

Employment Update

Null disciplinary dismissal for "association or bond."

4th October 2019

About the STSJ Canarias (Las Palmas) of 29 August 2019

The recent ruling of 29 August 2019 (RS 531/2019) by the Labour Chamber of the High Court of Justice of the Canary Islands (based in Las Palmas) confirms the nullity of the disciplinary dismissal of a worker (assistant waitress) and obliges the company (Hotel Oasis Duna de Corralejo) to readmit her because it considers that she had been dismissed in retaliation for the union and judicial activity of her partner, who is secretary and member of the Works Council of the hotel and also ratifies the compensation awarded on appeal in the amount of 6.251.-€ for violation of the fundamental right not to suffer discrimination.

The Court applies the concept of "discrimination by association or bond" coined by the EU Court of Justice in its judgment of 17 July 2008 (Coleman case; C-303/06) which settled a question referred by a UK court for a preliminary ruling in the interpretation of Council Directive 2000/78/EC. The case was brought against a female worker who was treated unequally and derogatorily by the company for applying for leave and reduced working hours in order to care for her disabled child. The ECJ understood that the principle of equal treatment is not confined to persons who are themselves disabled, but also includes those who are treated in a discriminatory manner because they have a relationship with them.

Of course, discrimination by association can be extended to cases other than disability, such as racial or ethnic origin, trade union membership, etc. Activities likely to fit into this type of discrimination could be, among others, the refusal to hire a worker because his or her spouse belongs to the Jewish people or to the Gypsy ethnic group or the failure to renew a fixed-term contract because his or her partner is a member of a trade union.

The close STJUE of 20 June 2019 (C-404/18) interprets Article 24 of Directive 2006/54 in the sense that the workers referred to in that Article, other than the person who has been discriminated against on grounds of sex, must be protected to the extent that the employer may cause them harm by supporting, formally or informally, the person who has been discriminated against.

After this introduction, it is convenient to review the relevant facts of the STSJ of the Canary Islands:

a.- The worker, with a permanent full-time contract, had been working for the company since 1 June 2016, with no prior sanctions;

b.- The sentimental partner of the plaintiff and with whom she shares domicile and residence, at least since 2013, is also a worker of the same company and representative of the workers since 25 October 2017. As secretary of the works council, he filed a complaint against the company with ITSS on January 3, 2018, which gave rise to the company's request dated April 2, 2018. It also brought a personal legal action against the company, which ended with a judicial conciliation on May 31, 2018;

c.- On April 30, 2018, the worker was dismissed in a disciplinary manner for "continuous and voluntary decrease in the performance of normal work" and was recognized as improper by the company in the act of trial.



For the Territorial Court, the worker developed a sufficiently precise and concrete allegatory activity around the indications of the existence of discrimination, in a scenario that, due to the previous facts, the business decision to dismiss was associated with the union and judicial activity of her partner.

The company was able to distort the context of discrimination of having carried out an evidentiary activity in order to minimally reason the existence of causes for the disciplinary dismissal of the plaintiff. In effect, the constitutional doctrine has established that once the evidence of the violation of a fundamental right has been accredited, what the employer must demonstrate is that his action has real causes, absolutely foreign to the alleged violation of fundamental rights and that such causes had sufficient entity to adopt the decision, the only means of destroying the harmful appearance created by the evidence.

But in the case prosecuted for not doing so and recognizing the employer, that the dismissal was inappropriate, further reinforced the signs of discrimination, which therefore led to the nullity of the dismissal produced to the plaintiff, given the evidentiary inactivity of the company.

By way of conclusion. The relevance of the STSJ comes from the expansion of new forms of discrimination that have difficult to fit under the modalities of direct and indirect discrimination. Faced with the "classic reprisals" unduly adopted by employers against the complaining worker (in frank violation of the guarantee of indemnity), the "sophistication of reprisals" of punishing someone close to their environment and employee of the same company (in the case, the sentimental couple) has evolved the European judicial doctrine and our social jurisdiction, applying flexible and extensive criteria to these new forms of discrimination.

You can read the [whole sentence](#) for more information

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