Labour comment

Disciplinary dismissal null and void due to disability and/or long-term temporary disability: The judgment of the SCJ Madrid of 8 March 2017

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When a disciplinary dismissal is due to the inevitable negative repercussions of illness or medical leave on the performance of the employee, as a rule such an approach will determine that it is illegal and unlawful. However, it will not determine that said dismissal is null and void due to discrimination or a violation of fundamental rights.

However, according to the doctrine of the Court of Justice of the European Union, the situation could be different if the illness of the employee is long-term, since such a situation could be considered a "disability" as described in Directive 2000/78.

With regards to above, it is important to comment on the judgment handed down by the SCJ Madrid on 8 March 2017 (RS 1172/2016) in action filed against the dismissal against the firm Fundación Adecco para la Integración Laboral, which revokes the unlawfulness of the dismissal agreed by SCJ no. 4 of Madrid and declares said decision null and void for two reasons: the fact that the employee was disabled, and the fact that her employment contract was terminated following "long-term" temporary disability (TD) due to illness.

- The relevant background facts of the case were as follows:
- The employee had provided services to the company since 28 October 2011 as a Level 1 administrative official and project manager.
- The employee, who had previously suffered episodes of vomiting and diarrhea at her place of employment (the reason for her absence on several isolated occasions), was stood down as a result of TD on 2 June 2014 with a diagnosed fever and other physiological problems, the causes of which are unknown. She was attended to by Sermas (Hematología y Medicina Interna de La Paz), who issued probable diagnoses of essential thrombocytosis, celiac disease and lymphocytic colitis.
- When submitting successive medical certificates to her employer, she told her employer about the various medical tests being conducted on her and the opinions of medical personnel in relation to her illness.
- Pursuant to a decision handed down by the INSS on 2 June 2015, it was agreed that TD would be extended once the employee has been in a state of TD for 365 days. She was given a medical discharge on 20 November 2015.
- On 23 November 2015 the employee returned to work, and she had no computer in working order. On 24 and 25 November 2015, she did not go to work due to health reasons. She was on holiday leave from 27 November to 14 December 2015.
- She was dismissed on 15 December 2015.
- The employee requested that she be recognised by the CAM as having a degree of disability. On 26 February 2016, she was informed that she was recognised as being 48% disabled.

The judgment to which these comments refer is based on the response provided by the Court of Justice of the European Union to the preliminary ruling handed down by Labour Court no. 33 of Barcelona in relation to the possible annulment of dismissals of employees who are on medical leave, dismissals which, until that point, had been considered unlawful under case law doctrine.

To this end, the judgment of the Territorial Court states that the CJEU admits the possibility that the dismissal of employees on medical leave could be considered null and void rather than unlawful if the temporary disability can be considered long-term. As a result, the employees in question could be considered disabled, with the dismissal of said individuals moving into the realms of discrimination.

For the CJEU, the judge in each case must determine whether the perspective of the medical leave given is or is not well demarcated to classify the dismissal as unlawful or null and void on the grounds of discrimination due to disability.

In the case of interest here, the Labour Court of Madrid understands that there was a long-term limitation of the capacity of the employee due to a common illness that saw the employee classified as 48% disabled. This made it virtually impossible for her to be reinstated, as demonstrated by her various discharges and subsequent periods of medical leave, which, of course, prevented her from fulfilling her duties to levels of effectiveness, performance and continuity required in the labour market.

Other circumstances the SCJ Madrid took into account when handing down its judgment were as follows:

1.- The employee was not accused of any of the workplace violations provided for in article 54 of the ET for her to be dismissed on the grounds of a serious and negligent breach of her professional obligations.

2.- The existence of numerous and repeated periods of medical leave for common illness and immediately associated with the dismissal for which she was TD.

3.- The recognition of a level of disability calculated at 48% from 10 June 2015 whilst on medical leave, once she had used up her 365 days' medical leave. On 2 February 2015, her medical leave was extended pursuant to an INSS resolution until 20 November 2015. Under the terms of this resolution, she was medically discharged even though she could not perform her duties once she had been reinstated.

Based on the above, the Labour Chamber concluded that **in this specific case** the "long-term" limitation classified as a 48% disability was met and the dismissal of the employee posed an obstacle in that it prevented her recovery and, as a result, her full and effective participation in the world of work under the same conditions as other employees as a result of her status as a disabled person or **person with a long-term temporary disability due to illness**, i.e. as a result of her health, the recovery and treatment of which is a fundamental right that cannot be indirectly ignored by dismissing her from her employment.

A number of lessons can be learnt from this important judgment of the SCJ Madrid and from the interpretation of Directive 2000/78 in the judgments handed down by the CJEU on 11 July and 1 December 2016, and from the most recent case law and legal doctrine:

1.- A person who has been dismissed by their employer exclusively due to an illness does not fall within the general framework established by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to combat discrimination on the grounds of disability.

2.- The prohibition on dismissals on the grounds of disability (as per arts. 2, paragraphs 1 and 3, paragraph 1, part c) outlined in Directive 2000/78 is opposed to dismissal on the grounds of disability, which, in view of the obligation to make reasonable adjustments for disabled persons, cannot be justified on the grounds that the person in question is not competent, trained or available to perform the fundamental tasks of the position in question.

3.- It is incumbent on the Court of First Instance to prove whether the limitation of the capacity of the interested party is long-term in nature, given that such an assessment is, first and foremost, factual.

4.- The long-term nature of the limitation must be analysed with respect to the status of the interested party as disabled as at the date on which the allegedly discriminatory action is taken against her.

5.- Signs that suggest that an illness is long-term include, in particular, the fact that on the date on which the alleged act of discrimination took place, it is not clear that the disability of the interested party will be overcome in the short-term and the fact that said disability can last for much longer before the person affected can recover.

The aim now is to find out how labour courts and tribunals interpret the concept of "long-term temporary disability". The solution is not trivial: in the event of an affirmative response, the absurdity of the termination of a contract will result in said dismissal being declared null and void, not unlawful.

With this approach, we highlight two judgments handed down by the Labour Chamber of the Superior Court of Justice of Catalonia. The first judgment, handed down on 3 April 2017 (RS 7641/2016), revoked the annulment set

forth in SCJ no. 3 of Barcelona of a termination of employment which occurred on 13 July 2015, in which the person dismissed had been temporarily disabled from 7 January to 17 March and from 4 June to 6 July 2015, with a relapse from 13 to 17 July of the same year. In other words, the person dismissed had been on medical leave for 69 days in the first phase and for 32 days in the second, with a period of service of 79 days in between.

The second judgment, which is dated 12 June 2017 (RS 2310/2017) and which revoked SCJ no. 33 of Barcelona, concludes that the dismissal of an employee who was on medical leave for an indeterminate period due to an industrial accident was not null and void but rather unlawful, based on the following reasons: (i) there had been no discrimination whatsoever on the grounds of disability, since there was no disability; (ii) the disability was reversible and, furthermore, barely two months had passed since the accident; and (iii) the employer did not consider the illness a segregating element, but rather that the reason was a function of the fact that the disability would inevitably have a negative impact on the performance of the employee.

Certainty, the abovementioned judgment of the SCJ Madrid, apart from the declaration of disability, also concludes that the dismissal should have been annulled due to the fact that the employee was temporarily disabled on a long-term basis. Of this there can be no doubt: by the time she had been dismissed, she had been on medical leave for 537 days (17.64 months).

It remains to be seen what new legal pronouncements are made to ensure a minimum level of legal security in all cases in which employers freely dismiss employees (for no legal reason whatsoever) because they are TD, bearing the cost of legal compensation and always bearing in mind that the dismissal must never be classified as null and void.

In this respect, we pose the question: in cases where there is no assumption that the employee can access a disability once they have been medically signed off as temporarily disabled for more than 70 days and their temporary disability is expected to continue, is this a “long-term” situation? Should this disability be of 100 days or more? We do not have the answer to this question.

What does seem clear is that businesses must exercise caution when dismissing without good cause individuals with a temporary disability or between periods of medical leave or discharge associated with illness.

For further information, please contact:

Alfredo Aspra

alfredo.aspra@AndersenTaxLegal.es

José Antonio Sanfulgencio

jantonio.sanfulgencio@AndersenTaxLegal.es