G A _ P

Gómez-Acebo & Pombo

Authorised absenteeism and redundancies: employees bear the brunt of unforeseen circumstances

Lourdes López Cumbre

Professor of Employment and Social Security Law, Universidad de Cantabria

Academic Counsel, Gómez-Acebo & Pombo

Sick leaves, however brief, are covered by the 'Social Security' (National Insurance) through temporary disability benefits. But there is a part that taxes the employer. Moreover, not all employee absences, even when authorised, arise from an illness, but may have other causes. In view of this, employment legislation, balancing conflicting interests, allows for redundancy where there is persistent intermittent absenteeism – however authorised – over a certain period of time, a redundancy that is now constitutionally endorsed.

1. The Judgment of the Constitutional Court of 16 October 2019 has endorsed the constitutionality of the provisions of Article 52(d) of the Workers' Statute Act ("LET"), an article that permits redundancies in response to absences from work, whether or not such absences are with valid reason. As this was already adjudicated on by the Court of Justice of the European Union of 18 January 2018, in case C 270/2016 (*Ruiz Conejero*), the question of constitutionality does not arise from the perspective of discrimination based on disability, but because of a possible violation of the right to physical integrity (Art. 15 of the Spanish Constitution ("CE")), to work (Art. 35(1) CE) and to health protection (Art. 43(1) CE).

   The referral of the question of constitutionality responds to a plurality of arguments. In the first place, the referring court posits that the legal regulation of redundancy on the grounds of absenteeism could condition the behaviour of workers who, fearful of losing their job, "could

jeopardise their health and physical or emotional integrity, going to work and thereby assuming an absolutely undue sacrifice, which could even complicate the evolution of their illness". Secondly, said court believes that the interest in fighting absenteeism to which Art. 52(d) LET responds, despite having a constitutional basis - the right to freedom of enterprise and, indirectly, the right to private property - can be protected equally effectively by other means. In fact, it is argued that only unauthorised absences should be taken into account, that is, those that do depend on the will of an employee and not absences due to illness, however brief, covered by a medical leave statement issued by the appropriate official medical services. Thirdly, the referring court indicates that absences with medical leave usually already involve a pecuniary loss for the worker, which in itself is a disincentive since, even when protected by a Social Security benefit, such does not always have a one hundred per cent reach. Finally, it is argued that perhaps the weighting of interests implicit in the legal regulation might not be sufficient to protect situations derived from chronic illnesses, with a fluctuating course, especially limiting in the phases of symptomatic worsening that give rise to brief but repeated periods of temporary disability, the diagnosis of which the company should ignore.

2. In line with the aforementioned Judgment of the Court of Justice of the European Union of 18 January 2018, in case C 270/2016 (*Ruiz Conejero*), the Judgment of the Constitutional Court of 16 October 2019 expressly admits that "the redundancy regulated in Article 52(d) LET reflects the lawful purpose of exempting the employer from the obligation to keep an individual in employment who has become excessively burdensome for the company, due to the employee's repeated absence from work; these intermittent absences, even if authorised, generate an increase in labour costs that the company should not have to bear" (Point of Law ["PL"] 3). Not for nothing the aforementioned Judgment of the Court of Justice of the European Union of 18 January 2018 stated that "combating absenteeism at work may be regarded as a legitimate aim, within the meaning of Article 2(2)(b)(i) of Directive 2000/78, since it concerns a measure of employment policy" (para. 44), and it is for the courts to ascertain whether in the specific case the legislative measure applied does not go beyond what is necessary to achieve that legitimate aim. And among the relevant factors that a court must take into account in order to carry out that assessment, said judgment includes "the direct and indirect costs that must be borne by companies as a result of absenteeism from the workplace" (para. 47).

   But here a conflict arises, mainly around three constitutional articles, namely Articles 15, 43 and 35 CE. With regard to the protection of physical integrity referred to in Article 15, a corporate action would only be considered to violate this right if demonstrated that such action results in a serious and certain danger to the health of the affected party (Judgment of the Constitutional Court no. 220/2005, PL 4). However, such a circumstance is not apparent from the application of the article at issue. It seems difficult to find a direct connection between the right to physical integrity and the actions of an employer who, under the aegis of the challenged article, makes an employee redundant because of the number of times, in a given period of time, he or she has missed work due to a short-term illness. "It should not be forgotten that the grounds for redundancy in this case are not the mere fact that the worker is ill, but the intermittent repetition of the number of absences from work, authorised or not, that have taken

place in a certain period of time - absenteeism in the workplace -" (PL 4). Taking into account the exclusions provided by the legislator, the absences that may give rise to the application of said article for this reason would be those derived from a short-term illness or sickness (whether or not they give rise to the issuance of medical leave statements), the legislator thereby keeping the obligatory balance between the interests of the company and the protection and safety of workers and avoiding "the production of unjust situations or perverse effects with the measure provided in Article 52(d) LET " (PL 4).

With regard to the violation of Art. 43 CE, which protects the right to health, the Judgment of the Constitutional Court of 16 October 2019 understands that the article at issue does not affect at any time the rules on access to or the content of employee healthcare, which at all times will be provided in the appropriate healthcare services of the National Health System, whether or not the employee requiring healthcare has been issued a medical leave statement. On the other hand, for the purposes of the decision to terminate employment permitted by Art. 52(d) LET, absences from work due to non-work-related injuries or illness or accident shall not count when the medical leave lasts for more than twenty consecutive days. Absences due to a serious work-related injury or illness, irrespective of their duration, shall not count either, nor, in the case of female workers, those derived from a risk situation during pregnancy and lactation, from illnesses caused by pregnancy, childbirth or lactation and those caused by a physical or psychological situation arising from gender violence. In short, "through controversial regulation, the legislator has sought to maintain a balance between the legitimate interest of the company in alleviating the onerousness of absences from work, which is connected with the protection of productivity (Art. 38 CE) and health and safety at work, it can therefore be concluded that Article 52(d) LET does not infringe the right to health protection which Art. 43(1) CE recognises, nor, it is worth adding, the right of workers to safety at work (Art. 40(2) CE)" (PL 5).

3. Finally, the referring court questions whether the right to work protected under Art. 35(1) CE should be deemed violated. As indicated in the Judgment of the Constitutional Court of 16 October 2019, the aspect of the right to work impinged upon by the challenged article is not that which refers to access to work, but to keeping the same (or, in other words, job stability), since what Article 52(d) LET regulates is one of the events of termination of employment contract by reason of redundancy - absenteeism under certain conditions. And, in this sense, the judgment underlines how the article in question "does not dispense with the causal element of redundancy, but rather endows the definition of the specific event of termination regulated - absenteeism in the workplace - with objectivity and certainty" (PL 6). The referred article clearly determines the number of absences from work, intermittent even if authorised, delimits the period in which they are computed, provides for compensation (severance pay) when the termination is executed, sets out the cases that cannot be computed as absences from work for these purposes and submits the business decision to judicial review. "Consequently, one cannot conclude from this perspective that the delimitation of the grounds for redundancy regulated by the questioned Article 52(d) LET violates Article 35(1) CE, without this court being competent to judge the appropriateness or convenience of the choice made by the legislator to assess whether it is the most adequate or the best of the possible choices" (PL 6).

However, the judgement acknowledges that the article in question contains a partial limit to the right to work, but this limit is justified because Article 38 CE recognises the freedom of enterprise and entrusts the public authorities with the safeguard and protection of its exercise, as well as the defence of productivity. As Judgment no. 119/2014 of the Constitutional Court recalls, "the right to work recognised in Article 35(1) CE is neither absolute nor unconditional" (PL 3). Thus, the "requirements arising from Article 38 CE can legitimise the legal recognition in favour of the employer of certain powers to terminate an employment contract as part of the employer's management powers" (Judgment no. 192/2003 of the Constitutional Court, PL 4). In short, and as already stated in Judgment no. 125/2018 of the Constitutional Court, Article 52(d) LET incorporates "a system of protection of the interests of the employer against the absence of the worker from his or her job, which finds its balance in the delimitation by the legislator of a set of events of exclusion from the calculation of absenteeism, which are related to the individual situations in which the employee may find himself or herself" (PL 5). Furthermore, and in relation to the alleged contradiction between Article 52(d) LET and Article 6(1) of the International Labour Organization's (ILO's) Termination of Employment Convention, 1982 - "temporary absence from work because of illness or injury shall not constitute a valid reason for termination" – mentioned in the referral, the judgment recalls that "international treaties do not integrate the standard of constitutionality under which domestic laws are to be examined, regardless of their hermeneutical value in the case of international texts on human rights as per Article 10(2) CE" (Judgment of Constitutional Court no. 140/2018 of 20 December, PL 6). As stated before, the possible contradiction between the internal regulation and the international conventions and treaties ratified by Spain does not in itself determine any constitutional violation: it involves a judgment of applicability - supervision of compliance with conventions - that belongs to the scope of non-constitutional legality. In spite of this, the Constitutional Court does not see any contradiction between these articles because, according to the ILO's Termination of Employment Convention, 1982, the legislator can establish its own regulation within its own margin of configuration, weighing the rights and interests in conflict, as it has effectively done through the regulation contained in Article 52(d) LET. Value has been given to the defence of productivity, "which may be compromised by the increase in direct and indirect costs that companies have to bear as a result of absences from work, intermittent even if authorised, occurring in a given period, in accordance with the provisions of Article 52(d) LET" (PL 6). Thus, any violation of Article 35(1) CE is ruled out because, "although it is true that the legislator has adopted a measure that limits the right to work, in its aspect of the right to job stability, it has done so with a legitimate purpose - to avoid the undue increase in the costs that absenteeism entails for companies -, which finds constitutional basis in the freedom of enterprise and the defence of productivity (Art. 38 CE)" (PL 6).

Lastly, two dissenting opinions accompany this judgment. One of these stands out: that which raises the existence of unconstitutionality due to indirect discrimination based on sex. Admitting that such discrimination may derive from statistical data (Judgment no. 128/1987 of the Constitutional Court, PL 6) and accepting, in this case, "the unequivocal conclusion that there is indirect discrimination based on sex in Article 52(d), because it affects women to a greater extent, due to the negative consequences of their double working day, that is, their greater

dedication to the care of their children, of the disabled and dependents (ascendants and descendants), together with their working hours, which also impinges on their health, all these circumstances negatively affecting their work", it is stated that the unconstitutionality of the article should have been accepted for violation of the right to non-discrimination. Inasmuch as women continue to suffer "to a much greater extent than men the burden of the double working day, work and family, [and] this situation has a significant impact on their health and work, which, together with their physiological conditions, leaves them exposed to a much greater extent to suffer short-term disability leaves or absences due to family burdens, which may be subject to the application of Article 52(d) LET", said article should have been held unconstitutional.

4. This has not been the case and, therefore, the possibility of making an employee redundant (with compensation of twenty days per year worked) is kept when he or she misses work even if such absences are authorised, provided that the absences are intermittent and exceed the statutory limits (reaching *twenty percent* of the working days in *two consecutive months,* provided that the total number of absences in the previous twelve months reach five percent of the working days or *twenty-five percent* in *four discontinuous months* within a twelve-month period). In addition, certain absences will not be computed: absences due to a legal strike; to the carrying out of activities of statutory representation of workers; to accidents at work; to maternity; to risks during pregnancy and lactation; to illnesses caused by pregnancy, childbirth or lactation; to paternity; to time off and holiday entitlements; to non-work-related illnesses or accidents when the leave has been agreed by the official healthcare services and has a duration of more than twenty consecutive days; neither those caused by a physical or psychological situation arising from gender violence or those owing to a medical treatment of cancer or serious illness.

5. All the objections raised in the question of constitutionality have been overcome by considering that the exceptions provided by the legislator allow the challenged article to pass the constitutionality test. It is not a case of absences arising from situations that may give rise to discrimination based on sex, a violation of the right to freedom of association or a violation of workers' right to health, but rather other types of absences, namely repeated short-term absences that generate losses to the employer's productive organisation, which makes it necessary to consider the freedom of enterprise, also constitutionally guaranteed. In fact, European rules and their respective interpretations make it necessary to consider absenteeism due to the direct or indirect cost it involves for the company.

   Even absences due to illness may not be expressly raised insofar as the article does not allude to them, but rather to any repeated, albeit intermittent, authorised absence. However, it should be noted that absences due to illness are those found in the subject matter of this action, generating a cost to the employer. And not because there is no Social Security benefit to cover them - temporary disability - but because, in order to avoid collusion between the worker and the employer and to discourage potential fraud, the law provides that the first four days of said disability are not paid and that, from the fourth to the fifteenth day, the amount is paid

by the employer (Art. 173(1) of the Social Security Act). However, in view of the foregoing, it is not so much the fact of being ill that is penalised as the repetition and intermittency of the worker's absences during a certain period (and it could be found that, regardless of repetition and intermittency, the truth is that the worker is ill, since these are authorised absences - an act of God - and not absences of his/her own volition – unauthorised -). This would therefore be an unacceptable approach by a legislator who is insensitive to a defenceless worker, but labour legislation also requires balance. Precisely, in the matter of redundancy, the balance of interests is found in Article 52 LET, since the legislator admits a series of lawful events of redundancy – unexpected ineptitude of the worker, lack of adaptation to the work, financial, technical, organisational or productive causes or insufficiency of budgetary appropriation derived from public funds, in addition to the event that is analysed here, in exchange for a price (twenty-day severance pay).

Perhaps indirect discrimination based on sex should be taken into account, if conveniently proven. Now this is excluded because the article in question does not admit as events of redundancy those that affect workers more directly and because, even if it is true that the workload of the female employee is doubled with longer working hours, wage gap, family support, care and greater precariousness, figures do not clearly reflect that intermittent authorised absenteeism affects women more than men. Perhaps because women, with more precarious jobs and part-time work, are compelled to avoid absences.