Employment Update

Nullity of dismissal due to situation of Temporary Incapacity

26th August 2020

Regarding the Judgment of the High Court of Justice of Galicia dated June 9th 2020

What follows is not gibberish, although it may seem so.

Worker requesting the annulment of a disciplinary dismissal, say, for cause ***A***. The Labour Court's sentence upholds the claim not only for cause ***A*** pleaded, but also for cause ***B***, not alleged, and furthermore condemns the company to the payment of the amount of 6,251 euros as compensation for violation of fundamental rights. Finally, the sentence of the High Court of Justice will confirm the anulment, but this time exclusively on objective and automatic grounds, let's call, ***C***, with acquital of the compensatory sentence imposed on the company.

In other words, the questions we ask ourselves are: can the judicial body accept grounds for the annulment of a disciplinary dismissal, not claimed in the lawsuit? And if the answer is affirmative, is it indifferent whether the declaration of annulment is established by the Labour Court or the High Court of Justice? Or, on the contrary, should the company allege that it is clearly powerlessness, with an overtone to benefitting, because it has not been able to refute with the relevant allegations and means of evidence the cause of annulment that was later put forward?

In order to give a complete answer to these questions we will use the procedure that, for the time being, culminates with the **Ruling of the Supreme Court of Galicia of June 9th 2020** (Subject: Carpintería Metálica Aluman, S.A.; RS 32/2020). The background of interest from which we started were the following:

1.- The plaintiff, with the professional category of Manager, requested paternity leave for the birth of a child, for the period May 26th to June 22nd 2018. The date of birth of the child was May 22nd 2018.

2.- The worker underwent temporary incapacity process due to lumbago, starting on June 25th 2018 and discharged on the following September 21st.

3.- On June 25th 2018, the plaintiff presented conciliation papers with the Service for Mediation, Arbitration and Conciliation against the company, claiming an amount for trips, vacations and outstanding payments. Previously, on June 6th 2018, he had filed a claim before the Panamanian courts against the company, Grupo Aluman Panamá, S.A.

4.- By means of an registered letter dated September 4th 2018, he was dismissed based on a conduct consisting of the fact that on August 21st, the previous day, the plaintiff, in a family home under construction, located in Lugar de Larazo (Vila de Cruces-Pontevedra), carried out work that was supposedly incompatible with the alleged ailments that afflicted him. It has been proven exclusively in court that on that date he helped another person to push a small concrete mixer that

had been used in the aforementioned works, with wheels, to bring it closer to the truck, also helping him in the operation of loading the said mixer to the truck driven by that third person by means of a crane.

The initial **Judgment of Labour Court nº 1 A Coruña** of July 23rd 2019 declared the nullity of the disciplinary dismissal for two reasons:

i.- Violation of the indemnity bond. Retaliatory action, for violation of the right to effective legal protection and guarantee of indemnity, in the dismissal carried out by the company based on the previous two claims made by the worker against his employer in Spain and the Panamanian company when he rendered services in Central America.

ii.- Infringement of the fundamental right to equality. As the worker was dismissed while in a situation of temporary incapacity, based on the ruling of the European Court of Justice of 1st December 2016 and Directive 2000/1978/EC, and, specifically, applying the concept of disability or long-term illness.

In the appeal filed by the company, it was claimed that the only reasoning or foundation that could be taken into account as a reason for the annulment declared by the Court a quo, would be the one stated in the complaint (the possible retaliation and not the "disability" never invoked), reasoning that the **High Court ruling** dismisses for a double argument:

1st.- Because the judicial body is bound only by the **core** of what is requested and discussed in the lawsuit, and **not by the wording** of the specific claims exercised in such a way that there will be no "*extra petitum*" inconsistency when the Judge or Court decides or rules on a claim that, although it was not formally or expressly exercised, was implicitly or necessarily a consequence of the articulated petitions or the main issue discussed in the proceedings.

2nd.- The consistency of the judicial decisions is compatible with the use by the judicial body of the aphorism ***iura novit curia***, by virtue of which the Judges and Courts are not obliged, when giving reasons for their judgments, to strictly comply with the allegations of a legal nature made by the parties.

On the other hand, the Labour Chamber revokes the fact that the ground for invalidility is the equation of low back pain with disability. In effect, it recalls that according to the pronouncements of the Court of Justice of the European Union and of European Directive 2000/1978, the essential thing for these purposes is whether the duration of the physical, mental, intellectual or sensory ailments is sufficiently long to understand that they may be submerged in the concept of disability. It is emphasized that low back pain is a highly incapacitating illness, but with a short recovery or healing period (according to the medical manuals, a maximum of 4/6 weeks), to which it had to be added that it was equally accredited that the dismissal was caused by a simulation of sick leave or by carrying out activities contrary to the debilitating condition, and never by the illness suffered by the plaintiff himself.

At this point the reader may wonder why the disciplinary dismissal for performing tasks in a temporary incapacity situation was not declared and then for what reason it was declared null and void?

The HCJ understands that, in view of the concurrent circumstances, especially the nature of the illness and employment, the worker's conduct was neither serious nor intentional enough, **nor was it proven that it was susceptible to risking his recovery or showing his employment nature**, with the consequent simulation to the detriment of the company. Therefore, it is concluded that the facts that led

to the dismissal did not warrant the imposition of the maximum penalty of those provided for in the employment law.

And, finally, the most important thing to resolve the mess exposed at the beginning, what argument does the High Court use to declare the annulment and not the impropriety of the dismissal, discarding the violation of the guarantee of indemnity and that it was a dismissal of a "disabled" person or with long term leave?

The answer is very simple, because of the previous use of paternity leave. Starting from the date of birth of the child of the plaintiff on May 22nd 2018 and the date of dismissal on September 4th since the then 9 months established (today twelve months) between both dates did not pass, and this by the simple diction of Article 55.5 of the Statute of Workers' Rights at the time of the event:

> "Dismissal shall also be void in the following cases: [...] c) That of the workers after having returned to work at the end of the periods of suspension of the contract due to maternity, adoption, foster care or paternity referred to in article 45.1.d), provided that no more than nine months have elapsed since the date of birth, adoption, delegation of foster care or adoption of the child or minor".

In conclusion, there are several lessons that can be extrapolated from the HC of Galicia ruling:

1st.- Disciplinary dismissals for carrying out work during a temporary incapacity situation cannot a priori be considered an action that delays the healing of the ailments, nor jeopardizes recovery, it being up to the company, in accordance with the rules governing the burden of proof, to prove that medically the alleged facts have negatively interfered in the evolution of the worker's clinical process by unduly prolonging the time spent.

2nd.- If the Labour Court or the High Court, based on the facts alleged and accredited in the dismissal procedure, simply understand that the fundamental right violated by the contractual termination is not the one expressly cited by the worker in the lawsuit, but a different one, it is not possible to speak of an *extra petita* inconsistency, but of a simple resolution in accordance with the applicable legal rules in force, since the facts alleged will remain the same and the basis of law and claim of the lawsuit (that the dismissal is null and void because it has taken place with violation of fundamental rights) would not suffer a significant modification, nor could it cause defenselessness to any of the parties, because the rules of the burden of proof do not vary according to the fundamental violated right (art. 96.1 of the Law governing Administrative Jurisdiction).

3rd.- This is all the more so when the dismissal is deemed to be null and void, acquiring such a description directly and automatically, because it is in one of the cases of fact included in the Statute of Workers' Rights (Article 55.5), as has occurred in the case examined when the dismissal occurs after the enjoyment of the paternity leave and within the period of protection established by the statutory regulation.

4th.- Regardless of the fact that the termination of the contract had a real cause unrelated to the worker's previous claims (non-existence of a guarantee of indemnity) or to his short term medical leave (absence of injury to the right to equality due to disability), the truth is that when the dismissal took place, the worker was in a situation of protection, after the paternity leave, which meant that the termination could only be qualified as appropriate or null, never as inappropriate. And, as we

have seen, the facts charged and accredited in court were not, in the opinion of the court, serious enough nor enough guilt to merit the maximum disciplinary punishment.

The Ruling can be read on the following link.

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