Newsletter Labor and Employment Law

GARRIGUES

Spain

March 2022

Index

1. Validity and ultra-activity of collective bargaining agreements after the reform

Federico Durán López

The reform of Article 86 of the Workers' Statute maintains, in substance, the previous regulation and the conceptual confusion that characterizes it (it does not clearly delimit the concepts of validity, extension and ultra-activity). The expired agreement will have to be applied (ultra-active) as required by the legislator, but in no case can it be considered legally in force, which has a series of very relevant legal implications.

The reform of Article 86 of the Workers' Statute (WS) carried out by Decree-Law 32/2021 (article one, ten) maintains, in substance, the previous regulation and, the conceptual confusion that characterizes it. The wording of sections 1, 2, 3, in its first two paragraphs, and 4 (now converted into 5) is the same as before, and in the new section 4 the last two paragraphs of the previous section 3 are reworded. It reorders the cases of mediation and arbitration when negotiations are blocked and, above all, establishes the provision that "in the absence of an agreement, when the negotiation process has elapsed without reaching an agreement, the validity of the collective labor agreement will be maintained". This reference to the maintenance of the validity is equivocal and must be understood in the sense that what is established is the indefinite ultra-activity of the collective labor agreement, eliminating the previous limitation of its duration to one year. We are not in the presence of an indefinite and unlimited validity of the agreement, but of an ultra-active application of the same, once its validity has been lost, with no time limit.

The Law, in fact, neither before nor now, clearly delimits the concepts of term, extension and ultra-activity. The term of the collective bargaining agreement, like that of any other contract, is that expressly agreed (different terms may be agreed within the same collective labor agreement: Article 86.1 of the Workers' Statute). Once the term has expired without denunciation, the tacit renewal (Article 86.2 of the Workers' Statute) is maintained for one year (and operates every year as long as there is no denunciation). And if the parties agree to extend the term of the agreement, it remains in force during the extension period, during which the agreement must be considered to be in full force and effect. However, once the agreement has been denounced and its initial term or that of any of its extensions has expired, the agreement ceases to be in force. There cannot be, as the legislator seems to suggest (article 86.3, first paragraph), a kind of "validity after the end of the term". The parties may, expressly or tacitly, extend the term of the agreement as long as they wish, but once it has been lost, after the denunciation, the only thing that can exist, and that is what in a correct interpretation of the rule exists, is the legal requirement that the application of the provisions of a collective contract (agreement) that is no longer in force be maintained. The ultra-activity, first for one year (which seems to be considered a "normal" period for the renegotiation of the agreement: articles 86.3, second paragraph, and 86.4 of the TE) and subsequently (once the negotiation has failed or been blocked) indefinitely (article 86.4, third paragraph), does not imply, despite the conceptual and terminological confusion of the legislator, an ex lege maintenance of the validity of the agreement, nor can the agreement be considered in force during this period. The expired agreement will have to be applied (ultra-activity) as required by the legislator, but in no case can it be considered legally in force. The ultra-activity is nothing more than a legal imposition, exceptional, which, contrary to what would result from the contractual regulations, requires that the application of a contract (agreement) that has lost its validity be maintained. And this cannot, logically, fail to have repercussions on the legal regime to which the agreement must be subject during the period of ultra-activity.

The obligation to continue to apply the CBA (Articles 86.3, second paragraph and 4, third paragraph, of the WS) cannot, therefore, be interpreted, despite the legislator's wording, as meaning that it is still in force. This is why the "peace clauses" that may have been agreed (Article 86.3, second

paragraph) lapse, because the agreement is no longer in force and therefore the strikes called to seek the modification of a collective agreement during its validity (Article 11.c of Decree-Law 17/1977, of March 4, on labor relations) cannot be considered illegal. This is why the mandate of article 86.4, third paragraph, is compatible with that of article 84.1, since otherwise the indefinite validity of the agreement would lead to a "petrification" of the bargaining units and the structure of collective bargaining, vetoing the prohibition of any change in the bargaining unit.

The ultra-activity, previously limited to one year, is now of indefinite duration (unless otherwise agreed, which could be prior to the reform, since the same judicial doctrine would have to be applied that was established, in relation to the agreements against the limitation of the ultra-activity, after the 2012 reform), but its nature and legal regime must be the same as before.

In this regard, the doctrine set forth by the Supreme Court (SC) in its judgment of October 5, 2021 (judgment 958/2021, appeal 4815/2018) is very important. The SC clarifies that the legal expression referring to the "term" of the collective agreement, which we have already criticized, must be understood "as referring to the initial term provided for or expressly extended by the parties, but not to the period subsequent to such term, once the agreement has been denounced, known as ultra active term, whether provided for in the agreement itself or, in its absence, that established in article 86.3 ET". The concepts of validity, extension and ultra-activity are clearly delimited here, which the SC, in order to accommodate the conceptual imprecision of the legislator, calls "ultra-active validity". It is clarified that the legal reference to the term of the agreement (in Article 86.3 and now also 4) must be understood as being made to its agreed or extended term (expressly or tacitly), but not to its ultra-activity or "ultra-active term".

Therefore, as the SC also clarifies, in a doctrine that must be considered fully applicable after the regulatory reform, "the prohibition of concurrence (of Article 84.1 of the ET) ends upon the loss of validity of the agreement and despite its maintenance in a situation of ultra-activity". Agreements are "temporary or fixed-term rules", and ultra-activity "cannot be confused with validity". The period of validity referred to in Article 84.1 of the ET "cannot include the possible period of ultra-activity of Article 86.3 ET, since these are two different concepts".

Once the term of the collective bargaining agreement has expired, then, despite its ultra-activity, whether limited (to one year under the preceding legislation, or under the terms agreed under the current legislation) or indefinite (under the current legislation, in the absence of an agreement, or if so agreed under the preceding legislation), it becomes possible to change the bargaining unit and a new collective bargaining agreement can be negotiated, in the preceding legislation), it becomes possible to change the bargaining unit and an agreement of a different scope can be negotiated, or the agreement that has been agreed in concurrence with the terminated agreement and that is expected to enter into force at the end of the term of the latter can become fully effective. Otherwise, says the Court, the "petrification" of the collective bargaining structure (to which we have referred) would occur, which would be contrary to a system of free bargaining, since the corresponding units would be eternally predetermined.

This doctrine should have other interpretative consequences. Fundamentally, in my opinion, it will not be possible to seek the non-application ("*descuelgue*") of a collective bargaining agreement that has lost its validity, although it continues to be of ultra-active application, and that it will be possible, on the contrary, to seek the substantial modification of working conditions agreed in an agreement not in force and of application only because of its "ultra-active validity".

2. News

Protection of temporary layoffs has been extended until March 31, 2022 and the new minimum wage and other social measures have been approved

The Government and social partners have reached an agreement to extend temporary layoffs and other relevant measures from a labor law standpoint, as we reported in this alert on February 23, 2022. In addition, the increase in the minimum wage has been published in the Official State Gazette.

The key elements of the new labor legislation published include the extensión until March 31, 2022 of the protection of temporary layoffs, the application of the MECUIDA Plan until June 30, 2022 and the increase of the minimum wage up to 1.000 euros per month in 14 payments.

The time period for paying social security contribution differences under the 2021 Social Security Contribution Order has been extended until June 30, 2022

The 2021 Social Security Contribution Order (Order PCM/1353/2021) published on December 4, 2021 with effects from September 1, 2021, provided that any differences with respect to contributions made on or after September 1, 2021 could be paid without any surcharges until February 28, 2022. The new Order PCM/121/2022 extends that time period until June 30, 2022.

The Contribution Order for this year is also expected to be published soon.

The European Commission publishes its proposal for a directive on improving working conditions at work on digital platforms

The general objective of the proposed directive is to improve the working conditions and social rights of people working through platforms, with a view also to foster conditions for the sustainable growth of digital platforms in the European Union.

More specifically it aims to: (i) ensure that people working across digital platforms have the right employment status with the platform and receive access to applicable labor and social protection rights, (ii) ensure fairness, transparency and accountability in algorithmic management in the context of platform work and (iii) increase transparency, traceability and awareness of developments in platform work and improve the effective enforcement of rules referring to workers, including those operating across borders.

Temporary protection to be given to people affected by conflict in Ukraine will include work and residence authorization

Two ministerial orders have been approved, increasing the temporary protection and implementing the procedure for recognition of temporary protection for people affected by the conflict in Ukraine, detailing the procedure for the recognition of such temporary protection. As the most relevant aspect, the granting of temporary protection includes the residence and work authorization.

For further details, please refer to our alert.

The Government approves the preliminary draft law transposing the 'Whistleblowing' Directive

The Council of Ministers has approved the Preliminary Draft Law regulating the protection of persons who report regulatory infringements and fight against corruption, in order to transpose Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of European Union law (better known as the Whistleblowing Directive).

The aim of the regulation is to ensure the protection of persons who whistleblow or report fraud or corruption, prohibiting any form of retaliation against them. The preliminary draft mainly regulates the following issues: (i) the legal regime to guarantee the protection of persons reporting the infringement, (ii) the regulation of information systems and (iii) the obligation to have internal information channels for companies. In relation to this last point, companies with more than 50 workers will be obliged to establish an internal whistleblower channel.

New piece of legislation on road transport includes measures in the labor field

The Official State Gazette of March 2, 2022 published Royal Decree-Law 3/2022 of March 1, 2022, on measures to enhance sustainability in road freight transport and on the functioning of the logistics chain, and transposing Directive (EU) 2020/1057 of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, and on exceptional measures regarding price reviews in works public contracts, as we reported in this alert.

The regulation adds a new chapter to Law 45/1999, concerning the posting of workers in the framework of the provision of transnational services, including, among others, the communication of the posting of this group's obligations or the obligations of the transport companies.

At the same time, infringements to the Labor and Social Security Infringements and Penalties Law related to the fraudulent transnational posting of workers are introduced, as well as infringements relating to obligations to register workers and pay social security contributions under the European Union social security regulations.

The pension revaluation for 2022 is approved

The Official State Gazette, of January 26, 2022 has published Royal Decree 65/2022 of January 25, 2022, on the review of social security pensions, of "Public Class" public sector pensions and other state welfare benefits for fiscal year 2022, as we reported in this alert.

This rise is equal to the average year-on-year variation in the Consumer Price Index for the months between December 2020 and November 2021. The norm's economic effects are valid from January 1, 2022.

3. Judgements

The installation of a monitoring device in an employee's computer does not constitute an infringement of fundamental rights

The High Court of Justice of Castilla y León, in its judgment dated December 30, 2021, has declared that the installation of a monitoring device on an employee's computer may involve "excessive" control, but does not constitute an infringement of the fundamental right to privacy.

In the studied case, the company found that the employee had not been working for several minutes, so it accessed the contents of her device while she was teleworking and found that she was visiting an Internet forum, calling her attention to this fact. Faced with this situation, the worker sent an email to human resources and her supervisor, stating that she understood that her right to privacy had been violated.

The court upheld the lower court's decision declaring the dismissal unlawful but dismissing the nullity claim. It considered that there had been no violation of the fundamental right to privacy that could lead to a dismissal in violation of fundamental rights. Likewise, it declared that the guarantee of indemnity did not apply either, as it understood that the e-mail was not considered as an extrajudicial claim.

The Supreme Court declares the dismissal of a female employee who announces her upcoming marriage for the purpose of requesting leave as null and void

In the case analyzed by the judgment of February 2, 2022, the Supreme Court concludes that the dismissal following the worker's announcement of her future marriage and her desire to take paid marriage leave is null and void. The court affirms that the constitutional list of circumstances against which discrimination is proscribed is open, so that "to adopt a derogatory decision for a worker as a consequence of her announcing or getting married is, quite simply, to inflict discriminatory treatment on her, contrary to Article 14 of the Constitution".

The judgment also invokes EU law on non-discrimination in employment on grounds of gender and cites Article 33 of the Charter of Fundamental Rights of the European Union which proclaims that "everyone has the right to be protected against dismissal for reasons connected with maternity" and, on many occasions, a woman's marriage falls into this category.

Reinstatement after a voluntary leave of absence in a location other than the one in which the services were rendered previously is valid when the previous workplace is closed

The Supreme Court, in its ruling of January 18, 2022, deals with the case of an employee on voluntary leave of absence who requests his reinstatement and finds that his work center has been closed. The court considers that this is not a case of dismissal since the closing of the work center is not an impediment to maintain the worker’s preemptive reinstatement right, since there are other work centers available. Consequently, the employer never denied the possibility of reinstatement, but on the contrary, preserved his right to reinstatement and kept the contractual relationship alive.

Employees on leave due to COVID-19 are not entitled to the supplement for temporary disability comparable to a work-related accident

The Supreme Court, in a ruling dated January 20, 2022, declares that workers in a situation of temporal disability comparable to a work-related accident derived from COVID-19 are not entitled to receive the supplement of 100% of the month prior to the sick leave's regulatory base. Thus, workers in a situation of temporal disability comparable to a work-related accident due to periods of isolation, contagion or restriction in leaving the municipality due to COVID-19, will be so only and exclusively for the Social Security temporary disability economic benefit.

Companies must adapt job positions in cases of supervening ineptitude, unless it would impose an excessive burden on the company

The Court of Justice of the European Union (CJEU) has issued a judgment dated February 10, 2022 interpreting Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Specifically, it concerns the case of an intern whose contract was terminated as a result of his being declared unfit to perform the duties for which he had been recruited. The CJEU concludes that Article 5 of Directive 2000/78 must be interpreted as meaning that the concept of "reasonable accommodation for people with disabilities" implies that the employer must assign the employee declared unfit to another post for which he has the skills, abilities and availability required, provided that this measure does not impose an excessive burden on the employer.

The CJEU dictates that vacations must be accounted for as effective working hours for the purposes of calculating overtime

The CJEU, in its judgment of 13 January 2022, has ruled that Article 7(1) of Directive 2003/88/EC must be interpreted in light of Article 31(2) of the Charter of Fundamental Rights of the European Union, rejecting a provision of a collective bargaining agreement under which, for the purposes of determining whether the necessary hours worked to obtain an overtime allowance are reached, the hours corresponding to the period of annual leave are not counted as effective working hours.

One of the elements raised by the court in order to reach this conclusion is that, since it entails an economic detriment for the worker by not reaching the right to be compensated for overtime, it could dissuade the worker from exercising his right to enjoy the vacation period.

4. Garrigues Sustainable - Labor and Employment

The future Sustainable Mobility Law will include the negotiation of sustainable transport plans to work

The Preliminary Sustainable Mobility Draft Law obliges companies with more than 500 workers (or 250 workers per shift) to develop a sustainable transportation plan to work.

The new sustainability directive will lay down due diligence obligations for companies

European Commission publishes proposal for a directive on corporate sustainability due diligence and a communication on decent work worldwide.

Labor relations and the commitment to sustainability under debate in 'Garrigues Sustainable Dialogs'

Sustainability in labor relations, which covers aspects such as respect for human rights and responsibility in the value chain of companies, is occupying an increasingly bigger strategic space in corporate agendas. Moreover, future European initiatives on due diligence and decent work, as well as legislative developments in this regard, which are due to be brought in in Spain in 2022, has heightened interest in the subject.

Future law for due diligence on the environment and human rights takes first steps

The legislation, currently under a public consultation period, will set out an infringements and penalties system for companies that fail to fulfill their duties to respect, protect and promote human and environmental rights and will ensure access to justice so that potential victims can claim an effective remedy, among other measures.

Annual Regulatory Plan 2022: these are the ESG initiatives included in the ministries' agenda.

Among the legislative or regulatory initiatives planned by the different ministries for this year 2022, important environmental and energy reforms stand out, as well as numerous normative proposals in relation to labor and social regulation.

5. Articles from the Labor and Employment Law Blog

Can an employer be liable for discrimination against a female employee by a third party?

Neither the annual holding of International Women's Day on March 8, or the profuse existing legislation prevent gender inequality scenarios from continuing to happen. The president of the European Commission was recently ignored by the Ugandan foreign affairs minister because she is a woman. The question that arises from this scenario is what claimable obligations would the European Union have if it were a private company and Ursula von der Leyen were a female employee**.**

An equality plan, the best gift to celebrate International Women's Day

This year's International Women's Day in 2022 is commemorated after the entry in force of the obligation for all companies (unless they have fewer than 50 workers) to draw up and implement an equality plan.

The Labor Reform will increase the number of worker representatives at companies

Following the labor reform introduced by Royal Decree-law 32/2021, published on December 30, 2021, an unprecedented reduction is foreseen in Spain in temporary contracts. This will also mean a significant increase in indefinite-term contracts and, especially, seasonal contracts, therefore with an increase in the number of worker representatives and trade union presence at companies.

Is it possible to pay an employee's salary in cryptocurrency?

Could companies pay their employees' salaries in cryptocurrency for consumption in a virtual reality? Or as salary in kind? The absence of a legal framework covering these possibilities makes them difficult to implement for the time being. It will also be necessary for the courts and tribunals to reach decisions on such an innovative issue.

How to reduce the employer's liability in work-related accidents with a preventive culture

As a basic foundation of occupational risk prevention obligations, Law 31/1995 of November 8, 1995 (LPRL) establishes the employer as the principal guarantor of the health and safety of the employees under its charge, given that it is the title holder of the authority of management and organization of the company. This involves liability on the part of the employer in a labor environment and, in particular, for the prevention of occupational risks, the assessment of which must be integrated into the corporate compliance system.

Measures to reduce the environmental impact of work-related travel: a new trend?

Italy has recently approved measures aimed at reducing the environmental impact of workers to and from work. Other European Union countries may also decide to take steps in the same direction, so it could be the start of a new trend in the future of sustainable work-related mobility.

Can employers require workers to get the COVID-19 vaccine?

In Spain, there is no law backing the mandatory vaccination of citizens. Spanish labor law does not contain any legal provision in this regard, either. Therefore, employers cannot retaliate against employees who are not vaccinated or do not have a COVID-19 passport. Another matter is the possibility of adopting measures to ensure employees' health and safety in the workplace in the context of occupational risk prevention.

Attracting young talent: the "tinderization" of employment relationships

Businesses have a huge challenge ahead: they will have to sharpen their wits to attract the attention of the new generations of professionals who join the labor market and are used to interacting in a digital world through applications in which immediacy and quick and easy access to information is the norm. In this context, apps such as Tinder, in which it is becoming increasingly frequent for young people to interact naturally, could be the catalysts of a new way of forming relationships, which will even impact on the labor market. It is what could be called the "Tinderization" of employment relationships.

6. Garrigues Labor and Employment in the press

A story of the latest labor reform, with spoilers

Article by Bernardo Pérez-Navas, Garrigues Labor and Employment Department partner (Blog de Fide in *El Confidencial*).

Attracting young talent: the "tinderization" of employment relationships

Article by Pablo Salguero Molina, Garrigues Málaga Labor and Employment Department principal associate ('Economist & Iuris').

The much-discussed labor reform

Article by Misericordia Borrás, Garrigues Barcelona Labor and Employment Department partner ('Diari de Tarragona').

A true labor reform?

Article by Francisco Javier Rojas Aragón and Francisco Javier Navarro Arias, Garrigues Murcia Labor and Employment Department partner and principal associate, respectively ('La Verdad de Murcia').

More information:

Labor and Employment Department

Follow us:

GARRIGUES

Hermosilla, 3
28001 Madrid España
T +34 91 514 52 00 - **F** +34 91 399 24 08

garrigues.com