SPAIN

Supreme Court (Social Chamber)
Decision of 23 March 2000

Void dismissal– infringement of fundamental rights or freedoms- additional compensation
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HEADNOTES

Facts

The employee, a workers' representative supported by the union CCOO (Comisiones Obreras), provided his personal services as a guard and gardener at a residential home for the elderly under a special kind of temporary contract of employment "to carry out a certain work or service". He was dismissed in 1996, after having presented several claims to the Social Tribunal against the public body running the residential home, as well as having brought a claim against the employer to the Employment Inspectors, on the grounds that it had violated the employment legislation and the rights concerning the union representatives. The Social Tribunal found that the employee had been unfairly dismissed. Being a workers' representative, he requested to be reinstated and as a result he returned to work on 15th July 1997. Following his reinstatement his employer subsequently instituted a disciplinary procedure against him due to an allegation that he had misused his statutory right to time off with pay for representative functions. Apparently the outcome of the disciplinary proceedings was that he was not found to have misused his statutory rights and no disciplinary action was taken against him.

On 30th September 1997, the employer terminated all temporary contracts of employment "to carry out a certain work or service" that it had entered into. On the day that the contracts terminated the employer re-employed these employees under another kind of temporary contract. These temporary contracts were intended to cover the vacancies during and until a separate recruitment process had taken place for permanent posts of employment. The workers' representative was, however, the only employee not

to be re-engaged. Consequently, he claimed that the termination of his contract amounted to a void dismissal on the grounds of the performance of his representative functions. He also claimed compensation for damages sustained because of the resulting infringement of his fundamental rights.

The Social Tribunal num. 3 of Orense, in its decision of 27th April 1998 held that there had been a void dismissal, and as a result made an order requiring the employer to reinstate the employee immediately with back pay, but rejected the claim for damages. Both parties appealed to the High Court of Justice of Galicia (Social Chamber), which in its decision of 15th December 1998 affirmed the previous decision, except for the amount of a day's pay due in respect of back pay. The High Court of Justice's decision was then appealed to the Supreme Court (Social Chamber) by both parties.

Decision

The Supreme Court (Social Chamber) rejected the employer's appeal "in cassation" in relation to the nullity of dismissal, and upheld the High Court's decision in relation to the award of compensation, given that the employee had not provided the means, figures or arguments for the court to quantify the loss suffered in consequence of the violation of the employee's fundamental rights.

Law Applied

Workers' Statute (Royal Legislative Decree 1/1995 of 24th March) (WS)

Art. 55.6. *Void dismissal will have the effect of the employee's immediate reinstatement, with back pay.*

Procedural Labour Act (Royal Legislative Decree 2/1995 of 7th April) (PLA)

Art. 180.1. *The judgment will make a declaration about the existence of the alleged infringement or otherwise. If the complaint is upheld, and after making a declaration about the nullity of the conduct of the employer [...], it will order the immediate cessation of anti-union conduct and the restoration of the situation at the moment prior to having taken place, as well as the compensation of consequences of the act, including the appropriate award.*

JUDGMENT

ANTECEDENTES DE HECHO

(...)

FUNDAMENTOS DE DERECHO

SEXTO.- El debate se presenta en términos claros y bien delimitados: se trata de decidir si en los supuestos de despidos nulos con causa en la vulneración de derechos fundamentales, basta con la readmisión y el abono de los salarios dejados de percibir para colmar las exigencias legales, o si es posible conceder al despedido, además, una indemnización complementaria en los términos previstos por el artículo 180 de la Ley de Procedimiento Laboral, cuando se cumplan las condiciones para el logro de ese objetivo.

Ciñéndonos a esta única cuestión, a la que queda reducido el fondo del recurso, debemos recordar la doctrina que con reiteración viene exponiendo la Sala, cuando ha tenido que interpretar y aplicar el artículo 180.1 de la Ley de Procedimiento Laboral, en cuanto dispone que la sentencia que declare la existencia de vulneración de derechos fundamentales y libertades públicas, ordenará la reparación de las consecuencias derivadas del acto, incluida la indemnización que procediera. A tal efecto ha declarado la Sala en sentencias de 9 de junio de 1993, 22 de julio de 1996, 20 de enero de 1997, 2 de febrero de 1998, 9 de noviembre de 1998 y 28 de febrero de 2000 que el artículo 15 de la Ley Orgánica de Libertad Sindical dispone que «el órgano judicial, si entendiese probada la violación del derecho de libertad sindical, decretará la reparación consiguiente de las consecuencias ilícitas del comportamiento antisindical, y en el artículo 180.1 de la Ley de Procedimiento Laboral, al precisar que la sentencia que declare la existencia de la vulneración de este derecho, ha de disponer la reparación de las consecuencias derivadas del acto, incluida la indemnización que procediera, no significa, en absoluto, que basta con que quede acreditada la vulneración de la libertad sindical para que el juzgador tenga que condenar automáticamente a la persona o entidad conculcadora al pago de una indemnización. Estos preceptos no disponen exactamente esa indemnización automática, puesto que de lo que en ellos se dice resulta claro que para poder adoptarse el mencionado pronunciamiento condenatorio es de todo punto obligado que, en primer lugar, el demandante alegue adecuadamente en su demanda las bases y elementos clave de la indemnización que reclama, que justifiquen suficientemente que la misma corresponde ser aplicada al supuesto concreto de que se trate, y dando las pertinentes razones que avalen y respalden dicha decisión; en segundo lugar que queden acreditados, cuando menos, indicios o puntos de apoyo suficientes en los que se pueda asentar una condena de tal clase».

Abundando en la misma idea, la primera de las sentencias citadas, advirtió que el demandante en esta modalidad procesal de tutela no queda totalmente exento de la obligación de alegar y razonar en su demanda los fundamentos de su pretensión indemnizatoria, o que deba quedar relevado de la carga de acreditar una mínima base fáctica que sirva para delimitar los perfiles y elementos de la indemnización que se haya de aplicar, sino que, por el contrario, sobre el actor pesa el deber de justificar los elementos de hechos necesarios para que sea reconocida la indemnización.

En este caso concreto, el trabajador se limitó a incluir en el suplico de su demanda la petición de condena para la empresa a que le abonara una indemnización de dos millones de pesetas, sin hacer siquiera alusión al perjuicio que con el despido se le hubiera podido producir, ni identificar tampoco la especie de daño o perjuicio sufrido, así como su alcance, y sin que después propusiera ni practicara prueba alguna al respecto, y por eso la Sala se ve privada de los elementos suficientes para estimar el recurso, tal como ha sido planteado.

SÉPTIMO.- Por lo demás, y en lo que se refiere a las consecuencias que se derivan de los despidos nulos por discriminatorios, en las previsiones que contienen los artículos 55.6 del Estatuto de los Trabajadores y 113 de la Ley de Procedimiento Laboral para la generalidad de los casos, la sentencia recurrida atiende a satisfacer las consecuencias que se derivan del pronunciamiento de nulidad del despido, es decir, la inmediata readmisión del trabajador con el abono de los salarios dejados de percibir, que son los efectos que el ordenamiento jurídico anuda a la nulidad de los actos, y que en este caso resultan particularmente más gravosos para el empresario que los derivados de la improcedencia del despido, porque no se ofrece al empleador la posibilidad de optar por la readmisión o el abono de la indemnización (artículo 56 del Estatuto de los Trabajadores), y no cabe tampoco imputar al Estado el pago de los salarios de tramitación que excedan de sesenta días hábiles desde la fecha en que se presentó la demanda y aquella en que se dicte sentencia declarando el despido improcedente.

OCTAVO.- Por todas esas razones y de conformidad con el informe del Ministerio Fiscal, procede la desestimación de ambos recursos de casación para la unificación de doctrina; el interpuesto por la empresa por falta de la necesaria contradicción entre la sentencia recurrida y la señalada para el contraste, y el interpuesto por el trabajador por el acierto de la sentencia recurrida al desestimar la demanda en su petición de indemnización complementaria para el despido nulo, todo ello sin especial pronunciamiento sobre costas.

Por lo expuesto, en nombre de SM el Rey y por la autoridad conferida por el pueblo español.

FALLAMOS

Desestimamos los recursos de casación para la unificación de doctrina interpuestos por el Letrado don José P. A. en nombre y representación de la Mancomunidad das Terras do Navea Bibei y por el Letrado don Pablo G. F. en nombre y representación de Pedro D. A., contra la sentencia de la Sala de lo Social del Tribunal Superior de Justicia de Galicia de 15 de diciembre de 1998, que resolvió el recurso de suplicación núm. 3183/1998, interpuesto contra la sentencia del Juzgado de lo Social núm. 3 de Orense de 27 de abril de 1998, sin hacer especial pronunciamiento sobre las costas.

(...)

[Source: ARANZADI, Repertorio de Jurisprudencia 2000/ 3121]

ANNOTATION

1. Two issues are submitted for the Supreme Court's consideration by means of appeal in cassation to unify the doctrine. On the one hand, whether the different treatment consisting in termination of the contract without subsequent re-employment amounted to a void dismissal, on grounds of representative functions, in accordance with what both the Social Tribunal and the High Court of Justice of Galicia had held previously.

The reported decision rejected the appeal on this point because of procedural reasons concerning this method of appeal's requeriments. Broadly speaking, a High Court' decision reached on appeal in "supplication" *(recurso de suplicación)* against a Social Tribunal's decision, can be further reviewed by the Supreme Court Social Chamber by means of the so-called "appeal in cassation to unify the doctrine" *(recurso de casación para la unificación de doctrina).* According to Arts. 217 and 222 Procedural Labour Act (PLA), the appellant must satisfy that the High Court's decision concerned is in contradiction with another decision from either any High Court or the Supreme Court on the same matter. The Supreme Court pointed out in the present case that the decision (of 3 July 1995 from the High Court of Murcia) submitted as comparable by the employer did not deal with the same circumstances, since the dismissed employee was not a workers' representative. Thus, given the lack of contradictory decisions to unify, the High Court's judgment respecting the nullity of dismissal was not to review and, therefore, non-appellable.

2. The employee in turn could submit a contradictory decision (High Court of Justice of Madrid, decision of 31st July 1992) on the second question which arose in the appeal as to the statutory consequences of void dismissal. Hence, the Supreme Court was able to consider this paramount issue. According to Art. 53.2 of the Spanish Constitution, a preferential and summary judicial procedure must be provided for the guarantee of fundamental rights and freedoms. As regards claims concerning labour jurisdiction (i.e. the labour branch of the judicial system), this requirement has been implemented by means of Arts. 175 to 182 PLA which envisage a preferential procedure

to be followed in case of the infringement of trade union freedom or other fundamental rights. Nevertheless, Art. 182 of the said Act excludes from the application of the above-mentioned procedure, amongst other claims, claims against dismissal. As a result a different and specific appeal procedure against dismissal will apply. Despite this exclusion some High Courts of Justice have interpreted the requirements regarding a preferential and summary procedure envisaged by Art. 53.2 Spanish Constitution, as involving the necessity of applying procedural guarantees provided for the procedure on fundamental rights and freedoms regulated by Arts. 175 and following, to those specific procedures mentioned by Art. 182.

This difference in procedure does not only affect procedural rules but also the provisions regarding the contents of decisions terminating both proceedings. With respect to the procedure for the guarantee of fundamental rights, Art. 180.1 PLA states that if the tribunal finds that the alleged violation of a fundamental right existed, it must make a declaration about the nullity of the conduct, and will order the immediate cessation of such conduct and the restoration of the situation to that, prior to the conduct taking place. This is in addition to the provision of reparation for the consequences of the act, including the appropriate award. Similarly, Art. 15 Trade Union Freedom Organic Act, 11/1985, of 2nd August, states that *"if the tribunal considers the infringement of trade union freedom proven, it will order the immediate cessation of anti-union conduct, as well as the consequent reparation of its unlawful consequences [...]".* In the same sense, Art. 55.6 Workers' Statute (WS) and Art. 108.2 PLA provide that discriminatory dismissal or against a fundamental right or freedom will be deemed to be null and void.

Differences in treatment can be found mostly in the effects of nullity. Thus, although Art. 55.6 WS and Art. 113 PLA states that a void dismissal will have the effect of the employee's immediate reinstatement with back pay, nothing is stated about any award of compensation. It is worth noting that, under Spanish Employment Law reinstatement is mandatory when the dismissal is null and void. By contrast, in the case of unfair dismissal (i.e. a dismissal which does not fulfil the procedure and/or the reasons set by Workers' Statute to this end), it is for the employer to choose between reinstatement or termination with an award, unless the employee is a workers'

representative, since then Art. 56.4 WS confers on the representative the ability to choose.

The possibility to apply Art. 180.1 PLA to void dismissals has instigated deep debate. In some authors' opinion, supported by the prosecutor, according to Art. 182 rules embodied by Art. 180.1 could not be applied to procedures for dismissal, and as a result the appellant should not be awarded compensation in addition to reinstatement and back pay.

On the other hand, it has been utilised as the main argument for the extrapolation of Art. 180.1 LPA award, that such provision implements the constitutional requirement set by Art. 53.2 SC, which refers to any case of violation of fundamental rights, regardless of whether the infringement entailed a dismissal or another detrimental decision. It has also been argued that reinstatement and back pay do not fully compensate the loss actually sustained by the employee as a result of the violation of his/her fundamental rights or freedoms. For these reasons the decision from High Court of Justice of Madrid, of 31st July 1992 (submitted as contradictory to justify this appeal) declared that the employee was entitled to an award of compensation, as well as to be reinstated with back pay, thereby in agreement with the same High Court's decision of 20th July 1992.

With respect to the Supreme Court's precedent, it was not unanimous. Although the Supreme Court's decision of 9 June 1993 held the application of Art. 180.1 to any proceedings concerning fundamental rights or freedoms, its decisions of 18th May 1992 and 25th November 1994 have expressly denied an award of compensation in case of dismissal null and void. In the reported decision of 23rd March 2000, even when the Court finally rejected the appeal on the basis that the claimant had just asked for a lump sum of two million pesetas, without providing any figures or arguments to enable the court to quantify the compensation for damages, it could by implication be said that, had the employee submitted them, he would have been awarded the appropriate compensation as provided by Art. 180.1 LPA, in addition to mandatory reinstatement and back pay according to Arts. 55.6 WS and 113 LPA. Nevertheless the judgment does not justify the legal foundations of extrapolation of rules concerning the contents of

judicial decision in proceedings relating to the violation, to those in which the alleged violation of fundamental rights occurs by means of a dismissal. This lack of justification deserves criticism, considering that the present decision constitutes a significant change in relation to the above-mentioned decisions of 18th May 1992 and 25th November 1994.