Employment Update

“Substantiality" in changes in working conditions

14th February 2019

Regarding the STS of December 4th 2018

If we examine the judicial statistics of the procedures followed before the social jurisdictional order, a large part is occupied by the processes followed in the matter of substantial modification of working conditions (MSCT). Without a doubt, we find ourselves with a high level of conflict initiated either through collective conflict processes followed at the request of the Unions and/or the legal representation of the workers (via articles 153 and following of the Administrative Jurisdiction Law), or due to individual demands of the affected workers (through the procedures of article 138 of the Administrative Jurisdiction Law).

The recent High Court Judgement issued on 4 December 2018 (RC 245/2017) makes clear the always difficult qualification of the substance of a working condition. This was a collective dispute procedure that concluded with the nullity of the new system of variable objective remuneration applied unilaterally by the companies Altadis, S.A., Tabacalera, S.L.U., and Imperial Tobacco España, S.L., for the year 2017, as it significantly altered essential aspects of the previous one, and for that reason constituted an MSCT that did not follow the mandatory procedure of article 41 of the Worker’s Statute.

The subject matter of the litigation was none other than to determine whether the so-called 2017 Loyalty Scheme constituted an MSCT that should follow the procedure provided for in the aforementioned precept, or was a unilateral decision pursuant to law by remaining within the ius variandi of the companies and that could be adopted without being subject to the rules of said legal precept.

Confirming the previous ruling of the Audiencia Nacional dated September 28, 2017, the High Court Judgement contains a jurisprudential doctrine that should be summarized.

Given that the list of conditions established in the first paragraph of article 41 in the Worker’s Statute is merely exemplifying and not exhaustive, not every business decision that alters the provision of services by the worker constitutes a substantial modification.

The impossibility of drawing up a dogmatic notion of "substantial modification" and the convenience of resorting to empirical criteria of casuism are highlighted, being held to this effect by authoritative doctrine that the variation that combines its intensity and the subject matter on which it is seen, is really or potentially harmful for the worker.

In order to qualify the "substantiality" of a specific modification, not only the subject matter on which it has an impact, but also its characteristics must be weighed, and this from the threefold perspective of:

a.- Its qualitative importance;

b.- Its temporal scope;

c.- Even the eventual compensation.

In the specific case judged by the High Court Judgement, several arguments confirm the essential alteration of the previous conditions for the accrual of variable remuneration, highlighting two in particular:

The fact that the company didn't provide the employees' representatives information on the revision of the plan, which in the Court's view amounted to a lack of transparency which had a very significant impact on the employees' difficulty in adequately knowing the new performance levels required.

The one who alluded to the fact that while the workers who participated in the previous plans retained the right to be included in the following ones when they requested it, and that situation had been maintained, peacefully and unconditionally, for 14 years, now the discretion of the company was imposed, which meant a certainly substantial variation of the regime applied to date.

The ruling of the High Court also provides an argument that is certainly striking and extremely practical, the "irrelevance" of the fact that the modifications may really be more favourable for the workers than those they had previously, since what is at issue is that if the modifications are "substantial", as in the case under trial, the new company policy on compensation should have been made subject to the negotiation and consultation procedure contemplated in article 41 of the Worker's Statute during which the company can expose and defend the benefits it attributes to the new system that it cannot unilaterally implement.

Thus, without prejudice to the enormous casuistry existing in relation to this matter (MSCT) and therefore the need to resort to the individualizing criterion or specific case, it seems that the High Court provides some guidelines - already known by another side - for the necessary and/or advisable prior analysis for the not always easy identification of the eventual substance of a specific modification of working conditions (qualitative importance, temporal scope and eventual compensation).

In short, in those doubtful assumptions, in the borderline to accurately appreciate the magnitude of the change and the level of harm or sacrifice that the measure may entail for the affected workers, as so often happens, the detailed examination of the jurisprudential and judicial doctrine, specifically, in the matter or condition of modified work, may provide the solution of whether or not the company has to follow the channel of the procedure of article 41 of the Worker's Statute or whether its unilateral decision falls within the ius variandi.

You can read the whole sentence for more information

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