OBJECTIVE DISMISSAL FOR FAULTS OF ASSISTANCE STILL JUSTIFIED

Article 52.d) of Royal Legislative Decree 2/2015, of October 23, which approves the Consolidated Text of the Workers' Statute Law ("ET") enables the employer to terminate the employment relationship by absenteeism in case of reaching certain thresholds for absences even if they are justified. Such thresholds are to reach (or, of course, exceed): (i) 20% of working days intermittently in 2 consecutive months, assuming 5% within the previous 12 months; or (ii) 25% of working hours for 4 discontinuous months in a period of 12 months. However, the abovementioned provision excludes the calculation of those times off sick due to non-occupational accidents, or those agreed upon by health services for a common illness whose duration exceeds 20 days, among others.

The Constitutional Court pronounces on this in its Judgment of October 16, 2019, rec. 2960/2019, whose ruling supports the legality of the objective dismissal due to absenteeism, by the article 52.d) ET. In this regard, the Court rejects the violation of precepts 15, 35.1 and 43.1 of the Spanish Constitution of 1978 ("CE"). Its rationale is based on the fact that in no case the worker's health is put at risk, since the conduct foreseen in the article does not conceive an act of such caliber, and that nevertheless, the rule excludes certain assumptions from the calculation such as the loss of long duration or certain serious illnesses, which, consequently, gives objectivity and conviction the extinction of work due to absenteeism. In addition to the above, this article fulfills the purpose of promoting productivity through the recognition of freedom of enterprise, referred to in article 38 CE.

However, this Judgment has the formulation of 3 particular votes, that made by Mr. Fernando Valdés Dal-Ré and that of Mrs. María Luisa Balaguer Callejón, to which Mr. Juan Antonio Xiol Ríos adheres. The first of them understands that the question of unconstitutionality should have been estimated for violation of article 35.1 CE, since the worker is discouraged from the right to health care for fear of any reprisal by the employer, thereby neglecting his health. The second particular vote focuses on the discrepancy of the Magistrate in the use given to the freedom of a company ex Article 38 CE as a justifying means of contractual termination. At the same time, it contemplates, as a consequence of applying article 52.d) ET, indirect discrimination on the basis of sex towards women, since the times off sick due to common contingencies are mostly taken by women.