Labour Law Remark

Information to the employees' legal representative in the event of workforce restructuring

September 2017

Re the Decision of the Supreme Court of 29 June 2017

In the event of a restructuring of the workforce (i.e., redundancies), can the requirement specified in a collective agreement of a preliminary report from the employees' legal representative (ELR) extend to individual dismissals that do not exceed certain thresholds?

Let us imagine a collective agreement that contains a specific provision in relation to information to the ELR. Specifically, it reads as follows: *"3. The duties of personnel delegates or the Enterprise Committee will be as follows: (...) 5. Issue a report prior to the execution by management of decisions adopted in relation to the following issues: a. A restructuring of the workforce and* ***complete or partial*** *definitive or temporary dismissals of personnel"*.

Such was the wording of art. 52.3.5 of the Collective Agreement of the Empresa Municipal de la Vivienda, Suelo y Equipamiento de Sevilla, S.A (Emvisesa), with the question at issue being whether the request submitted to the ELR so that it could issue its relevant report proceeded not only with collective dismissals, but also with objective individual dismissals that also constitute a restructuring or partial dismissal of personnel of the company.

Indeed, this is the case analysed and which has resulted in the relevant **DSC handed down on 29 June 2017** (RCUD 1512/2015), and which is based on the following background of interest:

- On 4 October 2012, Emvisesa informed an administrative manager of the objective dismissal for organisational and production-related reasons, effective from said date.
- At least 6 more employees were dismissed on the same date.
- Following the dismissal of the employee, her duties were carried out by two other employees.
- DSC no. 11 Seville of 3 May 2013 declared the objective dismissal appropriate.
- However, in its decision dated 22 October 2014 (RS 2360/2013) that upholds the requested appeal of the employee, the Social Chamber of the SCJ of Andalusia (Seville) declared it inadmissible on the grounds that the failure of the company to comply with the obligation stipulated in the agreement prevented the analysis of the reasons for the objective dismissal, which was based on organisational reasons and reasons related to production.

The recent decision of the SC reminds us that the formal requirements for dismissal for objective reasons are set out in art. 53.1 ET. In essence, these requirements consist of:

a) Written communication to the employee, stating the reasons for their dismissal.

b) An offer of compensation, and

c) A period of notice.

The precept also establishes the intervention of the employees' legal representative, specifically in section c). This requirement to provide the ELR with information refers to the notification of dismissal, which should state the reasons for the decision to terminate the employment of the employee and which, apart from this preceptive mention of the reason, should also normally contain references to the period of notice and the offer of compensation.

In terms of the method used to issue said communication to the employees' legal representative, case law has dismissed the notion that this communication can merely be verbal in nature (DSC 7 March 2011; RCUD 2965/2010).

The requirement to deliver the copy has been made in relation to the provisions of article 64 ET, inasmuch as it constitutes an essential element so that individual representatives can learn about the position of the business, while the current wording of article 53 ET (following Law 35/2010 of 7 September) and art. 122 of the LRJS attribute the classification of irrelevance to the dismissal that does not meet formal requirements.

However, in the case analysed here the SCJ of Andalusia was of the understanding that the Enterprise Committee should not only be informed in a copy of the letter of dismissal (which was, in fact, issued), but that it should be asked to issue the relevant preliminary report.

However, the response of the Supreme Court will be contrary to the position of the Territorial Court based on these arguments:

1.- The clause of the conventional pact merely replicated in this point the most literal version of article 64.5 ET.

2.- The perspective provided by the legislator to unitary representation in individual dismissal should not be confused with that attributed to said representation in what is referred to in article 64 ET as "*workforce restructuring*". While it is the case that the dismissals referred to in art. 52 c) ET are aetiologically associated with that concept, it is also true that the jurisdiction to consult granted in article 64 ET is clearly developed for collective dismissal in article 51 ET, which should be considered to have been referred to.

3.- If the doctrine of the Social Chamber of the Supreme Court stipulates the need to deliver a copy of individual dismissals, it does so precisely to emphasise the fact that the information offered through individual dismissals is relevant for the exercise of the powers of the Committee in terms of restructuring. With good reason, the causes and the number of employees constitute significant pieces of information for any action to be taken by the employee representative body (the classic claim challenging a de facto collective dismissal or individual dismissal carried out in contravention of the law).

Furthermore, the DSC referred to above emphasises that **the obligation to engage in prior consultation should not be extended to the employees' representative also in the event of an individual dismissal**. Therefore, the decision under appeal is annulled.

In conclusion, and in accordance with jurisprudence to date, the scope of material collected in relation to the right of the ELR to receive information should not exceed the terms used by the precepts regulated therein.

Finally, it should be pointed out that the aforementioned decision is also followed by the doctrine contained in the recent decision of the National High Court on 3 July 2017 (decisions 152/17). In the procedure in relation to a collective dispute in which the UGT demands from AENA and ENAIRE a copy of the services agreement signed by these parties in December 2016, said decision dismisses the claim on the grounds that according to applicable jurisprudential doctrine, the obligations to provide information to the ELR in relation to contractors and subcontractors of works and services do not exceed those stipulated in article 42 ET, with no scope for the AENA group to assume that such an obligation exists based on the wording of the agreement.

For more information, view the DSC handed down on 29 June 2017 here.

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