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JAN. 22

INFORMATIVE NOTE

EMPLOYMENT AND LABOUR

Restriction of the scope of Ministerial Extension Orders

The Évora Court of Appeal handed down its judgment in Case no. 1842/19.9T8FAR.E1 on 13 January 2022. In this judgment, the court took a clear position in the debate on the non-applicability of a Collective Labour Agreement (CLA), which is subject to an Ministerial Extension Order, to companies affiliated to an employers' association that is not a signatory to the CLA that has been extended.

> " The Évora Appeal Court has taken an important step in terms of case law by adopting the legal interpretation that limits the scope of application of the Ministerial Extension Orders."

The legal uncertainty faced by companies in situations where several collective labour regulation instruments are potentially applicable to their activity is well known. Not only is the assessment of potentially applicable instruments complex, but also the conflict rules are difficult to understand and even result in contradictory decisions in court.

This difficulty occurs even in companies that are members of an employers' association and are often confronted with the supposed applicability of collective instruments negotiated by employers' associations other than the one to which the company is affiliated, which happens by means of a Ministerial Extension Order.

This is an invasion of the collective autonomy of companies by collective labour regulation instruments negotiated by third parties, and often third parties with very little representation in the companies potentially covered. As a result, it generates a patent insecurity in the definition and observance of the labour status of employees and unpredictable contingencies in business activity.

However, the Évora Appeal Court has taken an important step in terms of case law by adopting the legal interpretation that limits the scope of application of the Ministerial Extension Orders. Specifically, it held that an employer cannot be covered by a collective regulation instrument signed by an association to which it is not affiliated, even if it has been extended by a ministerial order, as long as it is affiliated to another employers' association that has its own regulation instrument.

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"The judgment upholds the parties' bargaining autonomy and contractual freedom. It safeguards the freedom of action of companies and employees."

As such, the judgement upholds the parties' bargaining autonomy and contractual freedom, including the freedom not to contract. It safeguards the freedom of action of companies and employees, and their legal security in defining a stable and predictable labour status. It also safeguards their freedom of association.

It should be noted that the thesis endorsed in the judgment is simply the other side of the coin of an understanding that protected unionised employees themselves. In fact, in the past and in defence of employees' rights of collective autonomy and freedom of association[1], the courts had already upheld the position that employees could not be subject to a collective agreement negotiated and signed by an employee representation structure in which they were not involved.

The judgment of the Évora Court of Appeal is particularly illustrative of all this:

> *Pedro Romano Martinez believes that "the ministerial extension order should not cover the extension of the application of a collective agreement to the employees of a union that has not signed the agreement and to employers affiliated to another employers' association".*
>
> *This author justifies this as follows:*
>
> *"To admit that the extension of the autonomous instrument may cover employees affiliated to another trade union association would be to call into question the contractual autonomy of that trade union, whose bargaining freedom would be curtailed. (...).*
>
> *"If a certain trade union did not wish to negotiate and conclude that collective agreement, or did not wish, after it was concluded, to sign up to that instrument, that means it had some objection with respect to that collective agreement.*
>
> *Thus, if the trade union association has an objection to that collective agreement or arbitration award, to accept that, by means of an ministerial extension order, the members of that trade union will be subject to that collective instrument requires that the contractual autonomy of trade union associations with regard to the negotiation and conclusion of collective agreements be curtailed".*
>
> ***This author also applies this criterion to employers' associations as follows: "Otherwise, by means of the ministerial extension order, the Government could put pressure on trade unions and employers' associations, which did not want a certain collective agreement, to indirectly accept it, with the danger that the parties signing the agreement would be less representative than those to whom the agreement is intended to apply by means of the ministerial extension order."***

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1 Judgment of the Supreme Court of Justice of 20.06.2018, Case no. 3910/16.0TVIS.C1.S1; available at [Acórdão do Supremo Tribunal de Justiça (dgsi.pt)]

This same understanding was followed in the judgment of the Supreme Court of Justice of 20 June 2018, which deals with this issue in greater detail.

We support this understanding. As the employer is a member of AHETA, which has a collective agreement with FETESE, it is not admissible to extend the collective agreements signed by AHRESP and by FESAHT, and by APHORT and by FESAHT, to the employment relationship between the defendant and its employees, who are union members of the claimant, by means of a ministerial extension order.

The court also values the principle of subsidiarity expressed in article 515 of the Employment Code to stress that the scope and possibility of issuing an Ministerial Extension Order should be limited to cases in which there is a vacuum of potentially applicable collective regulation.

"The scope and possibility of issuing an Ministerial Extension Order should be limited to cases in which there is a vacuum of potentially applicable collective regulation."

The above judgment emerges from an appeal from a lower court decision which went in the opposite direction. This means there may well be an appeal to the Supreme Court of Justice.

Curiously, even though we do not know the full reasoning of the first instance judgement and are restricted to operative part of its ruling, it clearly reflects the insecurity we have noted. This is because the first instance court decided that a certain collective instrument would apply to the company between 1 September 2017 and 30 June 2018, and another one would apply as from 1 July 2018, and both were negotiated by parties totally unrelated to the company in court. In other words, the company would be obliged to apply a certain instrument for only 10 months, and then another instrument would apply to it, possibly only until a new ministerial extension order came along and imposed itself as well, without it having been involved.

In sum, this decision makes an important contribution to clarifying the framework of the labour status for companies and employees, which is fundamental for the stability of labour relations. ■

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