Employment Update

The proceedings for recourse against the joint debtor

15th May 2020

Regarding the Provincial Court of Alava December 19th 2019 Judgment

1.- Introduction.

The Workers' Statute (ET) regulates the joint and several liability of the contracting employer together with other third-party employers when certain factual assumptions are made. The contracting of works and/or services entities (Article 42), the illegal transfer of workers or labour lending (Article 43) and business succession (Article 44) are good examples of the possible emergence, in the face of the existence of labour debts in favour of workers, of a joint and several liability that can be extended to other companies outside the formal employer.

Specifically, Article 43 of the ET, which is headed "*transfer of workers*", after describing in paragraph 2 the circumstances giving rise to the idea that there is an illegal transfer of workers, states in paragraph 3 that:

"Employers, transferor and transferee, who violate the provisions of the preceding paragraphs shall be jointly and severally liable for the obligations contracted with the workers and the Social Security, without prejudice to other liabilities, including criminal liabilities, arising from such acts".

At the start of paragraph 4, adding that:

"Workers subject to the prohibited trade shall have the right to permanent status, at their choice, in the transferor or transferee company".

It cannot be inferred from this legal regulation that, in the internal relations between the transferor and the transferee, it is the company that takes the employee back that has to assume in full the payment of what is due to the employee.

We should point out that within **joint debts** there is a double aspect to be distinguished, each of which has a different legal regime. On the one hand, there is the legal relationship that links the creditor (worker) with the joint debtors (companies), which can be called an **external relationship** (it is governed by the idea that each of the joint debtors, by itself and independently, owes the entire object of the obligation and that, therefore, the creditor -worker- can claim the entire debt of any of the debtors -companies-). And, on the other hand, there is the relationship that links the joint debtors (companies) with each other, which can be called an **internal relationship**.

Once the worker's claim has been satisfied, by means of payment made by one of the joint debtor companies, solidarity disappears (as a superstructure created in the exclusive interest of the creditor) and the so-called **action of repetition or right of return** arises in favour of the joint debtor company which has paid the worker-creditor and against the other joint debtors to recover that part of

the payment to the creditor which, on the basis of the relations between the joint debtors, did not correspond to him but to the other joint debtors.

This debt, from the rest of the joint and several co-debtors in favour of the debtor who has paid the creditor, **is partial**, as it is divided between the co-debtors, each of whom is only liable for his share and not for the others'.

2.- Analysed case.

Following a dismissal procedure before the employment court (STSJ País Vasco 10-11-15; RS 1746/15) two companies (Mercedes Benz España S.A.U. and ESC Servicios Generales S.A.) were jointly and severally liable for having incurred in an illegal transfer of labour to the plaintiff, the main company having paid certain amounts for wage differences, severance payments and processing fees.

The companies had entered into a service lease agreement, agreeing that the contractor (ESC) providing the fire protection service would assume the employment liabilities arising from the provision of that service. The clause was as follows:

> *"The supplier will be solely responsible for any legal obligations deriving from the performance of the contracted work, in any of the labour, tax, risk prevention or any other type of areas, caused by its own workers or subcontractors, responding in all cases to any claims that may arise against MBE".*

The main company (MBE) may bring an action for recovery or right of return for payments made in fulfilment of a joint and several obligations under Article 1145 of the Civil Code. Payments for which the contracting entity was 100% liable by virtue of the binding effect of the clause; or subsidiarily 50%, by application of Article 1138 of the same legal body, all of which are exclusively related to the amounts paid by MBE.

Initially the sentence of the Court of First Instance nº 7 of Vitoria condemned the contractor to pay the total amount paid, in the amount of 724,937.23. However, the **ruling of the Provincial Court of Alava, handed down on 19th December 2019** (RA 1146/2019) dismissed the action brought by MBE, absolving the defendant contractor (ESC).

The Court considers that the action of repetition exercised by the principal company (joint debtor) for the amounts paid as a consequence of a sentence in the social order was a legal fraud in that it sought to free itself from the consequences imposed by employment law by means of the prohibition of the transfer of labour in the terms regulated by Article 43.2 of the ET.

It is emphasized that the cause of the contract was illegal because it violated the prohibition on the assignment of labour that regulates the precept. Therefore, the contractual clause on which the claim was based was not binding on the parties because the contract is not valid.

On the other hand, illegal assignment of labour has harmful effects on workers. The benefit that a company obtains by means of the illegal assignment of labour is that of interposing a supposed employer, different from the first one, in order that he acts, in the scope of the relations with his workers, subject to a certain collective agreement that foresees lower wages than those applicable to the original company.

Those harmful effects were present in the present case. If it were accepted that the main company could obtain, by means of the action of repetition, that the contractor would pay it 50% of the amount of the

wage differences that it had to pay to the workers as a result of the illegal assignment of labour, the company would be benefiting from this illegal operation, obtaining a reduction of the labour cost by that 50%. This saving of 50% of the extra cost would be an incentive for employers to resort to illegal transfer of labour because, after the intervention of the legal system, they would still achieve such savings.

For all of the reasons above, even though the original sentence issued in the labour proceedings was joint and several, without the determination of quotas, Article 43 of the ET would lose its protective effect on the individual and collective rights of the workers if the main company, which was ultimately obliged to hire the workers directly, managed to obtain all or part of the savings in labour costs.

As this result of the action of repetition exercised leads to a result prohibited by Article 43 of the ET, the Civil Chamber of the Provincial Court considers that the action of Article 1145 of the Civil Code was exercised to avoid the law and, in accordance with the provisions of Article 6.4 of the same regulatory text, the claim of the principal employer (MBE) against the contractor (ESC) was rejected.

3.- Is the doctrine established by the Provincial Court of Alava consistent and consolidated?

Based on the consolidated practice of including for the provision of services between companies in contracts (via art. 42 ET) a stipulation of repetition or return, normally in favour of the main company, for joint and several debts in which both companies could be condemned and which one of them had fully satisfied, the reader will wonder whether at present, with the doctrine of the judgment that is the subject of our comments, such a clause would be permissible.

Analysing similar cases, resolved after previous final labour judgments condemning both employers (principal and contractor) jointly and severally with a prior declaration of illegal assignment of workers, we can conclude that the action for recourse brought before the civil courts also has a favourable background for the claimant employers, contrary to the doctrine recently established by the Álava Court.

In fact, there are precedents in which the companies have been aware of the illegality of the contract for a long time and have not done anything. Therefore, as the proportion of the companies involved in the illegal assignment is the same, the distribution of responsibilities for the payment of the sentence must be made at 50%, as established in the June 27th 2016 SAP Pontevedra (RA 164/2016).

The same solution was reached for the 50% distribution, among others, in the 31st July 2015 STS (Civil) of (RC 2436/2015) and in the 13th March 2015 SAP of Ourense of (RS 255/2014) and Madrid of 23rd October 2018 SAP (RS 135/2018).

4.- Can the initial equal distribution *ex lege* of the joint debt be adapted to the sharing of the responsibility held by each employer?

In other words, if two employers are jointly condemned, the one who has paid may exercise the right of recourse against the other jointly liable who has not done so, claiming from him a percentage of more than half of what was paid, on the understanding that he may be held more liable for non-compliance with labour regulations.

In general, the answer is affirmative. It should be remembered that under Article 1138 of the Civil Code, in principle, the debt is divided among all the joint and several debtors in equal parts ("*they shall be*

presumed to be divided" says the precept literally), although this legal presumption may be destroyed by evidence to the contrary.

This circumstance, if proven, may result in a different burden in the distribution of the joint and several liability. Two examples clarify this question.

The 18 July 2017 Leon SAP (RA 34/2013). In action of repetition of the amount paid by a company for the sanction that had been imposed on two entities jointly by the Provincial Directorate of the INSS for non-compliance with health and safety regulations, the final distribution of responsibility was set at 75% and 25%. Therefore, the claim in percentage of 50%, in the amount of 30,525.73 (penalty amount 61,051.47) was only partially estimated (15,263),

The 25 June 2018 Ourense SAP (RA 342/2017) In civil proceedings in which an employer's action for proceedings of recourse of half of the amount paid to the TGSS as a surcharge on benefits and compensation imposed as a result of the accident was judged, the SAP revoked the sentence of the court of first instance (77,634.27€) which is the estimated 50% of (155,268.55€), on the understanding that the claimant employer had the most immediate obligation to monitor compliance with safety regulations, and therefore reduced the share of responsibility and the percentage of what was claimed against the other employer to 20% (31,053.70).

5.- Conclusions.

1.- Impact of the AP Alava ruling analysed. It leaves the workers with the option of choosing from the various sentenced employers who should be the payer of the debts, without any possibility for the payer of the debt to any recourse against the other employer, despite the stipulation in the commercial contract for the provision of services that exempted the main company from liability.

2.- Lawfulness of contractual indemnity agreements. There is no consolidated and uniform body of jurisprudence and judicial doctrine along the lines of the previous sentence that leads to the failure of an action of repetition by a company, against another or other jointly condemned entrepreneurs, for the amounts paid as a result of a conviction in the employment court.

3.- Legal ET regulation. From the regulation contained in the ET, it cannot be asserted that in the internal relations between two or more employers jointly sentenced, it must be the main company, the contractor and/or the one that readmits the worker that has to assume in its entirety of the payment owed to the worker.

4.- Legal presumption of distribution of obligations for companies jointly sentenced. In the event that there are no agreements between two companies on the distribution of the joint sentence in their internal relations, there must be a legal presumption that the fees will be paid in equal parts (art. 1138 CC), so that each of the companies jointly condemned must pay half of the economic responsibilities established.

5.- Right of recourse legal feasibility. It is still possible to defend the legal possibility of recourse against employers who have been jointly and severally sentenced in accordance with the contractual provisions established for this purpose. Alternatively, we can claim not only half of the amount paid, but a higher percentage if it is proven that greater responsibility can be demanded for non-compliance with labour regulations. Therefore, the same could be said in the defence of the defendant employer against a 50% right of recourse that could urge a reduction of the sentence.

6.- Great difficulties, after processes of illegal assignment of workers, to alter the equitable distribution (50%) among the companies condemned jointly. The individualisation of the share of responsibility, following the right of recourse urged by a company arising from a previous illegal transfer of workers, is in practice difficult to ascertain, since in matters of labour lending the negligence of the two companies involved (main and contractor) is usually of the same magnitude.

6.- Subsequent recommendations.

1st.- In commercial contracts for the provision of services, it is advisable to maintain the policy of establishing stipulations affecting the action of repetition or right of return, in the event of possible convictions in the social jurisdiction with joint and several liability for various companies.

2nd.- And, in any case, it is obvious to say, to adopt the necessary measures so that the contracts of works and/or services do not become, from their beginning or in the course of time, a figure of labour lending and thus, we avoid a possible joint and several liability, the entry into play of article 43 of the ET and the sanctioning mechanism at the request of the Inspectorate of Work and Social Security.

You can see the full text of the sentence here.

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