Labor and Employment Newsletter

Spain

GARRIGUES

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Index

1. Dismissals: the prohibition which in fact was not one

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The Supreme Court concludes, in a judgment delivered in a case handled by counsel from Garrigues, that the violation of the misnamed prohibition of dismissal during the pandemic means that a dismissal is unfair, not null and void

After the passing of Royal Decree-Law 9/2020, of March 27, 2020, article 2 of which provided that "force majeure and the economic, technical, organizational and production reasons providing the basis for the measures of suspension of contracts and reduction of working hours provided for in articles 22 and 23 of Royal Decree-Law 8/2020, of March 17, 2020, cannot be considered as justifying the termination of employment contracts nor dismissals", certain sectors of opinion announced the good news of the alleged prohibition of dismissal. According to the more extreme opinions, during the pandemic dismissals were simply eradicated, employers being entitled to adopt only temporary solutions that maintain the employment relationship. According to the more nuanced opinions, the presence in a decision to terminate of circumstances that that could be traced back to those arising from the pandemic, was sufficient to declare the dismissal null and void.

Numerous judgments of the high courts of justice follow this line of interpretation, although the majority of the case law favored the unfairness of the dismissal arising from reasons attributable to the pandemic. This is the line endorsed by the Plenary Session of the Fourth Chamber of the Supreme Court which, in a judgment of October 19, 2022 (841/2022), has established the criterion for interpretation of the above-mentioned article 2, as meaning that its *infringement* does not render the dismissal null and void but rather unfair. This important judgment (issued in a case handled by counsel from Garrigues) contains, in any event, rulings of great interest, not only in relation to the past but also with a view to the future of our employment relations and to certain questions that may be raised in the future.

What is important about the Supreme Court judgment, in my opinion, is its assertion (point five of the legal grounds, section 2) that the legislation in dispute contains a "decriminalization, a neutralization of the grounds for termination", not in any case a prohibition of dismissal. "The meager legislative drafting", according to the Supreme Court, "does not prohibit the termination of contracts, but rather removes the coverage of the dismissal due to business difficulties". In other words, the true objective of the legislation is that dismissals for objective reasons or collective dismissals which, in the absence of such legislation, would be fair or lawful, cease to be fair or lawful in the terms regulated by it. The purpose of the statutory provision, therefore, if we follow the court's reasoning, is that dismissals which, without the exceptional legislation passed due to the pandemic, would be objectively justified, cease to be justified. What is provided for in the legislation is the treatment of potentially justified dismissals, which, due to a decision of parliament, in the exceptional situation arising from the pandemic, cease to be justified. However, the legislation does not change the concept, and the treatment, of unjustified or unfair dismissals.

Before, and after, Royal Decree-law 9/2022, unfair dismissals and void dismissals are subject to the same legal treatment. No legislative change occurs in this respect. Of course, there is no basis in any case for the creative interpretation adopted by the judgment overturned by that of the Supreme Court that the legislation provided job protection, in the face of the pandemic, similar to that reserved for fundamental rights. This is so for the sound reasons spelled out by the Supreme Court among which I wish to emphasize the equating of the right to work (article 35 of the Spanish Constitution) with freedom of enterprise (article 38). Both provisions, according to the Supreme Court, are included in the same section of chapter two of title I of the Constitution, and therefore "it does not seem that there can be an inappropriate alteration of rank or of protection between them, although parliament gives weight to one or the other as it adopts its decisions".

All of this is very rightly summarized in the assertion in the judgment (point five of the legal grounds, section 3) that "Royal Decree-law 9/2020 does not contain a genuine prohibition of dismissal, but rather a temporary restriction of its fairness; during that time frame, so to speak, the applicability of the provisions regarding the aforementioned grounds for dismissal for objective reasons, collective dismissal or due to force majeure has been suspended". Dismissals in violation of fundamental rights, in the terms recognized by the case law, and recalled by the judgment at hand, are still null and void. The presence of dismissals without a "proven reason, whatever the reason relied on by the employer (or even the absence of any reason), leads to unfair dismissal", whose legal rules are also still the same. The change lies in the fact that dismissals which, without the provisions of article 2, would be considered fair, may become unfair if the reasons on which they are based are those referred to in the provision (arising from the pandemic).

The latter is subject to an important qualification. The Supreme Court explains, relying on the judgment of the same chamber of March 16, 2022 (239/2022) (in a cassation appeal also handled by Garrigues), that article 2 of the Royal Decree-law 9/2022 "is not applicable when the origin of the economic or production reasons justifying the dismissal had commenced before the pandemic and arose from a structural or sectoral crisis, but not from the health crisis". Therefore, despite the *decriminalization*, in the words of the Supreme Court itself, carried out by the above-mentioned article 2, "if the employer proves the existence of a structural situation, it can decide on a collective dismissal" (or, it should be added, dismissal for objective reasons).

A final comment: the Supreme Court reaffirms the case law regarding the unfairness of dismissals for no reason. A dismissal for no reason must be considered unfair and not null and void, and this complies with the alternative remedy provided for in article 10 of Convention 158 of the International Labor Organization (ILO), which expressly provides for compensation as a possible consequence of the breach of the principle requiring that reasons are given for the dismissal. Although the Supreme Court does not consider it, because it was not raised in the case, it must be concluded that Spanish legislation in this respect also complies with article 24 of the European Social Charter, which provides for the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief. The sufficiency of the compensation provided by Spanish legislation in cases of unfair dismissal can be disputed (as is done in the complaint brought by the labor union UGT to the European Committee of Social Rights), but not their options regarding the classification of dismissals and the instruments provided to address their unfairness.

2. News

Dismissals that do not comply with what is known as the "prohibition of dismissal" during the pandemic are not null and void

As we reported in our alert, the Plenary Session of the Labor Chamber of the Supreme Court has delivered a judgment on the so-called "prohibition of dismissal" in article 2 of Royal Decree-law 9/2020, in the context of the health crisis caused by COVID-19. In that judgment it concludes that a dismissal that has occurred outside the provisions of the above-mentioned legislation should not be classified as null and void.

The judgment was delivered by the Supreme Court due to a cassation appeal for unification of case law which was handled by counsel from Garrigues, thus settling an intense legal debate among authors and courts since the start of the pandemic.

In his tribune, Federico Durán enlightens us on the content and importance of the judgment.

The work calendar in Spain for 2023

The Official State Gazette has published the Resolution of October 7, 2022, of the Directorate General of Labor, publishing the list of public holidays for 2023.

European minimum wage directive published

As we reported in our alert, Directive (EU) 2022/2041 of the European Parliament and of the Council of October 19, 2022 on adequate minimum wages in the European Union has been published in the Official Journal of the European Union. For the purpose of improving living and working conditions of workers in EU territory, the directive establishes procedures for the adequacy of statutory minimum wages, promotes collective bargaining on wage-setting and enhances effective access to minimum wage protection for workers entitled under applicable national legislation.

Member States must adopt the necessary measures to comply with the provisions of the directive not later than November 15, 2024.

Spain ratifies the Additional Protocol to the European Social Charter providing for a system of collective complaints to the Council of Europe

The Official State Gazette published on November 2, 2022 the Instrument of ratification of the Additional Protocol to the European Social Charter providing for a system of collective complaints, done at Strasbourg on November 9, 1995. As we reported in this alert, with the ratification of the protocol, Spain definitively adopts the entire system of the European Social Charter, which will come into force for Spain on December 1, 2022, although it was already being provisionally applied since July 1, 2021.

The labor union UGT files a complaint regarding the current system of dismissals in Spain

Applying the mechanism for collective complaints to the Council of Europe, the labor union UGT has filed a complaint against the current Spanish system of dismissal. The complaint lodged, admitted for consideration by the European Committee of Social Rights (ECSR), argues that the Spanish system of dismissal is manifestly in breach of article 24 of the European Social Charter and Convention 158 of the International Labor Organization. In the labor union's view, the compensation for dismissal must provide a sufficient remedy proportionate to the damage caused to the worker, which, its opinion, is not currently provided for persons who have been employed for a short time.

In relation to this complaint, the Labor Minister, Yolanda Díaz, has put forward a possible dismissal reform, proposing to draw a distinction between compensation according to factors such as gender, age or the worker's personal circumstances. However, the minister has stated that the focus of such reform must revolve around the grounds for dismissal and not the amount of the compensation.

Publication of the order approving the job evaluation procedure with a gender perspective

The order has been published whose purpose is to approve and publicize the job evaluation procedure with a gender perspective provided for in Royal Decree 902/2020, so as to ensure the effective application of the principle of equal treatment and nondiscrimination between women and men in relation to pay, as we reported in this alert.

The Government approves the Draft National Budget Law for 2023

The Council of Ministers has approved the Draft National Budget Law for 2023 to be approved by Parliament. The draft allocates six of every ten euros to social expenditure and provides for the making of a contribution to the Social Security reserve fund for the first time in 13 years. All new aspects of the draft budget can be consulted at the following link.

Social partners continue to negotiate the minimum wage for 2023

The positions of employees and labor unions are increasingly further apart, as the latter seek to set the minimum wage at 1,100 euros monthly due to inflation.

3. Judgments

The Constitutional Court again validates video surveillance evidence for disciplinary purposes

The Constitutional Court, in a judgment of September 29, 2022, holds that video surveillance evidence obtained in a video monitored area is lawful, even if the dismissed worker had not been expressly informed.

In order to reach that conclusion, the court considers that (i) cameras had previously been used for disciplinary purposes, (ii) they were used to verify a specific fact based on a suspicion backed by circumstantial evidence and (iii) they were situated in locations visible to workers and to the public in general.

In short, the judgment considers that, since a justified, suitable, necessary and proportionate measure was involved, there has been no violation of data protection legislation nor of the right to privacy.

The National Social Court rules again on void clauses included in remote working agreements

The National Social Court *(Audiencia Nacional)* rules again, in a judgment of September 12, 2022, on the possible nullity of various clauses included in remote working agreements. In the scenario analyzed, the plaintiff labor unions question the legality of several clauses of remote employment contracts signed with workers.

The National Social Court partially upholds the claim, declaring null and void: (i) the provision that "the employer shall reply in writing indicating acceptance of the request in view of its possibilities" and the (ii) provisions of the clause that "remote working time shall be determined by his superior in view of the department's needs". It is explained that by such clauses: (i) the worker's voluntary decision is made subject to the employer's possibilities and (ii) the determination and alteration of the percentage of face-to-face work is being left in the employer's hands.

On the other hand, the clause establishing different notice periods for exercising reversibility is considered valid (15 days for the employer and 1 month for the worker). The clause establishing a notice period of 5 working days to increase, from time to time, face-to-face workdays is not considered unlawful either.

The National Social Court had already ruled declaring various clauses void as unfair, inter alia, in the judgment of March 22, 2022.

The CJEU holds that the prohibition of wearing any visible sign of religious beliefs does not constitute direct discrimination if it is applied in a general and undifferentiated way

The judgment of the Court of Justice of the European Union of October 13, 2022 has ruled on the request for a preliminary ruling filed by the Brussels French-speaking Labor Court, regarding whether the terms "religion or beliefs" which appear in the Directive on equal treatment in matters of employment and occupation should be interpreted as two sides of the same protected criterion or, on the other hand, as two different criteria. It also asks the European court whether the prohibition of wearing a sign or an item of clothing with religious connotations, included in the company's internal employment regulations, constitutes direct discrimination on religious grounds.

In this respect, the CJEU rules that article 1 of Directive 2000/78 should be interpreted as meaning that the terms "religion or beliefs" appearing in that article constitute a single ground of discrimination, covering both religious belief and philosophical or spiritual belief.

The Court of Justice also points out that a provision of a company's internal employment regulations which prohibits workers from manifesting, through words, clothing, or in any other way, their religious or philosophical beliefs, whatever those beliefs may be, does not constitute, with regard to workers who intend to exercise their freedom of religion and conscience through the visible wearing of a sign or an item of clothing with religious connotations, direct discrimination "on the [ground] of religion or belief" within the meaning of EU Law, provided that such provision is applied in a general and undifferentiated way. However, the CJEU points out that a rule of that kind may constitute a difference in treatment, if it is established that the apparently neutral obligation results in persons adhering to a particular religion or belief being put at a particular disadvantage.

The Supreme Court rules that the amount of the attendance and punctuality supplement cannot be reduced for workers with reduced working hours due to legal guardianship

The Supreme Court, in its judgment of October 4, 2022, confirms that an employer's practice of applying a proportional reduction of wage supplements known as "attendance" and "punctuality" for persons with reduced working hours due to legal guardianship provided for in article 37.6 of the Workers' Statute must be considered void.

It explains that the wording of the collective agreement regulating such supplements is clear, and that the attendance and punctuality supplement does not depend by any means on the time worked, nor on the employee's longer or shorter workday. It points out in this respect that, since it is not a

supplement that depends on the number of hours worked, it does not make sense to reduce its amount according to whether the worker has reduced working hours due to legal guardianship.

The court also confirms this criterion by adopting the so-called "gender perspective", pointing out that the interpretation of the attendance and punctuality supplement provided by collective agreement in these cases is important from the perspective of discrimination laws, since empirical evidence proves that it is mainly women who exercise the right to the reduction of working hours due to legal guardianship.

The National Social Court annuls a clause which allows teleoperators to be dismissed for underperformance

In its judgment of October 13, 2022, the National Sicuak Court ruled on the claim in a collective dispute brought by various labor unions challenging a clause which added the company to the teleoperators' contracts and allowed them to be dismissed if they failed to reach certain monthly production targets.

The National Social Court upholds the claim and considers the clause void since it is a clause that is not negotiated and is imposed by the employer, so that "the worker's failure to accept it is equivalent to not signing the employment contract". It also considers that the clause is manifestly unfair, since it applies "*ipso facto* as grounds for termination of the contract ignoring the subjective or objective elements that may have impacted on such underperformance".

At the same time, it considers that the right to collective bargaining is also being violated, because the employer has resorted to individual contracting on a mass scale. In this respect, it points out that since a voluntary and continuous drop in performance is penalized by dismissal on disciplinary grounds in the collective agreement, "the insertion of the contested clause by mass-scale individual bargaining amounts to ignoring the terms agreed in the Collective Agreement and dispensing with the necessary voluntariness of the underperformance so as to constitute grounds for disciplinary dismissal, in addition to avoiding the guarantees regarding disciplinary dismissal imposed by substantive (art. 55 Workers' Statute) and procedural laws (arts. 105 et seq. of the Labor Jurisdiction Law), as well as art. 58.1 of the Workers' Statute which renders the system of penalties for breaches of contract subject to collective bargaining".

When the three-month period has elapsed, any resolution that is issued on the request for registration of an equality plan can only be affirmative

The High Court of Justice of Madrid, in its judgment of September 30, 2022, rules on a claim filed by a company requesting that the resolution refusing registration of an equality plan be declared void, on the grounds that positive administrative silence has taken effect, since the three-month period has elapsed without an express resolution having been issued.

The court fully upholds the claim and declares the contested resolution unlawful, annulling it, on the grounds that positive administrative silence has applied, upholding the admission of the registration application and registration of the equality plan at the labor authority. It explains in this respect that, in accordance with the provisions of article 24.3g.a) of Law 39/2015, when the three-month period has elapsed, the authority's resolution could only have been to accept the request for registration of the equality plan.

4. Garrigues Labor and Employment and Sustainable

The European Parliament approves the proposal for a Directive on corporate information regarding sustainability

European Union (EU) companies will be required to disclose information regarding the impact of their activity on people and the planet, and regarding the sustainability risks with which they are faced.

The Council of the European Union endorses the Directive regarding the gender balance on boards of directors of companies

The legislation provides that at least 40% of the directors of listed companies must belong to the underrepresented gender.

Nonfinancial information statements: the legal requirements to be taken into account for 2023

Before the end of the year, it is important to know the new developments that will affect the obligation to draw up the nonfinancial information statement of the year 2022 in Spain as well as the prospects regarding the future sustainability report.

7th Anniversary of Agenda 2030: 10 initiatives to lead change from the private sector

Companies play an important role in the adoption of Sustainable Development Goals. We review some of the most relevant initiatives and actions that are being adopted by the private sector so as to comply with Agenda 2030 and contribute to change.

5. In the Labor and Employment Blog

Can effective compliance with a disciplinary penalty be postponed until it is final?

In general, the disciplinary employment penalty, once it has been imposed, is directly complied with by the worker, although they contest it in the courts. However, can there be an alternative formula consisting of the imposition of a penalty with postponement of effective compliance with it until it is final, either because the worker has not contested it in the courts or because, although they have contested it, it has been confirmed by the courts? A recent judgment endorses this possibility.

Teleworking from different locations impacts on occupational risk prevention

From the perspective of occupational risk prevention, the possibility of teleworking from different locations may involve an increase of costs, and also difficulties when ensuring adequate protection for the worker from job-related risks.

The wrongful apportionment of extraordinary payments may cease to have consequences for the employer

A Supreme Court judgment reopens the debate regarding the possible consequences for the employer of the apportionment of extraordinary payments when the collective agreement expressly forbids it.

Social Security contributions are not paid on teleworking expenses

According to the News Bulletin Red 3/2021 of the General Social Security Treasury, compensation paid by employers to workers for teleworking-related expenses is excluded from the contribution base.

The challenges posed by data protection in relation to employment

The technological evolution, globalization and the use of the Internet constantly raise new questions regarding how to act in situations that may affect personal data protection. This is particularly important in the employment area, in which numerous situations arise in which it is necessary to analyze the impact of employers' decisions in relation to the protection of workers' personal data.

New clues in the international teleworking labyrinth

The Administrative Commission for the Coordination of Social Security Systems of the European Commission has published guidelines on international teleworking and the Social Security system applicable where work is done remotely within the European Union.

Towards a due diligence law for the protection of human rights in relation to employment

The eradication of child and forced labor, combatting discrimination at work and protection and respect for human rights also form part, together with other measures (for example, to combat the environmental impact), of the principles contained in the UN commitment acquired in Agenda 2030 for sustainable development which Spain assumed in 2015.

The National High Court outlines the requirements that must be met by teleworking agreements and the consequences of a possible breach

Teleworking poses a challenge for employers, who must regulate internally its practical application. A National High Court judgment indicates the most important aspects to be taken into account in teleworking agreements.

Equal Pay Day: the achievements to date and the remaining challenges

September 18 marks the third anniversary of the approval by the United Nations (UN) of International Day for Equal Pay between women and men, which reminds us of the efforts made, and those still pending, to achieve true equality between both sexes at work.

6. In the press

La "pinza" contra la reforma laboral (The “clamp” against the labor reform)

Article by Federico Durán, of counsel of the Garrigues Labor and Employment Department ('Expansión').

¿La enfermedad es una causa de discriminación? (Is illness grounds for discrimination?)

Article by Nicolás Clark, principal associate of the Garrigues Labor and Employment Department ('Cinco Días').

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