

Serving whose interests? Company influence on prevention services



In a June 2020 judgment that caught the eye of the Spanish press, a Barcelona tribunal ruled that a prevention service company had exerted pressure on a doctor to change a worker's health report from "temporarily unfit" to "permanently unfit". The worker, who was a union delegate at the bus company where he was employed, was then dismissed on grounds of incapacity.

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Journalist

The option to dismiss workers who are permanently unable to do their jobs on health grounds is known in Spanish labour law as "*despido por ineptitud sobrevenida*" – dismissal on grounds of incapacity. This can occur when a prevention service reports that a worker is "unfit" for his/her post and the business has no alternative post available that the worker could take up. The most scandalous aspect of dismissing someone on health grounds in this way is that it provides no access to any disability or similar pension other than the general unemployment benefit. This regulation has been in place since the 1980s, but it has been



increasingly used by firms that are twisting risk prevention rules to rid themselves of “difficult” staff, necessarily aided and abetted by prevention services.

The Spanish Law on the Prevention of Occupational Risks provides that workers’ legal representatives must have a role in selecting a company’s prevention service. But as a mechanism for oversight, this rule has mostly proved to be worth less than the paper it’s written on because the final decision always lies with the firm. An unscrupulous business is quite capable of exerting pressure on the prevention service and can often persuade it to change its technical and medical criteria to the firm’s advantage. Such are the circumstances that led to the dispute between worker Genis García and the bus company Autocares Meg Bus S.L. of Tarragona. García, a delegate of the trade union Comisiones Obreras (CCOO), and Francesca Fuentes, a union lawyer, won a historic judgment when Social Court No. 33, Barcelona, ruled that the company Quirón Prevención S.L. exerted pressure on a doctor to change García’s health report from “temporarily unfit” to “permanently unfit”. Autocares Meg Bus then used that report to dismiss García.

A dedicated union delegate

As a CCOO union delegate, García had fought hard to defend the rights of his colleagues in a company where overwork is the norm. “Basically, our job is to drive, although we have to do a lot of admin too: sell tickets, sell passes, check that everyone who gets on has paid, count how many people get on, etc. Given the timetables and

routes we have, it’s almost impossible to get through all the admin and run on time. Sometimes you have to work miracles to get to a stop on time. Some workers have even been penalised for arriving at a stop one minute late. Depending on who you are, whether the boss likes you or not, that minute’s delay could mean disciplinary measures or just a reprimand.” In his capacity as union delegate, García has made several reports to the labour inspection authorities, all of which were upheld.

Finding this unacceptable, the company decided to use various means to remove García from his position as union delegate. The first was to use its own business structure to undermine him. The firm where García works as a driver, Autocares Meg Bus, is part of what the court described in its judgment as a “pathological group of businesses”. In other words, they are four businesses operating as a group, for example by swapping workers (“labour lending”), but they are not a group in the legal sense. Antonio Alcazar, the CCOO delegate and Chairman of the Workers’ Committee at Cintoí Bus S.L. explained as much to the court. All four companies (Autocares, Cintoí, Mon Servei Planificació and Hispano Pantorrina) are owned by Francisco Monasterio. This kind of business jiggery-pokery of “labour lending” was used to weaken support for García as union delegate. In order to prevent García from winning, a few days before the elections the owner moved five of García’s 27 colleagues to another business in the group. And this was not his only strategy to undermine García: he also tried to arrange for another worker to stand as an independent. He failed in that aim because the other major union, the General

Union of Workers (UGT), filed a complaint with the Labour Inspectorate, challenging the legitimacy of the candidacy on the grounds that it was not done in time. Ultimately, only the CCOO and UGT contested the election; the CCOO obtained the most votes, and García was at the top of its list.

Health monitoring after an extensive period of time off

Shortly before the election, García had been off work with renal colic. He first started noticing the colic pains while driving, but held out until he finished the drive because he knew how difficult it would be to replace him on the spot. As soon as it was time for his regulatory 45-minute break, he phoned the boss to tell him he was going to hospital because he was experiencing very sharp pains. “Yes, go, but be quick,” he was told. “Don’t be late for your next service.” García took a painkiller and went back to his shift, but the next day was unable to work: the renal colic had resulted in serious lower-back pain, with lesions on two vertebrae that kept him off work for nearly a year.

It is a requirement of Spanish law that, when a patient is discharged following lengthy rehabilitation and then returns to the workplace, a report must be issued by the prevention services. In theory, this is because businesses should “make adjustments” to a job following an extensive period off work in order to prevent the health of a particularly vulnerable worker from deteriorating. García thus paid a call to Quirón Prevención, the external prevention service used by the company, and the largest of its kind in Spain. It is estimated to deal with around 40 per cent of prevention sector business in the country.

The Quirón Prevención doctor first reported that García was “fit”, but a week later García told her about a medication he was taking, and when she realised that it could affect his driving ability, she issued a second report stating that he was “temporarily unfit”. She proposed a temporary change of job while García’s medication was reduced because his GP advised against taking him off it all at once. The company’s reaction was to give García a dressing-down for going to the prevention service before taking up his post again, and he was treated with what could well be described as “bully-boy” tactics. “They made me a passenger for 20 days. I travelled in a bus but had no duties to perform, as if I were a passenger rather than a worker,” he explains. After 20 days of this, the company mooted dismissal,

An unscrupulous business is quite capable of exerting pressure on a prevention service.

but ultimately did not go through with it. “When the boss realised that compensation for unjustified dismissal would be 27 000 euros, he started to back-pedal. Then the union election was held, and I was re-elected. And that was unacceptable to the company,” he explains.

After his re-election, he was called by the company and told that he was to be dismissed on grounds of incapacity. “When they handed me the objective dismissal¹ and 17 000 euros in compensation, they informed me that the prevention service had issued a new report describing me as ‘permanently unfit’. This report is unknown to me, no one has given me a copy. In fact, I’ve never set eyes on it. To get me out of the company immediately, they said they would also pay me the 15 days’ notice that they hadn’t given me,” he explains. He immediately notified the CCOO legal service about what had happened.

A doctor under pressure

The CCOO reported the dismissal to the court, and following the doctor’s testimony, the judge ruled that the change in the opinion given by Quirón Prevención was the result of pressure from its client and had violated the worker’s rights: “Without any substantive change in the worker’s medication that was the basis of the report by Quirón Prevención S.L. that he was temporarily unfit, one week later the same doctor issued a new medical report describing the worker as ‘unfit for work’. This rapid change in opinion and diagnosis was the direct result of a decision by the management of the risk prevention business, without the patient having attended any further medical consultation.”

The doctor’s testimony was fundamental to the judgment, explains Francesca Fuentes, the lawyer for CCOO-Catalonia legal services who brought the case: “There are three medical reports on the worker: in the first, he’s deemed fit; in the second, the doctor advised that he shouldn’t drive because he was taking medication and suggested a change of post until he was off the medication; and a third described him as permanently unfit. In court, I asked the doctor if she had seen the worker again before issuing the third report, and she told me she had not. I then asked how it was possible for her to change the diagnosis without seeing the worker and without any change having occurred in his state of health. That was when the doctor said that the company management had called her to ask her to change the report.”

Fuentes says this was not the first time that CCOO legal services had been approached by a worker with two conflicting reports in succession without having undergone a second consultation, although it was the first time that a judgment had brought this bad practice on the part of a prevention service to light so forcefully. In court, the doctor said in her defence that, at the end of the report, in small font, she had noted “subject to review”. Fuentes adds: “Plenty of witnesses lie in court, but they are under oath to tell the truth, and that’s what this doctor did. She told the true story behind the change of opinion.”

HesaMag contacted the doctor who, at the time of writing, is still working at Quirón Prevención. She declined to make a statement on the matter, which was still *sub judice* at that moment because the company had appealed to the High Court of Justice, Catalonia. No one has yet made a complaint against Quirón Prevención, despite its apparent liability, not least in exposing the doctor herself to psychosocial risks. Forced by her superiors to act against her better judgement, this was a clear case of what psychopathologist Christophe Dejournes describes as “ethical suffering”. Mónica Pérez, the CCOO’s Head of Occupational Health in the province, reports that the situation is doubly serious in this case because “Workers are being used to undermine other workers’ rights. This is not acceptable.”

Reinstatement and a heavy fine

In its judgment, the court declared the dismissal void because it found that the reasons upon which it was based were not only false but had been manipulated in advance

in order to achieve a fraudulent purpose. Additionally, it was of the view that the worker was being victimised by the business for his union activity, and accordingly it ordered the group of companies to pay compensation of 50 000 euros for breach of fundamental rights, including the right to representation and freedom of association. The court found that it had been proven that the business had received the report before the union elections and had used it only once the union delegate had been elected. The judgment states that “the behaviour of the business has been particularly complex: by necessity, it involved a third business, coerced the will and the professional reputation of a doctor in view of the intended aim of preventing the worker in question from representing other workers, breached the right of the entire staff to freely elect their representatives and, through the dismissal, sent a warning to other union representatives”.

Blackmail in a time of pandemic

The clarity of the judgment has not led to a change in attitude on the owner’s part, however, and his victimisation of García continues. On the very day he went back to work, disciplinary proceedings were opened against him for leaving the garage 20 minutes late, which García claims was due to a failure on the part of management to provide him with the correct information he needed that day to perform his job. He received a letter from the company four days later stating that, despite the fact that his conduct (late departure) was a minor fault, in view of the fact that it had occurred on the day of his reinstatement following dismissal, and because he was a workers’ representative, the business was taking disciplinary proceedings against him and imposing a penalty of two days without work and without pay.

1. In Spain, objective dismissal is a dismissal justified on specific grounds such as medical incapacity or repeated absence, even where such absence is justified on sickness grounds. Compensation for this type of dismissal amounts to 20 days per year of work – less than for an unjustified dismissal.
2. ERTE is the procedure under which a company can temporarily lay workers off. Take-up of this procedure has been massive during the Covid-19 crisis.

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García reported this new episode of discrimination to the Labour Inspectorate but was in low spirits: the victimisation was beginning to take its toll. "It's the first time I've been reprimanded in all the years of my working life," he explains helplessly.

The victimisation did not finish there. In the middle of a pandemic and with the staff on temporary unemployment (ERTE),² the company persuaded four workers close to them to instigate a clandestine meeting to overturn García's appointment. *HesaMag* has been in contact with three workers who confirm that the staff were pressured to sign to overturn García's appointment, telling the magazine: "They told us 'If you don't sign, you won't work.'" In a staff of 26 workers, 15 voted to overturn García's appointment.

that we had commissioned, but we have refused to work with them, and for good reason. In the light of the judgment, we do not trust Quirón Prevención. If they manipulated a medical report, who can be sure that they have not also manipulated the psychosocial risks evaluation? If they are capable of forcing a doctor to change a health report, just imagine what they could do to a risk prevention officer in a risk assessment."

The union's court battle continues, and the circumstances of the workers in this group of businesses have not improved. Currently, only the workers who cooperated in the conspiracy against García are working. Chairman of the Workers' Committee Antonio Alcazar confirmed to *HesaMag* that none of those who refused to sign the document against García have come off ERTE.

On 25 September 2020, the Catalonia High Court of Justice fully upheld the judgment of the employment tribunal in García's favour. The only option open to the business is to submit a further appeal on points of law to the Supreme Court. According to the CCOO Legal Studies Office, the case law on malpractice in prevention services chiefly comprises six judgments: one from the Supreme Court and five from High Courts of Justice in various regions of Spain. These judgements extended their sentences against employers – for failing to provide adequate protection to a worker from occupational risks – to prevention services and insurance companies. Such legal precedents make it highly unlikely that any appeal to the Supreme Court would call into question the achievements that trade unions have made in this domain through lengthy court battles over the years. ●



"We do not trust Quirón Prevención"

Genis García and the entire staff of Autocares Meg Bus speak of being severely exposed to psychosocial risks: amongst other things, authoritarian attitudes, scorn, an excessive workload, and assaults by users when on night services. Marian Rodríguez, the officer in charge of occupational health at the Public Services Federation of CCOO-Catalonia, who is providing support around the clock to García and the other workers, explains: "The situation in the business with regard to exposure to psychosocial risks is very serious. In fact, at the most recent Health and Safety Committee meeting, Quirón Prevención was due to present an evaluation of psychosocial risks

↑ Marian Rodríguez, occupational health officer (Catalan branch of the CCOO) and Genis García.
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