Notes on Spanish Labour and Employment Regulations: Termination With and Without Cause Under the Workers' Statute

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1. Ruling on terminations of employment and related effects

Once an employer has taken the decision to terminate employment, the employee has the right to dispute this decision before a court of law whereby judges will be responsible for ruling on this same. Rulings on termination of employment are regulated in articles 55 and 56 of the Statute for Workers and in articles 108-110 of Law 36/2011 of the Social Jurisdiction. With the aim of correcting important flaws in the laws governing dismissals, this matter has recently been modified by the Royal Decree-Law 3/2012, of February 10th, and finally by Law 3/2012, of July 6 th, regarding urgent measures for labour market reform.

In Spain, there are three types of rulings on termination of employment: with cause, without cause or void. At the same time there are three types of dismissal: disciplinary, objective and collective. Disciplinary termination (art.54 of ET) is based on a serious and deliberate breach committed by the employee. On the other hand, objective dismissal (art.52 of the ET) is determined by reasons which are objective as opposed to subjective (these last being characteristic of disciplinary termination) and may include breaches of the provision which are neither malicious nor culpable but which are still to the detriment of the employer. Collective dismissal (art.51 ET) constitutes a mechanism for restructuring companies for reasons which are economic, technical, organizational or related to production.

In the first place, a ruling of termination with cause applies when the breach- alleged by the employer in the letter of termination- has been demonstrated. If the termination is disciplinary then the employee is not entitled to compensation but he is entitled to claim unemployment benefits. Only when an objective termination is declared with cause is there compensation of 20 days salary for each year of service, distributed pro rata over months for periods of less than one year and with a maximum of twelve monthly payments.

In the second place, termination without cause is defined as that in which the breach alleged by the employer in the termination letter has not been demonstrated or as that which does not comply with the formal requirements as established in the Workers' Statute. Once the judge has ruled that the decision to terminate employment is without cause, the employer is left with the choice of re-employing the employee or paying compensation. That said, when the employee who has been dismissed is a workers representative than then rule is inverted and it is the employee who chooses between compensation or re-employment. If the party making the decision remains silent then, in both cases, the legal response is reemployment.

In the third place, void dismissal is that which involves a breach of the employee's fundamental rights or a breach of the right to reconcile family life and work (as recognized under the law). When a termination of employment is declared null the employer must reinstate the employee with back pay.

2. Objectives of 2012 labour reform

Practical experience has revealed important flaws in the laws governing the termination of employment. On one hand, proceedings were at times deliberately delayed by the claimant because of

wages which could be generated from the moment employment was terminated until the court's judgement was handed down (and then added to the legal compensation). This so-called interim salary* pay was paid by the employer when termination was declared null or without cause. In some cases, however, the 2012 labour reform abolishes such interim salary alleging that the length of time taken by a judicial process cannot be used as grounds to compensate the harm caused by loss of employment. Furthermore, the employee may claim unemployment benefits from the very moment that the decision to terminate employment is made effective. Interim salary may only be paid if the party terminated without cause is a legal representative of the workers or a union delegate or, beyond cases described, if the employer opts to re-employ the claimant.

On the other hand, the so-called "express dismissal" consisted of termination with legal cause, acknowledgement of unfair dismissal and payment of compensation. This was clearly a move away from legal processes and altered the nature of the motives for termination of employment. In the setting of the economic crisis, it became clear that the main way of terminating permanent contracts was indeed via "express dismissal", far surpassing the number of collective and objective dismissals. In order to avoid the legal process, employers generally preferred to pay compensation for termination of employment which was higher (45 days) than specified in the law for termination with cause (20 days or nothing in disciplinary termination). These were the reasons why the labour reform eliminated "express dismissal".

Lastly, strong segmentation in the labour market between temporary employees and employees with a permanent contract has meant a reduction in the costs of terminating the employment of permanent employees. After the 2012 labour reform, severance pay for termination without cause is 33 days wages for each year of service, distributed pro rata over months for periods of less than a year, up to a maximum of twenty four monthly payments (previously it was 45 days' wages for each year of service, with smaller periods of time distributed pro rata over months, with a maximum of forty two monthly payments).

2.1. Related problems

The application of the 2012 labour reform has led to serious doubts as to whether interim salary is to be paid in those dismissal procedures begun prior to February 12, 2012 but which are resolved by the courts after this date (which is the date the reform was passed into law). Several decisions have been handed down in this matter that have found both for and against.

With regard to these terminations of employment, the 2012 Labour Reform has established a transitory rule regarding severance pay for termination without cause for those contracts drawn up prior to the law being passed. Thus, compensation is to be calculated on the basis of 45 days' wages for each year of service for the period of time worked prior to the aforesaid date the law was passed and on the basis of 33 days wages for each year of service for the period of time worked afterwards.

The amount to be compensated may not be greater than 720 days' wages, unless compensation for the period prior to the passing of the Royal Decree-Law is calculated to have a greater number of days. In such cases, this will be the maximum amount of compensation to be applied, and on no account may be greater than 42 monthly payments.

2.2. How to calculate compensations for termination of employment a hypothetical case

An employee was hired as an administrative assistant on July 1st in 1998 by the company "Informática S.A" by means of an ordinary permanent contract.

On March 20st 2012, he was notified by the company that he is to be subject of a disciplinary termination. In the termination letter it is alleged that he has repeatedly removed computer equipment over a period of time.

* Interim salary may be defined as the employee's salary from the date of termination through the date on which the court's judgement is notified.

In a ruling made available to the employee on September 10 in 2012, the judge rules that the termination is without cause on the grounds that, during the hearing, the employer was unable to prove that the employee behaved in a way that led to the termination of employment.

Including the corresponding portion of bonus payments, the employee's monthly salary is 1,500 euros.

Solution

As established by article 56 of the Workers' Statute, according to the draft provided by the 2012 Labour Reform, a disciplinary termination without cause means that the employee would be entitled to receive compensation of the amount of 33 days wages for each year of service, with a maximum of 24 monthly payments. At the same time, and applying the aforementioned transitory rule, two types of calculations must be made:

1st Step: compensation corresponding to the period July 1, 1998 to February 11 ,2012
(13 years, 7 months and 11 days of service) would mean:

156 + 8 (whatever the number of days worked since the last full month, the apportionment to be made for months, as if he had worked the whole month)= 164 months

12 months ..... 45 days of compensation
164 months x
X= 45x164/12=615 days of compensation

This adds to a total of 615 days of compensation

Daily wages that are to act as a unit of measure for calculating the compensation:

(1.500 x 12) / 365 = 49.32 euros

Amount of compensation until February 11, 2012:
49.32 euros x 615 days = 30,331.8 euros

2nd Step: Compensation corresponding to the period February 12 to March 20, 2012
(1 month and 9 days of service)

12 months ..... 33 days
2 months x
X= 33x2/12= 5.5 days of compensation

49.32 euros x 5.5 days = 271.26 euros

3rd Step: Total amount of compensation:

30,195.67 euros + 271.26 euros= 30,466.93 euros

The hypothetical situation described above proposes to add up the interim salary (wages which are generated from the moment of implementing the termination-March 20, 2012-until notification of the court's judgement-September 10, 2012) for terminations of employment implemented prior to the

work reform. However, if the employment had been terminated subsequent to the work reform then in no circumstances would interim salary be paid when the company had decided to pay compensation.

In sum, it is clear that the 2012 labour reform has considerably reduced the cost of termination of employment, not only for employees hired from the date the new rule was made effective but also for those hired beforehand.