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ANALYSIS

Employment

Severance pay is a claim against the insolvent estate - not an insolvency claim - if a pre-opening-of-insolvency-proceedings dismissal is ruled unfair post hoc

Notwithstanding a dismissal occurring before the opening of insolvency proceedings, if a court finding of unfairness and an employer decision to make a severance payment occur after, the dismissed employee's claim must be deemed against the insolvent estate, even if the parties had reached a settlement, if such was reached also after.

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1. Although the current Insolvency Act (Royal Legislative Decree 1/2020 of 5 May [*Official Journal of Spain* of 7 May] approving the recast version of the Insolvency Act [TRLC]) has been amended on several occasions since its adoption, the fact remains that application issues continue to arise that, in the employment or, above all, civil branch of the court system, warrant analysis. Such is the case with the classification of severance pay-related claims arising when, following an unfair dismissal finding, the choice to pay severance pay rather than reinstate is made after the opening of insolvency proceedings, even if the dismissal took place before this.

> *The unfair dismissal compensation claim accrues, for the purposes of its classification, upon the employer's decision not to reinstate the dismissed employee*

Supreme Court (Civil Division) Judgment no. 640/2026 of 27 April summarizes its established doctrine on this matter. It recalls that in Supreme Court (Civil Division) Judgment no. 400/2014 of 24 July a decision was rendered for the first time regarding the classification of severance pay in respect of a dismissal that occurred prior to the opening of insolvency proceedings, the unfairness of which was determined by a judgment given after the insolvency proceedings, given the impossibility of reinstating the employee. The nature of the severance pay corresponds to that of compensation for harm caused to the employee by that decision — the failure to reinstate — despite the unfair nature of the dismissal and despite having opted (expressly or tacitly) for reinstatement when this does not occur or is irregular. The same reasoning shall apply in the event that reinstatement is impossible because the insolvent debtor has ceased operations, and the judgment itself that finds the dismissal unfair also holds the contract terminated and sets the severance pay, since the cessation of the insolvent debtor's operations is a decision made in the interest of the insolvency proceedings, which determines the termination of the employment contract (despite the finding that the dismissal was unfair) and the accrual of severance pay for unfair dismissal. In short, following the opening of insolvency proceedings, the decision to terminate the contractual relationship is made in the interest of the insolvency proceedings, just as is the case with other contractual relationships generating reciprocal obligations that are in effect when insolvency proceedings are opened (former Art. 61(2) of the Insolvency Act 22/2003 of 9 July (LC) — *BOE* of 10 July —, now Art. 158 TRLC).

In subsequent Civil Division rulings (Supreme Court Judgments nos. 423/2015, of 1 July; 473/2016, of 13 July, and 414/2017, of 28 June), the court chose to reiterate the above doctrine, although without addressing the scenario under Article 56(1) of the Workers' Statute Act (LET), that is, when the insolvent debtor (with the consent of the insolvency practitioner) or the

insolvency practitioner, depending on the receivership or suspension of pecuniary powers, opts for the termination of the contract with compensation.

Subsequently, Supreme Court (Civil Division) Judgment no. 1674/2025, of 19 November, addresses this situation, in a case where the option of termination with severance pay for unfair dismissal is also exercised after the opening of insolvency proceedings; therefore, pursuant to Article 56(1) of the Workers' Statute Act, the termination shall be deemed to have occurred on the date of the effective removal. The court will hold in such a case that the unfair dismissal compensation claim accrues, for the purposes of its classification, upon the employer's decision not to reinstate the dismissed employee once the dismissal has been ruled unfair. This occurs not only when the employer has opted for reinstatement, or when the employer fails to make the choice within the time limit and is deemed to have opted for reinstatement, and reinstatement does not occur, or when it is not feasible and the employment court judge, in the judgment, deems the option for severance pay to have been chosen and orders termination, but also when the employer subject to insolvency proceedings (or the insolvency practitioner) opts for termination of the employer/employee relationship with severance pay after the opening of insolvency proceedings. The choice not to reinstate thus includes the scenario in which termination with severance pay is chosen, because this implicitly constitutes a choice not to reinstate. For the purposes of classifying the claim, the employer's obligation to pay severance pay does not arise until the option for severance pay is exercised. At the time of removal (dismissal), the obligation to pay severance for unfair dismissal has not yet arisen. If this option is exercised after the opening of insolvency proceedings, the claim must consequently be classified as a claim against the insolvent estate.

Following the opening of insolvency proceedings, the decision to terminate the contractual relationship is made in the interest of the insolvency proceedings

2. If this is the case, when, as in the judgments of the Supreme Court (Civil Division) nos. 1889/2025 of 18 December and 60/2026 of 22 January, the decision to terminate the contract is expressed by the employer in a settlement with the employee prior to the opening of insolvency proceedings, the claim for compensation for unfair dismissal must be classified as an insolvency claim. Conversely, if the settlement is concluded after the opening of insolvency proceedings, the employee's claim must be classified as a claim against the insolvent estate, as provided in Supreme Court (Civil Division) Judgment no. 640/2026 of 27 April.

   It should be noted that, in the case under consideration, the employee is made redundant with redundancy pay of twenty days' salary per year of service, up to a

When the employer's option for severance pay and the settlement approved by the court clerk's directive occur after the opening of insolvency proceedings, a claim against the insolvent estate is created

maximum of twelve months' pay. The employee files a claim for unfair dismissal, but the parties file a written submission with the Employment Court stating that they have reached a settlement whereby the employer acknowledges the unfairness of the dismissal and opts to terminate the contract due to the impossibility of reinstatement, offering severance pay that the employee accepts. Both parties agree on the effective date of the contract termination and reach other agreements regarding wages and the waiver of claims. The Employment Court approves the settlement reached. For its part, the insolvency practitioner had already acknowledged the claim for compensation for unfair dismissal as an insolvency claim contingent on the provisional report and on the final version of the list of creditors. Following the issuance of the directive approving the settlement reached, the insolvency practitioner acknowledges the claim as a non-contingent insolvency claim.

However, the Insolvency Payments Service (FOGASA) files a lawsuit against the insolvency practitioner and the insolvent debtor, requesting that the employee's claim for compensation for unfair dismissal be acknowledged as a claim against the insolvent estate rather than as an insolvency claim. It argues that, although the employee was made redundant prior to the opening of insolvency proceedings, the redundancy was challenged in the employment branch of the court system, and the Employment Court approved a settlement between the parties by directive dated after the opening of insolvency proceedings. It argues that the compensation for unfair dismissal arises not from the termination itself, but from the recognition of its unfairness and the defendants' subsequent choice to pay compensation. And, although the effects of the dismissal were established as of the date of termination, it is the declaration or recognition of its unfairness and the subsequent choice of compensation, approved by judicial decision, that give rise to the compensation claim, which did not exist on the date of termination. Therefore, the claim arises upon the finality and conclusiveness of the judicial decision approving the settlement, and thus must be acknowledged as a claim against the insolvent estate. This is an opinion not shared by the insolvency practitioner, who argues that, since the directive approving the settlement sets the date of termination prior to the opening of insolvency proceedings, it constitutes an insolvency claim.

The Business Court upholds the claim and acknowledges the employee's compensation as a claim against the insolvent estate, since, if the directives approving conciliation hearings that conclude with a settlement — which reproduce the agreement set out in the minutes — are granted the same effects as judgments (enforceability, appealability, res judicata), it must be considered that, for the purposes of the pres-

ent proceedings, the directive approving in court the settlement must have the same constitutive effect. Hence, even if the claim was filed prior to the opening of insolvency proceedings, since the settlement was reached during the conciliation hearing held after the opening of insolvency proceedings, the date of the directive is the date that must be considered, regardless of the fact that in the settlement the effects are retroactive to the date of dismissal as required by employment law.

3. Certainly, pursuant to Article 56(1) LET, when the dismissal is held unfair, the employer, within five days of notification of the judgment, may choose between reinstating the employee or paying compensation equivalent to thirty-three days' salary per year of service, with periods of less than one year prorated on a monthly basis, up to a maximum of twenty-four monthly payments. The choice of severance pay shall result in the termination of the employment contract, which shall be deemed to have occurred on the date of the effective removal.

   In this case, the redundancy prior to the opening of insolvency proceedings is challenged by the employee at the employment branch of the court system, and the parties, following said opening, submit a settlement whereby the employer acknowledges the unfairness of the dismissal and opts for the severance pay provided for in Article 56(1) LET — the amount of which is set out in the settlement —, with this agreement, prior to trial, being approved by way of directive of the court clerk.

   In this context, Supreme Court (Civil Division) Judgment no. 640/2026, of 27 April, clarifies that the provision applicable to the case *ratione temporis* is Article 242(8) TRLC, which, in the version prior to Act 16/2022 of 5 September (Official Journal of Spain [BOE] of 6 September), established that claims against the insolvent estate include:

   > … those arising from the carrying out of the insolvent debtor's professional or business activity following the opening of insolvency proceedings. This rule encompasses employment-related claims corresponding to that period, including severance pay or compensation for the termination of employment contracts that occurred after the opening of insolvency proceedings […], until the judge orders the cessation of the professional or business activity or the conclusion of the insolvency proceedings.

   The appealed judgment bases its decision to classify the claim arising from compensation for unfair dismissal as a claim against the insolvent estate on Article 84 of the Employment Jurisdiction Act, concerning the conciliation hearing in employment proceedings, which, in the version applicable to the case *ratione temporis*, prior to Act 1/2025 of 2 January (*BOE* of 3 January), establishes, among other matters, and with reference to the court clerk, the following:

   > [T]he court clerk shall attempt conciliation, carrying out the mediating role inherent to him or her, and shall advise the

> parties of the rights and obligations that may apply to them. If the parties reach a settlement, he or she shall issue a directive approving it and, furthermore, ordering the case to be closed. Similarly, the court clerk shall be responsible for approving the settlement reached by the parties prior to the date set for the conciliation hearing and trial [...] conciliation reached before the court clerk and the agreements reached between the parties and approved by the court clerk shall, for all legal purposes, be considered a judicial conciliation [...] 3. If no settlement is reached before the court clerk and the trial proceeds, the approval of any conciliation agreement reached by the parties at that time shall be the responsibility of the judge or court before which it was obtained, by means of an oral or written decision documented in the settlement itself [...]. The conciliation and the settlements between the parties approved by the court clerk or, where applicable, by the judge or court shall be enforced through the procedures for the enforcement of judgments...

The Court finds here that, unlike the dismissals addressed in the Supreme Court (Civil Division) judgments nos. 1889/2025 of 18 December and 60/2026 of 22 January, in the present case the dismissal occurred prior to the opening of insolvency proceedings, and the recognition of its unfairness and the employer's choice to pay compensation occurred subsequently, with the settlement approved by the directive of the court clerk also taking place after said opening. The approval of the settlement, which shall be considered a judicial conciliation, shall occur provided that the settlement does not cause serious harm to any of the parties or to third parties, nor constitutes an abuse of law or an abuse of rights, nor is contrary to the public interest. It constitutes an enforceable instrument, such that the terms agreed upon in the judicial settlement may be enforced through enforcement proceedings as if it were a final court judgment, allowing for its compulsory enforcement through the procedures for enforcing judgments if a party breaches the settlement. However, for the purposes of classifying the claim, the provisions of the cited judgments are valid, as the issue is whether that out-of-court settlement — even if it is filed with the court to have the effects recognized under employment procedural law — is effective between the parties and enforceable.

And, in light of the foregoing, the answer can only be affirmative. Even in the absence of a judicial or procedural decision holding the dismissal unfair or approving the settlement, following the employer's decision not to reinstate the employee and to opt for severance pay — with the employee's consent, on the one hand, to discontinue the proceedings, and on the other, to the amount of severance pay set out in the settlement — the employment contract is terminated. This is without prejudice to submitting the settlement to judicial oversight or to the court clerk to verify the absence of harm, fraud, abuse of rights, or any other serious invalidat-

ing defect. However, "in the present case, both the settlement and the directive approving it came after the opening of insolvency proceedings, and therefore the claim for compensation for unfair dismissal is a claim against the insolvent estate" (Supreme Court (Civil Division) judgment no. 640/2026, of 27 April, 2nd point of law).

4. Currently, the questioned wording of Article 242 TRLC has been amended. In that prior to the amendment the following were established as claims against the insolvent estate:

> ... those arising from the carrying out of the insolvent debtor's professional or business activity following the opening of insolvency proceedings. This rule encompasses employment-related claims corresponding to that period, including severance pay or compensation for the termination of employment contracts that occurred after the opening of insolvency proceedings [...], until the judge orders the cessation of the professional or business activity or the conclusion of the insolvency proceedings.

Now, Article 242(11) considers the following to be claims against the insolvent estate:

> ... claims arising from the carrying out of the insolvent debtor's professional or business activity following the opening of insolvency proceedings and until the judicial approval of the composition or, otherwise, until the conclusion of the insolvency proceedings. This provision covers employment-related claims accrued after the opening of insolvency proceedings, severance pay or compensation for the termination of employment contracts, as well as surcharges on benefits due to non-compliance with occupational health and safety obligations, until the judge orders the cessation of the professional or business activity or the conclusion of the insolvency proceedings.

It might appear that the new wording resolves situations such as those described here, but this is not the case because, just as before — when it was specified that claims against the insolvent estate were those arising after the opening of insolvency proceedings, including employment-related claims corresponding "to that period" — employment-related claims "accrued after the opening of insolvency proceedings" are now included, which means that doubts regarding their application may continue to arise.

The judgment under consideration adequately resolves these doubts, despite the discrepancy between employment law and the interpretation of civil law. Indeed, employment-related legal doctrine has long held that, since dismissal is a constitutive legal act, it inherently has the power to terminate the employer/employee relationship, regardless of whether it is challenged

or not and, if challenged, regardless of whether it is found to be fair or unfair. However, while employment legislation once provided that a "fair dismissal shall result in the termination of the employment contract without entitlement to severance pay or back pay", today, Article 55(7) LET provides that a "fair dismissal shall validate the termination of the employment contract resulting therefrom, without entitlement to severance pay or back pay". This argument, among many others developed by the case law of the employment branch of the court system, would support the view defended here by the civil branch of the court system and which allows upholding, for the purposes of classifying the claim, that only the employer's decision to pay compensation or reinstate the employee determines whether the claim is classified as a insolvency claim or a claim against the insolvent estate, depending on whether it is established before or after the insolvency proceedings.