

Labour Comments

Null and Void Dismissal. Compensation for Moral Damage resulting from the Violation of Fundamental Rights

30th November 2017

Regarding the Supreme Court decision of 5th October 2017

The question to be discussed is whether or not additional compensation is appropriate, in the face of a declaration of nullity of a disciplinary dismissal for the judgement of an infringement of a fundamental right, if nothing is specified (neither in a complaint nor in an oral hearing) to the effect that business conduct has been particularly serious or has caused the worker harmful consequences of a moral or psychological nature, or of an economic nature.

In other words, if the compensation for violation of fundamental rights is imposed automatically, without the need to properly assert the bases and key elements of the amount claimed and without at least providing evidence, guidelines or sufficient points of support in the process that could be used to establish a compensatory sentence.

The regulation of the Labour Procedure Law (*Ley Procesal Laboral (LRJS)*) regarding the procedural modality of protection of fundamental rights and public freedom devotes its article 183 to "Indemnities". Its true scope is the one that is actually at the heart of the discussion, so we remind ourselves of its first two issues:

"1. Where the judgment declares that there has been an infringement, the judge shall rule on the amount of compensation, if any, payable to the plaintiff for having suffered discrimination or other infringement of their fundamental rights and public freedoms, on the basis of both the non-material damage resulting from the infringement of fundamental rights and the additional damage and injury resulting therefrom.

2. The court shall decide on the amount of the damage, prudentially determining it when the approval of its exact amount proves to be too difficult or costly, in order to sufficiently compensate the victim and to restore the victim, as far as possible, to the integrity of his or her pre-injury situation and to contribute to the purpose of preventing the damage".

In the prosecuted case that serves for the present labour commentary, the plaintiff insisted that the dismissal be null and void and of 30,000€ compensation for simple reference to the Labour Infringements and Penalties Law, without taking into account any other parameter, even though the Labour Court judgement started from the following relevant declared proven facts:

- The worker (a specialist telemarketing operator) provided his activity for the company (dedicated to telemarketing activity), full time, from November 2010, with a salary of 33.80€ per day with pro rata extra pay.
- In May 2012, he was elected member of the works council as a candidate on the list presented by the CCOO Trade Union.
- On November 18th, 2013 a lawsuit was filed against the employer and the worker appeared as a witness in the oral trial. Both the trial judgment (22-11-2013) and the appeal (23-5-2014) upheld the collective dispute claim.
- On February 14th, 2014, the company dismissed a worker, also affiliated to CCOO., who had testified at the trial.
- On 19 February 2014, the company dismissed the worker (claimant) on disciplinary grounds. He accuses him of having given false testimony at the trial, with serious harm to the company.

Courthouse nº 3 in Lugo on 15th July 2014, upheld the lawsuit filed in its entirety, ordered the annulment of the disciplinary dismissal and the payment to the plaintiff of an amount of 30,000€ as compensation.



The judgement of the High Court of Justice of Galicia of 30th March 2015 partially overturned the court ruling, overruling the sentence for the company to pay the additional 30,000€ compensation.

The supreme court judgement clarified, issued in the unification of doctrine, dated October 5th 2017 (RCUD 2497/2015; Caso Abante Business Process Outsourcing, S. L.) the appeal brought by the plaintiff was repealed, overthrew the judgment of the Territorial Court and upheld the conviction of the Lugo Courthouse, that is, the 30,000€ compensation.

The Employment division of the Supreme Court itself, in a clear exercise of self-criticism, acknowledges that its doctrine regarding compensation for the violation of fundamental rights has not been as uniform as would be desirable, describing up to three positions before arriving at the current jurisprudential doctrine.

And we ask ourselves, "What is the current thinking? In view of the new regulation that has been approved in this matter following the labour courts regulatory law, it is considered that the enforceable identification of "relevant circumstances for the determination of the compensation requested" should be excepted in the case of moral damages linked to the violation of the fundamental right when it is difficult to estimate in detail".

In this way it is emphasized in the High Court decision that:

If the text of the labour courts regulatory law linking the violation of fundamental rights and the reparation of the moral damage to the payment of an indemnity is not correct then the application is rejected for not having proven the basis for the calculation of the loss.

- If there has been an infringement of fundamental rights, insofar as it has been transferred to the labour court, it must be the object of full compensation. In the case in question, where it is proven that fundamental rights have been infringed (compensation, linked to the transmission of truthful information and the exercise of representative functions by employees), it must be agreed that the claimant should be reinstated to the full extent of his right.
- The doctrine according to which the amount of compensation reasonably fixed by the tribunal of first instance should only be corrected or suppressed when it is excessive, unfair, disproportionate or unreasonable is considered valid.
- Similarly, the use of the guiding criterion for financial penalties provided for in the Labour Infringements and Penalties Law for infringements by employers has been accepted by constitutional jurisprudence (Judgement of the Constitutional Court 247/2006) and can continue to be considered a reasonable parameter.

To conclude, the supreme court sentence underlines that this is dire business conduct that appears as retaliation for having exercised a right, the exercise of the right is at the same time the fulfilment of a duty, the violation is associated with dismissal and that in these conditions, which resort to sanctions provided for very serious business infringements seems logical.

In addition, Article 8 (2) of the legislation on labour infringements and penalties considers 'infringement decisions by the employer which constitute unfavourable treatment of workers in reaction to a complaint within the undertaking or to an administrative or judicial action seeking compliance with the principle of equal treatment and non-discrimination' very serious.

Considerations that lead the Labour Chamber to maintain as adequate the indemnity amount of 30,000€ established in the Courthouse, since it does not appear to be unreasonable or arbitrary. Necessary conclusions to the wording of the previous supreme court sentence that seem to be very important in business practice would be:

1^a. - Faced with an alleged violation of fundamental rights, the viability of the compensatory sentence for moral damages caused is assumed almost automatically, without the need to prove a specific injury, simply quoting the legislation on labour infringements and penalties.

2^a. - It could happen that in the medium term, when declarations of violations of fundamental rights and the complete nullity of the employer's actions (in the terms of art. 182 legislation on labour infringements and penalties) occur, they necessarily come with a specific compensation.

Depending on the specific case, economic convictions may also occur (in the correct interpretation of art. 183 legislation on labour infringements and penalties), and this may occur without specific material damages having been proven, since, as the Supreme Court states, the duty to quantify the damage can be determined prudentially when, as is the case as a rule for moral damages, proof of its exact amount is too difficult or costly.

3^a.- Admitted as a guideline criterion for the purpose of fixing compensation for moral damages the recourse to the criteria of the legislation on labour infringements and penalties, we must remember that the compensation set in the analysed case (30.000. -€), has moved within the average level of very serious infringements (25,001 to 100,005€ [Article 40 legislation on labour infringements and penalties]) and that its amount to the Social Chamber has seemed reasonable and not arbitrary.

If we compare the compensation awarded in the case in question with the worker's gross annual wage, the meaning is that he has been compensated with practically two and a half years of his annual salary (12,337€) for the simple violation of a fundamental right.

Does this mean that with the express reference to legislation on labour infringements and penalties, this equalization parameter (2.5 of the gross annual wage,) can be granted in the future? We question whether a worker with a gross annual wage of 40,000€ would easily access the indemnity amount of 100,000€ as non-pecuniary damage? Would the amount be considered excessive, unfair, disproportionate or unreasonable? In the event of higher salaries, will the amount of 100,005€ operate as an indemnity cap if relevant circumstances are not expressed and proven for the determination of the indemnity?

These are questions that do not have answers at the moment, so we will have to be aware of what is resolved in future judicial pronouncements. In any case, the subsequent recommendation is obvious and involves articulating legal defences that, both procedural and substantive, are solid and carefully tailored to the specific case, since, as the reader is well aware, many procedures in the area of fundamental rights respond to questions of ordinary legality.

For your information and knowledge, you can consult the supreme court sentence of 5th October on the following [link](#)

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