ANDERSEN TAX & LEGAL

The regulatory salary of an expatriate worker dismissed in the framework of a collective dismissal and the discharging effectiveness of the settlement

30th June 2020

Regarding the STS of 21st February 2020

The Plenary of the Employment Division of the Supreme Court (given the characteristics of the legal question raised and its importance), in proceedings for objective individual dismissal deriving from a collective dismissal, issued a ruling on 21st February 2020 (FCC case; RCUD 3229/2017), dismissing the appeal for unification of doctrine filed by an expatriate worker, confirming the precedent of the Valencia Supreme Court of 6th June 2017, with two issues being raised.

The first was to determine whether it constituted a salary and therefore integrated the regulatory salary for the purpose of calculating severance pay**, the amount of the housing rent and the health and accident insurance premiums paid by the company**. The second was to **determine whether the severance payment made by the worker was in full discharge of his obligations.**

Given the importance and usefulness of such a pronouncement, especially in the construction sector, an analysis of its main considerations is made below.

1st Background:

The worker provided services in a situation of international mobility and was assigned to Lima (Peru) by means of an international mobility contract signed on April 8th 2013. In addition to the basic salary, the so-called "activity" and "complementary" bonuses and an expatriation bonus, **the company assumed the amount of the rent for the house** (1,156 euros/month) **and medical insurance** (3,094 euros/year).

On 30 May 2016, the worker was repatriated to Spain by means of communication of the same date with effect from 30th June, remaining assigned to the work centre in Madrid. Once the worker was reinstated in his post, he is informed by letter on 22rd July 2016 that he has been affected by the collective dismissal (which ended with an agreement on 29th April 2016, agreeing to the termination of 610 jobs) for economic, productive and organisational reasons, and that because he was a 61-year-old worker and as part of the measures provided for in the social plan accompanying the agreement, he had the possibility of taking partial retirement or, if not, the right to receive compensation of 20 days' salary up to a maximum of 12 months' salary and an additional 5 days' compensation. 5,000 euros.

Since the worker did not opt for early retirement, he was given the letter of dismissal, immediately making available to him the meritorious compensation of 20 days' salary (112,924.35 euros), in addition to the additional 5,000 euros of compensation, by writing at the bottom of the letter:

> *"I agree to the agreement of 29th April 2016 under the terms of paragraph (a) and accept and receive the nominative cheque referred to in that paragraph, noting that it is delivered to me at this time.*
>
> *I also accept the calculation bases, amount of the compensation, as well as the concepts and amounts of the settlement of assets, with the sole exception of errors of an arithmetical nature.*

With the receipt, in this act, of the amounts that are delivered to me by means of cheques for compensation, liquidation and notice, I declare myself totally compensated, settled and terminated all the effects, in relation to any concept, fixed or variable, to which I could have done as a consequence of the labour relationship maintained and its extinction, granting the present document the widest and most effective liberating value to all legal effects, committing myself to not present any claim whatsoever".

The worker challenged the employer's decision by requesting a declaration that the dismissal was unjustified, arguing, among other reasons, the violation of Article 26.1 in relation to Article 53.1b) and 50.2 of the Workers' Statute, due to an error in the calculation of the compensation, **since the concepts of housing rent and medical insurance that he regularly received during his stay in Lima were not included in the regulatory salary.**

2nd Pronouncement of the Valencian Community High Court:

The judgment delivered on 6th June 2017 by the Tribunal Territorial de la Comunidad Valenciana (Regional Court of Valencia) (RS 731/2017) dismissed the worker's application for leave to appeal, confirming the dismissal of the application and the precedent of LC No 8 Valencia of 2nd November 2016 (Order No 788/2016), on the basis of the following reasoning:

a) Under the terms of the international mobility contract, the rent for the accommodation was paid directly by the company. The Chamber understands that both the payment of the housing, as well as the payment of the medical insurance and other various concepts (trips to the country of origin, moving and learning the language), were payments of a compensatory nature linked to the special characteristic and situation of an expatriation (work outside the country) of a temporary nature, and that therefore, they were not considered as salary payments. Thus, not being of a salary nature, the exclusion of the above concepts from the calculation of the compensation was correct.
b) The value of the settlement document signed by the worker, from the moment he was informed of all the possibilities and had the presence of the legal representatives; and that all this was done in the framework of a collective dismissal, in which the information was abundant.

3rd Pronouncement of the Plenary of the Employment Division of the Supreme Court:

The ruling of the Supreme Court analyses three aspects of interest: (i) the salary or extra-salary nature of the concepts of housing rent and health and accident insurance premiums; (ii) the consequences of the calculation error, and; (iii) implicitly, the eventual value in discharge of the settlement signed by the plaintiff.

3.1. Nature of the concepts of housing rent and health and accident insurance premiums

In this first question, the Supreme Court rectifies the erroneous criterion set by the High Court that considered the two controversial concepts as extra-salary, by establishing, as we shall see, their salary nature.

The Chamber, after recalling the notes configuring the concept of salary (presumption that it includes everything that the worker receives unless it is proven that it is due to compensation or substituted for expenses incurred by the worker as a result of the activity) brings up previous judgments in cases of workers against the same company in which it was emphasized that it was not a case of geographical mobility under article 40 of the Workers' Statute, but rather contractual agreements signed with the specific purpose of providing services in a certain location in a foreign country.

Recalling that when it is a question of the conclusion of the contract for the provision of services in the place that constituted its object (a foreign country in this case), it is clear that what is paid is of a salary nature, and not compensatory for travel expenses to which the contract does not oblige. And it is

precisely the absence of the duty to move from one centre to another due to business taxation that serves to qualify the legal nature of the compensation paid.

Citing the ruling of the Supreme court of February 5th 2014 (RCUD 1136/2013), it is emphasized that in cases such as the one analysed, it is remarkable that the company is assuming an expense concept that, regardless of where the work was performed, would be borne by the worker; whatever the place where the services were provided, it is the worker who will have to bear the cost of his or her housing without any repercussions on the working relationship.

Specifically, the High Court considers that the company has come to pay a sum dedicated to the worker's housing, not just to replace an additional expense borne by the worker:

> *"since the worker is not temporarily displaced as a result of the contract, but necessarily resides in the location of destination fixed in the contract".*

With this, the rent of the dwelling constitutes a salary, whether the company includes an amount in the payroll for this concept, or whether the rental income of the dwelling occupied by the worker is paid directly (salary in kind). The same conclusion is reached with respect to health and accident insurance for the benefit of the worker, which is wage compensation for the worker's obligations.

3.2. Inexcusable error in making the compensation available

With regard to this second question, and on the basis that the analysis of the possible existence of an error in the calculation of compensation requires a specific analysis (not every legal error, nor any difference, even of a small magnitude, is necessarily excusable), the Chamber is conclusive, however, in recalling that before the dismissal of the plaintiff, it had already ruled on two occasions (same company and type of employment contract), stating the absolute inexcusability of the erroneous provision of compensation.

However, in this procedure, the logical and consequent conclusion (because of the undue reduction of the amount of compensation, by excluding two concepts already sentenced as salaries), was not the impropriety of the objective dismissal, but the dismissal of the appeal, because as we will see now, we do not enter into the prosecution of the casational motive aimed at questioning the effectiveness and liberating value of the settlement signed by the plaintiff.

3.3. No contradiction in questioning the liberating value of the settlement signed by the plaintiff

The Supreme Court dismisses the second plea put forward by the worker who claimed that the value of the settlement in discharge was ineffective, since it did not assess the necessary existence of a contradiction between the judgment under appeal and the judgment in contrast, since the ruling of the High Court of the Valencian Community granted discharge on the basis of various circumstances that were not present in the judgment in contrast (Supreme Court Ruling 26th February 2013).

In particular:

(a) This was an individual objective dismissal in the context of a collective dismissal in which higher amounts than those legally established had been agreed upon

(b) The settlement was set out in a document provided for in the Collective Agreement for the Construction Sector, to which two ad hoc paragraphs were added for the occasion

c) The plaintiff was given all the explanations on possible alternatives and the documents he signed clearly reflected the different items paid to him and their origin and reason for being.

c) The settlement was signed in the presence of the workers' representatives, which constituted a relevant additional guarantee.

For this reason, even though the ruling of the High Court of the Valencian Community contains erroneous doctrine on the configuration of the salary that served as the basis for the calculation of the compensation, such precision has finally not had any practical relevance, as the reason affecting the subscription by the plaintiff of a document of balance and settlement in which he considered the amount received to be correct (due to the absence of any contradiction) has become final.

4th Dissenting Opinion

The resolution analysed has a dissent signed by four Judges (of the twelve that made up the Labour Chamber) in favour of the existence of a contradiction between the sentence appealed against and the contrast that was invoked and the estimation of the casational motive related to the ineffectiveness of the liberating value of the settlement signed.

It is pointed out that from the time when the salary for calculating the compensation was miscalculated, the fact that the worker expressed his agreement with the calculations of the compensation could not serve to affirm that his possible action to contest the termination was being withdrawn.

In fact, the dissent recalls that the Chamber has held that when the termination decision comes from the company, the acceptance of the payment does not imply conformity with the extinction, since in order to be incorporated it is necessary to add the unilateral will of the worker that implies a transaction that makes clear the agreement to avoid or end the dispute, and a clear acceptance of the rupture of the bond.

Therefore, in this case, it was not possible to maintain that the expression of will that the calculation was correct according to the parameters offered by the company, completely closed the possibility that the worker rejected his dismissal; since there was neither a mutual agreement nor a transaction, since what was agreed in the collective dismissal was strictly paid.

To sum up, the Jurisprudence that has been rejecting the liberating value of the settlement when the liquidation is inferior to the one that corresponds to the worker should have been applied and, consequently, the dissent understands that the resource should have been estimated, declaring the unsuitability of the dismissal and condemning the company to the consequences inherent to such declaration, calculating the compensation for which, in its case, the company chose according to the entirety of the salary.

5th Conclusions:

First.- The jurisprudential doctrine on the configuration of the salary that has to serve as a basis for the calculation of the compensation of a worker in a situation of international mobility, establishes the salary character of the concepts "housing rent" and "health and accident insurance premiums".

Second. - Companies cannot exclude the inclusion of concepts of a salary nature such as the two mentioned above, even if the worker received them in kind because they were benefits paid directly by the company.

Third.- However, if this is done by the companies in a termination of the contract for objective reasons, we would be in the presence of an absolute inexcusability of the erroneous provision of the legal compensation of 20 days of salary per year of service that would lead to the impropriety of the dismissal, having to calculate the compensation for which, if any, the company would choose according to the full salary.

Fourth.- Although the Supreme Court Judgement does not expressly confirm the doctrine of the High Court of the Valencian Community Judgement with regard to the value of the severance payment, by rejecting the reason given by the worker (due to the absence of a contradiction), it does so implicitly, considering the amount received and its effectiveness to be correct, based on the four specific and unique circumstances that stand out (I receive compensation greater than the legal

amount, express acceptance of the bases of calculation, explanations given and signature in the presence of the legal representatives of employees).

You can see the Sentence for more information.

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