Employment Update

Unjustified sentence in the scope of an ERTE due to rights abuse

30th April 2020

Regarding the 29th April 2019 Madrid High Court ruling

There are not many occasions when a judgment finds abuse of the law in the summing up of a Settlement within an ERTE (temporary lay-off). The current status of the furlough schemes advises us to remember the not so distant STSJ Madrid issued on April 29, 2019 (RS 1219/2018; company AT BIOTECH TRACEABILITY INFORMATON SYSTEM S.L.) which, after revoking SJS nº 29 of Madrid on September 21st 2018, declared the measure of suspension of the work contract of a worker prolonged for 245 days unjustified.

A.- Facts declared relevant:

1. In October 2017 the company, governed by the collective agreement of the consulting companies sector, processed a first furlough for economic and productive reasons, under the protection of article 47 of the Worker's Statute (ET), in which it proposed the reduction of the working day and salary of the 6 workers that formed the company's staff, reaching an agreement on 11th October that determined the suspension of the plaintiff's work contract and the reduction of the working day and salary of another employee by 55% (until 11-4-2018, for 182 days).
2. On April 18th 2018 the period of consultation of a second ERTE began, from which the High Court Judgement brings cause for our comments. In its Explanatory Report, it proposes a reduction in the working day and in the salary of all workers, stating that there were no "redundancies" in the work team, all of which were essential for the continuity of the activity, proposing a reduction of 20% to 5 employees and 70% only to the concerned party (from 1-3 to 31-12-2018).
3. At the second meeting, the committee did not accept the company's proposal, because it affected the entire workforce and because it was understood that the reduction would take a long time and that the percentage of reductions in working hours and wages was high. In view of this, the managing director of the company proposed the same solution as in the previous case as an alternative, which would have meant the suspension of the contract of employment of the same worker affected in the previous case (the applicant until 31.12.18).
4. At the third meeting the company explained that there was no legal impediment to the latter solution, and the committee stated that the two proposals had been put to a vote by the 6 employees, the first being rejected and the second approved with 4 votes in favour and 2 against. The concerned party did not want to sign the minutes of the meeting in principle, and his observations were subsequently incorporated, including his attempt to have an alternative other than the two mentioned above voted on.
5. After that, the consultation period was closed with the agreement of the parties to suspend the contract of the concerned party for 245 days (from 1-5 to 31-12-2018), with functional mobility among the workers for the fulfilment of the obligations towards third parties and that the tasks of direction and sales coordination (the concerned party was the General Sales Director, with a gross monthly salary of 6,666.66€) would continue to be assumed by the Managing Director without any remuneration, and that the tasks of technical management and technical support would be guaranteed by the Technical Director.
6. The representative committee that was part of the negotiation committee in both ERTEs was made up of 3 workers elected by the 6 staff members.

B.- The reasoning of the Chamber of the Court of Justice:

The court concludes that the Agreement reached in the ERTE was exercised manifestly breaking the limits of its normal use, incurring in the abuse of rights recognized in Article 7.2 of the Civil Code, according to which the law does not protect the abuse of rights or the antisocial exercise of them.

The grounds leading the Court to that conclusion were:

1. ***From initial total assignment to final partial assignment referring to a single worker***. Although the ERTE is formulated by the company with the purpose of carrying out the reduction of the working hours and wages of all the employees (6), in the face of the opposition of the negotiating committee (composed of 3 of the 6 workers of the staff) the company immediately proposes a solution which, again, exclusively affected those who had also suffered the consequences of the first file, whose beginning and evolution was exactly the same.

2. ***Contradiction of Agreement with the Report reached***. The explanatory report highlights the need for all employees to be affected and states that there are no redundancies to achieve the objective of maintaining the company. And the agreement only reaches and harms one employee.

3. ***No proposals and/or consideration of other measures***. Neither the company nor the Negotiating Committee proposed or examined any other solution, such as reducing the duration of the measure or the percentage of salary and working day reductions, or a rotation, or the inclusion of the affected party in the generalised functional mobility.

4. ***Existence of an obvious conflict of interest.*** The 3 members of the Negotiating Committee are half of the workers initially affected by a measure that was expected to affect all of them.

5. ***Lack of proof of justification for the measure***. The company did not claim, nor did it justify, that the option finally adopted (suspension of a single contract for six months) was economically viable for the company, compared to the one initially envisaged (reduction of 20% to 5 employees and 70% to only the affected party for 9 months).

6. **Reiteration of the breach of contract and the effects of the ERTE on the same employee as in the previous case.** The full weight of the situation is once again placed on a single employee, the same one who had already had to bear the consequences of the company's crisis in the previous case, and in return the remaining employees do not have to suffer any detriment.

Thus, the court appreciates that, in spite of having followed the established procedural steps, the company's agreement and the negotiating commission committed an abuse of rights, and by revoking it declares the suspension of the interested party's work contract for 245 days (from May 1st 2018 to December 31st 2018) unjustified. Likewise, in accordance with Article 47(1) of the Worker's Statute, the judgment condemns the employer to pay the salaries that the worker no longer receives or, as the case may be, to pay the differences that may arise in relation to the amount received by way of unemployment benefits during the period of suspension, without prejudice to the reimbursement of the amount of those benefits by the employer to the SEPE.

C.- There are several lessons that can be taken from the sentence:

1. If an agreement is reached within an ERTE with the legal representation of the workers, it is not possible to challenge the concurrence of the cases in the individual process, as it is stated in Article 47 of the Worker's Statute, as well as in Article 41 (MSCT) of the same legal text.

Nevertheless, despite the signing of an Agreement during the consultation period, it is perfectly feasible that the affected workers may fight, in individual proceedings, if there has been fraud, deceit, coercion or abuse of rights in the agreement reached.

3. In the period of negotiation of an ERTE, the use of objective, reasonable and non-arbitrary criteria for the selection of the affected workers is decisive.

4. It is a singular and indicative characteristic of an abuse of rights that the measures of an ERTE end, without further reasoning, affecting only one worker in the same way as in a previous suspension file. This is even more so when the Negotiating Committee does not propose or examine any other solution, such as reducing the duration of the measure or the percentage of salary and workday reduction, or a rotation, or the inclusion of the affected person in a generalized functional mobility.

You can see the full text of the sentence here.

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