Employment Update

The double pay scale

1st August 2019

About the High Court Judgement of June 24th, 2019

The Plenum of the Social Chamber of the Supreme Court (12 Magistrates), given the characteristics of the legal issue raised and its significance, has unanimously issued, without any particular vote, a judgment dated 24 June 2019 (RC 10/2018) resolving a classic recurrent that is raised before the social order, the legality or illegality of a double salary scale clause contained in a pact with the legal representation of workers.

The procedure followed in the matter of Collective Dispute, from which the high court judgement brought its cause, arises from a lawsuit filed by the Federation of Services, Mobility and Consumption of UGT demanding the partial nullity of the agreement adopted between the company and the union sections on March 25, 1997, for contravening the constitutional principle of equality, and the condemnation of the company being sued (Sanitas, S.A.) to apply the same regime to all workers in matters of premium participation, and with it, the same number of payments must be applied to all workers regardless of the date of entry into the Company.

The underlying question arose from the fact that a specific group of employees was recognised in an extra-statutory agreement for the calculation of the bonus, the consolidation of the amount already reached by application of previous agreements, unlike the group of employees who joined the company as from 1 January 1997.

At the oral hearing of the trial, held at the Audiencia Nacional, the union sections of CC.OO. and CSI-CSIF joined the lawsuit.

Revoking the sentence dictated in the first instance by the National Court of July 7, 2017 (orders 179/2017), the High Court upholds the appeal of cassation formulated by the acting Union and resolves according to the request expressed in the complaint, previously transcribed.

What was the National High Court's reasoning (with no preliminary hearing) to dismiss the Union's claim?

For the hearing there was no double salary scale detrimental to the principle of equality in the application of the law because: (i) the group of workers who joined the company on January 1, 1997 was never affected by the calculation formula; (ii) the existence of an agreement of wills that qualifies and justifies it and which, because it has contractual value and respects the necessary minimum rights, is perfectly granted in article 30 of the sectoral collective agreement for the years 2004 to 2007, and concordant precepts of subsequent agreements; (iii) without infringing the principle of equality because they are two groups of employees in a different situation and (iv) the repeated doctrine relating to the nuanced application of the principle of equal treatment in matters of salaries and its compatibility with other principles such as the principle of the autonomy of the will being applied.

On the contrary**, what have the Supreme Court's arguments been for granting the union claim?**

The Social Chamber starts from the initial application of article 39 of the General Collective for Insurance, Reinsurance and Occupational Accident Mutual Funds, which is to be interpreted in the sense that premium-sharing remuneration systems and other alternative systems may not be contrary to the principles set out in that precept, which did not establish any inequality with regard to the date of workers' entry into the companies or those that either of them might have received prior to 1 January

1997. And to this effect, in its legal basis are detailed various judgments of the Supreme Court itself of which we highlight as paragraphs more relevant than:

a.- The Agreement must be analyzed in accordance with social and constitutional jurisprudence with respect to the principle of equality (arts. 14 Spanish Constituion and 17 Workers´Statute) and the corporate obligation to "pay for the provision of work of equal value the same remuneration, directly or indirectly, and whatever the nature of the same, salary or extra salary" (art. 28 Workers´Statute).

b.- The double salary scale lacks objective and reasonable justification.

c.- It deepens, indefinitely and with projection of future, in the salary gap by means of recognizing to one of these groups a system that is going to increase the retributive condition in question.

d.- In order for the wage difference to be in accordance with the principle of equality, it is necessary that, within the agreement, some type of business commitment be introduced that entails a consideration to those affected that could potentially make the measure compatible with Article 14 of the Constitution; and, on the other hand, that, based on compensation or rebalancing guidelines, determine the establishment of the difference on a transitory basis, ensuring its progressive disappearance.

After citing previous cases sentenced by the Chamber, and without further reasoning, it is concluded that in the disputed Extra-Statutory Agreement directly linked to the collective agreement, an illegal double salary scale is established which must be annulled.

Our comments don't end here. The High Court Judgement also has a **strong interest because the Social Chamber considers** that the doctrine of the Court of Justice of the European Union is inapplicable and more specifically, the Judgment of the Court of Justice of the European Union dated 14 February 2019 (C-154/18, Tomás Horgan, Claire Keegan and Minister for Education & Skills, Minister for Finance, Minister for Public Expenditure & Reform, Ireland, Attorney General) which concluded on the question referred for a preliminary ruling that:

"Article 2(2)(b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that a measure such as that at issue in the main proceedings, which from a certain date it provides for, is to be interpreted as a measure, by introducing new teachers, the application of a lower salary scale and step classification to teachers who joined before that date under the rules prior to that measure does not constitute indirect discrimination on grounds of age within the meaning of that provision".

The Supreme Court's justification for excluding the European Judicial Doctrine is striking. In a marked application of "gleaning", the doctrine of the ECJ admits beneficial for employees, but discards if it favours companies, given that as manifested in the Spanish constitutional and ordinary jurisprudence, in interpretation of the principle of equality and the business obligation to pay for the provision of work of equal value the same remuneration, prohibits the existence of a double salary scale based exclusively on the date of entry into the company, asserting that "such an interpretative doctrine constitutes a more favourable rule than that which would result from the interpretation made by STJUE 14-02-2019 (C-154/18) of Union Law".

Also on the **procedural level**, the high court judgement is relevant because it clarifies that the procedure to follow for challenging an extra-state agreement, following the entry into force of Law 36/2011, of October 10, regulating the Social Jurisdiction, is that of collective disputes and not that of challenging collective agreements, as had been erroneously considered by both the National High Court in the reversed ruling, as the Supreme Court itself in other previous resolutions.

Finally, five **practical conclusions** could be drawn from the analysis of the two related judgments:

1ª.- Anything that a priori plays with a different remuneration system for groups of workers due to the date of hiring, whether agreed in a collective agreement or in an extra-statutory agreement, does not cease to be an establishment of a "double salary scale". And that for it to merit judicial approval, it must not contravene the constitutional principle of equality.

To this end, the study of the judicial casuistry referring to the "objective and reasonable justification" of the different treatment, as on so many occasions but more so in this one, seems fundamental and essential, because as we have seen, in the case tried for the three magistrates of the National High Court there was no double salary scale detrimental to the principle of equality in the application of the law and, However, for the twelve Magistrates who formed the Plenum of the Social Chamber of the Supreme Court, the contested Extra-Statutory Agreement directly linked to the Collective Bargaining Agreement established an illegal double salary scale that was annulled with the consequence of retributive equalization.

2ª.- The viability of an agreement, even if adopted unanimously by the social party (UGT, CC.OO. and CSI-CSIF), being subsequently challenged by one of its signatories (UGT).

3ª.- Also, the possibility that the agreement will be challenged after 20 years. In the present case, no less than two decades have elapsed between its signing (25-3-1997) and the month of May 2017, when the previous mediation procedure promoted by UGT was held.

4ª.- The affected workers will be able to claim from the company the difference in remuneration between what they have received as a premium share supplement since May 2016, that is, since one year before the UGT Union filed the request for mediation with the SIMA (May 2017). This difference is double the amount that would have been received to date as a complement to the participation in premiums based on the annulled agreement (3.5 base salary payments, instead of the 7 payments recognized by the high court judgement).

5ª.- In the event of a possible discrepancy between the doctrine of the ECJ and ordinary Spanish constitutional and jurisprudence, the latter will always be applied, only if it is more favourable to workers.

Yoi can read the complete sentence for more information.

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