Employment Law Remark

Expired Collective Bargaining Agreement. Application of a higher-level agreement without contractualisation of working conditions

August 1st 2018

On the Judgments of the Social Chamber of the Supreme Court of 5 and 7 June 2018

What happens when a collective agreement loses its validity and there is no collective agreement that provides a solution? In particular, if the provision in the fourth subparagraph of Article 86(3) of the worker's statute is applied, according to which *"after one year has elapsed since the termination of the agreement without a new agreement having been agreed or an arbitration award having been made, the agreement shall, unless otherwise agreed, cease to be in force and the applicable higher-level collective agreement, if any, shall apply"*; or, on the contrary, such provision shall be dispensed with and the previous agreement shall continue to apply.

The question has been resolved after the Plenary Session of the Social Chamber of the Supreme Court held on 30 May 2018, made up of 11 judges, and which gave rise to the **judgments** delivered on **5** (RCUD 364/2017, rapporteur Mr. Angel Blasco Pellicer) and **7 June 2018** (RCUD 663/2017, with a presentation by Mr. Sebastián Moralo Gallego).

Both cases involved lawsuits against Axpe Consulting, S.L., following objective dismissals for productive and economic reasons, which questioned the interpretation of the Collective Provincial Agreement on Offices and Offices for Bizkaia in force for 2009, 2010, 2011 and 2012 (Offical Gazette of the Basque Country 6 June 2011) and, specifically, Article 3 thereof:

Duration, extension and denunciation

> *"This Convention shall enter into force upon signature by the parties entitled to it. The period of validity of this Agreement shall be four years from 1 January 2009 to 31 December 2012, with the exception of travel, subsistence allowance and mileage, which shall not be retroactive and shall be effective from the date of signature of this Agreement.*
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> *This Agreement shall be deemed to have been terminated on 15 December 2012 and both parties undertake to begin deliberations on the next Agreement within fifteen days of the date of delivery of the preliminary draft, either by the workers' representatives or by the business representatives".*

The core issue of the procedures revolved around whether a compensation for objective dismissal (1-7-2015) declared appropriate should be calculated in accordance with the salary conditions of a Collective Agreement (Provincial of Offices and Dispatches for Bizkaia) whose validity had expired, or in accordance with the applicable Collective Agreement of a higher scope (State-owned Market Consulting Companies).

The Supreme Court proclaims that the conventional text of a higher level should be applied without contractualising the preconditions that workers were enjoying. The provision contained in article 86.3 of the ET must be applied and if, one year after the expiration of the Collective Bargaining Agreement, a new one does not exist, it disappears from the legal system ("sustituitio in integrum") and is completely replaced by the Collective Bargaining Agreement for the sector. In such circumstances (in the case of a higher-level conventional text) there is no contractualisation of the conditions.

The High Chamber of the Court of Justice of the Basque Country challenged said that the salary applicable to the workers dismissed in 2015 was the one that corresponded to them in application of the Provincial Agreement of offices and offices in Vizcaya, without the application of the State Agreement of consulting companies due to the loss of validity of the aforementioned Provincial Agreement being applicable:

a.- on the one hand, because it was not appropriate for the company to alter the balance of the basic benefits of the employment contract, reducing the salary in an application of the agreement of higher scope and,

v.- on the other hand, because its article 8 indicated that the improvements acquired must be respected, which in annual calculation were higher than those of the agreement itself.

The High Court upholds such an interpretation because:

1.- The regulation of the legal ultra-activity regime implies, as Article 86.3 of the worker´s statute stipulates, that one year after the termination of the agreement, "the collective agreement of a higher scope that is applicable shall be applied, if any". The clarity of the legislator's will be clear from the normative construction itself and from the explanatory statements of the reform rules.

To conclude by saying that:

"In the present case, there is no doubt about the existence of a convention of a higher scope, nor that the existing one is applicable, therefore, compliance with the legal norm in its entirety is required, without it being appropriate to apply techniques that are foreign to the precept and to the very configuration of the system of sources of Labour Law exceptionally provided by this Chamber in a specific case in which there was an absolute regulatory vacuum and the only possible alternative was deregulation whose consequences were particularly strange in the field of labour relations".

2º - On the other hand, the provision for the preservation of the personal conditions enjoyed by each worker under article 8 of the Collective Agreement of a higher scope does not refer to the maintenance of the normative conditions arising from the Collective Agreement previously applicable, but to those strictly *ad personam* as an improvement of the legal or conventional conditions; and, on the other hand, because in no way can it be deduced from its wording that the sectoral agreement seeks to maintain partially in force the agreement that has already disappeared.

As a summary and reflection:

a.- When the renegotiation of the collective agreement is not possible, the legislator intends to avoid a *"petrification"* of the working conditions agreed in this text and that the renegotiating agreement is not excessively delayed by a time limit on the ultra-activity of the agreement to one year.

b.- For the application of the Collective Agreement of a higher scope, it must regulate the same matters as the deceased agreement, that is, the most typically "normative" and relevant aspects of the individual employment relationship, such as remuneration, leave, leave, working day, leave, vacation, overtime, etc.

c.- The improvements in working conditions established in the *"ad personam"* employment contracts (basically, the annual salary) are maintained despite the new application of the collective agreement of a higher scope.

d.- **Workers who come holding working conditions exclusively derived from the application of a collective agreement** (fundamentally, salary and working day), **if it loses its validity, the collective agreement of a higher scope that is applicable will be applied** (if any), **although its salary tables are lower and the working day higher than the previous one.**

e.- The reader will ask himself the real repercussions that in practice meant for the company and the workers to pass from a Provincial to a State Agreement. They were not insignificant as can easily be deduced from two simple working conditions. For example, the working day went from a duration of 1742 hours (deceased agreement) to 1800 hours (higher level agreement) and, in terms of salary, from being the gross annual salary of a graduate with a higher degree of 27,980.42€ (deceased agreement) to becoming 21,969.72€ (higher level agreement).

There is no doubt that the case law will be a clear "notice to skippers" in the context of collective bargaining, following the denunciation of a collective agreement that lost its temporary validity. The shadow of the non-contractualisation of working conditions and the application of a higher agreement with more harmful working hours and wages will encourage negotiations in favour of reaching an agreement that will give continuity to the expired agreement and avoid the application of the higher agreement when it is less beneficial for workers.

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