Employment Law Remark

Concepts that should be included and excluded for calculating compensations due to termination of employment contracts

July 2017

Concerning the two judgements passed by the Supreme Court on 3 May 2017

It is well known that the determination of the compensation items that should be included for calculating severance pay is always a controversial and highly relevant issue. A miscalculation in the compensation may lead to an objective or collective dismissal which actually legal, being classed as unlawful due to an inexcusable error. And, likewise, without knowledge of the current jurisprudential doctrine, the scheduled costs of a disciplinary or objective dismissal being considered unlawful and the compensations due upon the conclusion of fixed-term contracts, may also be increased.

Two recent judgements, coincidentally issued on the same day by the Social Chamber of the Supreme Court shed some clarity in this regard.

1.- The **Supreme Court Judgement of 3 May 2017** (Gelgene case) confirmatory of the Supreme Court of the Basque Country, analyses whether the premiums for **medical and life insurances** and the **retirement plan** should be considered as part of the base salary for the purpose of calculating a compensation for dismissal.

The response from the Court is overwhelming. Both insurance premiums and contributions made to a retirement plan are salary items that should be taken into the calculation. Considering that their wage nature is out of the question as of the moment they are concepts that are paid as a consequence of the labour relationship and as a counterpart to the employee's obligations.

The possible quality of voluntary improvement of the Social Security which may actually be attributed to the three concepts (life insurance, medical insurance and retirement plan) can only be attributed to the benefits obtained through the corresponding insurance covers, but cannot be assigned to the corresponding premiums, which are wages in kind from which the employee can hypothetically benefit.

With this decision, the Supreme Court reiterates a criterion which had already been sustained in the previous Supreme Court Judgement of 2 October 2013 (RCUD 1297/2012), thus establishing the jurisprudential doctrine that closes, seemingly indefinitely, the debate regarding the inclusion of these concepts in the compensation.

2.- Likewise, another **Supreme Court Judgement** of the same date, **3 May 2017** (RCUD 3157/2015; Securitas case) questioned the possibility of inclusion in the base salary, for the purposes of procedural salaries and calculation of compensation, of the amounts received by a security guard in concept of **clothing** and **transport bonuses**.

A question which the Supreme Court no. 12 of Málaga and the Supreme Court of Andalucía responded positively, understanding that although in principle such bonuses were not of a salary nature, given that their purpose was to compensate the employee for the expenses incurred through travelling to work (transport bonus) or the use of certain clothing for performing the job (clothing bonus), they were however of a salary nature and should be calculated when paid in a regular manner; regardless of the situations that should give rise to their spending, due to being paid over 15 payments and, respectively, of the attendance to the place of work and/or of the greater or lesser distance between the employee's place of residence and having to justify the expenses incurred for purchasing and maintaining the work uniform.

However, this criteria is corrected by the Social Chamber of the Supreme Court by underlining that in general it has maintained that the nature, salary or non-salary, of transport and clothing bonuses, will depend (aside from the name given by the parties in the Agreement) on whether such concepts effectively remunerate or not the worker's transport expenses or the maintenance of work clothes, *"without giving rise to automatically assuming the intended salary nature due to paying them each month, even when on holiday, as this does not simply denote the non-existence of the expenses which such bonuses conceptually remunerate"*.

In this sense, after analysing article 72 of the Collective Agreement of Surveillance and Security Companies, the Supreme Court sustains that a simple reading of the precept reflects its nature of compensation of expenses which is assigned to the discussed complements and, therefore, in accordance with article 27.2 of the Workers' Statute, its non-wage nature is undeniable, given that said classification is evident in accordance with the interpretative canons of literalness and intentionality established in article 1281 of the Civil Code, and is endorsed by the publication of the Agreement with the labour authority (article 90 WS) having brought to light any illegality.

Equally underlining that in order to refute this conclusion mere formal extremes shall not suffice (fixed amount; form of payment over 15 months; payment during holidays), given that specifically in order to not have to justify the expense an annual amount was agreed which would then be paid over 15 months.

3.- In **conclusion**:

I.- Premiums for medical insurance, life insurance and retirement plans are considered as wage for compensation purposes when, regardless of whether the medical and life insurance covers are stipulated individually or through a collective commitment of the company, the premium which the company pays (regardless of its frequency) for the aforementioned benefit constitutes a remuneration in kind for the provision of services.

Despite admitting the nature of the Retirement Plan as an improvement of the Social Security, all this entails is that the concept of salary excludes obtaining subsequent benefits or compensations derived from said Plan, but not the amount paid monthly by the company, which shall be considered as remuneration in kind for the provision of services.

ii.- On the contrary, transport and clothing bonuses, when they effectively remunerate the transport expenses or expenses incurred through the maintenance of the worker's work clothing shall be of a non-wage nature and their amounts should not be calculated as part of the base salary for the purpose of calculating compensation.

For your information and knowledge, you may check the following link to read the Supreme Court judgement of 3 May 2017 (Gelgene case) and the Supreme Court judgement of 3 May 2017 (Securitas case).

For more information, please contact

Alfredo Aspra

alfredo.aspra@AndersenTaxLegal.es

José Antonio Sanfulgencio

jantonio.sanfulgencio@AndersenTaxLegal.es