SPAIN

Constitutional Court (Second Chamber)

Decision of 18 June 2001, num. 136/2001

"Sexual harassment: legal concept and burden of proof in case of discriminatory dismissal on grounds of sex"

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HEADNOTES

Facts

On 31st October 1994, Ms Concepción C.R. received a written notification of dismissal, based on the following facts: a) Breaking of her duty of confidentiality, when revealed data and issues of restricted nature to several colleagues at work. b) Misuse of business telephone for private purposes. c) Delay in the achievement of her tasks. d) Repeated lack of punctuality.

The employee claimed against dismissal before the Social Tribunal num. 21 of Madrid, which in its decision of 22nd February 1995, held that the termination of her contract involved the violation of fundamental rights to equal treatment and prohibition of sexual discrimination, as well as the employee's right to privacy. Firstly, the Tribunal found that the employer had not proved the generic and imprecise faults alleged to justify the dismissal. In addition, the decision sustained that the facts invoked by the employee amounted to pieces of evidence of sexual harassment. Briefly, those facts were: 1) In February 1992 the claimant had lunch in a restaurant of Madrid with the President of the company she worked for. 2) In May 1993, the employee asked the Telephone Company for a change of her telephone number on personal and security grounds. 3) In June 1993 she talked the lawyers who where handling her separation, about the state of anxiety and distress she lived in, for she was victim of sexual harassment, being the harasser her boss, the President of the company. 4) In January 1995, her general practitioner at the National Health Institute issued a medical report stating that, from August 1994, Ms Concepción C.R. showed problems of insomnia, anorexia, intermittent headaches and distress, which the employee associated with the harassment that she was suffering on the part of her boss; according with the report such distress subsisted in 1995, and seemed to be related to her work conflict.

In the light of the above-mentioned facts, the Social Tribunal num. 21 of Madrid upheld the claim based on sexual harassment, and found the dismissal null and void, and as a result made an order requiring the employer to reinstate the employee immediately with back pay.

The employer appealed to the High Court of Justice of Madrid (Social Chamber), which in its decision of 15th July 1996 reviewed partly the decision reached in the lowest instance by the Social Tribunal. On the one hand, the High Court confirmed the decision in respect to the declaration that the employer had not satisfied the proof of those faults detailed in the notification of dismissal in order to justify his decision. But on the other hand, conversely to what the Social Tribunal had declared,

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the Court pointed out that the existence of sexual harassment could not reasonably be inferred from the facts alleged by the employee. Consequently, the High Court stated that the dismissal was not null and void, but merely unfair.

Ms Concepción C.R. claimed then before the Constitutional Court (Second Chamber), by means of an appeal for the protection of her fundamental rights. She postulated that, in spite of the faults alleged in the notification of dismissal, the termination of her employment contract was actually due to her rejection to the employer proposals, and that such conduct violated her fundamental rights to privacy and not to be discriminated on grounds of sex, therefore the dismissal should be deemed null and void.

Decision

The Constitutional Court (Second Chamber) rejects the employee's appeal, whereas upholds the High Court's decision stating the unfairness of such dismissal. The Constitutional Court finds that the employee did not provided any pieces of evidence in order to establish the existence of sexual harassment.

Law Applied

Spanish Constitution (of 27th December 1978) (CE)

Art. 14. *The Spanish are equal before the law, without any discrimination which prevails by reason of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.*

Art. 18.1. *It is guaranteed the right to honour, to personal and family privacy and to the own image.*

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

Art. 55.4. *The dismissal will be deemed fair when the breach alleged by the employer in the written notification is proved. It will be unfair otherwise [...].*

5. *The dismissal will be null, when its motive is any of the grounds of discrimination forbidden by Constitution or Law, or when it involves the violation of worker's fundamental rights or freedoms [...].*

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

Art. 96. *In those proceedings where from the plaintiff's declarations it may be deduced the existence of pieces of circumstantial evidence of sex discrimination, it will be to the respondent the presentation of an objective and reasonable justification, of adopted steps and of their proportionality.*

JUDGMENT

I. ANTECEDENTES (...)

II. FUNDAMENTOS JURÍDICOS

<<**3.** (...) Este Tribunal ha establecido que, **en los casos en los que se alegue que un despido es discriminatorio o lesivo de los derechos fundamentales del trabajador, el empresario tiene la carga de probar la existencia de causas suficientes reales y serias para calificar de razonable, desde la perspectiva disciplinaria, la decisión extintiva y que expliquen por sí mismas el despido, permitiendo eliminar cualquier sospecha o presunción contraria a su legitimidad deducible claramente de las circunstancias** (STC 90/1997, de 6 de mayo, F. 5, sintetizando los criterios sentados por la jurisprudencia constitucional sobre la prueba indiciaria y recogiendo abundantes decisiones de este Tribunal en el mismo sentido). En el entendimiento de este Tribunal, no se trata de situar al demandado ante la prueba diabólica de un hecho negativo, como es la inexistencia de un móvil lesivo de derechos fundamentales (SSTC 266/1993, de 20 de septiembre, F. 2; 144/1999, de 22 de julio, F. 5; 29/2000, de 31 de enero, F. 3), sino de que a éste corresponde probar, sin que le baste el intentarlo (STC 114/1989, de 22 de junio, F. 6), que su actuación tiene causas reales, absolutamente extrañas a la pretendida vulneración de derechos fundamentales, y que tales causas tuvieron entidad suficiente para adoptar la decisión, único medio de destruir la apariencia lesiva creada por los indicios (SSTC 74/1998, de 31 de marzo; 87/1998, de 9 de julio, F. 3; 144/1999, de 22 de julio, F. 5; y 29/2000, de 31 de enero, F. 3).

Ahora bien, como recordaron las SSTC 21/1992, de 14 de febrero (F. 3) y 266/1993, de 20 de septiembre (F. 2), **para imponer al empresario la carga probatoria descrita, no basta la mera afirmación de discriminación o lesión de un derecho fundamental, sino que tal afirmación ha de reflejarse en unos hechos de los que resulte una apariencia de aquella discriminación o lesión. Se hace necesario, por ello, que quien afirme la referida vulneración acredite la existencia de indicios que establezcan razonablemente la probabilidad de lesión alegada**. La aportación de tales indicios es, así, el deber que recae sobre el demandante que está lejos de hallarse liberado de toda carga al respecto y al que no le basta alegar, sin más, la discriminación o lesión de un derecho fundamental. El mismo deberá aportar algún elemento que, sin servir para formar de una manera plena la convicción del Juez sobre la existencia de hechos normalmente constitutivos de lesión del derecho, le induzca a una creencia racional sobre su probabilidad.

4. En todo caso, y si bien es cierto que los indicios declarados probados en la instancia fueron valorados por el Tribunal Superior de Justicia de forma exhaustiva, llegando a una conclusión razonada de que los mismos no alcanzaron la entidad suficiente para invertir la carga de la prueba sobre la entidad demandada, al hallarse en juego la potencial vulneración de los arts. 14 y 18.1 CE, no bastará con la simple evaluación de la razonabilidad de la decisión judicial, sino que será preciso analizar si la misma resulta o no vulneradora del ejercicio de los derechos fundamentales alegados (...).

Resulta imprescindible, por tanto, para construir el juicio de constitucionalidad, determinar con precisión si, en el supuesto enjuiciado, los datos declarados como probados en la instancia, que sirvieron de base para la declaración de nulidad del despido y que, posteriormente, se estimaron insuficientes por el Tribunal Superior, revisten la necesaria entidad para ser considerados como indicios suficientes de un acoso sexual, vulnerador de los derechos fundamentales de la recurrente. Ello no significa que este Tribunal pueda revisar la valoración de la prueba efectuada por los

Jueces y Tribunales ordinarios, «función privativa suya» que no podemos desplazar, sin que ello obste a que podamos alcanzar una interpretación propia del relato fáctico conforme a los derechos y valores constitucionales (STC 224/1999, de 13 de diciembre, F. 4).

5. Como señaló este Tribunal en la anteriormente citada STC 224/1999, de 13 de diciembre (F. 3), **«para que exista un acoso sexual ambiental constitucionalmente recusable ha de exteriorizarse, en primer lugar, una conducta de tal talante por medio de un comportamiento físico o verbal manifestado, en actos, gestos o palabras, comportamiento que además se perciba como indeseado e indeseable por su víctima o destinataria, y que, finalmente, sea grave, capaz de crear un clima radicalmente odioso e ingrato, gravedad que se erige en elemento importante del concepto»**.

Son, pues, en primer término, la objetividad y la gravedad del comportamiento los presupuestos sobre los que asienta la doctrina constitucional la posible existencia de acoso sexual y, por tanto, los elementos que deberán ser valorados a la hora de suministrar los elementos iniciales de prueba que permitan al Juez presumir la posible existencia de los hechos discutidos.

Proyectadas las anteriores exigencias sobre los hechos acaecidos en la presente controversia, es evidente que de los mismos no resultan elementos que nos conduzcan a interpretar de otro modo, a la luz de los derechos y valores constitucionales, el relato fáctico que da por sentado el Tribunal Superior de Justicia de Madrid, según el cual no puede extraerse de los datos aportados la existencia de un principio de prueba que permita afirmar la probabilidad de la existencia del acoso sexual denunciado.

6. (...) Sin descartar la realidad psicológica del acoso que la actora dice haber sufrido, los hechos psicológicos sólo pueden probarse a través de hechos físicos y de los aquí presentados no cabe extraer, razonablemente y habida cuenta de los límites de nuestra jurisdicción, la existencia de una situación discriminatoria o lesiva del derecho fundamental.

Las anteriores consideraciones conducen directamente a la desestimación del amparo pedido, dado que, conforme a lo expuesto, de la constelación de hechos probados no es posible deducir la existencia del hecho a probar: en este caso la existencia del acoso sexual alegado por la recurrente en amparo. El resultado es, pues, que, no habiéndose aportado indicios suficientes de la vulneración constitucional, no se produce la inversión de la carga de la prueba, de modo que el demandado venga obligado a probar la inexistencia del propósito lesivo del derecho fundamental.

7. (...)

FALLO

En atención a todo lo expuesto, el Tribunal Constitucional, POR LA AUTORIDAD QUE LE CONFIERE LA CONSTITUCION DE LA NACION ESPAÑOLA

Ha decidido

Desestimar el presente recurso de amparo.>>

(...)

[Source: ARANZADI, Repertorio de Jurisprudencia Social, 2001/136]

ANNOTATION

As well as other questions concerning the procedural requirements in order to lodge an appeal for the protection of fundamental rights before the Constitutional Court, the Constitutional Court Decision of 18 June 2001, num. 136/2001 also deals with two paramount issues in relation to sexual harassment: the legal concept of employment-related sexual harassment and the burden of proof in case of discrimination on grounds of sex. The following lines focus on the latest Constitutional Court position on both questions:

1. *Legal concept of employment-related sexual harassment*

It is worth noting that in Spain the legal definition for the notion of "sexual harassment" is not provided by statute law, but through case-law development, being a good example of it, the Constitutional Court doctrine, settled in its Decision of 13 December 1999 (num. 224/1999), and followed by the one reported here.

According to those decisions, in order to establish the existence of sexual harassment, there must be a conduct, exteriorized by means of a physical or verbal or non-verbal behaviour, which is objectively of sexual nature, is perceived as unwanted and rejected by the recipient, and is serious enough to create a hostile, humiliating or intimidating working environment for the victim. The so-defined concept of sexual harassment clearly takes into consideration the definition provided by the Code of Practice issued by European Commission, in its Recommendation num. 92/131/EEC, on the protection of the dignity of women and men at work, of 27th November 1991.

The two main premises, on which the Constitutional Court bases the existence of sexual harassment, are objectiveness and seriousness of the conduct, but such circumstances may only be assessed in view of the facts fixed by the social tribunal judgement.

As for the present case, the Constitutional Court finds that the facts established by the employee did not reveal the existence of an objective sexual harassment, since they were subjective allegations made by the employee to her lawyers about her anxiety and distress, which might well have to do with her divorce. As regards to the medical report issued one year later by her general practitioner, it did not stated for sure the existence of sexual harassment but the doctor's belief that the patient's state of anxiety "seemed to be connected to her work problems". Furthermore, the report was issued after the dismissal had taken place, and thus it referred to a moment when the alleged sexual harassment would have finished. Finally the Constitutional Court does not consider a single lunch with the boss to be a serious and objective sexual conduct either, in spite of the subjective perception of the employee.

2. *The burden of proof in case of discrimination on grounds of sex*

Under Article 55.4 Workers' Statute, it is for the employer to establish the facts detailed in the written notification of dismissal, otherwise the dismissal is deemed unfair. In the present case, the employer could not prove the breach alleged to justify the dismissal. However the claimant argued that the dismissal was not merely unfair -as the High Court of Justice of Madrid Decision had found-, but null and void by virtue of Article 55.5 ET, since the termination of her employment relationship was the consequence of the rejection to her boss sexual proposals, and therefore involved the infringement of her fundamental rights to equal treatment and privacy. The employee further alleged that in case of discriminatory dismissal, it was as well for the employer to discharge the burden of proof of any objective and reasonable justification for his decision.

Even though this appears to be the rule set by Article 96 Procedural Labour Act in case of discriminatory treatment on grounds of sex, as the Constitutional Courts points out in the reported decision, the Act does not mean that the claimant is free from any proof, or that her sole declarations respecting the existence of sexual harassment determine the duty of the alleged harasser to prove that he did not proposed the employee any conduct of sexual nature, for the proof of negative facts, or "diabolic proof", is impossible to satisfy.

This is the reason why the Constitutional Court doctrine (i.e. Decisions 21/1992, of 14 February and 266/1993, of 20 September) states that, it is only once the claimant has submitted pieces of evidence which may lead reasonably to presume the existence of sexual harassment or discrimination, when the inversion of the burden of proof provided in Article 96 LPL takes place, resulting in the presumed harasser duty to submit an objective justification of his conduct. However, as said before, both the Constitutional and High Courts found that the facts provided by the employee did not enable to infer the existence of sexual harassment, nor the violation of any fundamental right.

In conclusion, not being her dismissal null and void, the employee had not right to mandatory reinstatement (as provided for in Article 55.6 ET), but only depending on the employer decision, who in case of unfair dismissal can opt between the employee reinstatement, or the termination of employment relationship with an award of compensation of 45 days pay for each year of employment (Article 56 ET).