Roj: STS 828/2011

Id Cendoj: 28079140012011100103

Body: Supreme Court. Social Chamber

Place: Madrid

Section: 1

Appeal No.: 1532/2010

Decision No.:

Procedure: SOCIAL

Reporting judge: AURELIO DESDENTADO BONETE

Type of Resolution:

Judgment: Sentence

JUDGMENT

In Madrid, on the thirty-first of January of the year two thousand and eleven.

Having seen these decisions pending before this Court, by virtue of the appeal regarding the consistency of case-law to the Supreme Court brought by the company MERCADONA SA –Mr. García Barcala Lawyer acting for and on its behalf– against the judgment of the Social Division, subordinate to the Tribunal Superior de Justicia [High Court of Justice] of Asturias, of March 12, 2010, regarding the appeal No. 188/2010, brought against the judgment of November 26, 2009, of the Juzgado de lo Social [Employment Court] No. 1 of Oviedo, in the decisions No. 833/09, given at the request of Mr. Fernando against the said claimant, about the dismissal.

D. Fernando, represented by the attorney Mr. Pérez Villamol, has attended the hearing by way of appeal.

Reporting Judge: Mr. Aurelio Desdentado Bonete,

FACTUAL BACKGROUND

FIRST .- On March 12, 2010, the Social Chamber of the Superior Court of Justice passed sentence by virtue of the appeal lodged against the judgment of the Employment Court No. 1 of Oviedo, in the decision No. 833/09, given at the request of Mr. Fernando, against the said claimant, about the dismissal. The operative part of the judgment of the Tribunal Superior de Justicia of Asturias states that: “Having considered the appeal lodged by Mr. Fernando, against the judgment of the Juzgado de lo Social No. 1 of Oviedo, in the decision No. 833/09, we revoke the said decision and declare the dismissal null

and void, by reason of infringement of the fundamental rights and we sentence the defendant to reemploy him and to pay him the salaries unpaid since the date of the dismissal –August 17, 2009–, at the rate of 38,39 Euros per day."

SECOND.- The judgment of the Preliminary Court of November, 26, 2009 passed by the Juzgado de lo Social No. 1 of Oviedo, contained the following proven facts: "1.- Fernando, whose personal circumstances are set forth at the beginning of his appeal, started working on March 4, 2008 for and under the direction of the defendant enjoying an indefinite full-time contract. He worked as a level A Manager and received a daily gross salary as severance pay up to 38.39 Euros (extra month's salaries included). The contractual relationship is submitted to the collective agreement of Mercadona SA – 2. In principle, he served at a store located in Avilés. He was later on transferred to another store located in Calle Peñarroyo Marcos in Oviedo. The coordinator of this establishment was Rodolfo. The report made by Ms. María Antonieta as of November 19, 2008 regarding that center, detailed as inputs for improvement: the lack of punctuality in joining the post, being on top of them to comply with the timing, not caring enough for the lack of products on the shelves, the bases of palletized not guaranteed every day, with limited authority given to the B managers and the little respect they have. She finally pointed out that a little discipline is good especially when dealing with some people. As of March 17, 2009 the company and Rodolfo agree that the latter stops working as a level C Manager to perform the functions of level A Manager.Then, the company appointed Ms. Leocadia to the post of level C Manager or coordinator of that center. On the same day he took up his post, he gathered with the workers from different shifts in order to tell them what was his way of working and warn them that they would have to perform their daily work and fulfill the high quality plan. During the contract, the person working as the level B Manager told the workers that it was desirable that they purchase products from the store because it was better for the company, and therefore this person, as well as the coordinator, encouraged the workers to offer to the public the different products that were close to expiry, but in no case expired, as they are withdrawn from the sale three days before the expiration date. The appellant was once reprimanded by the coordinator since he failed to satisfy the stipulated time for replenishment of goods and was entrusted, on occasion, to help one of his workmates to remove the pallets. The appellant's working place closed to the public at 21.15 hours. Nevertheless, the departure time of the employees is at 22h; until that time they continue working inside and stopping at that time to change their clothes. So they never leave before 22.10 or 22.15, and almost always, all the employees leave at the same time. In May, September and December, the company performs an assessment of the work of each employee. Failing the annual assessment for two consecutive years may result in dismissal. The appellant did not pass the assessment in May. He obtained a mark of 6.8, but he needed a 7. ---- 3. - The plaintiff went to the Centro de Salud de la Corredoria health center on March 9, 2009 and March 19. On May 28, June 12 and June 18, he also turned to the medical assistance given by the mutual insurance company Ibermutuamur, which covers the company's professional contingencies. On May 25, 2009 he went to the Emergency Department of the Hospital Central de Asturias, and he was diagnosed with paresthesia possibly following cervical syndrome. On July 10 he returned to the same department showing intermittent paresthesias in his legs. As of July 13, 2009 he became temporary invalid. His invalidity derived from a common illness and the diagnosis was of paresthesia. He remained in this state

until October, 9 of this year, when he was discharged as he recovered and was already able to perform regular work. The company, which acts as an insurer during temporary invalidity, has its own medical assistance, with which the appellant met at least on August 7, and had a conversation that has been transcribed in document No. 1 of the appellant's set of evidences, whose content is considered fully reproduced. Before that date, on May 29, 2009, the mutual insurance company carried out on the appellant: an electromyography that showed that he was within normal limits, some tests that also showed no alteration and a cranial magnetic resonance on June 23 with normal results.

---- 4. - On August 17 this year the company sends the following fax: "Dear Sir: Through this letter we inform you that the Management of the company Mercadona SA has agreed on, effective from today 08/17/2009, a disciplinary dismissal for your person, which terminates the contract. The reasons for this decision are set out below:

In any contract there is a principal and fundamental obligation, which is an obligation pertaining to every worker, recognized in article 5 of the Employment Statute (hereinafter ET) of:

- Compliance with the specific obligations of his/her post, according to the rules of good faith and diligence.

- Compliance with the orders and instructions of the employer in the regular exercise of his/her managing activities.

- Contribution to improving productivity.

Well, you do not fulfill the obligations and commitments of your post, not complying with the diligence and cooperation referred in Article 20.2 of the ET, which is the reason why you did not pass the first assessment of the current year (2009), which was made in the month of May of this year (21 May, 2009).

Moreover, since July 13, 2009 until today, you are enjoying a medical leave for common illness but despite being aware of the existing medical assistance, you have never contacted it or the whole department when being offered assistance, always under medical supervision and control, which you have rejected.

For all these reasons, the company has decided not to maintain this situation anymore. The expectations we placed on you at first, to fulfill the normal business objectives, which are necessary for the proper provision of services, result uncertain.

Consequently, and based on the company powers granted to it by the ET in Articles 54.1 and 2 d) and e) for breach of your contract obligations contained in Articles 5 and 20.2 of the ET, and pursuant to Article 35 C-1 and C-11 of the Collective Agreement of Mercadona SA, your attitude constitutes a serious and guilty breach for violation of contractual good faith and for low productivity. Your behavior represents two very serious employment violations, so the company management has decided to dismiss you with effect from today.

As it has been stated by the Supreme Court in its repeated case-law (SSTS 01/29/01, 07/12/204, 05/23/05, 11/22/07 or 18/12/07), we insist: what is claimed in this letter of dismissal is not the justified disease itself that makes impossible the performance of the job, but rather his lack of cooperation, his attitude and the decreased productivity and consequent financial loss that this situation creates, making the dismissal a proportionate and convenient measure for the company.

However, in order to avoid litigation and making use of the powers conferred by Article 56.2 of the ET, the unfair dismissal is recognized in this act and the compensation to which Article 56.1 a) of the aforesaid statutory provision refers is ordered, “which amounts to 2,601 Euros”. Within 48 hours from submission of this communication the appropriated amount for the compensation will be fixed in the deposit and appropriation account of the Juzgados de lo Social of Oviedo, where you may come to withdraw it. All this is communicated for relevant legal purposes.

As you enjoy since 07/13/09 an IT leave following common contingencies, you have 15 days from the effective date of dismissal to communicate and apply for the corresponding unemployment compensation,receiving in any case the IT compensation in the amount that corresponding to unemployment and until situation of medical leave ends. For this purpose you must deliver the confirmation reports or the medical discharge to the company, if it meets the legal requirements, to receive unemployment compensation discounted for the time you’ve been on medical leave.

We inform you that in the coming days you can come to your workplace to collect the necessary documentation (company certificate) in order to ask for the appropriate unemployment compensation. Likewise, we want to tell you that the amounts corresponding to your settlement will be paid into the account where monthly payroll is paid.” The company agreed that amount on August 19 in the Juzgado Decano [Senior Court], being aware of the agreement of the Juzgado de lo Social No 4 of this city, which on September 2 decided to end the proceedings as the worker had received the set amount.

---- 5 º. - In many cases, the company has laid off workers who took medical leave as they did not accept the advice of the company’s medical service, which is aimed at a gradual reintegration. ---- 6 º. - The applicant does not and has never represented the workers. ---- 7. - On August 26, 2009 the conciliation settlement was held and ended without agreement.”

The decision is worded as follows: "I may reject and I do reject the claim made by Mr. Fernando against Mercadona, SA, acquitting the defendant of all claims."

THIRD. - Lawyer Mr. Garcia Barcala, representing the company MERCADONA, SA, by letter of April 26, 2010, made an appeal for the consistency of case-law, in which: FIRST. - It is alleged that the judgment passed by the Social Chamber of the Tribunal Superior de Justicia of Cataluña, on March 22, 2006, is contradictory to the appealed judgment. SECOND. – It is alleged that Article 55.5 of the Royal Decree 1/1995 dated March 24, was breached according to Article 15 of the Spanish Constitution.

FOURTH. - By order of this Court dated April 29, 2010 the appellant presented himself before the Court and this appeal was considered lodged for the consistency of case-law.

FIFTH. – Once contested, the Public Prosecutor issued a report deeming the appeal to be appropriate and, the Honorable Reporting Judge being informed, the orders were declared concluded, January 25being appointed as the date for the vote and the decision–on which date it took place.

LEGAL RATIONALE

FIRST. – Within the proven facts it is stated that the appellant works for the defendant company as level A Manager and that on July 13, 2009 he began the process of temporary invalidity resulting from a common illness which was diagnosed was paresthesia. He lived in this situation until October 9, 2009, when he was discharged after recovery, which allowed him to perform regular work. The company has its own medical service, with which the appellant met at least on the 7th of August. They had a conversation which has been reproduced in the document number one of the appellant's set of evidence, whose content is considered fully reproduced. On August 17, 2009 the company informs him of his dismissal by letter. In this letter, after referring to the breach of his employment obligations and to the fact of not passing the assessment in the first part of the year, it is indicated that, to these failures, it is added that, since July 13, 2009 to that date, he was taking a leave due to common illness, and despite having knowledge about the medical service method, he had not collaborated with it or with the rest of the department, when he was offered assistance, under the supervision and control of the medical service. Before that time the appellant had taken an electromyography on May 29, 2009, carried by the mutual insurance company, which showed that he was within normal limits, as well as having had an analysis done which also showed that there were no alterations and a cranial magnetic resonance in June 23, also with normal results. The letter added that, in order to avoid litigation, the dismissal was recognized as unfair as provided in Art. 56.2 of the ET. The judgment of the Preliminary Court dismissed the claim, but the defendant considered the appellant's appeal and declared the nullity of the dismissal. It is of interest to note that in the second point of its legal reasoning, section 3, the judgment under appeal contains a statement with factual value regarding the judgment of the Preliminary Court, in which the behavior of the company which is operating is considered as a "common practice", "coercing workers to be reinstated in their jobs ... when there is a medical report issued by a public health practitioner who considers that the worker is not fit to return to work yet", a coercion that is linked to the warning to take "The dismissal if not accepting the proposal."

The judgment under appeal argued, by quoting the STC [Judgment of the Constitutional Court] 62/2007, that threatening one with dismissal if one does not leave the public healthcare system –whose doctors deemed it necessary to stay in temporary invalidity– constitutes an infringement of the right to physical integrity described in Article 15 of the Spanish Constitution. Thus the judgment upheld the appeal and declared the nullity of the dismissal.

The company protested against this resolution, providing for the purpose of comparison the judgment issued by the Social Chamber of Cataluña on March 22, 2006. A case is defined therein, in which the dismissed employee suffered an abrasion on the foot that led to the need to amputate a toe, as a result of using of safety boots provided by the company. Because of that injury and the diabetes that the worker suffers, two types of disability occurred –he was diagnosed with plantar ulcers. The first

disability complaint took place from September 16, 2004 until October 27, 2004 and the second from October 27, 2004 to February 2, 2005. Before the end of the first period of disability leave the employee received a call from the company telling him that if he did not rejoin his post he would be dismissed, as the company could not have workers who were not productive. The company recognized the unfair dismissal, and made the payment into court as provided in art. 56.2 of the ET. The contrasted judgment considers, confirming on this point the judgment of the Preliminary Court, that the reason for dismissal had been the situation of temporary invalidity and the lacking productivity of the appellant, which, according to the abovementioned case-law (judgments of this Chamber of January 29, 2001, September 23, 2002, July 12, 2004 and May 23, 2005), determines the unfair dismissal but not its nullity.

SECOND. - The contradiction between the judgments must be assessed, because, as pointed out by the Public Prosecutor, the fact that in the judgment under appeal the dismissal occurred because of the appellant's refusal to ask for the medical discharge and return to work and in the contrasted case of the judgment of dismissal it was determined by a new medical leave, is irrelevant. Responding to the objection put forward by the defendant, it should be noted that the pressure on the worker to get back to work is present in both cases, although the reference in document number one of the appellant's set of evidence provides more detail than the brief reference in the contrasted judgment. What really matters is that in both cases there is a threat of dismissal to force the worker to return to work and that the fact that in one of the cases the dismissal only occurs during the invalidity process while in the other it occurs just a few days after the beginning of the second process is not relevant. In both cases the worker is anticipated to return under threat of dismissal and in both cases the threat becomes a reality when the return does not occur or, if it occurred following the threat, another leave is taken by the worker just a few days afterwards. Therefore, in both cases the threat of dismissal puts the company at risk of not only being accused of discrimination, but also may raise the issue of a possible infringement of the right to physical integrity. In this sense it is not irrelevant to note that Art. 15 of the Spanish Constitution -on which, as we have seen, the appealed judgment is based- was denounced as having been violated in the appeal pronouncing the contrasted judgment.

THREE. - As the Court has repeatedly stated, this kind of appeal is an extraordinary remedy which, when a legal offense covered in section e) of Article 205 of the LPL of the same law is claimed, must necessarily have invoked, as grounds for impeachment, the violation of a rule of the legal system, be it a constitutional provision, a law or a regulation, a collective or statutory agreement, or a case law (judgments of February 19, 2001, May 31, 2004 and these cited therein). Moreover, the Board has also established that the requirement of establishing the alleged violation of the law "is not satisfied by just indicating the provisions that are considered applicable but that, in addition, various interpretive options be in play that have led to the various judicial pronouncements, it is also an inescapable requirement to reason in and explicit and clear way on the relevance and merits of the appeal regarding the violation or violations submitted"(judgments of April 25, 2002, July 13, 2007 and October 22, 2008, among others). This is assumed not only from Article 205 of the Employment Procedure Act, but also from the Civil Procedure Act, whose Article 477.1 provides that "the appeal must be based on the infringement of the rules applicable to solve the issues subject to the procedure", while Article 481.1 of

the Civil Procedure Act requires that the grounds of appeal be exposed, to the extent necessary, in the grounds of the appeal.

The grounds of this appeal lodged contains two errors while reporting the infringement on which the claim must be founded. First, it confuses the claim against the infringement with reference to the violation produced in unifying the interpretation of the law and the formation of jurisprudence, when it comes to different requirements to the extent that the violation appears, in principle, from doctrinal contradiction, but this does not necessarily mean that the appealed judgment is the one that should be eliminated for being contrary to law, which is to be verified by formulating the relevant claim and reasoning it in the development of the subject. The appeal contains, however, the formulation of the claim, because it says, although in the wrong place, that "the infringement" has occurred specifically "regarding Article 55.5" of the ET " and its jurisprudential interpretation in relation to art. 15 of the Spanish Constitution and to art. 180.1 of the LPL ". Although the judgments of this Chamber of November 22, 2007; December 18, 2007 and September 22 2007 are later mentioned", what is certain is that, that the infringement of the provisions which are denounced is not well-reasoned nor are the judgments cited examined to prove the infringement of the case-law. In fact, the motive, in accordance with its rubric which, as has been previously said, refers to the suffering, compares the legal basis of the appealed judgment with the contrasted judgment to conclude that the compared judgments "give opposite decisions in an alleged dismissal in which the same facts take place", which could lead to a contradiction but does not provide any legal basis for the formal complaint.

This lack of a legal basis cannot even be made up for with reference to the legal basis of the contrasted judgment, because, as it is pointed out in the judgment of November 24, 2010, collecting previous doctrine: 1) the legal basis of the offense has a different requirement from that of the exposure of the contradiction, 2) the defendant has the right to be informed of the scope of the offense which is being reported and the arguments which support its opposition and 3) it is not a function of the Chamber to reformulate the appeal of the appealed judgment based on the contrasted judgment in a reasoning that would be outside of the defendant’s contradiction , who would not be aware prior to his opposition the terms of that reformulation.

But also in this case, not even that possible reformulation of the legal basis of the contrasted judgment could make up for the lack of legal basis of the complaint. In fact, the grounds for the decision of the appealed judgment is based on the violation of the right recognized in Art. 15 of the EC to the extent that the threat of dismissal and its subsequent execution in not having led to reincorporation to the workplace imply a damage to the right to physical integrity of the worker and, in this sense, the appealed judgment made sure to clarify the "the great difference" between the alleged case decided by it and those which have been decided by this Chamber, in which although the person is dismissed due to the work consequences of the morbidity of the worker, there is not an attack on the integrity since the threat of dismissal is not used so that the worker walks away from the medical leave which has been prescribed to him. On the contrary, in the contrasted judgment, although the infringement of Art. 15 of the EC was reported by the worker, there is no reflection on the threat of dismissal as an attack on the right to physical integrity, since that judgment limits itself to dismissing the plea simply by referring to

the case-law cited, specifically –and apart from the doctrine of supplication -the one contained in our judgments of January 29, 2001; September 23, 2002 and May 23, 2005.

However, neither these judgments, nor those mentioned in the appeal have dealt with the problem examined here. In most of the judgments of the Chamber which have been cited and in the most recent judgment of January 29, 2009 that which is debated is deeming those dismissals which occur due to the workers being ill as discriminatory within the meaning of Art. 14 of the EC. The mentioned judgments exclude nullity because illness cannot be considered generally as a cause or motive of discrimination in the sense of the final digression of Art. 14 of the EC, since it is not, except exceptionally, a prejudicial factor in oppression of a group. It is normally, according to these judgments, an contingency inherent to the human condition and is not specific to a group or collectivity of people or workers; attention is also drawn to the fact that in the prosecuted dismissals there is not a prejudicial motive, but a business interest which excludes the maintenance of the employment contract since the medical leaves affects the performance of the contracted work. In some resolutions the illness is not considered a handicap to the effect of the dispositions of Arts. 4.2.c.2º and 17.1 of the ET and the Directive 2000/78 in relation to that established by the judgment of the Court of Justice of the European Union, dated June 11, 2006. In other judgment it is indicated that the right to health, as a guiding principle of social and economic policy "is not part of the "fundamental rights and public liberties" (1st Section of Chapter II of the First Title) to which the legal regulations refer" of the ET which establish the nullity of the dismissal (judgments dated December 11, 2007, September 22, 2008 and January 27, 2009, among others). Only in the judgments of November 22, 2007 and September 22, 2008 was a claim of the breach of Art. 15 of the EC dealt with by the Chamber,connecting the dismissal on grounds of illness with the infringement of the right to physical integrity. In these judgments, it was said that the dismissal on the grounds of illness did not affect, in principle, "the right to physical integrity which protects above all physical well-being, that is, the right of a person “not to suffer harm or detriment in his/her body or external appearance without his/her consent ..., which only has an incidental relation to the alleged case" decided, "in which the right not to suffer harm or damage of personal health [untouched by dismissal, certainly] is not at stake, but more precisely the right to work is – even in cases of physical misfortune". But in those judgments the dismissal was still a response of the company to the effects in the work of the illness of the worker, since in neither one of them does the dismissal act as a coercion or a threat aimed directly to the worker to abandon his medical treatment which has been imposed to him with a compulsory medical leave from work, which is what has justified the nullity of the dismissal in the appealed judgment insofar as that coercion is relevant. It is relevant because it relates to the case-law of the Constitutional Court in that its decisions SSTC 62 and 160/2007 have pointed out that "the right not to suffer harm or damage of personal health is part of the right to personal integrity" and "while not every alleged case of risk or damage to health implies a violation of the fundamental right, only those which create a severe and true threat to it do", it is specified that "a determined action or omission of the employer" in the appliance of his/her faculties of directorship and control of the employment activity "could imply, in certain circumstances, a risk or damage to the health of the worker, the neglect of which would entail a violation of said fundamental right". It is concluded that "such act or omission could affect the area protected by Art. 15 of the EC when it takes place where there is a verified risk of

certain production, or potential production but justified *ad casum*, of the causation of harming health, that is, when the work order generates a risk or danger to it". However, in principle, the pressure of a threat of dismissal such that that the worker stops the medical treatment which, along with a medical leave from work, has been prescribed to him constitutes a conduct which puts at risk his/her health and, due to this, an action of this kind should be considered harmful to the right to physical integrity in accordance with said constitutional case-law and this conclusion has not been combated in the appeal.

It proceeds, therefore, to dismiss this appeal, which determines, in accordance with art. 226 of the Employment Proceedings Law, that the loss of the sums deposited on appeal and the maintenance of the payment into court to guarantee the enforcement of the judgment. The costs shall also be imposed to the appellant under the terms of Art. 233 of the Employment Proceedings Law.

For all this, on behalf of His Majesty the King and the authority given by the Spanish people

WE DECIDE

To dismiss the appeal for the consistency of case-law brought by the company MERCADONA, S.A., against the judgment of the Social Chamber of the Tribunal Superior de Asturias, dated March 12, 2010, in appeal No. 188/2010, brought against the judgment passed on November 26, 2009 by the Juzgado de lo Social No. 1 of Oviedo, in decisions No. 833/09, at the request of Mr. D. Fernando against said appellant, on dismissal. We order the loss of the sums deposited on appeal, which will be given to their legal destination. We maintain the payment into court to guarantee the enforcement of the judgment. We order the appellant company to pay the costs of this appeal which will consist of the fees of the Lawyer of the defendant; the amount being fixed, subject to the legal constraint, by the Chamber where appropriate. Give the actions and the supplication roll back to the Social Chamber of the Tribunal Superior de Asturias, with the certification and the communication of this decision.

For our judgment, which will be inserted into the LEGISLATIVE COLLECTION, we pronounce, order, and sign it.

PUBLICATION.- On the same day of the date this judgment by His Excellency Magistrate Mr. Aurelio Desdentado Bonete holding a Public Hearing in Social Chamber of the Supreme Court of Justice was read and published, which as Secretary of the same, I certify.