Employment Update

Disciplinary dismissals without cause, nullity in favour of the workers.

30th November 2018

About the decision of the High Court of Justice of Castilla-La Mancha of September 11, 2018

With regard to the rules on the burden of proof in processes of violation of Fundamental Rights (hereinafter, DDFF), Article 96.1 of the Law Regulating the Social Jurisdiction establishes that in those processes in which the plaintiff's allegations deduce the existence of well-founded indications of discrimination on the basis of sex, the defendant shall provide an objective and reasonable justification, sufficiently proven, of the measures adopted and their proportionality.

Equally reiterated doctrine of the Constitutional Court has stated that when it is alleged that a business decision conceals a conduct injurious to DDFF, the burden falls on the employer to prove that his action is based on reasonable grounds, alien to any purpose that violates a fundamental right.

However, for the burden of proof to play in that sense, the worker must provide 'reasonable evidence' that the business act infringes his DDFF. That is to say, the mere allegation of constitutional infringement is not sufficient for the worker, but he must provide a reasonable indication that the violation of the fundamental right has occurred, so that only when these indications have been provided will the so-called reversal of the burden of proof occur, and it is then for the defendant to prove the existence of sufficient, real and serious causes to qualify the business decision as reasonable, the only means of destroying the harmful appearance created by the indications provided by the plaintiff.

The introduction carried out is not trivial, since in the course of business there are occasions when there are dismissals that simply reproduce the breach of contract, without specifying any fact, and what's more, on occasions the company recognises the impropriety of the dismissal before its challenge, or in the preliminary phase before the Court of Mediation Conciliation and Arbitration (SMAC) or before the Social Court.

Faced with such a situation, and after a worker has rejected compensation equivalent to unfair dismissal, the following questions arise: Can you claim that the business decision is discriminatory because of your status as a woman? Should you provide reasonable evidence that the dismissal violates your fundamental rights?

The answers to the two questions formulated, as the reader already knows, are affirmative; more as always, the controversy is served with the interpretation of what should be "prima facie evidence".

In the analysed case, from the account of facts declared proven (HDP) of the STSJ (decision of the High Court of Justice) of Castilla-La Mancha of September 11, 2018 (Azkar Logística, S.A. Case; RS 1854/2017) follows that:

a) Ms. Lucía has been providing full-time employment services for the company Azkar Logística S.A. with seniority on 1 August 2006, professional category of Warehouse Manager and with a salary of (...) (1st HDP).

b) By letter dated October 3, 2016 the company proceeded to the disciplinary with effects of the same day and in which the only cause referred to is the continued decrease in work performance (3rd HDP).

c) Between 2015 and 2016, the company dismissed a total of 20 workers, of whom 14 were men and 6 women. (70% men vs. 30% women). Of these dismissals, 7 were managers, 4 men and 3 women (57.4% versus 42.85%) (4th HDP).

d) Excluding temporary contracts, in February 2015, there were a total of 302 existing employment contracts, of which 179 were for men and 123 for women (59.27 per cent for men and 40.72 per cent for women). As of December 2016, a total of 360 employment contracts were in force, of which 194 were for men and 135 for women (62.5 per cent for men and 37.5 per cent for women) (6th HDP).

e) With regard to company heads, in February 2015 there were 31 managerial/responsible positions of which 19 were men and 12 women (61.29 per cent men versus 38.70 per cent women); in December 2015 there were 33 managerial/responsible positions of which 22 were men and 11 women (66.66 per cent men versus 33.33 per cent women). In May 2016 the number of managers rose to 39, of whom 22 were men and 17 women (56.41% men against 43.58% women). And in January 2017, the number of people in charge remained the same, although 23 were men and 16 were women (58.97% men as against 41.02% women) (7th HDP).

f) The number of men who attend the selection processes of the jobs offered through ETT (temporary employment agencies) is significantly higher than the number of women (10th HDP).

Against this background, the judicial controversy focused on whether there was any strong evidence from which to infer the suspicion that the corporate decision to dismiss was a discriminatory decision because of the female status of the Chief Warehouse keeper.

The judgment of the Court of First Instance (JS (Labour Court) nº 2 Guadalajara) did not consider the "prima facie evidence" of a violation of Mexico City to be accredited, and this with the data it had as proven (on the number of personnel dismissed by gender, by professional categories, as well as on new hiring, etc.). (statistics detailed above]), and therefore concluded that the discrimination denounced "because of her condition as a woman" was non-existent, nor, therefore, that the dismissal was declared null and void, thus accepting the recognition made by the employee herself of the dismissal's impropriety, with the consequences set forth in article 56 of the ET (worker's statute).

However, the Social Chamber of the Supreme Court of Justice considers that there is enough evidence of discrimination on the basis of the following two grounds:

The employer stated in opposition to the claim that it did not accept the violation of DDFF or the nullity of the dismissal but acknowledged its inappropriateness and already opted in that act for compensation.
The company did not even attempt to practice any means of evidence as to the veracity, gravity or culpability of the imputed conduct.

The STSJ, which is the subject of these comments, is not unwavering because it has prepared an appeal to the Supreme Court for the unification of doctrine. But, regardless of what is finally resolved, what reflections or recommendations can we extract from its content?

1) The problem arising from an "empty letter" or "orphan of facts" in which there is no data, but the mere transcription of the alleged breach of contract (usually the "voluntary and continuous decrease in work performance"), contravenes the provisions of Article 55.1 of the DE and greatly facilitates a claim for violation of FDDF (as in the case, discrimination for her status as a woman).

2) The classic "arbitrary dismissals" or "without cause" must certainly be motivated in the extinctive letter with a detail of the facts imputed to the worker. And this even if one is aware of the inexistence of the "seriousness" of the same to justify an extinctive origin.

3) If not, before an "empty letter" and subsequent application for dismissal with violation of DDFF, at least the company:

    a) Should combat the existence of prima facie evidence of violations of fundamental rights.

    b) Although the impropriety of the dismissal is manifest (due to the formal defects of the dismissal letter) it is not advisable to recognize this qualification and,

    c) Should seek to prove the certainty and gravity of the events that led to extinction. This proof would never make it possible to proceed with the dismissal (before "empty letters") but if, at least, if there were enough indications of violation of FDDF, give an "objective and reasonable justification" of the existence of breaches that undermine the qualification of nullity in favour of the unfairness of the disciplinary dismissal.

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