Employment Law Remark

The succession of contracts. The provisions of the collective bargaining agreements are called into question

31st October

Regarding the Supreme Court Judgement of 27 September 2018

Undoubtedly one of the most important legal news of the year and with a clear practical impact on the future of the succession of conventional contracts, is provided by the recently publicized decision number 873/2018, of the Plenum of the Social Chamber of the Supreme Court last September 27 (RCUD 2747/2016; Clece) issued in relation to the sector of succession of contracts in the cleaning service.

The judgement of the supreme court confirms precedents ruling of the High Court of Justice Castilla y León (Valladolid) of 2 June 2016 and judgement of Labour Court number 1 of León of 30 September 2015, which jointly condemned the incoming contractor (Clece) for debts prior to the succession of the outgoing contractor (Cleanet Empresarial). And this even though the Collective Agreement for the Cleaning of Buildings and Premises in the province of León established that the company that was laid off was responsible for the salaries earned by the workers subject to subrogation until the time of the cessation.

The conclusion of the High Court is that despite the contrary provision of the sectoral collective agreement, the new entrepreneur is jointly and severally liable for the debts of the former under the terms of Article 44.3 of the Worker´s Statute. In short, the jurisprudential doctrine is rectified to accommodate the ECJ judgement of July 11, 2018 (Somoza-Hermo Case - C-60/17).

> The aforementioned ECJ judgement ruled on a reference for a preliminary ruling submitted by the Labour Chamber of the High Court of Justice of Galicia, in relation to the possible application of Directive 2001/23/EC of 12 March (on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, of centres of activity or parts of companies or centres of activity) which ultimately led to the dismissal of the claims of the incoming contractor who had been condemned in the instance for salary debts prior to succession (Supreme Court ruling 26-7-2018; RS 2310/2016). A guard of the Compostela Museum of Pilgrimages claimed certain amounts that the outgoing company owed him and that the incoming company did not assume. With regard to this specific sector of building and premises surveillance, the ECJ ruling (based on the fact that it was an activity "that does not require the use of specific materials"), stated the following:

"(point 36): In this respect, the resolution of referral indicates that, in order to carry out the surveillance activities of the Santiago de Compostela Museum of Pilgrimages, previously entrusted to Esabe Vigilancia, VINSA took charge of the workers assigned to these activities by Esabe Vigilancia.

(point 35): It may be regarded as an activity which relies essentially on labour and, consequently, a group of workers carrying out a joint supervisory activity on a lasting basis may, in the absence of other factors of production, constitute an economic entity. In this case, however, it is also necessary for the entity to retain its identity even after the operation in question.

(point 37): The identity of an economic entity such as the one at issue in the main proceedings, which relies primarily on labour, can be maintained if the purported transferee has taken over an essential part of the staff of that entity.

(point 38): The fact that the assumption of personnel is imposed by collective agreement does not affect the fact that the transfer relates to an economic entity."

Following the ruling of the European Court and rectifying previous jurisprudential doctrine, the Supreme Court now sets these four premises:

(1) There is a transfer of an undertaking falling under Article 44 worker's statute if the succession of contracts is accompanied by the transfer of an economic entity between the outgoing and the incoming undertakings.

2) In activities where labour is an essential factor, the assumption of a relevant part of the personnel assigned to the contract (in quantitative or qualitative terms) activates the application of Article 44 of the worker's statute.

3) When labour (not infrastructure) is relevant, subrogation only proceeds if a relevant part of the personnel is assumed.

4) The fact that the assumption of a relevant part of the workforce derives from the provisions of the collective agreement does not preclude the application of the foregoing doctrine.

And what is undoubtedly very relevant, it is established that "it will be logical that whoever maintains that there has not been a sufficiently relevant assumption of labour accredits it (art. 217 LEC) and that the corresponding debate takes place when the issue is controversial.

The following two questions, among others, arise as a result of this reasoning:

a.- Do the foregoing comments mean that all contracts in which the assumption of a relevant part of the workforce is predominant (whether a collective agreement is required or not) are subject to the application of Article 44 of the worker's statute?

b.- Can there be cases (specifically in the cleaning and surveillance sectors) in which there is no succession of companies Article 44 but simply the application of the provisions of the relevant conventional regulation?

The high court judgement which is the subject of these comments resolves both issues.

If the company accredits in judicial headquarters the contribution of a relevant infrastructure to carry out the agreed services, even if a significant part of the staff is taken over, the application of article 44 of the worker´s statute would not be present. In this sense, the Supreme Court exemplifies as specific material in cleaning contracts, the contribution by the incoming contractor of sweeping or cleaning machines, lifting platforms, self-propelled vehicles, disinfecting cisterns, etc. (which was not the case).

c.- What will happen from now on? We understand that in the procedures followed in matters of conventional succession in which incoming entrepreneurs wish to exclude themselves from the application of article 44 of the worker´s statute, the practical recommendation of what has to be done/tested becomes obligatory: it will have to be accredited in a court of law that the decisive or essential element in the contract does not lie in the workforce, but in a relevant provision of infrastructure or material means.

Finally, it should be noted that the sentence has a Private Vote (1 magistrate out of the 11 that made up the Plenary), of which the attention is powerfully drawn, regardless of the legal reflections it expresses, that the new doctrine of the Social Chamber can very presumably achieve a perverse effect for the group of workers affected by the mechanism of succession by imperative of the provisions of collective agreements.

Specifically, it underlines that if the assumption of part of the staff in business cases in which there is no transfer of the company by itself, as in the case of the mere succession of contracts, entails (ex Community doctrine) the original non-existent subrogation phenomenon, it is well understood that such a novel effect established by the new jurisprudential doctrine may negatively affect (in future negotiations) the will of the employer's representation to improve (as to date) job stability in certain sectors, such as cleaning or security.

The next becoming negotiator of the succession of contracts in those collective agreements in which the assumption of a relevant part of the personnel predominates, will confirm us or not this prediction of the dissenting vote.

For your information and knowledge, you may consult the judgment in this link.

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