

Employment Flash

- **Anti-harassment protocols and measures in companies following Organic Law 10/2022 of 6 September, on the comprehensive guarantee of sexual freedom**
- **The Supreme Court Judgment of 19 October 2022: About the qualification of the nullity of dismissal and ILO Convention 158**

Anti-harassment protocols and measures in companies following Organic Law 10/2022 of 6 September, on the comprehensive guarantee of sexual freedom

In relation to the labour aspects addressed by the recent Organic Law 10/2022 of 6 September, on the comprehensive guarantee of sexual freedom ("**LOGLS**"), it is appropriate to draw attention to an aspect that may have gone unnoticed, and which has a direct impact on the protocols and other preventive measures against harassment, which companies have been applying by virtue of art. 48 of Organic Law 3/2007 of 22 March for the effective equality of women and men ("**LOI**").

Under the previous wording of art. 48 LOI, companies were required to have protocols in place to deal with complaints of sexual harassment or harassment on grounds of sex, also providing for the drafting of codes of good practice and other preventive measures with regard to such possible specific situations of harassment.

DF10th LOGLS modifies the aforementioned art.48 LOI, replacing the reference to these "anti-harassment" protocols with a more generic reference, but with a much broader scope. Thus, the new art.48.1 LOI stipulates that companies must promote "*working conditions that prevent the commission of crimes and other conduct against sexual freedom and moral integrity at work, with particular emphasis on sexual harassment or harassment on grounds of sex...*".

Thus, it is now art. 12.1 LOGLS which contemplates the business obligation to have the protocols in question, and which refer to the much broader scope indicated above. Specifically, after reiterating the same obligation to promote working conditions incorporated in art. 48.1 LOI, the aforementioned article establishes that companies "*must establish specific procedures*" to prevent "*the commission of crimes and other conducts against sexual freedom and moral integrity at work, with special emphasis on sexual harassment or harassment on grounds of sex*", thus "*providing a channel for complaints and claims that may be made by those who have been victims of these conducts...*".

In short, the protocols already in place in companies, in many cases as part of the Equality Plan, must now be updated in accordance with the new LOGLS approach. Thus, although they should focus especially on situations of sexual harassment or harassment on grounds of sex, their scope should be significantly broadened to include the management of complaints or claims about any conduct contrary to sexual freedom or moral integrity at work. Furthermore, these protocols are now conceived as a preventive measure with regard to the possible commission of offences in this area.

On the other hand, codes of good practice and other preventive measures are still provided for in Art. 48 LOI, but their scope is also broadened, and they must now also cover this diversity of potential conducts contrary to sexual freedom or moral integrity at work.

The Supreme Court Judgment (STS) of 19 October 2022: on the qualification of nullity of dismissal and ILO Convention No. 158

The STS of 19 October 2022, adopted by the Plenary of the Social Court, ruled on the qualification of the dismissal carried out in contravention of article 2 of Royal Decree-Law 9/2020, which stipulated that the objective causes of business crisis deriving from the pandemic "*may not be understood as justifying the termination of the employment contract*", as the law provides for specific suspensive measures for such situations. The High Court confirms what otherwise seemed clear from a calm and objective reading of the rule, i.e. that it did not entail any prohibition on dismissal, and that as such causes do not "justify" the decision to terminate, the consequence is the classification of the dismissal as unfair, as the Labour Law provides for dismissals without sufficient legal cause.

In consistency with the criteria already established by the High Court, but which had again been called into question by some judgments of the High Courts of Justice when ruling on dismissals adopted in violation of the emergency labour regulations due to the pandemic, the judgment confirms that dismissals without cause or in fraud of the law must be classified as unfair, and not as null and void, unless the law expressly provides for such classification of nullity (as occurs with dismissals carried out in fraud of the regulations on collective dismissals).

In addition, the judgment includes interesting references on the adequacy of the legal regime of dismissal in Spain with respect to ILO Convention 158, which has sometimes been discussed in different jurisdictional and doctrinal instances.

On the one hand, it has been argued that the effectiveness of dismissal without cause, classified as unfair (and not null and void), could be considered as a kind of company "withdrawal", contrary to the requirement of "just cause" in the aforementioned International Convention. In this regard, the High Court recalls that the classification of the dismissal as unfair respects ILO Convention 158 and is a sanction for the company's decision without cause.

On the other hand, apart from the question of the unfeasibility of the nullity of the dismissal for lack of cause, which is the subject matter of this judgement, it is interesting to note that it concludes categorically that "*Spanish legislation complies with the alternative remedy of Article 10 of ILO Convention 158*", setting a specific compensation payment for the breach of the principle of causality.

The precept thus invoked by the judgment refers to "*adequate compensation payment or other appropriate relief*" for unjustified termination of employment. In some cases, this has been interpreted as enabling the courts to impose additional severance pay to that provided for by law for unfair dismissal, at least in certain cases in which the amount of the severance pay resulting from the legal provision is "manifestly inadequate" to compensate for the damage caused and accredited (for example, in cases of low seniority of the dismissed worker), with clear illegality (absence of cause), fraud or abuse of rights.

With regard to this controversial doctrine, and although it is not the subject of the Supreme Court's pronouncement in the judgment under discussion here, it seems interesting to highlight the brief but categorical criterion of the Plenary of the Social Division of the Supreme Court, according to which the Spanish regulation on severance pay for unfair dismissal complies with Article 10 of ILO Convention 1158 and is therefore an "appropriate remedy" or "adequate compensation", in the terms of the Convention, for dismissals without "just cause".

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