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NRO: 337-2007
Office: Labor Appeals Court, 3rd District

Refactor: Minister Dr. Estela Gomez Franco

Montevideo, September 10, 2007

VIEWS: In the second instance final judgment this case: "DA SILVA, Alexandra v. BANK STATE INSURANCE". Writ of Amparo (F.2-13142/2007). The case came to the attention of this court by merit of the appeal brought about by the plaintiff against decision No. 17 of June 6, 2007, issued by Ms First Instance Labor judge 2º Circuit, Dr. Yvonne Perelli.

RESULTING:

(I) That ruling rejected the writ of amparo, without special procedural penalties.

(II) The plaintiff appealed (fs.244-261) claiming, in short, that exceptionally this appeal can be relegated to the ordinary proceeding, mostly "when what is at stake is the biological conditions of a worker who has suffered an injury in her working environment that has left her with a dysphonia that practically prevents her from doing any work"; because as though she said that Article 1 of the law requires manifest illegitimacy, in Article 2 the writ of amparo is conditional to the inefficacy of other existing judicial or administrative means, this should be understood under the light of the legal nature of amparo as an essential guarantee.

The appellant notes that it has been proven that she was injured in the workplace by the emissions of chemical products that were handled; that the occupational illness that emerged from the work environment was the suffering from episodes caused by intoxication, and which culminated in the last episode that caused an absolute dysphonia which has dragged on for 9 months and has impeded her communication because she virtually lacks a voice; that waiting years for the resolution of an ordinary trial is ineffective to protect her right to health; that there are reasons for the "urgency" of a resolution; that the department of occupational therapy of the Hospital de Clinicas qualifies the causal relationship between the work environment and disease suffered and the preventative report of the Banco de Seguros del Estado, and that the Department of Environmental and Occupational Health (Departamento de Salud Ambiental) of the Public Health Ministry (Ministerio de Salud Pública) stated in its report the risks of the production process; all of which demonstrates the illegality of the conduct of the Banco de Seguros del Estado in rejecting the studies of other organizations and deny her the application of the law 16.074, which guarantees protection from liability and allows claims for damages and actions against the company, referring it to the BPS and DISSE service. She added that it is an indisputable occupational disease even if the Banco de Seguros is neglecting it, and requests the judgment to be revoked and the amparo the be allowed, and that ultimately it is found that there is an occupational disease with all of the emerging rights arising from September 2006.

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(III) After service of the notice to appeal (fs.264-265), the appeal was allowed, the Court received the file on September 5, 2007; the case was analyzed and judgment was agreed to be handed down on this date:

WHEREAS:

(I) The Chamber, by the concurring opinion of all its members, upholds the judgment of first instance, as the arguments expressed by the appellant on appeal do not affect the reasons of the decision under appeal.

(II) It is to be seen that in this case the appellant stated that on 14 September 2006 she suffered a work-related injury from exposure to toxic chemicals used in the company where she worked, and that these caused respiratory difficulties and dysphonia, which were not covered by the Banco de Seguros del Estado, which referred her to the DISSE, violating her legitimate interest to be protected by that Institution; so that, on 9 January 2007, the appellant sought coverage from the Banco de Seguros as an occupational health disease and/or work-related accident with reports from the investigation carried on after her complaint to the MTSS and Faculty of Medicine; that the Banco has not issued a resolution in that regard and only referred her for a psychiatric consultation and ordered additional tests; that from the Banco's medical history emerges the referral on 22 February to the Occupational Disease Unit (La Unidad de Enfermadedes Profesionales) for a resolution and direction to follow, expressing itself with urgency; that the appellant directed the Banco de Seguros, by certified telegram to make a decision in her case but it had not responded; and that appeals are not viable due to the time they would consume, therefore she requested that the amparo be allowed so that her illness is covered as a occupational health disease and/or work-related accident since its beginning in September 2006, with all the rights that apply in terms of assistance, treatment, and diagnosis from a medical as well as from the financial standpoint so as to grant provisional and/or permanent loss of income damages which corresponds to law.

(III) The Banco de Seguros del Estado added a report on 10 May 2007 from Drs. Rodolfo Vazquez and Pedro Sierro, in which it was indicated that the episode dated 16 Sept 2006 was not a work-related accident, specifying (fs. 86) that: "Having analyzed the condition of the patient in conjunction with Dr. Dagoberto Puppo, medical psychiatrist and forensic medical expert, and Dr. Carrau, a otolaryngologist, we consider that:

1) We dismiss the link between the current aphonia and the exposure to Cyclohexanone, given the indemnity of the mucosa as it has been documented in the medical record.

2) The patient reported emotional disorders that in a normal person could not produce even a somatoform disorder so severe and enduring as aphonia. In this case, the emotional factors may have come about because her preexisting personality was abnormally structured, with suggestibility features as those with histrionic personalities, as was noted by Dr. Costos when he diagnosed pithiatism, which is synonymous with histrionic dysphonia.

3) For these reasons, we consider that it is not possible to establish a causal relationship between the occupational injury and her aphonia."
With this technical report from various professionals, the Banco de Seguros del Estado adopted a negative decision and denied that the condition of the appellant was an occupational health disease, and when she requested the review of the case, the Banco solicited the advice of the MTSS, in addition to ordering new clinical studies and granting a transfer to psychiatry. It cannot be ignored that the appellant was look after as a member of her own Mutual , therefore, as noted by the Institution, the time taken to reach a resolution did not imply an omission, nor that some of the rights to which this exceptional and subsidiary proceeding refers, have been actually or imminently damaged, limited, altered, or threatened, and even less with manifest illegitimacy,

In the case, it was not proven that the condition of Ms. Da Silva was a occupational health disease and Dr. Laborde Garcia, doctor in the Toxicology Department of the Hospital de Clinicas who saw to her by referral from a doctor of the MTSS, stated in these instances (fs. 210-212) that was not the most suitable person as the patient had been seen by several ENT otolaryngologists; that she requested information about the chemical products that the appellant handled at work to the Ministry of Health that has conducted an inspection of the workplace; that she requested a report from the neurologist because she suspected there were chemical substances that could have affected the nervous system with associated problems, not that they were the cause of the aphonia, and the results were normal and the patient did not return; and finally clarifying that what is expected from an inflammatory injury is that it reverses in weeks, not months, as in this case which had been so prolonged.

Now it is clear that the appellant was treated, but that the experts arrived at the conclusion that she did not suffer from an occupational health disease, hence she was referred to DISSE; that resolution of the Banco de Seguros can be subject to administrative review, which according to the Banco's statement at fs. 227, the appellant effectively filed against the decisions of the technical services, that is, a motion to set aside the decision and an administrative appeal before a higher administrative authority.

The Judge *a quo* stated that the appellant prompted this action for the purposes of classifying the illness she suffers from September 2006 as an illness of occupational health nature, and decided that the amparo in its guarantee function, must be limited to urgent action in cases where constitutionally recognized human rights may have been violated as a consequence of an omission or as a result of a manifestly illegitimate behavior, and where there are no other judicial and/or administrative means open to achieve the same result, or when they exist but are ineffective to protect those right. In conclusion, it is not appropriate to analyze the merits of an issue for which there exist legally established procedures and remedies, furthermore it was proven with the attached documentation that the appellant was treated by the BPS, BSE, and her Mutual health insurance (Medica Uruguaya).

(IV) The first thing to consider in this case is that the writ of amparo is meant to be a exceptional procedural remedy ,and as was noted by Professor Luis Alberto Viera in

"The Law of Amparo" (p. 20-22), it is not enough with the existence of an act, event or omission that harms or threatens to injure a constitutional right or liberty, but it is also necessary to prove that that act, event or omission is manifestly illegitimate, adding that the illegitimacy must be clear, evident, unequivocal, gross, that it is proven immediately "*in continenti.*"

What is immediately apparent in the case is that the amparo action raised goes beyond the scope and purpose of the law, which is intended for the protection of fundamental rights inherent to human personality or derived from the republican form of government, as expressly established in Article 1 of law No 16.011, with reference to article 72 of the Constitution.
There must exist a specific right of the claimant, which in the case there is not; as well as an unlawful conduct by action or omission of the defendant, which also does not occur, and the constitutional origin of the affected right and an effective permanency of the wrong claimed.

It has also been said that the demand for the manifest illegitimacy requirement in the system of law No 16.011 tends on one hand to restrict the use of the exceptional action of amparo; on the other hand, it is essential in a quick process that does not deserve more than a summary cognition that the illegitimacy be clear and arising from the act itself or from the case file, through summary evidence. (Cf. Vescovi "Main profiles of amparo in Uruguayan Law," RUDP No.4/90). It is essential that the matter does not require further research, and above all, that it be found out of seriously founded controversy. If it does exist, unless it is arbitrary or malicious, amparo does not apply. The matter should be clear, categorical, evident, and beyond all reasonable doubt. It must not be decided through this procedure questions open to bigger argumentations and that should be solved by standard procedures. This supposes that the matter is outside of any seriously founded controversy (RUDP. No3/96 c.529, p.530, Anuario de Jurisprudencial Laboral, 2002, c. 22, p 19-20).

And also note that in this case the decision of the Banco de Seguros del Estado has been founded and supported by technical reports, that the claim of the appellant is not categorical or clear, as it was presented in the initial complaint based on reports that solve nothing as to whether the appellant suffers an occupational health disease or not, and that the elucidation of the issue necessarily requires a deeper and more polished debate than a summary action in order to overthrow the decision of a medical body of the institution concerned.

The procedures imposed by our Law, though may well be long, ensure the right and opportunity for a defense, hence the process of amparo is of exceptional application, as it can only proceed when if not acted urgently, the rights of the claimant be finally prejudiced. Assimilating technically delay with the inefficacy required by Article 2 of the law No 16.011 is not acceptable, since through this pathway it is possible to ignore the principle of legality which characterizes our procedural system, allowing all matters to be tried by summary proceedings of amparo, abandoning all the established constitutional

and legal means (RUDP.No4/02, c.657, pg.636-637)

The legal and factual issues of this case do not yield any argument that justifies an amparo, nor can even ensure that administrative remedies in place have been ineffective to achieve the final purpose; let alone that the appellant proved in this summary action that her condition is really is an occupational health illness. Amparo cannot be allowed when it comes to arguable issues that require a broader argumentation and evidence process (Cf. Palacio, Civil Litigation, t.VII, p.144); it is worth to point that the appellant receives medical care so her fundamental right to health has not been violated.

These statements lead to the dismiss the complaint, as it has been resolved correctly in the previous instance. For these reasons, it stands in accordance with the provision of law No.16.011, Article 261 of the CGP and 688 CC of the Court.

FINDING:
Confirming the judgment, without any special penalties for costs or costs of appeal.
Promptly returned.