Employment Update

The effects of non-compliance with a Covenant of Permanence

5th December 2018

About the ruling of the Madrid High Court of Justice dated May 11, 2018

In the development of labour relations, it is a widespread practice to enter into typical agreements outside the basic contractual conditions established in individual employment contracts. We refer, among others, to the figure of the pre-contract of work, to the pact of full dedication or exclusivity, to the post-contractual non-competition and to the pact of permanence. Regarding the latter, article 21.4 of the Workers Statute establishes the following:

> "When the worker has received a professional qualification at the expense of the employer to implement certain projects or to carry out a specific job, it may be agreed between the two of them to stay in that company for a certain period of time. The agreement will not last more than two years and will always be formalized in writing. If the worker leaves work before the deadline, the employer is entitled to compensation for damages."

With respect to this pact, we recall an important and curious decision of the Madrid Supreme Court dated May 11, 2018 (RS 823/2017; Altadis case) that revokes the ruling in favour of the worker. The antecedents of the case as can be seen from the attached resolution were:

a) The party (Titled Marketing Manager Technician) was selected by the company for the realization of a Master of "Manager Development Program", taught by the I.B.S., of eight months duration, for which he paid 25.850.-€.

b) In relation to said Master, the actor agreed with the company to pay the established percentage of its amount if it resigned within the periods indicated up to four years counted from the starting date of the course, 1 April 2014.

c) The agreement signed by the party established that if the employee leaves his job in the service of the company before meeting the deadlines set from the beginning of the Master the company will recover a proportion in attention to a scale of: first year 100%, second year 80%, third year 60% and fourth year 20%.

d) Well, the party resigned on May 17, 2016, that is two years and a month and a half after the start date and a year and a half after the completion date of the Master (December 3, 2014).

The company deducted from its settlement €15,510, equivalent to 60% of the amount of the Master, a percentage set for the event that the cessation occurred, as it did, within the third year following the start of the Master, indicating as a concept of the deduction "payroll advance discount".

The question that immediately arises is whether the covenant was fully valid or only partially signed.

Initially, the STSJ tells us that although the agreed period of permanence exceeds the legal maximum established by the precept transcribed above (4 years of the agreement versus the maximum of 2 years of the ET), it must be taken into account that the agreement established the term from the "starting date" of the Master, while the ET establishes a maximum term of two years, but counting "from the end" of the professional specialization paid for by the employer, when regulating the pact established when "a specialization has been received", using the past and thus carrying it out:

> *"This cannot be otherwise, since training that does not end does not enrich the worker's curriculum and could give rise, if necessary, to a claim by the company for damages, but not to a pact of permanence".*

Likewise, the ruling of the aforementioned Territorial Court underlined that the pact contemplated a "singular or qualified training", since apart from being given the Master by a school of recognized prestige, having a high cost for the company, it supposed: (i) an obvious enrichment of its curriculum and (ii) an enrichment of the patrimony or professional value of the easily identifiable worker that exceeded much of the ordinary professional training due.

Thus, the judgment concludes that the agreement signed between the parties was fully valid, although its effectiveness should be limited to the maximum two years allowed by the ET, so that it ended on December 3, 2016, the date from which the employee could have left the company voluntarily without having to compensate for this reason, but given that the decline occurred before the aforementioned day, and within the third year in the terms agreed upon by the parties, these terms must be adhered to and the now recurrent had to be reimbursed 60% of the value of the pact.

In addition, the judgment points out that despite the Company's error in the denomination of the concept relating to the discount made to the employee in his liquidation, given the obligation of the latter to reimburse 60% of the agreement, "payroll advance discount", since in fact its amount did not correspond to any debt because nothing had been anticipated to him, the Supreme Court of Justice considers that this circumstance cannot enervate the lawful discount made because:

> *"regardless of whether such concept is erroneous, the debt exists and was liquid, due and payable and therefore compensable in accordance with the provisions of Articles 1091, 1156, 1195 and 1196 of the Civil Code, with the aforementioned discount being adjusted to entitlement even if it was not correctly named by the company, notwithstanding which it was evident that it was due to the actor's obligation derived from the pact, its amount corresponding exactly to what was agreed".*

Finally, we highlight two points of interest that should serve for eventual and future subscriptions of pacts of permanence:

a) The maximum two-year commitment to stay in the company starts from the date of completion of the specialisation course;

b) The validity of a scale for refunding the cost of the Master's, considering the unfulfilled period of permanence from its beginning.

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