Employment Update

# The payment of housing rent and its consideration as a computable salary module with respect to severance payments.

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About the High Court Judgement of July 19, 2018

Without analysing or interpreting all the possibilities or casuistry derived from the consideration of the concept of "payment of housing rent" as a regulatory salary, the fact is that the Supreme Court has established a criterion around the consideration of this concept as a salary or not, what would be the temporary projection of the worker's geographical mobility, that is, whether it would be a (temporary) displacement or a (definitive) transfer. Time will tell if we are dealing with the analysis of a specific case in specific circumstances or, on the contrary of a tendency that can be projected on other eventual cases and concepts where what really determines its consideration as a regulatory salary will be the time factor - displacement or transfer - and not so much the nature of the concept, form of payment, amount, professional or personal use, etc.

Thus, when the worker is or has been transferred or posted abroad one of the most problematic issues that arise in the termination of employment contracts for objective reasons and/or disciplinary dismissals, concerns the salary module that must be used to determine the compensation that corresponds to him and, more specifically, the possible calculation within the regulatory salary of the amount corresponding to the housing rent of the worker paid by the company.

Clarifying the existing contradictory judicial doctrine, the Social Chamber of the Supreme Court, in a ruling handed down on 19 July 2018 (FCC case; RCUD 472/2017) when it comes to determining whether the payment by the company of the rent of a dwelling is a concept of a salary or extra-salary nature, opts for the decisive role that the "time factor" has to play in geographical mobility, whether it is the one foreseen in the contract or the one actually existing.

The case under trial analysed the claim filed by an employee for differences in the calculation of the indemnity for the termination of the employment contract for objective reasons, the following facts being relevant to the present effects:

a.- After several years of providing services that began in 2005, on May 23, 2011 it signed an international mobility contract with the company to provide services in Canada, agreeing, among other working conditions, the *"rental of a dwelling adequate to the living conditions of the destination country"*.

b.- The company paid directly the rent of the dwelling occupied by the actor in the amount of 1.672,27.-€, doing so during the twelve months of the year.

c.- After the final act of the formal consultation period with respect to the collective dismissal procedure, by letter dated March 4, 2014, the worker was notified of the termination of his employment contract with effect on the same day, under the provisions of Article 53 of the Worker's Statute for economic, productive and organizational reasons.

d.- The High Court Chamber nº 31 of Barcelona of January 11, 2016, estimating the lawsuit, condemned the company to pay the plaintiff the amount of 47,919.05€, as it understood that the rent of the dwelling was of a salary nature and, therefore, was part of the regulatory salary for compensation purposes.

e.- However, the High Court of Justice Sentence Catalonia combated on 16 September 2016 considered that it was an extra-salary concept and, therefore, alien to the determination of the amount of compensation, reducing its amount to the sum of € 30,734.15.

Against the report of the Public Prosecutor's Office that advocated the dismissal of the cassation appeal for the unification of the doctrine formalized by the worker, when considering the concept of "housing rental" of an extrasalarial nature, the Supreme Court estimates it, revoking the High Court of Justice Statement and leaving the High Court Statement firm, starting from the fact that in the case analyzed the temporary projection of geographic mobility, in principle indefinite and with a real duration (until dismissal) of practically three years, places it materially in the framework of a "transfer", which is not simply "displacement".

What were the arguments used by our High Court to reach this conclusion?

1.- The legal nature of the institutions is determined by the reality of their content and must prevail over the **nomen iuris** that the parties may erroneously or with interest give it. It is irrelevant the express configuration of the concept -housing- made by the parties in their international mobility contract, excluding it from Personal Income Tax and Social Security contributions.

2 - When determining the legal nature of the concept of "housing rental" as a salary or extra-salary, attention must first be paid to the decisive question of whether it is a contract ex novo for the provision of services abroad or whether, as is the case, such services are provided in the exercise of geographical mobility [art. 40 Worker's Statute] or by agreement between the parties.

i.- In the first case of direct hiring to work abroad, it would be a purely salary concept, not only by applying the presumption that any amount paid by the employer to the worker compensates for the labour benefit and is therefore "salary", but more specifically because entered into a contract to provide services in a particular place, this involves the acceptance *ab initio* of an ordinary expense (housing) of every person and that in principle the worker would have to pay whatever the place of provision of services, so that its assumption by the company involves for the worker an undeniable wage increase; and this whether it is done directly on the payroll (salary itself) or indirectly when it is paid by the company itself (salary in kind).

ii.- In the second hypothesis that the provision of services abroad is already in force, we situate ourselves within the framework of geographical mobility, in which case the legal nature of the concept of salary or extra-salary is not determined by the game of the will of the worker in the change of location but by the *"duration"* of the same. In this second situation, the Sala de lo Social establishes that:

a.- The element will be compensatory (extra-salary) if the worker maintains his housing and rent in our country, despite his need for housing in the country to which he has moved, because it is ordinarily a mere "displacement", the scarce temporariness of which

does not advise to do without the homeland, and therefore the necessary housing in the country to which he moves involves an extra expense.

b.- But it is to be assumed (the proof to the contrary would correspond to the company) that the dwelling in Spain will be dispensed with when we are in the presence of a transfer itself, since it would be economically incomprehensible to maintain the tenancy in our country when the provision of services abroad is of an indefinite nature.

As **conclusions,** when defining the legal nature of the concept of "renting housing abroad", we must start from:

1º: If the hiring is *ex novo* to directly provide services abroad, the payment of the rent of the dwelling is a salary concept;

2º: If the international geographic mobility takes place in force the employment contract, starting from the fact that the worker lives in a rental regime in Spain, the solution is directly related to: (i) if it is a transfer (salary concept) or (ii) if it is a displacement (indemnifying consideration);

3º: The sentence, as it expressly refers, does not definitively resolve all the variables or circumstances that would oblige to qualify the referred solution (for example, when you are the owner of a property in Spain; or there are notable differences in the amount of rent between Spain and the country to which you are moving, etc.), as this is not the approach made by the parties, and therefore any consideration in this respect is idle.

It is true that to substantiate about the legal nature of housing rental abroad, after geographical mobility, when the worker has owned housing, would in no way affect the ruling of the judgement in the judged case (because it is not a matter of debate) but it does seem that a great opportunity has been lost for at least one obiter dictates, the Social Chamber of the Supreme Court to pronounce to that effect and thus avoid contradictory judgments by the Social Courts and High Courts of Justice.

For your information and knowledge, you can consult the Judgment of the Supreme Court of 19 July 2018.

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