Labour Law Remark

The two CJEU judgments of 21 September 2017 and modifications of employment conditions: More modifications of interpretation or no modification?

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Before turning to the analysis and consequences of the well-publicised judgments of the Court of Justice of the European Union, it should first be said that the recent **SCJ of 14 July 2017** (Manpower Group Solutions; RC 74/17) implicitly confirms the legal basis of the fiercely-contested SCJJ of the Basque Country of 19 December 2016 (RS 41/16), inasmuch as when interpreting Article 51.1 of the ET, it emphasised that for the purposes of this case the terminations to be counted include those that occur during the period in question on the initiative of the employer for other reasons not related to the individual worker other than those provided for in paragraph c) of section 1 of Art. 49 ET, **such as terminations the consequence of transfers or substantial modifications of employment conditions (Arts. 40.1.4 and 41.3.2 ET)**.

This is even if said transfer or modifications are not the result of wishes of the worker, but rather of the substantial unilateral modification made to the contract by the employer or an agreement reached with workers' representatives, but which in any event have been made for reasons that do not involve the worker.

Similarly, the **SCJ of 24 January 2017** (RCUD 38/16) states that, when a contract is terminated after a temporary suspension of contracts that occurs as a consequence of global measures adopted not as a direct result of the administrative decision that authorises the termination but rather because the worker affected has not taken advantage of a transport option adopted by the employer and included in said global business restructuring plan, and all other legal requirements are met, it is a measure comparable to dismissal for reasons that are not related to the individual worker.

However, in the doctrine of territorial courts of justice we see that this case law criterion is not always adhered to. For example, the SCJJ Madrid of 18 November 2015 (RS 583/15), citing the above SCJJ Castilla La Mancha of 24 April 1997, does not include terminations of employment contracts due to a transfer or substantial modifications of employment conditions that are in response to the wishes of the worker in view of legal conduct by the employer.

This is also the conclusion reached in the SCJJ Catalonia of 12 January 2015 (RS 5184/14) in respect of terminations of employment contracts where compensation was paid in the event of a transfer or substantial modifications of employment conditions.

Following this necessary introduction, one must not forget a key background fact to the current SCJJEUs to which these comments refer. We refer to the judgment of said **European Court of 11 November 2015** (C-422/14; *Pujante Rivera),* in view of the reference for a preliminary ruling prejudicial judgment filed by Labour Court no. 33 of Barcelona pursuant to Article 267 of the TFEU and which c*ontained this third and important pronouncement:*

> "*Directive 98/59 should be interpreted to mean that in cases where an employer unilaterally makes a substantial modification to essential elements of the employment contract for reasons not related to the individual worker, to the detriment of the worker, such action shall fall within the meaning of the concept of "dismissal" used in Article 1, section 1, paragraph 1, letter a) of said Directive "*.

This is a precept that, in view of its importance, we have transcribed below:

> *"1. For the purposes of the application of this Directive:*
>
> *a) "Collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:*
>
> *i) Either, over a period of 30 days:*
>
> *- At least 10 in establishments normally employing more than 20 and fewer than 100 workers,*
>
> *- At least 10 in establishments normally employing a minimum of 100 and fewer than 300 workers,*
>
> *- At least 30 in establishments normally employing a minimum of at least 300 workers,*
>
> ***(…) For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies***".

The doubt that arose with the Pujante Rivera judgment was whether the mere unilateral modification to employment conditions should be compared to the concept of "dismissal" for the purposes of the Directive, when there was no legal requirement for the worker to accept the termination of their employment contract with compensation.

A priori, the answer should have been in the negative, since the question raised by the Spanish Labour Court referred specifically to the termination of a contract pursuant to Article 50 ET (salary adjustments that had exceeded Art. 41 ET) after the modification and in which the CJEU, in setting out its conclusions (sections 50 and 52), referred explicitly to the existence of a termination after the modification.

Thus, following the two judgments handed down by the CJEU on 21 September 2017, there are two questions that must be resolved:

(i) Whether the employer who decides to modify employment conditions is required to implement the procedure stipulated in Directive 98/59 for collective dismissals.

(ii) Whether the obligations of the employer to consult and provide notifications established in the Directive arise before workers have the right to terminate their employment contracts with compensation.

As a consequence of the above, these questions must be the focus of discussion and not translated in an erroneous and confused manner from a headline in the media when it is stated that *"changing the employment conditions is considered dismissal"*.

As has been stated, when calculating the threshold for collective dismissals, our Supreme Court compares dismissals the result of articles 40 (transfers) and 41 (certain substantial modifications of employment conditions that cause prejudice) of the ET. As a result, the judgments the object of our comments have nothing new to contribute.

In short, the cases referred to the CJEU (Halina Socha [C-149/16] and Malgorzata Ciupa [C-429/16]) analyse the questions raised by the courts of Poland in two procedures in which analyse the challenge to general wage reductions applied in two hospitals in that country. In both cases, the courts raised a similar question: whether the employer who decides to modify employment conditions is required to apply the procedure stipulated in Directive 98/59.

The judgments are similar (same chamber and rapporteur). In **C-149/16**:

> *"Article 1, section 1, and Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted to mean that an employer is required to carry out the consultations provided for in said Article 2 when it plans a unilateral modification to conditions of remuneration to the detriment of workers that, if rejected by the latter, would result in a cessation of the employment relationship inasmuch as the requirements stipulated in Article 1, section 1 of said Directive are met, a circumstance that should be confirmed by the referring court"*.

And in **C-429/16**:

> *"Article 1, section 1 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted to mean that a unilateral modification to conditions of remuneration on the initiative of the employer to the detriment of workers that, if rejected by the latter, would result in a termination of the employment contract, could be considered a "dismissal" for the purposes of this precept. Article 2 of said Directive must be interpreted to mean that the employer is required to handle queries provided for in said article when planning this type of unilateral modification to conditions of remuneration, provided that the requirements established in Article 1 of said Directive are met. This must be confirmed by the referring court".*

Below are some points contained in the two judgments which are notable by virtue of their special interest, together with comments:

1.- Polish national legislation, i.e. Articles 1 to 6 of the [Law of 2003] contain "no provisions relating to those modifications to the conditions of an employment contract" (*section 18, Socha case*).

On the other hand, Spanish industrial legislation adequately regulates geographical mobility and substantial modifications of employment conditions, both individual and collective.

2.- "The unilateral implementation by an employer of a **non-substantial modification** of an essential element of the employment contract for reasons not related to the individual worker or a substantial modification of a non-essential element of said contract for reasons not related to the individual worker to the detriment of said worker cannot be considered a "dismissal" as defined in said Directive" (*section 26, Socha case*).

Or in accordance with Spanish legislation.

3.- "It is incumbent on the **referring court**, as the only court competent to hear the facts, **to determine**, in view of all the facts of the case, whether this temporary reduction in remuneration should be considered a **substantial modification**" (*section 30, Ciupa case*).

The wording is crystal clear. It will be the courts and tribunals of Spain, upon resolving the disputes that arise, that will continue to determine whether or not what we have here is a "substantial" modification of employment conditions.

4.- "In any event, even if the referring court considers that the modifying novation to which the main dispute refers is not covered by the concept of "dismissal", the **termination of the employment contract that results** from the refusal of the worker to accept a modification such as that proposed in said modifying review (calculation of period of service) must be considered a termination of the employment contract, on the initiative of the employer, for one or more reasons not related to the individual worker for the purposes of the provisions of Article 1, section 1, paragraph two of Directive 98/59, with the result that it should be **included in the calculation** to obtain the total number of dismissals" (*section 31, Ciupa case; expressed in similar terms in section 28, Socha case*).

Doctrine along the lines of the current case law of the Supreme Court, and which should contain adaptations made to the same by said Labour Courts of the Superior Courts of Justice (which, as we saw), excludes from terminations to be counted terminations for which compensation has been paid pursuant to articles 40 and 41 of the ET.

5.- "Given that a decision that results in a modification of employment conditions could avert collective dismissals, the **consultation procedure** provided for in Article 2 of the same Directive **must begin** when the employer plans to make such modifications" (*section 31, Ciupa case; expressed in similar terms in section 29, Socha case*).

A solution that exists in Spain, since in the event of collective transfers or substantial modifications of collective employment conditions there must be a consultation period.

At this point, the following questions arise:

- In Spain, is it sufficient to follow the procedure for substantial modifications of collective contractual conditions established in Article 41 of the ET or should we go to the procedure regulated for collective dismissals in Article 51 of the ET and Royal Decree 1483/2012 for development?

- For substantial collective modifications, will the unit of calculation be the place of work when these modifications occur in a particular place of work? And will it be the business when thresholds are exceeded using the whole business as the unit of reference?

- In other words, the regulatory gleaning operation that has been corroborated for collective dismissals when using the place of work (parameter of the Directive) in addition to the business, together with the numbers and in the temporary values (valid for 90 days) provided for in Article 51.1 of the ET, should such gleaning [of the business and the place of work] also occur when we see a substantial modification of employment conditions or collective transfers?

Summing up, by way of mere comments that should be considered and unless considered otherwise:

1.- For the purposes of a collective dismissal, the doctrine of the Supreme Court that considers, among others, terminations that are a consequence of a transfer or a substantial modification of employment conditions (Arts. 40.1.4 and 41.3.2 ET) and for which compensation has been paid terminations to be counted, has been reinforced.

2.- The counting unit of the business specified in the ET, both for collective transfers (art. 40.2) and for substantial modifications of collective employment conditions (art. 41.2) should be understood to have been extended to the place of work under the terms of Article 1 of Directive 98/59. This is the same situation as that which currently exists with collective dismissals, and which has already been assumed by case law doctrine of the Supreme Court (for all, SCJ 6-4-17; rec. 3566/15).

Here is a simple example. If a company has 590 workers spread across three sites (250, 90 and 250 workers each) and wishes to relocate or substantially alter the employment conditions of 25 workers at the first site, even though according to the (larger) counting parameter of "business" it is not a collective measure (due to the fact that it applies to less than 10% of the total workforce), if the (smaller) counting parameter of "place of work" were to be applied it would be (given that said site has a workforce of more than 20 and the dismissal affects 10% of its workforce).

3.- Irrespective of whether or not contracts are terminated with the payment of compensation after the substantial modifications of employment conditions and/or collective transfers, there must be a period of consultation with the workers' legal representatives. In the cases analysed by the ECJs commented on here, and given that we do not have the Polish regulatory legislation applicable in this respect, the European Court refers to the procedures and requisites provided for in Article 1 of Council Directive 98/59 EC of 20 July 1998.

4.- The formalities of the consultation period specified for collective transfers and/or substantial collective modifications (arts. 40 and 41 ET) meet a series of requirements, the aim of which is to prevent workers from being unable to defend themselves and to ensure that they have relevant information. In principle, following the two CJEU judgments, for both cases (transfers and SCECs), one must not think that companies are required to observe the rules of the collective dismissal process of Article 51 ET and Royal Decree 1483/2012 of 29 October.

Indeed, even when Article 41.4 ET, unlike Article 51.2 ET, does not provide for the submission of documentation in the consultation period, case law (for all, SCJ 16-7-15; rec.180/14) has defended the position that there is no legal requirement for employers to submit the documentation requested for collective dismissals pursuant to Articles 3, 4 and 5 of Royal Decree 1483/2012 and has made the point that the list of documents prepared in the Regulations could serve as a guide so that in a future case (and in view of unique circumstances) the requirement to submit some or other documents should be considered reasonable, in particular when economic causes are cited and, at all times, within the same prism of required good faith and with the purpose of possibly reaching an agreement.

In short, as is almost always the case, we will have to wait for the next doctrine articles on this issue and, in particular, the first judicial pronouncements on the CJEU judgments referred to herein.

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