

Employment Law Remark

Discrepancies between a draft contract and an employment contract

27th October 2017

The JSC Madrid of 19 July 2017

Where there is a discrepancy between the conditions of the draft contract and those later included in the employment contract, judicial doctrine is in principle inclined to fully recognise those contained in the latter (JSC Madrid 19-11-2002; RS 2555/2002), in particular when it is expressly agreed that the contents of the employment contract "*constitute the sole agreement*" and "*revoke and replace any other contracts or agreements in relation to its content between the parties*".

However, the behaviour of businesses has at times been considered excessive. Recall, for example, the JSC Madrid of 8 May 2015 (RS 822/2015) in relation to a bonus for meeting targets set in an offer of employment conditions which, in the subsequent employment contract, was "illegally" made conditional on the employee still being employed at the company as at the date of the payment of said bonus.

Following up on these comments, the recent **JSC Madrid of 19 July 2017** (RS 677/2017) fully recognises and provides for a draft contract containing a parachute clause in (to be applied only if the company does not meet the recruitment requirement) following the appointment of the employee with no stability guarantee pact and her dismissed on disciplinary grounds – grounds that the company has recognised were inappropriate - a little over two months after the start of the employment relationship.

For the company, the unjustified termination of the contract should have resulted in the payment of compensation equal to 33 days' salary for each year of service, which we have calculated at €488.15. Due to the length of her employment, the employee would only have been entitled to compensation equal to 8.25 days' salary (rounding off the period between the start date and the end date of employment [4-9-15 to 10-11-15]) with a daily salary of €59.17 (giving a monthly salary of €1.800).

However, for the employee, the Labour Court and the Labour Division of the Territorial Court of Madrid should have applied, as has been the case, the clause agreed in a draft contract. This clause states that:

"In cases where the business does not fulfill the commitment to recruitment entered into in this document, M. will receive €13,000 in compensation for damages".

We do not know the reasons cited to explain, with no legal reason whatsoever, the termination of the employment contract, when the company had at the outset been very interested in procuring the services of the employee and, to this end, gave her protection so that if she was not given employment she would receive compensation of €13,000.



Similarly, we do not know if, in view of so-called “*legal engineering*” arguments put forward the company believed that if it was not interested in her services, it would be more advantageous to hire her (with no parachute clause) and terminate her employment shortly thereafter to pay some minimal salaries and minimum compensation, than to refrain from paying the agreed compensation if the employment contract was not formalised. As we can see this strategy was not effective, even when the employee did not demand protection in the form of compensation at the start of the employment relationship or refuse to complete a trial period.

The legal reasoning of the JSC was very clear: *“The company was familiar with the professional competence of the claimant, who was providing services to another company as a journalist and copywriter and has provided services for the respondent as a copywriter, not as a photographer; the company had a (logical) wish to secure her services in the role for some time, since she was already providing services to another firm in the category indicated above, and to fulfil the promises they had made to her, and with her dismissal expectations of her remaining in the position were frustrated for no good reason. The compensation clause was introduced to guarantee a degree of stability in employment; otherwise, the contract could have been terminated the day after it was signed with no compensation because, according to the contract, she was in her trial period. As a result, the outcome is the same as if no stipulation had been made for the payment of compensation for damages”.*

In conclusion, we emphasise that it is always advisable to have the appropriate advice, assessing the suitability of signing draft employment contracts in each specific case and agreeing to parachute clauses and/or compensation payable in the event of breaches by the parties, whether unintentional or deliberate.

Furthermore, as we have just seen, when no guarantee of employment stability is given when signing the contract (extending the parachute clause given in the draft contract or putting in place a new such clause), the theory of the abuse of rights or fraud can result in a “*prompt*” inappropriate termination of the employment contract not with compensation equal to 33 days’ salary for each year of service but rather, as understood in the JSC, with the compensation agreed in the draft contract as if the employee had not been hired. The problem will be determining whether the parachute clauses referred to in these cases in the draft contract can be extended into the “*medium*” term until she has been employed for a period longer than that required in order for her to accumulate the standard 33 days’ salary per year, the amount of compensation specified in said draft contract.

As on other occasions, one will have to be aware of specific events in the future of relations and, in particular, analyse what would have happened if in this case the parties had expressly overruled each of the stipulations in the draft contract in the subsequent employment contract. In other words, even if the inappropriate termination were to have occurred in the first few months, the question would have arisen: would the parachute clause have continued to apply for a certain period?

As always, one will have to wait for the answer in the next judicial doctrine familiar with this curious and peculiar legal question.

For information and knowledge, you can consult the judgement referred to herein by clicking on this [link](#)

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