Jurisdiction).

b.- The transcendence of this qualification for the purpose of appealing in supplication, since it is textually underlined, with unquestionable emphasis that: "the printing of such documents produces a kind of "thaumaturgical effect", what we can define as the "fetishism of the printed" that converts into a document what is not and it is justified that in some cases, starting from such a documentary

qualification, the intention is even to revise the proven facts in supplication but such a possibility is not admissible".

The debate is served. To put it more graphically, does the contribution in the oral hearing of emails that are recognized even by the opposing party have the consideration of documentary evidence for the purposes of being able to urge the revision of the facts declared proven, via article 193 b) of the Regulatory Law of Social Jurisdiction? Are we witnessing a partial doctrine of a Territorial Court or, on the contrary, is it corroborated by other Social Chambers of Superior Courts of Justice? Is there a contrary judicial doctrine giving full validity as documentary evidence to the emails?

The answers given to these questions are not trivial, since on many occasions the legal basis for success in a lawsuit is given by the essential and necessary evidence in the factual account of extremes contained in the emails. Let us simply think, and these are not laboratory assumptions, when the support of a disciplinary dismissal petition coming from or an extinctive nullity for breach of the indemnity guarantee is based, for example, on the content of emails addressed or received by the worker himself, company management, co-workers, clients, suppliers, etc.

In this regard, and without wanting to extend ourselves, we must anticipate that the doctrine of supplication is not peaceful as to whether the printing on paper of the emails that are provided as evidence in the act of trial are **"documentary evidence"** handy for reviewing purposes. There are several existing theses and multiple sentences dictated of which we only collect a minimum sample.

In the affirmative sense, that they are valid documents to review the proven facts: High Court of Justice Sentence Galicia 12-3-2019, RS 4149/2018; High Court of Justice Sentence Madrid 27-7-2018, RS 390/2018; High Court of Justice Sentence Castilla-La Mancha, 13-12-2017, RS 1483/2017; High Court of Justice Sentence Castilla y León (Valladolid) 16-1-2017, RS 2375/2016; High Court of Justice Sentence Cataluña 18-7-2016, RS 3194/2016 and High Court of Justice Sentence Aragón 17-11-2010, RS 736/2010.

2.- On the contrary, printed reports from e-mails are not considered documentary evidence and, therefore, are not suitable for the purposes of article 193.b) of the LRJS, apart from the mentioned Cantabrian High Court of Justice Sentence support of the present comments: High Court of Justice Sentences Galicia 28-3-2019, RS 2467/2018 and 2-12-2008, RS 4402/2008; High Court of Justice Sentences Madrid 19-7-2017, RS 677/2017 and 13-4-2015, RS 705/2014 and High Court of Justice Sentence Andalusia (Seville) 7-6-2017, RS 2217/2016).

And as an intermediate position, giving revision validity to the emails, despite not being recognized, if they had been warned expertly (High Court of Justice Sentence Catalonia 23-10-2015, RS 3164/2015).

Disagreeing with the Cantabrian High Court of Justice Sentence, inasmuch as it can be understood that when a party presents private documents that consist of e-mails with the same format and that are sent from an e-mail account that appears to be identified as the company's own, technically we are dealing with legal "documentary evidence". Indeed, it cannot be ignored: (i) the irruption of computer technology in the world of work and that emails have come to replace to a great extent the paper correspondence that certainly derives in its printing from a computer, as "an instrument that allows archiving, knowing or reproducing words" and (ii) that the rules must be interpreted in accordance with the social reality of the time in which they are to be applied (art. 3.1 Civil Code).

In this way, and as occurs daily in the courtrooms of the social jurisdictional bodies, with respect to the presentation within the branch of documentary evidence of emails, the **possible positions of the parties** in the oral trial are those contemplated in article 427.1 of the Code of Civil Procedure ("in the hearing, each party will pronounce on the documents provided to the contrary up to that moment, stating whether it admits or impugns or recognizes them or whether, if applicable, it proposes evidence about their authenticity"), and thus, following much of the existing judicial doctrine), and following much of the existing doctrine:

a.- If they **recognize** themselves, they will make full evidence in the process (art. 326.2 Code of Civil Procedure) and the judicial organ, by congruence with the positions of the parties in this respect, will not be able to deny the reality of the mails that will have probative value with respect to what results

from them, although there will always have to be a joint evaluation with the rest of the evidence; and if its content is not reflected in the proven facts of the sentence, they will be able documents to urge the factual revision in supplication.

b.- It is alleged that the mails **are not known**, but without affirming that they are false. Supposed that it does not appear regulated in articles 267 and 268.2 of the Code of Civil Procedure (which only seem to admit a duality, that the document is admitted or that its falsity is alleged), but that it has been traditionally admitted by forensic practice and social judicial doctrine. In such a case, the magistrate of the instance, as sovereign for the evaluation of the evidence presented, must decide on the evidentiary value that he grants to the e-mails presented, without that decision being reviewed by the Social Chamber in supplication.

C.- If they are **challenged**, in the sense that their authenticity is questioned considering, for example, that they are the product of manipulation, evidence must be provided (witness and/or expert witness) and there may even be a procedure under article 86 of the Administrative Jurisdiction Law on the suspension to file a complaint. It would also be possible to use the appeal of revision of final sentence through article 510.1.2º of the LEC to which article 86.3 of the Administrative Jurisdiction Law refers.

Fortunately in the correct understanding of the rules of good faith, the parties usually show what is called "signs of procedural elegance" (as described in the recent High Court Judgement nº 31 Barcelona 11-6-2019, orders 662/2017) when the parties exclude from their strategy in doubting that the opponent had prepared false documents to present them in court.

By way of recapitulation. Fortunately for the parties involved in the employment processes, and contrary to the criterion of the Cantabrian High Court Judgement, a good part of the judicial doctrine is admitting the printed electronic mail as documentary evidence and, therefore, with value for the factual revision in supplication, when it has been expressly recognized by the other party, thus overcoming the obstacle for the access to the appeal, presents the proof of instruments of article 384 of the Civil Procedure Law.

Of course, it is necessary to exclude from the skilful reviewing effectiveness, for the purpose of altering the proven facts of the sentences of instance, those emails that, even if recognized and not crossed out as false, constitute the written expression of the declarations of a third party (documented witness evidence), that do not lose this character, of personal manifestation, by the fact of having been expressed in writing. They would be documented testimonies and therefore subject to the free appreciation and exclusive evaluation of the jurisdictional body of the Instance, being able to be evaluated with the rest and in conjunction with the other evidentiary elements contributed to the act of the oral trial within the parameters and faculty granted by article 97.2 of the Regulatory Law of Social Jurisdiction.

To conclude, it would be convenient and necessary for the Supreme Court to put an end to this controversy by unifying the judicial doctrine of the Superior Courts of Justice in favour of the consideration as documentary evidence of e-mails and, in general, that those recognized as adverse are skilful documents for review purposes, since the opposite could imply a violation of the judicial tutelage enshrined in article 24.1 of the Constitution and an interpretation of the term "documentary evidence" alien to current social reality (art. 3.1 Civil Code).

You can read the complete sentence for more information.

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