PÉREZ BUSTAMANTE & PONCE PBP

Jose David Ortiz[1]

DISCRIMINATORY DISMISSAL IN ECUADOR'S CONSTITUTIONAL COURT DECISIONS

The Ecuadorian Constitution recognizes the right to formal and material equality and to non-discrimination. In general terms, the right to equality demands equal treatment in similar circumstances. In turn, consensus has been reached in that such respect does not prevent a different treatment in factually different situations, provided that the criterion used for distinction is not arbitrary[1].

To decide if a different treatment is objectively and reasonably justified and, hence, permitted by the Constitution or, on the contrary, if it is not justified and is an arbitrary differentiation, the high courts in the world have formulated scrutinies or tests to analyze the reasonableness of the measures adopted. Those tests seek to include guidelines for analyses to which it is possible to resort in order to assess whether different treatments are arbitrary measures that hinder the right to equality. Generally, those are strict or average tests or merely involve reasonableness[2].

The Constitutional Court of Ecuador is not an exception. Upon analyzing a case where a public entity unilaterally discharged an employee for the only reason that he had developed a catastrophic illness (HIV/AIDS), the Court concluded in its Judgment No. 080-13-SEP-CC that he was discriminated by having been dismissed on the basis of a suspect category. With that judgment, the Court established a line of case law relating to suspect categories by considering catastrophic illnesses as suspect categories giving rise to presumption of unconstitutionality.
The concept of suspect categories originated from case law of the Supreme Court of the United States of America. This principle considers that there are categories whose use is arbitrary and offensive to human dignity and, therefore, their unconstitutionality is presumed. To overcome such presumption, the use of that category ought to be subjected to a strict scrutiny that is extremely difficult to justify. Thus, the objective of that concept is to avoid the use of noxious

[1] Giardelli, L., Toller, F. & Cianiardo, J. (2008). Los estándares para juzgar normas que realizan distinciones, paralelismos entre la doctrina de la Corte Suprema estadounidense y la del sistema interamericano sobre el derecho a la igualdad. In E. Ferrer MacGregor & A. Zaldivar Lelo de Larrea, La ciencia del derecho procesal constitucional. Tomo IV, página 302. Mexico, Marcial Ponse

[2] Naranjo de la Cruz, R (2010): El Sistema de derechos constitucionales y sus garantías. Manual de Derecho Constitucional. Madrid. Editorial Tecnos.

and offensive categories as it considers that the law is an accomplice of inequality merely by using those classifications[3].

However, the United States Supreme Court case law only considers race, national origin and foreignness as suspect categories and subjects them to strict scrutiny, while classifications such as gender and sexual orientation are subjected to intermediate scrutiny. Other classifications such as age, physical disability, judicial records, among others, are merely analyzed with reasonableness. This is due to the fact that a noxious category such as race can practically never be used constitutionally as a justified differentiation factor, while others such as age may and should be taken into account to differentiate at the time of legislating[4].

Unlike U.S. case law, however, the Constitutional Court of Ecuador has established a lengthy catalogue of suspect categories. It justified including *gender* as suspect in its Judgment 292-16-SEP-CC, *filiation* as suspect upon considering the rights and benefits to children born in or out of wedlock (Judgment 057-17-SEP-CC). And it also classified *occupational diseases* and *disability* as suspect categories in its most recent decisions: Judgment 375-17-SEP-CC and Judgment 004-18-SEP-C, respectively.

To sum up, the Constitutional Court has established that all differentiation criteria described in Article 11(2) of the Constitution are suspect categories. This means that every time an employer dismisses an employee, whether directly or indirectly, based on ethnic criteria, place of birth, age, sex, gender identity, cultural identity, marital status, language, religion, ideology, political affiliation, judicial record, socio-economic situation, immigration condition, sexual orientation, health, HIV carrier, disability, occupational disease, physical differences, among others, it is presumed that dismissal is arbitrary and unconstitutional.

As it is evident, case law from the Constitutional Court in respect of suspect categories causes problems on practical cases alleging discrimination. The extremely lengthy catalogue of suspect categories sets in motion a strict scrutiny on practically all cases of dismissal and subjects the employers' decisions to a strict scrutiny that is extremely difficult to satisfy [5]. This has resulted

---

[3] Brest, P., Levinson, S., Balkin, J. M., Reed Amar, A., & Siegel, R. B. (2006). Processes of Constitucional Decisionmaking (Fifth Edition ed.). New York: Aspen Publishers, Inc.

[4] Giardelli, L. Toller. F & Cianciardo, J. (2008)

[5] Gunther Gerald, The Supreme Court: 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court, A Model for a Newer Equal Protection, Harvard Law Revies, 86, 1972.

in that work-related litigations involving dismissals are now transferred to the constitutional arena since workers are currently seeking to cover their dismissals with the robes of a discriminatory discharge in order to take advantage of the swiftness of the constitutional proceeding and presumption of unconstitutionality.