Employment Update

Measurable contractual terminations for purposes of determining the existence of Collective Dismissal

12th August 2019

Regarding the Judgment of the National High Court of July 4, 2019

The Labour Chamber of the Audiencia Nacional, in its Judgment of **July 4, 2019 (Unison Case),** endorses the doctrine of the Supreme Court ("SC") on the type of extinctions that must be taken into account within the reference period of 90 days for the purpose of calculating the numerical thresholds of collective dismissal - article 51, paragraph 1 of the Workers' Statute ("WS").

In the specific case, the High Court Ruling ("HCR") clarifies how disciplinary dismissals and objective dismissals for lack of assistance should be computed for the purposes outlined, **distinguishing between those that have been challenged**, and on those that concur qualification of impropriety -either by agreement between the parties or by virtue of a judicial resolution-, or which have also been challenged but no decision has yet been rendered on them by **those others who have not even been the subject of an individual challenge** by the worker concerned, or who, even though they have been, have subsequently withdrawn their application.

The controversy studied by the HCR, brings cause of the demand of collective dismissal followed at the request of the TU-SI and CIG Unions -and as interested, CCOO and UGT, among others-, understanding that within a company with a staff of 4.008 workers distributed in several work centres in five (5) provinces, there have been a series of contractual extinctions that considered in the legally established period of 90 days, would exceed the thresholds of collective dismissal, in accordance with the provisions of Article 51.1 of the WS (in this case, remember, there would be more than 30 workers).

Specifically, in the 90-day period since the last agreed termination (March 29, 2019 to December 30, 2018), a total of 57 individual extinctions were carried out according to the following schedule:

a.- 12 individual sackings, of which:

2 were objective dismissals Article 52(c) of the WS - by economic, technical, organisational or production causes;

4 dismissals reconciled with recognition of unfairness; and,

6 extinctions derived from geographical mobility - article 40 of the WS-

b.- 8 objective dismissals under the provisions of Article 52(d) of the WS, i.e. for absences from work, still justified but intermittent, of which:

4 were challenged, and at the date of the decision of the HCR are pending; and,

4 uncontested.

c.- 37 disciplinary dismissals, of which:

15 that were not challenged;

1 contested, but subsequently withdrawn;

1 conciliated without recognition of inadmissibility; and,

20 contested, although the decision is still pending at the date of the HCR.

In the opinion of the plaintiffs' unions, all these contract extinctions carried out by the company within the 90-day reference period would have to be qualified as null dismissals because the numerical thresholds established in article 51.1 WS had been exceeded; and therefore, **since a de facto collective dismissal had actually taken place**, without the legally established procedure for it having been observed.

In order to settle the controversy, the HCR begins by analysing the legal provision contemplated in article 51.1 of the WS, relating to the type of extinctions that must be computed for the purposes of the thresholds established in said regulation to consider whether or not we are in the presence of a collective dismissal. In this sense, the HCR, according to the literality of the referred precept, determines that all extinctions produced by the initiative of the employer and for reasons not inherent to the worker's person must be included in the computation, with the exception of the termination of validly entered into temporary contracts.

Based on the above premise, the HCR, bringing up the doctrine of the SC on the matter, analyses the treatment to be applied to disciplinary dismissal, for the purposes of calculating thresholds. In this regard, **it concludes that all disciplinary dismissals that have been declared inadmissible or consensual as such will be measured** (HCR of November 18, 2014 [Rec. 65/2014], among others).

However, with regard to those redundancies that are *subiudice*, with reference to the STS of 29 September 2017 [Rec. 62/2017], as well as in accordance with the provisions of Article 51.1 of the ET and 1.1 of Directive 98/59, asserts that they cannot be addressed in the collective redundancy procedure, and should be resolved in the corresponding individual redundancies.

In fact, the SAN considers that it cannot examine dismissals which are subiudice, since this requires a prior pronouncement on the nature and effect of such extinction, which would go beyond the material scope of the collective dispute.

Thus, descending to the factual assumption of the contested extinctions, and carried out by the respondent Company during the 90-day reference period, the HCR concludes that:

They must be included in the measurement for the purpose of integrating the numerical thresholds of Article 51.1 of the WS:

1.- Objective dismissals under Article 52(c) WS;

2.- The termination of contracts compensated, under the provisions of Article 40 WS, as a result of the adoption of geographical mobility measures;

3.- Disciplinary dismissals reconciled with recognition of impropriety;

4.- Conciliatory disciplinary dismissal without assessing the substance of the matter and therefore without express recognition of impropriety.

On the contrary, **they must be excluded from the calculation** for the purposes of the numerical thresholds for collective redundancy:

1.- Disciplinary dismissals which have not been challenged - including the case in which the worker finally withdraws his action - as well as those which, although challenged, are still pending;

2.- Objective dismissals under the provisions of article 52.d) of the WS; that is, for lack of assistance even justified but reiterated, that have not been challenged, or that despite having been challenged, are pending resolution.

Having said the above, of the set of extinctions analyzed in the SAN, only 13 of them would be computable for purposes of the alleged collective dismissal in fact (2 objective dismissals ex article

52.c ET; 4 dismissals reconciled with recognition of unfairness; 6 compensated dismissals consequences of geographic mobility measures; and, 1 dismissal reconciled without entering into the substance of the matter and without recognition of unfairness), for which reason the lawsuit filed by the unions is dismissed, concluding that the numerical thresholds of article 51.1 of the WS would not have been exceeded.

You can read the full sentence for more information.

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