Employment Law Remark

The limitation period for joint and several liabilities of the principal company is not interrupted by the wage claim made to the employer contractor

9th February 2018

Regarding the High Court decision of 5 December 2017

The question that we raise in this commentary is whether the exercise of the claim for payment claims against the employer company interrupts the limitation period of the action available to the worker to demand joint and several liabilities for the same type of debts, which is imposed by Article 42 in the worker's statue on the principal company that contracted the services of the contractor, for the performance of tasks corresponding to its own activity.

The background to the litigation discussed was as follows:

a. - In April 2011, Caja de Ahorros y Monte de Piedad de Navarra (CAN) signed a contract with **INCITA S. L.** to outsource the operation and management of its IT systems. Subsequently, the CAN was integrated into Banca Cívica S. A. and, with effect from 2 August 2012, the co-defendant company **CAIXABANK S. A**. took over the aforementioned Banca Cívica.

b. - The relationship between Caixabank and Incita ended in March 2013.

c. - Incita is in a competitive bidding situation.

d. - Incita seconded a worker for the development of the contract, who had started his services as a strategic consultant on 1 April 2011 and provided the services at the main company's premises.

e.- The worker left the company voluntarily on May 8th, 2013 and after the continued non-payment of wages and extra payments (at the date of termination of the employment relationship, the company owed him a total of 89,227.26€). This being part of the extra Christmas 2012 pay, from January to May 2013, and the pro rata of the extra summer pay and variable payments for 2011, 2012 and the first two months of 2013), on June 12, 2013, it filed a conciliation ballot to claim the sums already mentioned against Incita, and almost a year later (April 14,2014), it extends the claim against the main business (Caixabank) in accordance with the principle of joint and several liability.

f.- In those circumstances, No. 4 chamber of the Pamplona High Court considered the action brought against Incita as a whole, which it ordered to pay 89,227.26€. However, it dismissed it against co-defendant Caixabank, because the contract between the two companies ended in March 2013, with the result that the joint and several liability claim against the main company was due to expire after more than a year, when the claim against it was extended on 14 April 2014.

g. - The worker's appeal was dismissed by the ruling of the High Court of Navarra on 25 May 2015 (RS 209/2015) and an appeal for unification of doctrine was filed against the High Court in a civil aspect, alleging infringement of the articles 42 ET. and 1974.1 of the Civil Code, arguing that since it was an obligation of a joint and several nature, the claim against the contractor company Incita, by means of the conciliation ballot of 12 June 2013, also interrupted the limitation period for the action against the main company Caixabank, and that consequently, the action would not have been time-barred when the action was extended against it on 14 April 2014.

In its judgment of **5 December 2017** (RCUD 2644/2015), the Labour Chamber of the Supreme Court, with five judges ruled, in line with the judgment of the Territorial Court under appeal, that is, that the claim of the wage debt to the contractor employer does not interrupt the limitation period vis-à-vis the principal company, considering that article 1974 of the Civil Code is inapplicable.

To conclude, arguing with this line of jurisprudence:

This is the case in the present case where the joint and several liability of the principal undertaking is imposed by Art. 42.2 of the worker's statute differentiating it in its commencement, duration and demand from that of payment of wages regulated by Articles 1,26,29 and 59 of the worker's statute in its different individuals, which means that it is not a joint and several obligation of which Article 1137 of the Civil Code contemplates and which has a regime in order to prescribe the limitation of this different responsibility and to which Article 1137 of the Civil Code article 1974 of the Civil Code is inapplicable in order to interrupt the statute of limitations for the claim to another, as already pointed out this Chamber, even if it was as "obiter dicta" in its judgment of 20-9-2007 (R. 3539/2005)".

The High Court Judgement has a **Private Vote** that advocates considering the statute of limitations for action to be interrupted in order to claim joint and several liability of the principal company, since article 42 worker's statute regulates a typical case of joint and several liability on its own, which cannot be excluded from the application of the general rules of the Civil Code and cannot therefore be exempted from the provisions of article 1974 of the Civil Code, as if it were an improper cohesion.

The practical interest of this ruling is clear, since in many cases, with or without insolvency of the contractor company, workers who are creditors of wage credits accruing during the course of a contract of their own activity do not demand the principal employer to start.

In short, in the event that the principal employer is jointly and severally liable for all wage debts incurred during the contract or, in the event of the contractor's insolvency, if the wage guarantee fund (FOGASA) partially pays (in days and amounts) the dissatisfied amounts, it is a decision to be taken by the workers concerned.

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