Employment Law Remark

The time limit for filing a claim against a labour lender

25th Abril 2018

Regarding the high court sentence of 14 December 2017

The questions raised on this occasion are set out in the following relevant questions.

Firstly, is it possible to bring an action declaring the existence of an illegal transfer, even though the provision of services has already ended when the action was brought before the Social Court and, secondly, would the answer change if the preliminary conciliation ballot had been submitted at a time when the provision of services was ongoing?

The jurisprudential doctrine required that the employment relationship should be ongoing at the time when the employee filed the legal action for the declaration of the unlawful assignment of workers, since its success required the continued existence of the labour lender, since what was intended with it was the acquisition of the status of permanent worker in the company of choice (assignor or assignee), which logically used to happen in the main company.

In this way, in business practice, all kinds of behaviour has been observed which was intended to avoid the judicial declaration of a labour loan between the two contracting companies (the main company and the contractor).

In line with this reflection, the **Plenary of the Social Chamber of the Supreme Court** recently issued a **judgment** on **14th December 2017** (RCUD 312/2016), rectifying previous judicial decisions, to conclude that the possibility of taking action to obtain a declaration of the existence of an illegal assignment requires that the situation to be classified as such be in force at the time when the worker initiates the legal claim to his right, which will take place at the time when the legally required evasion of the process begins as a requirement for the presentation of the claim before the Social Court.

In other words, the continued existence of the assignment is linked to the delimitation of the moment of commencement of the unavoidable procedural steps for the action to set the process in motion, whether it be the conciliation ballot or the prior administrative claim.

The interest of this jurisprudential doctrine is clear since the well-known assessment of the worker's "lack of action" if he brought the lawsuit when he was no longer providing services in the contract, is now clearly rejected, if he had previously initiated the required pre-procedural procedures.

This is what happened in the chamber of the high court, which is the subject of these comments, based on the following background information:

1.- On February 19th, 2014, the worker had filed the corresponding ballot for conciliation against one of the co-defendants, Ingeniería de Sistemas para la Defensa de España S.A. (ISDEFE).

2.- On March 10, 2014, ISDEFE sent the plaintiff and the Commission a letter, that supported ISDEFE's services at the General Secretariat of the National Institute of Aerospace Technology Esteban Terradas (INTA), The administrative services provided by the General Secretariat of the Public Institute had ceased to be covered by the Commission, so that its services were terminated with the client and there were no other posts there to relocate him, which was why ISDEFE had decided to transfer him to another work centre based on the organisational reasons indicated.

3.- The worker filed the lawsuit on March 14th, 2014, when he was no longer working on the contract.

5.- The Social Court 23 of Madrid rejected the claim, arguing that the decisive moment for analyzing the possible existence of an illegal assignment was the filing of the claim, a criterion that was confirmed by the sentence of the Madrid High Court of Justice of November 18, 2015 (RS 373/2015), with an express and detailed quote from the high court of justice sentence of October 29, 2012 (RCUD 4005/2011), confirming the exception of lack of action.

With the ruling of the chamber of the high court, the two previous sentences passed are annulled and the proceedings are returned to the Social Chamber of the Madrid High Court of Justice so that it may come to the substance of the case, that is, whether or not the worker, under the formal protection of his employer ISDEFE, rendered services in the development of the contract with INTA, a situation occurred or not labour lending.

It will be interesting to follow this dossier to the end because we must remember the facts that have to be re-prosecuted no later than March 2014, so that the effects of a declaratory judgment in favour of the employee being able to opt to be part of the staff of the contractor company will be worthy of consideration, basically due to the possible wage differences in his favour.

We conclude by stressing that the chamber of the high court resolves the question with which this commentary begins and that, in order to avoid further confusion and create legal certainty, the Social Chamber, meeting in plenary session (10 magistrates), taking advantage of the appeal for the unification of the doctrine to be resolved, has established the most appropriate jurisprudential doctrine in order to preserve the rights of workers in matters of labour lending and that they should not be undermined by a simple "urgent departure" of the employee from the contract to which he was assigned.

For your information and knowledge, you can consult the STS of December 14 on this link

For more information, please contact:
Alfredo Aspra
alfredo.aspra@AndersenTaxLegal.es

José Antonio Sanfulgencio
jantonio.sanfulgencio@AndersenTaxLegal.es