Labor Newsletter

GARRIGUES

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1. Nullity of collective dismissal and freedom of enterprise

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Non-compliance with collective dismissal procedures can be sanctioned in various ways, but, in most cases, the execution of a judgment of nullity of a collective dismissal could not be carried out without violating the freedom of enterprise.

The "liberalization" of collective dismissals, with the suppression of prior administrative authorization for their execution, was carried out, in our legal system, following an inappropriate parallelism with the regulation of individual dismissals. The emphasis is placed, by the legislator -and in this wake are placed, reinforcing its features, administrative practice and judicial doctrine-, on the causes that can legally justify collective dismissal and on the judicial control of the same. Causality and control, together with economic compensation (compensation for those dismissed), are fundamental elements on which the regulation of collective or economic dismissals is based. Suffice it to note that the treatment that can be given by judicial decisions to collective dismissals is, mutatis mutandi, that of individual dismissals: the dismissal can be judicially classified as lawful (fair), not lawful (unfair) or null and void.

This regulatory approach is at the origin of the high level of litigation surrounding corporate restructuring processes and of the numerous problems that have arisen in connection with the judicial control of dismissals. If a priori administrative control was replaced by a posteriori judicial control, this was done without taking into account the particularities of collective dismissals. If in individual dismissals what is at stake is a breach of contract (or the concurrence of supervening circumstances particularly onerous for the continuation of the contractual relationship), in collective dismissals other factors come into play, entirely removed from the vicissitudes of contractual compliance, such as, above all, the freedom of enterprise, on the one hand, and the defense of employment on the other.

As regards the freedom to conduct a business, it cannot be said that the legislator has been very sensitive to its requirements. The Spanish legislation, which substantially transposes the European directive (Directive 98/59/EC), ignores the fact that the latter focuses, without questioning the freedom of enterprise, on guaranteeing, on the occasion of collective redundancies, respect for procedures for informing and consulting workers in order to deal with employment problems, in particular through the adoption of (accompanying social) measures aimed at reducing the scope of the redundancies or alleviating their consequences. The Community regulation, as has recently been recalled (Navarro Nieto, Medidas sociales de acompañamiento y mantenimiento del empleo), seeks to establish a (participatory) procedure to be respected for the execution of company decisions, without calling into question the freedom of enterprise and the power to decide on collective redundancies that is inherent to it (some time ago, the CJEU stated, in a 1995 judgment, that "the Directive has as its exclusive purpose the partial harmonization of collective redundancy procedures, and is not intended to restrict the freedom of undertakings to organize their activities and structure their personnel department in the manner which appears to them to be most suited to their needs"). When judicial control of the causes of collective dismissal is not limited, as is the case here, to the verification of compliance with formal or procedural requirements, but extends to the assessment of the adequacy, reasonableness or proportionality of the measures adopted by the employer, or to the subsistence and intensity of the causes alleged to justify them, the door is being opened to a much more intense judicial control of corporate decisions, which can severely limit, or nullify, the freedom of enterprise.

For this reason, as the recent trend in judicial doctrine (in emblematic rulings on the nullity of collective dismissals) clearly shows, the aim has been to condition corporate decisions and strengthen their judicial control. The protection of employment, the defense of the social interests affected by corporate restructuring processes, has been placed in the hands of the judges, forgetting that "the social judge is not the best solution in the management of employment" (Navarro Nieto).

In its extreme manifestation, this has sometimes led to the configuration of administrative and judicial intervention in collective dismissal procedures as being aimed at avoiding, at all costs, the execution of the dismissals and the adoption of the planned corporate restructuring measures. This is neither a reasonable approach nor in accordance with European regulations. The latter always bears in mind that collective or economic dismissals are based on the freedom of enterprise and that it is not a question of denying this freedom but of conditioning its exercise through participatory procedures to pay adequate attention to social interests (employment and reindustrialization policies) and individual interests (training actions, outplacement, economic compensation). The perspective that has prevailed among us (and which has also conditioned the trade union attitude which, on many occasions, has no other negotiating approach than that of opposing any dismissal) has led, among other things, to the fact that the central element in collective dismissal processes has been that of compensation. The discussion on the amount of severance pay has left outplacement processes, training policies to facilitate the return to the labor market and other social support measures in the dark.

If we add to all this the inadequate regulation of the judicial qualification of dismissals and their consequences, it is easy to conclude that the entire legal treatment of collective dismissals should be reviewed. In particular, the figure of nullity of the dismissal should disappear in the case of collective dismissals. Not only because of the judicial excesses that it allows (it has even been argued that the nullity of the dismissal is based on the absence of good faith on the part of the company, since it always had the intention of dismissing; but alma de cántaro, if the company had no intention of dismissing, what would be the reason for a collective dismissal), but, above all, because of the situations that it provokes. Non-compliance with collective dismissal procedures can be sanctioned in various ways, but, in most cases, the enforcement of a judgment of nullity of a collective dismissal could not be done without violating the freedom of enterprise.

In this regard, the order of the Audiencia Nacional, Sala de lo Social, 23/21, dated March 5, 2021, is very interesting. The order asks whether a judgment of nullity of a collective dismissal can be enforced in its own terms, to which it responds taking into account the right to free enterprise (Article 38 of the Spanish Constitution), the freedom of establishment in the Community sphere (Article 49 of the TFEU), and the fact that the resumption of the productive and labor activity "is an organizational decision that is the exclusive responsibility" of the company, in exercise of the "constitutionally recognized right to freedom of enterprise". Therefore, the order considers that we would be in the presence of a "personal obligation to do", that is, "an obligation to do that is not susceptible to be carried out by a third party at the expense of the defendant", so that its refusal "to reinstate the workers in their previous working conditions must be equated to the legal impossibility of readmission". Since the reopening of the production facilities "depends on a decision to be adopted by the defendant in the free exercise of its freedom of enterprise and establishment, not being susceptible of being replaced by any activity of the court, we must conclude that there is a legal impossibility of readmission in its own terms", which leads the Court to the application of article 286 of the LRJS, declaring the termination of the labor relationship of the workers, with the payment of an additional indemnity of 15 days per year of service (with a maximum of 12 monthly payments).

As we can see, everything results in an increase in the cost of business decisions and employment protection is once again limited to the indemnity aspect. This justifies the revision of the regulations on collective dismissals, and above all of the figure of the nullity of such dismissals.

2. News flashes

The Government sets the objective of reforming the labor market before 2022

The Executive intends to negotiate labor market reforms with the social partners during the year 2021. Specifically, it will address issues such as collective bargaining, subcontracting, internal flexibility, reform of hiring models and active employment policies.

Among the Government's objectives is the use of European funds to implement a "new permanent mechanism for employment stability and support for transition processes" for sectors affected by high seasonality or suffering a significant drop in demand, whether cyclical or structural in nature.

ERTEs will be maintained until May 31, 2021 while talks continue between the Government and the social partners on additional extensions

The Directorate General of Labor has confirmed that the ERTEs due to force majeure are extended until May 31, 2021, as established in Article 1 of Royal Decree-Law 2/2021 (regardless of the end of the state of alarm on May 9, 2021).

Likewise, the Government and the social agents continue negotiations on an additional extension of the ERTEs beyond May 31, 2021. As in previous occasions, the Government's proposal is to continue with the current scheme, keeping in force the measures adopted to date such as the "employment safeguard" and the misnamed "prohibition to dismiss".

The compensation registry tool is now available

On the web page of the Women's Institute, the tool for the remuneration register, prepared jointly by the Ministry of Labor and Social Economy and the Women's Institute of the Ministry of Equality, has been published, which has also been agreed with the social partners, as we reported in our alert of April 15.

This tool establishes the format of the remuneration register that all companies must draw up in compliance with the provisions of Article 28 of the Workers' Statute and Royal Decree 902/2020 on equal pay for women and men. The tool is accompanied by a user guide and an illustrative example.

It is, in any case, a voluntary model to try to facilitate compliance with the legal obligation.

Labor Inspectorate publishes Technical Criteria No. 104/2021 on psychosocial risk actions

On April 14, 2021, the Labor and Social Security Inspectorate (ITSS) published the Technical Criteria on actions regarding psychosocial risks.

The technical criterion is structured around the three most frequent inspection actions in this area: (i) actions to control the preventive management of psychosocial risks; (ii) actions motivated by complaints from workers due to exposure to these risks; and (iii) actions on damage to health and occupational accidents caused by such exposure.

Through the aforementioned criterion, the ITSS aims to update the criteria for the homogeneous application of the current regulations on psychosocial risks.

Spain transposes the new Directive on the posting of workers in the framework of a transnational provision of services

On April 27, the BOE published Royal Decree-Law 7/2021 which, among other matters, amends several aspects of Law 45/1999 on the transnational posting of workers, as we pointed out in this alert of April 28.

As the most important novelty, the new regulation establishes that when the effective duration of a posting exceeds twelve months, the companies must guarantee (regardless of the law applicable to the employment contract), the working conditions provided by Spanish law with the exception of (i) procedures, formalities and conditions for the conclusion and termination of the employment contract, including non-competition clauses; and (ii) supplementary retirement schemes.

Likewise, Law 14/1994, of June 1, 1994, which regulates temporary employment agencies, as well as Royal Legislative Decree 5/2000, of August 4, 2000, which approves the revised text of the Law on Infractions and Penalties in the Social Order, are amended to guarantee equal remuneration and treatment between temporary workers assigned by temporary employment agencies and workers of the user company in the host State.

3. Judgments

The majority of judicial doctrine is in favor of the "prohibition of dismissal" only entailing unfair dismissal

The majority of court rulings have considered that Article 2 of Royal Decree-Law 9/2020 means that the causes related to COVID-19 cannot be considered justified and, consequently, the dismissal must be declared unfair, but not null and void. In this regard, we can highlight the rulings of the High Court of Justice of Madrid of November 25, 2020 and February 2, 2021; of the High Court of Justice of Castilla y León of February 24, 2021 and January 15, 2021; of the High Court of Justice of Galicia of February 8, 2021, or the recent ruling of the Plenary of the High Court of Justice of Catalonia of March 31, 2021.

On the other hand, other rulings have concluded the nullity of the dismissals, among others, that of February 23, 2021, or that of April 20, 2021 of the High Court of Justice of the Basque Country, which has declared the nullity of the dismissal, but limiting the effectiveness of the reinstatement and the accrual of processing wages until the date of termination of the temporary contract (internship) that the worker had.

Non-compliance with the obligation to prorate special payments allows employees to claim, in addition, the amount already paid on a pro rata basis

The Supreme Court, in its ruling of February 8, 2021, has stated that if the labor agreement establishes that special payments cannot be paid on a pro rata basis, it can be understood that the amount paid each month corresponds to items other than the special payments, even though they were paid under such concept, and the amount corresponding to them can be claimed.

The change in the setting of bonus objectives does not constitute a substantial modification of working conditions when this possibility is established in the individual agreement

The National Court, in its ruling of March 4, 2021, examined a case in which it was established by contract that the company had the authority to develop and communicate the variable remuneration objectives, without subjecting their modification to negotiation with the union representatives. The objectives were communicated annually at the beginning of each fiscal year.

In this case, the National Court considers that there has not been a substantial modification taking into account that the individual agreement contemplated the possibility of modifying the objectives and that the modification has not affected the dignity of the workers, their fundamental rights nor are they unattainable objectives.

The Constitutional Court admits that a dismissal carried out with a test that has violated fundamental rights may be unjustified

In a recent judgment, the Constitutional Court has declared valid the qualification made by the High Court of Justice of Madrid, which considered that the dismissal based on evidence obtained in violation of fundamental rights should be qualified as unfair and not null and void.

Thus, the High Court of Justice of Madrid considered that a distinction must be made between dismissal with violation of fundamental rights and dismissal in which there has been a violation of fundamental rights in the process of obtaining evidence of the facts motivating the dismissal, so that in the first case the dismissal must be declared null and void and in the second case unfair. Well, the Constitutional Court considers that this interpretation is neither arbitrary nor unreasonable, pointing out that it has been the interpretation accepted by many courts in the absence of a pronouncement by the Supreme Court.

The High Court of Justice of Madrid overturns a judgment requiring reinstatement in the event of unfair dismissal

In the lower court decision, a labor court of Madrid declared the unfairness of a dismissal, considering that the effects provided for in Article 56 of the Workers' Statute (reinstatement or payment of compensation) should not be applied, but that the employee should be reinstated in the company in accordance with the provisions of ILO Convention 158 and the European Social Charter.

For its part, the High Court of Justice of Madrid, in its rulings of March 17 and April 23, 2021, states that Article 10 of Convention 158 does not require the reinstatement of the worker, so that the employer, in the event that the dismissal is deemed unfair, has the option to opt for reinstatement or pay the corresponding legal compensation.

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