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Violations of the right to job stability: The case of early dismissal

Vulneraciones al derecho a la estabilidad laboral: El caso del despido intempestivo

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ABSTRACT: This research analyzes the legal figure of early dismissal considered in the Labor Code for the private sector and its relationship with a potential violation of the right to job stability. Thus, an analysis is proposed based on data collected in the city of Guayaquil (the metropolis has been taken as a case study). This “miscellany” is relevant because its legal antecedents are related to a current “contradiction” between Articles 33 and 325 of the Constitution and Article 188 of the Labor Code. According to these legal norms, work is a right, a social duty, and an essential source of income for the family economy. However, in the author’s opinion, the State does not end up effectively guaranteeing the right to work. Nor does it protect workers’ rights by applying early dismissal, thus violating the principles of stability and continuity of work. Therefore, after a review of the literature, this contribution uses the application of surveys and group interviews (focus groups). These techniques were relevant to identify among men of law the cause and consequences of early dismissal and illustrate aspects such as workers’ compensation in the event of early dismissal, the application of fines to employers, and other related aspects.

KEYWORDS: Social and economic rights, legal systems, law, labor, code.

RESUMEN: Este artículo analiza la figura jurídica del despido intempestivo considerada en el Código del Trabajo para el sector privado y su relación con una potencial violación del derecho a la estabilidad laboral. En ese sentido, se plantea un análisis a partir de datos recabados en la ciudad de Guayaquil (metrópoli tomada como caso de estudio). Este aporte es relevante y adquiere mayor notoriedad si se considera que sus antecedentes se encuentran en la contradicción entre los artículos 33 y 325 de la Constitución de la República y el artículo 188 del Código del Trabajo. Según estas normas legales, el trabajo es un derecho, un deber social y una fuente de ingresos esencial para la economía familiar. Sin embargo, en opinión de la autora, el Estado no termina por garantizar de manera efectiva el derecho al trabajo. Tampoco protege los derechos de los trabajadores al aplicar el despido intempestivo, violando de esta forma los principios de estabilidad y continuidad laboral. Por lo tanto, después de una revisión de la literatura, este aporte recurre a la aplicación de encuestas y entrevistas grupales (*focus group*). Estas técnicas fueron relevantes para identificar entre hombres de leyes la causa y las consecuencias del despido intempestivo y, asimismo, ilustrar aspectos como la compensación de los trabajadores en caso de despido intempestivo, la aplicación de multas a los empleadores y otros aspectos relacionados.

PALABRAS CLAVE: derechos sociales y económicos, régimen jurídico derecho, trabajo, código.

JEL CODE: F16, J01.

INTRODUCTION

Labor Law studies the legal relationships derived from the exercise of a human and fundamental right, which is the right to work. Consequently, work is understood as a legal act, as a subsistence, by allowing human beings to work to carry out dignified activities capable of sustaining the maintenance of their lives and their families. According to Luis Cueva Carrión (2013): “Rights are not true rights if they cannot be demanded. A right does not exist if it is not enforceable and achievable because unenforceable right is non-existent right” (n. p.).

When reviewing articles 33 and 325 of the Constitution of the Republic of Ecuador, the characterization and declaration of work as a right and a social duty is observed. Therefore, as a source of personal fulfillment and the base of the family economy. It is argued that the State will guarantee this right and protect the worker (CRE, 2008). However, in the Ecuadorian case, the Labor Code (2005) in its Art. 188, does not guarantee the “right to stable and permanent work”, for which figures such as early dismissal - provided for in that legal body - lead to the violation of the principles of stability and continuity of work.

These actions, even if they are “legal”, allow the presence of excesses and even abuses committed by employers, as they can unilaterally alter the agreements that were made at the beginning of the employment contract (where the employer, when dismissing the worker, would be ending the employment relationship “without cause”).

The problem is formulated based on the legal fact that occurs with early dismissal and when the constitutional right to job stability is violated through this legal figure. Then some general questions arise: What are the constitutional rights around work that the Ecuadorian State recognizes and guarantees? What would be the factual consequences of the early dismissal?

These questions are relevant since they allow defining the objectives of this brief miscellany that revolve around the need to identify early dismissal, its causes, and consequences; and establish the factual elements that justify the need legally and doctrinally for legislative reform of Art. 188 of the Labor Code.¹

1. CONSIDERATIONS FROM THE DOCTRINE

The obligations of the State and the workers are reciprocal and dependent, since being the product and member of society, the human being needs the State to provide him, according to the principles of equality and justice, with material and spiritual means for his improvement. For its part, society requires its members to perform work to produce national wealth that allows it to attend to national duties. It is the State that has the factual and legal obligation and duty to demand that the authorities administer justice and generate legal provisions in the most favorable sense for workers in the event of darkness.

However, the Labor Code (2005), in Article 188, establishes the labor legal institution of early dismissal, and through this legal figure, the right to job stability (constitutionally recognized) is violated. This consideration represents the motivation that justified an analysis inspired by the “idyllic dilemma” of guaranteeing job stability and the -useful- right to work.

1.1. Expanding the “dilemma”: some consequences of early dismissal

If the study of the consequences of early dismissal for workers is deepened, and the criteria of Selye (1950) are used, stress will be identified. This is presented as the organism’s

1 For this brief miscellany, the research was carried out in the city of Guayaquil in the 2019 period. The following consideration works as a hypothesis: regulating the process of early dismissal, established in the Labor Code, will help avoid job stability as the aim of the system.

response to the perception of a threat characterized by the prevalence of phases. The first alarm phase is where the body prepares to give a response. The second phase of resistance, where specific changes appear that will allow the individual to face a situation, and finally, a third phase is characterized as exhaustion, where there is a waste of energy used to face a threat. This same author establishes that there is a similarity between stress and depression and argues that both are the result of “experiential scenarios” that lead to an increase in blood pressure, heart rate variability, and other severe impairments in the functioning of the organism—adding others of a social nature such as the appearance of aggressiveness, propensity for isolation and non-recurring irritability.

Continuing with this line of argument, Rodríguez Carvajal (2011), based on Selye’s contribution, shows that these effects are produced by the lack of job stability that haunts workers in emerging economies and is not at all mitigated by permissive legislation against the introduction of figures such as early dismissal.

Concomitantly with the above, for Coduti (2011), anxiety and stress are consequences of negative experiential scenarios that also generate discouragement, tiredness, apathy, frustration, shock states, post-traumatic neurosis, dyspepsia, gastritis, and these can be attributable to circumstances such as that caused by early dismissal. Peiró and Lira (2013), for their part, favor these postulates when finding a scientific degree of verifiable correlation.

These considerations are not overlooked by the International Labor Office in Geneva (2013), which, in the edition of a manual titled “Prevention of stress at work,” explores aspects such as safety in one of its sub-themes of employment and protection of worker’s rights.

Finally, Camacho Ramírez (2017) analyzes those psychosocial risks that are influenced by work situations that have a high probability of damaging the health of workers, physically, socially, and mentally. This author also maintains that psychosocial risk can trigger events or situations that lead to harmful damage to the worker's health, causing mental illness, affective disorders, depression, demotivation, and low self-esteem, among others.

2. METHODOLOGICAL GUIDELINES

This miscellany used the survey and the focus group as techniques, and instruments, the multiple-choice questionnaire, and the script for the open group interview (through which the interviewer could formulate new questions if deemed necessary). Regarding the population, this was represented by free-exercise professionals attached to the Guayaquil Law School (16,566 adult individuals of both genders) and the sample by a total of 193 lawyers. Likewise, it considered 0.5 probability of occurrence and 0.5 non-occurrence, with a margin of error of 0.05% and a confidence level of 1.96%.

Through the application of the multiple-choice questionnaire, it was determined that early dismissal violates the right to job stability, identifying the causes and consequences that this produces, regardless of the type of contract in which it is applied. Also, the non-correspondence between articles 33 and 325 of the Constitution of the Republic and the Labor Code in article 188 was identified. The first norm proposes guaranteeing the right to work and job stability, and the second applies early dismissal. Although this problem should entail a legal solution that gives primacy to the constitutional norm due to its higher hierarchy it exemplifies a fundamental theoretical assumption that cannot be verified.

The applied questionnaires presented the following questions:

- 1) Do you believe that the employer, when applying the early dismissal, generates factual and legal insecurity, and contradicts the norms and spirit of the Constitution of the Republic?

Table 1: Results of the first question

Items	Total	Real	%
In total agreement	193	112	58%
Partially agree	193	21	11%
Neutral or undecided	193	8	4%
Partially disagree	193	30	16%
Strongly disagree	193	22	11%

Own elaboration

58% of the respondents, representing 112 of the 193 sampled, assure that when an employer applies the early dismissal, it generates factual and legal insecurity in the workers and contradicts the Constitution's norms and the spirit of the Republic. Another 11% partially answered in agreement, 4% behaved indecisively, and 27% acknowledged that such contradiction occurs.

2. Do you consider that early dismissal affects the worker's job stability?

Table 2: Results of the second question

Ítems	Total	Real	%
In total agreement	193	176	91%
Partially agree	193	5	3%
Neutral or undecided	193	4	2%
Partially disagree	193	4	2%
Strongly disagree	193	4	2%

Own elaboration

Early dismissal affects job stability in general, 91% answered affirmatively to the question, 3% partially agreed, 4% undecided, and 4% partially or disagreed.

3. Do you consider that early dismissal in Guayaquil is a generalized social problem?

Table 3: Results of the third question

Ítems	Total	Real	%
In total agreement	193	135	70%
Partially agree	193	30	16%
Neutral or undecided	193	6	2%
Partially disagree	193	17	9%
Strongly disagree	193	5	3%

Own elaboration

In Guayaquil, early dismissal also involves a social problem that affects most public and private entities. 86% of those surveyed stated that they totally and partially agree with the existence of this problem, 12% choose to totally and partially disagree, and 2% remain neutral.

4. Do you consider that it is necessary to establish reforms in Article 188 of the Labor Code?

Table 4: Results of the fourth question

Items	Total	Real	%
In total agreement	193	176	91%
Partially agree	193	6	3%
Neutral or undecided	193	8	4%
Partially disagree	193	2	1%
Strongly disagree	193	1	1%

Own elaboration

The Labor Code regulates in its article 188 the early dismissal. 91% of the respondents state that it is necessary to modify this legal body so as not to affect the job stability. 3% state that they partially agree, while 2% do not agree with this criterion, and 4% abstain from giving their opinion.

On the other hand, from the focus group's application, it was possible to identify that the experts recognize that it is necessary to reform article 188 of the Labor Code for the benefit of the worker. Regarding early dismissal, this reform should not only simplify the process of replacing the job; but a double compensation for the monetary values not received until the date of replacement. Besides, it is proposed to maintain three months of remuneration for up to three years, as compensation but not to exceed twenty-four months of remuneration, and various training strategies on worker's rights.

Likewise, the experts opined that many workers do not know the ways and means through which they can defend their rights to job stability. Sometimes because they have no basic knowledge of job training, other times because employers force them to sign their resignations through "psychological pressure."

Experts state that the psychological and personal consequences that early dismissal produces in workers can be numbered: tension, anguish, stress, altered moods, lack of concentration, low self-esteem, sleep difficulties, irritability, lack of appetite, apathy, dysfunctional homes, economically drowned families, job demotivation, delays in economic processes, in institutions among others.

Therefore, it was established that in the opinion of the experts, early dismissal violates not only the occupational but emotional stability of the worker, since it directly violates the norms of good living. The employer, regardless of the provisions

of the Labor Code, does not compensate as established. It was even stated that even the most significant violations are in private institutions, wherein in all the cases cited, employers must be subjected to lawsuits to comply with the provisions of the law.

CONCLUSIONS

With early dismissal, factual and legal insecurity is created in the worker. This scenario is in open contradiction with what is stated in the Constitution of the Republic that establishes that each worker has the right to work, and job stability, as necessary conditions to achieve a good living. However, the Labor Code violates this right in Article 188.

It is necessary to promote campaigns within civil society focused on training ordinary citizens on their labor rights. The introduction of public policies that allow the “labor education” of the Ecuadorians to be promoted will be beneficial in that it will favorably affect the reduction of factual and legal insecurity of the worker, in the correct identification of labor duties and rights, among others.

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