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Analysis of Some of the Unanswered Questions That the Labour Collective Bargaining Presents Under the Framework of the Spanish Public Administration

Carlos A. Arroyo
Royal University Centre of Escorial – María Cristina, Madrid, Spain
carroyo@rcumariacristina.com

ABSTRACT

The collective bargaining over working conditions of employees in the Public Administration service finds a number of features that in some cases do not always have a clear legal protection and in others, they have some specific characteristics exclusively in the public sector, thus making it necessary to proceed to its analysis.

Keywords: *public administration, collective bargaining, labour personnel, collective agreement*

JEL: K31, K40

1 Introduction

This article, written following an analytical methodology, with legal analysis for legislation and jurisprudence, and hermeneutics methodology, with legal interpretation of the issues raised, aims to deepen the knowledge of some factors that particularise collective bargaining over working conditions in the public sector, specifically in terms of legitimacy to negotiate and limitations to the negotiating field.

In order to analyse some of the peculiarities of the process of collective bargaining over working conditions of employees in the service of the Public Administration in Spain, it is necessary to know a number of things:

First: In Spain, following the mandate laid down in Article 37 of our Constitution, namely: 'The Law will guarantee the right to collective labour bargaining between representatives of workers and employers as well as to the binding force of the agreements', collective bargaining is to be regulated by Royal Decree Law 2/2015, of October 23 by which the revised text of the Law of the Statute of Workers, hereinafter SW, is approved.

The SW gives its Title III, Articles 82 to 92 to organise the collective bargaining process and to regulate the figure of collective agreements. Thus, it is necessary to understand that there is no other channel to achieve the collective bargaining 'labour' agreement but rather the channel provided by its own SW. Collective agreements which comply with the procedure stipulated by the SW, will have regulatory efficiency while, on the contrary, if the negotiating parties do not agree to negotiate in accordance with the criteria determined by the SW, the 'in theory' resulting agreements will have no binding force beyond the compulsory nature typical of a signed contract *inter partes*.

From the foregoing, the collective agreement regulator of working conditions is a statutory collective agreement.

Second: When identifying the parties entitled to promote the negotiation of a collective agreement, SW Article 87 comes to distinguish two areas or two different areas, namely: one, corresponding to collective Company agreements, business groups or group workers with specific professional profile; and the other, corresponding to sectoral agreements.

Whenever the Public Administration holds in its contractual relationship with their working civil servants a position of company, the test for standing under SW Article 87, for which we would have to choose is the first of those described above, i.e. the company.

Third: In the field of Public Administration when workers are identified as service providers, we use the term public servants/employees. Within civil servants, Article 8.2 of Legislative Royal Decree 5/2015 of 30 October, by which the revised text of the Law of the Basic Statute of Public Employees is approved, hereinafter BSPE, is to distinguish four types of employees, namely: civil servants, acting officials, labour staff and temporary staff. Of these, a hired labour personnel is understood to be that hired according to any of the procedures laid down in labour legislation.

Fourth: In collective bargaining, the BSPE endows Articles 31 to 38, Chapter IV, to regulate the collective bargaining process involving public employees, without their differentiation among the different existing modes of public employees while its Article 32.1 specifically states that 'collective bargaining, representation, and participation of public employees with employment contract shall be governed by labour legislation, without prejudice to the provisions of this chapter expressly applicable to them.'

Starting from the exposed ends we have to understand that the regulatory framework of the collective bargaining process for employees at the service of the Public Administration, is sorted on the basis of the SW, bearing in mind the particularities provided by the BSPE.

What are the particular or differentiating elements of the collective bargaining process presented by the public sector versus the private sector?

Without being the only differentiating factors, we will make two basic assumptions, namely: the identification of persons authorised to negotiate and the setting of specific restrictions on the contents of the collective agreement, specifically on remuneration.

2 Identification of the Persons Authorised to Negotiate a Collective Agreement of the Public Administration

According to the SW Article 87, the Works Council, the staff representatives or union sections which, as a whole, join the majority of the members of the Works Council, are entitled to negotiate collective company agreements, on the side of workers. This approach, which would put the Administration as a legitimate part of the Company side, should not raise any controversy, if not because, in practice, it is not accepted as a decisive criterion for identifying the persons authorised in the negotiation processes carried out in the public sector. Faced with SW Article 87.1 cited above, BSPE Article 33.1 foresees that collective bargaining of working conditions of civil servants is carried out 'through the exercise of representative recognised unions…', approach that leads to recognise the legitimacy representing the workers, the most representative trade union representatives, approach typical of the negotiation at the supra business level or sectorial level.

The first thing we would deduce from a textual reading of BSPE Article 33 is that we have a criterion of legitimacy that is not widely applicable to all public employees but exclusively to civil servants so, in regard to staff labour, it would result from applying the rule of SW Article 87.1, which recognises as legitimate in the negotiation, first, the bodies of unitary representation, namely, staff delegates and works councils. While this criterion is originally adopted by the Spanish Case Law (see judgments of the Supreme Court of February 15, 1993, December 20, 1995 and July 7, 1997), it is not the only line with existing jurisprudence, highlighting a second line in the opposite direction that came to recognise the legitimacy exclusively to trade unions (see judgments of the Supreme Court of December 15, 1994, April 30, 1996, and June 21, 1996).

The presence of these opposing positions and legal uncertainty of them derived, ends leading to the judgment of the same body, of December 21, 1999[1], which diverges from the criteria of SW Article 87.1, recognising the existence of a 'peculiar negotiation unit'. To this end and bearing in mind the provisions of the aforementioned judgment, it has to be from a mixed approach under which we adopt collective bargaining at the enterprise level, the criterion of business standing, while we adopt collective bargaining at the sectoral level or supra business level, the legitimacy

1 RJ/2000/528

of the workers' representatives. Therefore, the rules differ depending on the legitimacy of the parties concerned, applying the criteria of SW Article 87.1 on the company side and SW Article 87.2 (coinciding with BSPE Article 33.1) on the workers.

This configuration of a mixed negotiating unit, recognised mainly by the Spanish Case Law from the 1999 ruling, clashes with the lack of a legal mandate to justify it, since it cannot be grounded through BSPE Article 33, especially when it only mentions civil servants. It is not the competence of our courts the ex novo creation of a legal norm, especially when the recognised criterion is entirely unrelated to the rules of legitimacy provided by the SW.

On the other hand, despite the recognition made by the Supreme Court in its 1999 ruling by which the rule of legitimacy 'can find exceptions in those cases where the organisational structure of the entities in the bargaining unit is relatively simple' (Sala Franco, Blasco Pellicer, & Altés Tarrega, 2001, p. 19), the reality is that recognising the legitimacy negotiating for the most representative trade unions, has been confirmed as the prevailing rule; recognition, I come to understand, is justified by the vagueness of the 'relatively simple' expression.

3 Fixing the Contents of Specific Restrictions of the Collective Agreement: The Remuneration System

Facing generic recognition where in matters of collective bargaining Article 37 of the Spanish Constitution carries out, the Constitutional Court has come to recognise the possibility of introducing restrictions on collective bargaining[2]. In this respect, concerning the employees at the service of the Public Administration, the BSPE has come to order some materials, sorting what must be known and respected by the collective agreements. Among these materials we can emphasise access to public employment and selective systems, the provision of posts and mobility, disciplinary measures or plans of equality, to name some subjects. However, one of the most relevant subjects that composes it is the remuneration system.

In this regard, BSPE Article 27 provides that 'the remuneration of the workforce shall be determined in accordance with labour legislation, the collective agreement that is applicable and the employment contract, always respecting the provisions of Article 21 of this Statute'. In this regard, BSPE Article 21.2 foresees that the remuneration amounts provided for by the agreement may not be subject to increases higher than those expected annually in the Law on State Budget. Thus, through collective bargaining the distribution of the compensation burden between different wage concepts can be estimated without thereby posing salary increases higher than those expected annually in the Law on State Budget.

2 STC 210/1990, 20.12.

In any case, the limitations are valued on the salary mass which is not equivalent to recognise that wage increases should be linear between all workers. Therefore, we must play with two elements, namely: what do we mean by total payroll? How is it operated on the salary mass?

Salary mass shall mean the set of wage compensations and fringe benefits as well as the costs of social action accrued during the previous financial year, excepting in any case compensation for suspension or termination of the employment relationship as well as those resulting from transfers, supplemented expenses and contributions to the Social Security of which the company is in charge of as well as benefits and compensations of the Social Security (Torrents Margalef, 2007, p. 1283).

As to the second question, a limit to the maximum of the salary mass is recognised but not how to proceed to the distribution of this mass, which will be conditional to what is determined through the collective bargaining process. With them, the increases and salary adjustments are not of a linear character.

The lack of respect to control over the increases of the salary mass beyond the limitations arising from the Budget Act, will determine the illegality of the agreement.

4 Conclusions

In spite of starting from a recognition of the channels provided for in SW Chapter III with respect to computing processes of collective bargaining and its substantiation in the collective agreement, the reality is that the negotiation process within the public sector presents a series of particularities that come even in the field of legitimation to set up *ex novo* an ordering rule devoid of explicit regulatory support.

It is not understood in this sense that, after the successive legal reforms, a change in the standing determination of who holds the parties has not been made. For this reason, it would be advisable to rephrase the wording of SW Article 87 or recognise a specific regulation on legitimation, through BSPE.

On the other hand, as to the limitations on the contents under negotiation it is clear that it cannot recognise freedom of negotiation as an absolute principle but, on the contrary, it is subject to a number of limitations that do not operate implicitly, but present an explicit recognition.

The recognition of an express limitation to salary increases based on the provisions of the Law on General State Budgets may ask us discussion points in view of the lack of specification of the kind of administrative entity to which it is applied. Obviously it has repercussions on any administrative entity but it is true that the economic solvency posed by different administrations,

especially regional, is not the same. Therefore, a uniform limiting criterion, beyond the duty to control spending, may result in some discriminatory form.

Carlos A. Arroyo, PhD *is Doctor of Law, Distinction Cum Laude; practising Lawyer (1997- up to the present); associate professor of Labour Law and Social Security at the Royal University Centre Escorial - Maria Cristina, at the University Alfonso X El Sabio, at the Catholic University "Santa Teresa de Jesús" of Avila and at the International University of La Rioja, Spain. Coordinator and Lecturer in different national and international congresses, such as Master of Legal Practice (Madrid); International Recruitment within the Master of Foreign Trade, Avila; International Master of Ethics and Public Policy (2013); II National Congress of Economy and Freedom (2014), Avila. Programme Director for the European Network Projects for Cooperation and Development (2006–2007) (RECYD). Publications and articles published.*

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POVZETEK

1.04 Strokovni članek

Analiza nekaterih neodgovorjenih vprašanj, ki se postavljajo ob kolektivnem pogajanju o pogojih dela v javnem sektorju v Španiji

V skladu z določilom iz 37. člena Ustave, ki pravi: »Zakon mora zajamčiti pravico do kolektivnih delovnih pogajanj med zastopniki delavcev in delodajalcev kot tudi zavezujočo veljavo pogodb,« naj bi v Španiji kolektivno pogajanje urejal Kraljevi zakonski odlok 2/2015 z dne 23. oktobra, na podlagi katerega se odobri spremenjeno besedilo Zakona o delovnih razmerjih, v nadaljnjem besedilu: SW. SW ureja postopek kolektivnega pogajanja.

Na področju javne uprave postopek kolektivnega pogajanja upošteva posebnosti, ki so predvidene v Temeljnem zakonu o javnih uslužbencih, v nadaljnjem besedilu: BSPE.

Četudi izhajamo iz priznavanja metod, ki so predvidene v III. poglavju SW za postopke kolektivnega pogajanja in utemeljitve le-tega v kolektivni pogodbi, v resnici postopek pogajanja v javnem sektorju omogoča vrsto posebnosti, ki se izenačijo pri priznavanju legitimnosti, tako da se vzpostavi uredbeno pravilo brez izrecne regulativne podpore.

Špansko pravo priznava obstoj »posebne pogajalske enote«, ko govorimo o javnem sektorju: mešane pogajalske enote. Ta enota ni skladna z merilom, ki ga priznava SW. V skladu s tem, upoštevajoč člen 87.1 SW, člen 33.1 BSPE predvideva, da se kolektivno pogajanje o delovnih pogojih javnih uslužbencev izvaja »z uveljavljanjem reprezentativnih priznanih sindikatov ...«, kar je pristop, ki vodi k priznavanju legitimnosti za zastopanje delavcev, najbolj reprezentativnih zastopnikov sindikata, tj. pristop, za katerega je značilno pogajanje na nadpodjetniški ali sektorski ravni.

Po drugi strani pa se glede na omejitve vsebine pogajanj zunaj obsega SW višina nadomestila, določena v pogodbi, ne sme povečati za več, kot je predvideno letno v Zakonu o državnem proračunu. To pomeni, da je s kolektivnim pogajanjem mogoče oceniti porazdelitev bremena nadomestila med različnimi plačnimi koncepti, ne da bi prišlo do povečanja plačne mase nad zneskom, ki je letno predviden v Zakonu o državnem proračunu. Če se ne upošteva nadzor povečanja plačne mase glede na omejitve, ki izhajajo iz Zakona o proračunu, je pogodba nezakonita.