Employment Law Remark

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Breach of the "principle of correspondence" does not make collective agreements void

Analysis of the judgment of the Supreme Court of 23 February 2017 on the annulling of the collective agreement of Adaptalia.

This is a new judgment of the Supreme Court which has caused some controversy. Whereas before there was a large amount of case law and legal literature stating unanimously the need to respect the principle of correspondence in collective bargaining (in particular with the spread of the so-called "multiservice" sector), i.e. the need for a collective agreement to be negotiated solely by the representatives of the workers of the area in question, breach of this principle being an irremediable defect, there is now a decision of the Supreme Court which declares a particular section of the agreement void (that which governs the territorial application of the agreement) but not the agreement in its entirety,

The judgment holds: "the declaration of total nullity of a collective agreement involves a whole series of difficulties for all those who come under it, in particular for employees, who lose the rights and advantages the agreement granted to them, with the previous obsolete work conditions continuing to apply." While the subject is still likely to develop, there is no doubt that the principle or distinguishing factor of the case seems once again to concern the question of negotiation, which will make it necessary to examine the motives and reasons for each specific negotiation with all that entails.

On 4 March 2016 judgment was given by the Employment Section of the National Court of Appeal (case 17/2016) upholding a challenge to a collective agreement brought by UGT and CCOO, annulling the collective agreement of the company Adaptalia Especialidades de Externalización S.L. (Official Gazette 19-12-15) for having exceeded the principle of correspondence in its negotiations, as it was signed (on behalf of employees) by the Staff Delegate of the workplace in Madrid, who was not entitled to negotiate an agreement which included in its territorial scope workers who provided services at other sites on a permanent basis.

However in this case, after the cassation appeal brought by the employers, the recent judgment of the Supreme Court of 23 February 2017 (ref. RC 146/2016; read by Mr. Luis Fernando de Castro Fernández) overturned the complete nullity of the agreement, declaring void only the part affecting employees outside Madrid.

1.- The background to the case is as follows:

On 7 September 2015 there was a meeting in Madrid of employer's representatives and the Staff Delegate for Madrid, and it was agreed to negotiate a new collective agreement, the negotiations concluding with agreement on 6 October 2015.

On 19 December 2015 the collective agreement was published in the Official Gazette for the Region of Madrid to apply to the period between 1 January 2014 and 31 December 2019. It was stated in articles 1 and 3:

"Article 1. Functional scope and parties. This Collective Agreement is signed by the management of the company Adaptalia Especialidades de Externalización S.L. and the representatives of the workers of the site at Madrid, in order to lay down the framework of employment relations applicable to the workers employed by Adaptalia Especialidades de Externalización S.L. at the said site.

Article 3.Territorial scope. This Agreement is applicable to all employees hired at or allocated to the site in Madrid by Adaptalia Especialidades de Externalización S.L., including those who, having been hired at or allocated to the said site, work wholly or partially, temporarily or permanently, outside the site in Madrid, the Region of Madrid or Spain."

In November and December 2015, after the holding of union elections at the Jaén, Murcia and Valencia sites, negotiating committees were set up not only at those sites but also Barcelona (which already had union representation) which agreed to accept the Madrid Agreement, their respective labour authorities subsequently ordering the registration of these acceptances.

On 16 February 2016 employers and union representatives met in Madrid and agreed to amend article 3 of the Agreement as follows: "Territorial scope. This agreement is applicable to all employees of Adaptalia Especialidades de Externalización S.L. at the site in Madrid".

The company comes under National Economic Activity Code 8299 ("Other company support activities") and has as its corporate object the supplying to third parties of outsourced services including logistics, warehouse and goods management, classification of letters and packages and their storage, transport and distribution and services relating to auxiliary processes in production chains; cleaning.

In the company's communication to the labour authority annexed to the Agreement it indicates it has a total of 183 employees in the provinces of Barcelona, Corunna, Madrid, Monteverdi, Asturias, Valencia and Valladolid.

The company's website states that its main sites are in the provinces of Madrid, Seville, Murcia, Barcelona, Granada, Jaén and Valencia. The company hires staff in the provinces of Madrid, Barcelona, Córdoba, Granada and Valencia.

2.- The National Court of Appeal ruling that the agreement was completely void was based on the breach of the principle of correspondence in the sense that as the agreement was only signed on the workers' side by the staff delegate for Madrid, it could not be applied to workers who, although they were hired at or allocated to that site, worked wholly or partially, temporarily or permanently, outside the Madrid site or the region of Madrid or Spain.

Given that the real scope of the agreement clearly went beyond the Madrid site, the National Court of Appeal concluded that its being signed by the Staff Delegate for that location [1] was in contravention of the principle of correspondence imposed by articles 87.1 and 88 of the Statute of Workers Act and it should therefore be declared void as requested by the trade unions.

It should be recalled that until the judgment of the Supreme Court commented on here the following doctrine was settled - as confirmed by no fewer than five rulings of the Supreme Court in 2017, some of them from the month of March:

The principle of correspondence is breached if the collective agreement is applicable only to workers represented in the negotiations by the works committees taking part in the negotiation and signing of the agreement, but includes all workers hired at national level from the time of its coming into force (judgment of the Supreme Court 18-2-16; Kluh Linaer España: ref. RC 93/2015).

The principle of correspondence requires that the scope of the powers of the workers' representatives in the agreement must strictly correspond to the area covered by the agreement, regardless of whether other sites have unitary representation, as unitary representatives are elected by the workers of each site and if they do not exist this does not grant powers to representatives of other sites, this being the principle applicable to collective bargaining as also laid down in the judgments of (...) (extract from judgment of the Supreme Court 22-3-17, Paperwork Solutions, ref. RC 126/16).

The possibility of the agreement being subsequently amended so as to reduce its scope to the areas represented has been discounted (judgments of the National Court of Appeal 27-1-16, case 320/15, and 6-4-16, case 360/15 among others) even if this is proposed by the General Employment Directorate (judgment of the National Court of Appeal 17-2-15, case 326/14) as breach of the principle of correspondence is an irremediable defect (judgment of the National Court of Appeal 4-5-15, case 62/15). It is not therefore possible for "a negotiating team to be constituted to negotiate a company-wide agreement and then after the negotiations alter that scope of application" (judgments of the National Court of Appeal 7-3-16, case 380/15 and 8-3-2016, case 5/16).

Standing to negotiate "must exist and be proved at the time of the constitution of the negotiating team" (judgment of the National Court of Appeal 17-2-16, case 289/15).

3.- Now, as outlined above, the judgment of the Supreme Court of 23 February 2017 overturns the decision of the National Court of Appeal and, partly upholding the company's arguments, only declares void the part of section 3 of the Collective Agreement which provided: "including those who, having been hired at or allocated to the said work centre, work wholly or partially, temporarily or permanently, outside the site in Madrid, the Region of Madrid or Spain".

What are the legal arguments used in the judgment and which substantially alter the preceding doctrine on total and not partial nullity of the collective agreement if the principle of correspondence is breached?

The Employment Section provides these four:

a.- The starting point is the basic principle of "favor negotii" which informs all transactions and is designed to guarantee the validity of the legal transaction and to confine nullity to specific provisions:

"Legal doctrine gives priority to integrational interpretation of collective agreements in the face of arguments of illegality and case law is also reluctant to apply the doctrine of "equilibrium of agreement" in cases of partial challenge, maintaining that "(...) generally the declaration of total nullity of an agreement causes a series of difficulties for all those included under the same, particularly workers who lose the rights and advantages the agreement had given them, going back to obsolete work conditions of a previous time (...)".

b.- It is not acceptable to argue for and obtain a declaration of nullity of an entire collective agreement due to the improper nature (clearly and without doubt) of one addition to its scope of application: "including those who, having been hired at or allocated to the said work centre, work wholly or partially, temporarily or permanently, outside the site in Madrid, the Region of Madrid or Spain".

c.- This limitation of effects is all the more correct as most of the company's sites at national level (or all of them, as far as the court knows) have accepted the agreement.

d.- And finally the territorial scope has been reduced to what is legally appropriate (Madrid site)

Arguments which are not affected by the illegality of the intention to extend the agreement to national level when it was only signed by a representative in Madrid, as the judgment makes clear:

"An intention which may be criticised but which should not in itself alter the application of the said "favor negotii" principle and spread the nullity to the other provisions of the agreement, which do not present or even suggest any trace of illegality".

4.- To conclude reference should be made to the employer's interest in having a company-wide agreement and not one for a particular site or sites, which seems logical given that site agreements do not have priority application in respect of co-existing agreements in view of the provisions of article 84.2 of the Statute of Workers Act.

The judgment of the Supreme Court being commented on marks at least a turning point by emphasising that, based on the principle of "favor negotii", a clause which extends the scope of application of a collective agreement beyond that of the representative powers of the negotiators is an "improper addition" but does not make all of the agreement void.

It might be argued that this change upholding a collective agreement with the exception of a provision altering its territorial scope in breach of the principle of correspondence is not sufficiently explained, in view of the fact that subsequently the same Employment Division of the Supreme Court in another ruling dated 22 March 2017 holds that an agreement challenged for not respecting the principle of correspondence is completely void.

For this reason, and in view of the doubts concerning the doctrine and the view already being expressed that the arguments of the principle of "favor negotii" and "improper addition" to the territorial scope (going beyond the representative powers of the workers' representatives) do not seem sufficiently solid to avoid the complete nullity of the agreement, it will be necessary to wait once again for new rulings not just of the Supreme Court (which should be adopted in plenary session) but also of the Employment Section of the National Court of Appeal to know what the final solution to this important question will be.

In any event the full content of the final (legal) version of the Adaptalia collective agreement for its Madrid site, which other sites have validly accepted, should be analysed for readers to reach their own conclusions.

For your information and knowledge, you can consult the following link and read the collective agreement of Adaptalia here.

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