FINANCIAL CRISIS IN EUROPE AND SOCIAL LAW

Costas Papadimitriou
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STUDIES

Jeseong Park
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Sergio Gamonal Contreras
Moral damages for employment contract termination under Chilean law

Miguel Rodríguez-Piñero y Bravo Ferrer
Spanish Reform of Collective Contracts (2011/2012)

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FINANCIAL CRISIS IN EUROPE AND SOCIAL LAW

p. 6  Costas Papadimitriou
The Greek labour law face to the crisis: a dangerous passage towards a new juridical nature

p. 16  Pierre-Yves Verkindt
Contemporary French labour law in the economic and financial crisis

p. 22  Leszek Mitrus
Economic crisis and labour law: Polish experience

p. 30  Mathias Maul-Sartori, Ulrich Mückenberger & Katja Nebe
Financial crisis in Europe: impacts and repercussions on German labour law

p. 42  Csilla Kollonay-Lehoczky

p. 62  Catherine Barnard
The effect of the crisis on UK employment law: revolution or evolution?

p. 73  BOOK REVIEWS

STUDIES

p. 78  Jeseong Park
Subcontracted work in Korean law: a double crisis of the concept and of reality

p. 88  Pascale Lorber
Protecting fixed terms workers - using the Directive purposefully

p. 96  Sergio Gamonal Contreras
Moral damages for employment contract termination under Chilean law

p. 104  Miguel Rodríguez-Piñero y Bravo Ferrer
Spanish Reform of Collective Contracts (2011/2012)

INTERNATIONAL LEGAL NEWS

p. 114 Australia - 1st & 2nd semester
p. 118 Austria - 2nd semester
p. 120 Czech Republic - 1st & 2nd semester
p. 124 Serbia - 1st semester
p. 126 South Africa - 1st semester
p. 128 USA - 1st & 2nd semester

p. 132 IALLJ Call For Papers 2013 ~ Marco Biagi Award
Moral damages for employment contract termination under Chilean law

ABSTRACT
This article reviews how Chilean law has evolved in regard to compensation for moral damages due to contract termination beyond the legal indemnities set for length of service under labor laws. Cases are analyzed in which indemnities additional to the fixed compensation have been added, on an exceptional basis, in the case of unfair dismissal; and then moral damage is studied in the case of a dismissal in violation of fundamental rights.

KEY WORDS: Moral damage. Fixed compensation. Unfair dismissal. Dismissal in violation of fundamental rights.

RÉSUMÉ
Cet article analyse l’évolution du droit du travail chilien en matière d’indemnisation du préjudice moral causé par la rupture du contrat de travail, notamment celles fixées selon l’ancienneté. Dans cette optique, nous analyserons les cas d’octroi exceptionnel d’indemnités supplémentaires, puis nous étudierons le préjudice moral subi par le salarié dans le cadre du nouveau licenciement, attentatoire aux droits fondamentaux.

Moral damage may occur in several cases in connection with employment, both in a pre-contractual stage, during the term of the contract, at the end of the contract and thereafter. Either contractual or tort liability arises, as the case may be.

There may be moral damage in a pre-contractual stage, during the selection of employees, because the potential employee’s right to intimacy is violated if personal data are requested beyond what is reasonable or necessary to determine the experience and capacity of the individual. His right to privacy may also be infringed if there is an inquiry into his family situation, his recreational activities, family vacation activities, political, religious or union convictions. The same occurs if there are black lists that have an impact on the employee’s image or damage his right to that image.

During the term of a contract, there is nothing that prevents any redress for moral damage when obligations are breached that do not imply contract termination. Many situations may arise during a contract that may cause moral damage. For example, the worker’s right to intimacy may be violated, he may be unreasonably disciplined for reasons such as a lack of honor, or his family, religious or political life may be disrupted.

Once moral damage occurs during a contract, it must be repaired and it is feasible to also request that the actions that continue to cause effects over time cease.

A work accident or occupational disease may also occur during a contract. Chilean law specifically stipulates that moral damage must be repaired according to article 69.b) of Law 16,744.

We will discuss the compensation for moral damage occurring upon contract termination below.

Lastly, in the post-contractual stage, moral damage may ensue, for example, when the employer slanders the worker during a lawsuit for wrongful dismissal. In this case, the liability will be tort.

I - Theories on the compensation for moral damage due to contract termination

A - Doctrinal differences

The work relationship is typically one of power and, for the same reason, it imposes rights and obligations that can cause economic and non-economic damage when power is abused.

A simple dissolution of the contractual bond is a right of the employer, provided one of the reasons set down by law is present to terminate a contract. In these cases, it may be that reparation of the moral damage does not apply even though it does exist, notwithstanding the payment of a severance indemnity if the employment contract is continuing. This indemnity is payable when dismissal is made due to corporate needs and the amount is set according to

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1 In Chile, doctrine has defined moral damage as “the injury to the non-economic interests of the victim,” which are those that affect “the person and what that person has, but which cannot be replaced by a sum of money since it cannot be measured by that element of exchange.” Cf. J.L. Diez, El daño extracontratual. Jurisprudencia y doctrina, Santiago, 1997, p. 88. Chilean jurisprudence has allowed reparation for moral damage in tort since the early 20th century. Cf. C. Domínguez Hidalgo, “La indemnización por daño moral. Modernas tendencias en el derecho civil chileno y compa roado”, Revista Chilena de Derecho, Vol. 25, #1, pp. 45 et seq.


3 The examples cited are developed more completely in A. Süsseskind; D. Maranhão; S. Vianna; and L. Texeira, Instituições de Direito do Trabalho, Vol. 1, Sao Paulo, 1997, pp. 631 et seq.


6 A. Vázquez Vialard, La responsabilidad en el derecho del trabajo, Buenos Aires, 1988, p. 766.

7 These reasons are contained in article 159 et seq. of the Chilean Labor Code and include, among others, resignation, the worker’s death, expiration of the contract, conclusion of the work or service, an act of God or force majeure, disciplinary reasons, corporate needs and summary, unjustified contract dismissal (ad nutum dismissal).
length of service.8

Under this system, the Chilean Labor Code [like in many countries] created a special contract indemnity system. On the one hand, the employee is not obligated to prove damages, which is very convenient for the employee. On the other hand, the employer knows beforehand what the cost of dismissal will be. In this context, in principle, no other indemnities can be claimed.9 However, there are exceptional situations in which a need can be claimed to repair moral damage, namely the case of an unfair dismissal.

What do we mean by unfair dismissal? A wrongful or mistaken dismissal is not, in principle, unfair. An unfair dismissal refers to an exceptionally illegal dismissal when the employer wishes to dismiss a worker, but the legal grounds to allow him to terminate the contract are not present or his goal is to not have to pay contract indemnities. So, he maliciously cites a disciplinary reason that releases him from that payment. On other occasions, the employer conceals the true reasons for the dismissal, illicit in nature, such as discrimination or union persecution.

Ermida amply defines unfair dismissal as “dismissal that is made for no good reason or justification (or for a devious, dysfunctional or anti-functional cause or reason) or in bad faith or disloyally.”10

There are diverse opinions in doctrine regarding accumulating an indemnity for moral damage to the indemnity set by law.11 For some, that accumulation is improper since the indemnity set by law must be paid upon contract termination, which excludes the general principle of a comprehensive reparation of damages from the ambit of the labor relationship. This fixed indemnity would cover all eventual damages caused wrongful dismissal. The law has fixed the compensation so that the economic cost of dismissal would not affect the continuity of the company.

Moreover, in most doctrine, an indemnity for moral damage can be fully accumulated to the indemnities set by labor law for contract termination because the fixed indemnity only covers the economic damages of dismissal. It is therefore entirely logical to compensate moral damage caused by an abuse of the right of dismissal by a supplemental indemnity. Moral damage must also be repaired when it occurs due to acts other than dismissal that entail contractual defaults or unlawful acts. This means acts by the employer that may be prior, simultaneous or subsequent to the dismissal.

We can conclude that there is an important line of argument that admits the possibility of accumulating an indemnity for moral damage and injury to the legal indemnity set for contract termination when those damages acquire a certain relevance and substance.

B - Jurisprudence

Prior to enactment of the actual Labor Code, there were cases in jurisprudence that were filed to seek an indemnity for moral damage due to contract termination. They were based on the malicious use of certain grounds for dismissal [article 162 of the 1987 Code].

Since the enactment of Law 19,010 in 1990, restated in the present 1994 Labor Code, moral damage awards due to contract termination are exceptional.

The first case was decided by the Concepción Court...
of Appeals on December 12, 1997, in the case of Florencio Céspedes Ortiz vs. Banco del Estado. Mr. Céspedes was dismissed for a lack of integrity (currently called a lack of honor). The employee was charged with having misappropriated money from credits that he granted and with having granted credits with insufficient collateral.

The bank was condemned for wrongful dismissal and the Court opined that the severance indemnities applicable did not cover all damages caused to the plaintiff (recital 4).

The Appellate Court added that the charging a person with a lack of integrity without allowing him to defend himself adequately seriously injures his honor and integrity. Article 19.4 of the Constitution recognizes that individuals have the right to honor and guarantees such honor in respect of third parties. The court also said that the mental integrity of the employee was seriously disturbed, which is protected in Article 19.1 of the Constitution. He fell into a deep depression that affected his relationship with his families and friends (recital 5).

The court opined that the Bank’s conduct was willfully wrong because it was voluntary and the damages were clearly foreseeable, which put that conduct outside of the framework of the contract, making it a tort offense. Therefore, the damage had to be redressed.

The court believed that it could not be held that severance indemnities prevent an employee from taking other actions, such as a civil indemnity claim. Said severance indemnities are a part of the labor relationship and do not cause res judicata. What was claimed was an indemnity for tort liability and what was paid was compensation under an employment contract (recital 14).

The Court believed that moral damage was the equivalent to pretium doloris and condemned Banco del Estado to paying 10,000,000 Chilean pesos for this reason (recitals 18 and 19). In a ruling on May 5, 1999, the Supreme Court dismissed the appeal based on substance filed by Banco del Estado.

We do not agree with the application that this decision made of the rules on tort liability or with the reasoning that an unproven charge of a lack of integrity goes beyond the scope of the employment contract.

The other case is a decision by the Supreme Court on July 24, 2003 in the case of Retamal García vs. Comercial Automotora del Maule S.A. (COMAULE). The plaintiff was dismissed for a lack of integrity for supposedly having adulterated and forged fuel purchase orders and having obtained unlawful gains as a result.

The company was condemned for a wrongful dismissal and had to pay the applicable fixed contract indemnities. A civil damage indemnity claim was later filed because the employer charged the worker with officially prosecutable crimes that were false and it made disgraceful statements that were not effectively proven, meaning that it acted negligently, at the very least.

The Court considered that the charge of an officially prosecutable crime not proven in court is a civil quasi-offense that caused moral damage in tort to the plaintiff. It set a prudent reparation for that damage of 5 million pesos.

The decision added that in this case, it was not only a matter of insulting, but also slanderous, charges which, as they were false, fully justified applying a civil sanction. It also said that honor and mental integrity are fundamental subjective rights and the company acted negligently and recklessly by charging its employee with conduct that was detrimental to his person without having proven it. Lastly, it clarified that it was not necessary for the crime of slander to be declared criminally in order for the perpetrator thereof to be held civilly or contractually liable.

The Supreme Court dismissed the appeal citing substance and confirmed the appellate decision, but it reduced the moral damage indemnity to $2,500,000 Chilean pesos.

In 2011, in the case of Suazo vs. Codelco Chile, the Supreme Court reiterated the theory that moral damage occurring because of an unfair dismissal is tort in nature.

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12 This decision was published in Revista Chilena de Derecho, Volume 25, #2, April-June 1998, pp. 431 et seq. Court Internal Case #698-97.


14 Court Internal Case #1,726-02.


17 Court Internal Case #7,270-09.
The Court specified that the legal indemnity set under labor law did not exclude accumulating an additional indemnity for moral damage in special cases, provided extraordinary damages are proven, which would be the case of the moral damage to an employee who has been unfairly dismissed (recital 2 in the substitute decision).

As we said earlier, we agree with the reparation for moral damages, but we do not share the opinion that it be considered tort liability since the theory upheld by the Court would seem to be artificial. Abuse occurs precisely for the purpose of terminating the employment contract and that is why it is contractual liability.

II - Unfair dismissal in the new procedure for protection of fundamental rights

In the new labor procedural Law 20,087, published January 3, 2006, there is a special figure on unfair dismissal (article 489 of the Labor Code) when there is a violation of fundamental rights, such as, for example, when an employee is dismissed because of his religious beliefs, because of his opinions expressed in the press, because of a false charge that affects his honor, because of a sexual orientation, etc.

Consequently, if there is a dismissal in violation of a fundamental right, action may be taken under this figure. Article 485 of the law specifies which fundamental rights are involved:

- Life, physical and mental integrity, provided the violation is a direct consequence of acts occurring in the labor relationship.
- Privacy
- Honor
- The inviolability of any form of private communication
- Freedom of thought and religion
- Freedom of opinion
- The freedom to work
- The right to no discrimination at work

In these situations, the worker must file a claim within 60 days after severance. The effects of this dismissal in violation of fundamental rights will be as follows:

- The judge will decree payment of an indemnity equal to one month’s salary for failure to give prior notice.
- The judge will order payment of a severance indemnity pursuant to article 163.
- The judge will decree payment of the surcharges under article 168 of the Labor Code.
- The judge will also set an additional indemnity that is no less than six months nor higher than 11 months of the most recent monthly salary.

Once it has been decreed that the dismissal was in violation of fundamental rights, the law considers the dismissal to be wrongful and sanctions the employer by an additional or extra indemnity that is no less than six nor higher than eleven months’ salary, which is set on a per-case basis by the Labor Court judge.

This indemnity is for material and moral damages caused to the victim, in this latter case because of a violation of fundamental rights that have an important incidence in the non-economic interests of the employee.

Part of doctrine considers that the additional indemnity is a penalty and, therefore, an indemnity for moral damage would be pending. On the contrary, we opine that this indemnity is not a simple indemnity for length of service, but rather leaves a significant margin of appreciation of the damage to the judge hearing the case, especially the assessment of moral damage. The law sets a ceiling and a floor within which damage can be evaluated, taken from the experience of other countries in which labor moral damage has been evaluated. The judge can then decree the payment

18 See Note 5.
19 The new articles 292, 294 and 389 of the Labor Code also include violations of union freedom (unfair and anti-union practices) in this new protection procedure, such as when there is an anti-union dismissal (article 294).
20 See note 8.
21 See note 8.
22 See note 8.
23 See note 8.
of a certain number of monthly salaries. The rule in the new procedure surpasses the test of constitutionality, in our opinion, and grants the employer legal certainty.  

Along the same lines, in civil doctrine Barros says that a moral damage indemnity is subject to conditions of liability that differ from an economic indemnity. The law may establish reasonable criteria or tables to limit the indemnity.  

We will briefly discuss three decisions in this area. In the case of Miranda vs. Redbus Urbano, a recently hired female employee was sexually harassed by her direct superior. She filed a claim with the highest manager in the company, who asked that she not formalize the complaint in writing and promised to treat the matter at the next management meeting. A few days later she was moved from her workplace and her new boss demanded that she withdraw the complaint, under threat of being fired. Finally, three days later she received a letter notifying her that her employment contract was being terminated due to expiration. The court considered that there were sufficient indications that the practice in the company was to hire employees under a fixed term contract to try them out and then to hire them indefinitely. Since the employee had been performing well, it was not logical for her to be dismissed and the claim that she filed had made the company uncomfortable and they had not even investigated the harassment. Given the short time of employment of the plaintiff (which excluded her from any right to a legal severance indemnity), the judge decreed an additional indemnity of six months of salary.  

In the case Negrete vs. Gesfor Chile S.A., the privacy of an in-house e-mail of a former employee was debated (the company’s address) that was forwarded to the company’s management. That is how the management learned of the e-mail exchanged between that former employee (who created his own company) and other company employees requesting that they perform some support services for his new business. Based on that information, the decision was made to dismiss the plaintiff under the presumption that he had conducted negotiations incompatible with the Company’s business. The company was ultimately sentenced for having dismissed the employee in violation of his right to private communication and it was ordered to pay 9 months of indemnity in penalty.  

Finally, in the case of Omerovich vs. ISS Servicios Generales, a female employee hired to perform cleaning service was dismissed the first day of work when it was discovered that she limped. Since she not indicated that disability in the job interview, she was considered to be a liar and cheater and a disabled person. The employer also ripped up the signed contract in front of her. She said that she was perfectly able to perform the work and that she used canes or crutches solely on public thoroughfares. The decision concluded that this dismissal violated the plaintiff’s right to equal job opportunity and it decreed an additional indemnity of six months’ salary and an extra indemnity of another six months’ salary for moral damages.  

Conclusions  

Labor moral damage is an important exceptional supplement to the legal indemnity set by the law. Although the fixed indemnities are advantageous since the rule releases the employee from proof and allows the employer to know beforehand what the costs of dismissal are, there are exceptional cases in which it must be supplemented by an extra indemnity for moral damage, as we have postulated in the body of this work.  

This is how both the Chilean decisions that we have discussed must be understood as well as the recent amendments to the law that deal with dismissal in violation of fundamental rights and impose a special indemnity of 6 to 11 months of salary. We consider that this indemnity is for moral damage and its basis and limits set standards for the labor court judge with a view towards doing justice without significantly unbalancing the employer’s costs, above all in small and micro businesses.
The nature of this indemnity is not completely defined in Chilean law. As we said above, for some authors, this additional indemnity is a penalty, allowing for another extra indemnity if there is proof of moral damages because of a dismissal in violation of fundamental rights.\textsuperscript{30} This thesis was upheld in the most recent decision that we discussed. It is the only decision thus far that has made use of this thesis.

We believe that this is a very important evolution in Chilean labor law and strengthens worker protection. At a time when flexibility reigns at any cost and it would seem that business power is omnipresent and incomparable, it is hopeful to see these decisions and remember that work is not merchandise.

\textsuperscript{30} See note 24.
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The Greek labour law face to the crisis: a dangerous passage towards a new juridical nature

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Contemporary French labour law in the economic and financial crisis

Leszek Mitrus
Economic crisis and labour law: Polish experience

Mathias Maul-Sartori, Ulrich Mückenberger et Katja Nebel
Financial crisis in Europe: impacts and repercussions on German labour law

Csilla Kollonay-Lehoczky

Catherine Barnard
The effect of the crisis on UK employment law: revolution or evolution?

STUDIES

Jeseong Park
Subcontracted work in Korean law: a double crisis of the concept and of reality

Pascale Lorber
Protecting fixed terms workers - using the Directive purposefully

Sergio Gamonal Contreras
Moral damages for employment contract termination under Chilean law

Miguel Rodríguez-Piñero y Bravo Ferrer
Spanish Reform of Collective Contracts (2011/2012)

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