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EUROPEAN COMMUNITY'S INFLUENCE ON SPANISH LABOUR LAW ON PROTECTION OF EMPLOYMENT

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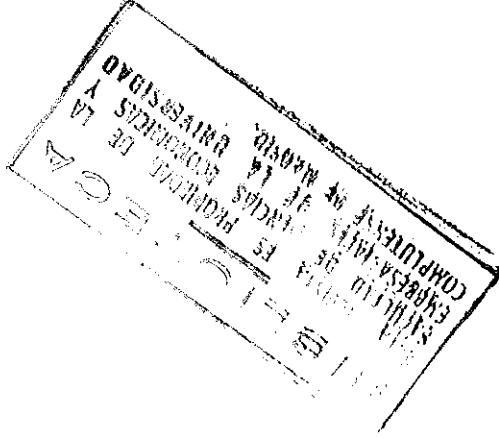

1.- EEC's competence in Labour Law.

Spains membership, since 1986, to the European Economic Community (EEC) has to have an impact on domestic Labour Law. In order to know the importance of this impact we must consider, first, which are the competences of the EEC in Labour Law. Secondly, to compare Spanish Labour Law standards with those of the EEC.

The organs of the EEC act through different juridical measures. These are regulations, directives, decisions, recommendations and opinions. The first three are obligatory.

Regulations are obligatory to all subjects concerned and national legislations in contradiction to them are to be considered null and void.

Directives are obligatory but only to the Member States and as far as their aims are concerned. The States remain free to achive these aims by the means they choice. They impose directly no binding obligations upon individuals.

Decisions are also obligatory and binding upon the specific subject concerned, normally a Member State or an EEC's organ, like the Commission.

Other measures (recommendations, opinions, resolutions) are not obligatory.

But the EEC has only a limited competence in Labour Law. Really the EEC's Treaty does not speak of Labour Law but of Social Policy. And EEC's competence in social policy is seen as limited, strictly as far as the achievement of economic aims depends on the solution of social problems. Labour Law provisions will be only those required by the achievement of an economic common market.

This does not mean that social achievements are alien to the EEC. Art. 117 of the Treaty affirms the agreement "to promote an improvement in the living and working conditions of workers" in order to reach their equiparation by the way of progress.

2.- The possibility of Directives on labour law.

Art. 117 is the basis for the Community's social policy. But this article does not give unlimited powers to the EEC. According to art. 100, the EEC may act through Directives when the national legal instruments have an incidence upon the institution or functioning of the common market.

Art. 117 is the basis for the community's social policy, but the social competences are in other articles.

Art. 118 gives the Commission a general competence to promote cooperation between the States in social policy, including Labour Law. But that is limited to non-obligatory measures (opinions, studies, conferences, etc.) and, in relation to art. 155, the power of the Commission to issue recommendations.

Further competences are given by arts. 48 and 51, including even the power to issue Directives and Regulations, but only in relation to the free circulation of manpower and to the social security of migrant workers.

But the EEC, as other international organisations, has not only explicit competences but also "implied competences" or "implied powers" which follow from other explicit competences.

Some provisions of the European Communities Treaties take into account implied powers which concern social policy. This is true of the provision of a common policy on traffic (art. 75.1.c), agriculture (art. 41.a: vocational training), coal and steel (art. 68 EECS Treaty: obligatory recommendations on low remunerations), and nuclear policy (art. 30 EAC Treaty: protection against radio-active danger).

Besides these implied powers, expressly taken into account, there also subsidiary competences provided for by articles 100 and 235 of the EEC Treaty.

Art. 100 gives the Council power to harmonize, by directives, such legal and administrative provisions of the member States which operate upon the institution or functioning of the Common Market.

But there are limits to the Directives of art. 100. They ~~can be adopted~~

can be adopted when different social situations (i.e., legal or administrative provisions) have an influence on the economic integration and falsify fair competition. They must be justified by economic reasons.

And, also, these directives must harmonize existing national situations, they cannot be adopted to regulate subjects not regulated by the member States.

Art. 235 gives the Council a larger competence to adopt provisions in order to realize the aims of the Common Market, even when the Treaty has not provided the necessary powers to this respect. Putting this in relation to the obligation of promoting social progress (art. 117), some authors (SCHNORR-EGGER) come to the final conclusion that art. 235 gives the Council the power to act when co-operation is not enough to achieve social progress.

3.- Directives on protection of employment.

Until now, the EEC has adopted some provisions on labour law but by means of directives adopted through art. 100.

Among these, some have an influence on the national or domestic regulation of the employment relationship. Of these, some are intended to harmonize the protection of employment. These are the Directive n. 75/129 of 17 February 1975 on "mass dismissals" (or redundancy) and the Directive n. 77/187 of 14 February 1977 on the protection of Worker's claims in the case of the transfer of enterprises, factories or part of factories; and Directive n. 80/987 of 20 October 1980 on protection in case of insolvency of the employer.

As for Directive n. 75/129, its art. 1 defines "mass dismissals" as those by reasons not related to the person or to the conduct of the enployee (so, they are collective redundancies) and affecting a certain number of workers in relation to the size of the factory. Then mass dismissals will be that affecting a number of employees (10 in factories employing 20 to 200; 10% in factories from 100 to 300; 30 in factories employing 300 or more) in a period of 30 days; or that affecting at least 20 employees in a period of 90 days.

As for the obligations of the employer, he is obliged to consult with the workers' representatives (that is, in the different countries, or the unitary works council or the trade unions), with the aim of reaching an agreement. The employer must also inform the competent office about the intended redundancies. Mass dismissals don't become effective until 30 days after this information, but domestic legislation may give the office the power to prolongate this period (up to 60 days) or to shorten it. During this time the office has to look for solutions to the problem which, in fact, means to mediate and to find facilities to re-employement and for unemployment benefits for the affected workers.

The Directive, then, does not involve authorisation for dismissals from any labour authority. But its art. 5 stipulates that "the present Directive does not diminish the faculty of member States to apply or to establish laws, regulations or administrative provisions more favourable to the workers".

As for Directive n. 77/187, it protects workers' rights in case of transfer of a whole enterprise, a single factory or even a part of a factory, by way of sale, lease, rent, fusion or any other means.

The protection consistis of the automatic transfer of all employees from the transferer to the transferee with all righas and duties they had, even those coming from a collective agreement , which willb bound the transferee until it is extinghished or replaced by a new agreement. In any case, the trasnfer is not a ground for dismissals, so that dismissals based on it are considered to be null and void (SCHNORR)

4.- Spanish labour law on dismissals.

Spanish legislation lays dawn up to 12 circumstances for the termination of a labour contract. Among these, there are individual termination by objective reasons related to the operational needs of the enterprise or to the worker's incapacity. The first, in enterprises employing fewer than 50 workers, when it cannot redeploy the worker in other tasks at the same place, is a case of individual redundancy. The second case is when the worker is unable to fulfill its job, to adapt to tecnological

changes or when he is unreliable because of continuous absences even justified (20% of working days in two consecutive months or 25% in four months in a period of twelve).

As for the procedure in case of individual termination by objective reasons, the employer must give a written notice (between 1 and 3 months, according to the years of service). The dismissed worker has right to a severance pay of 20 days'pay per year of service , six hours weekly leave during notice period and to unemployment benefits after 6 months of employment. He can also appeal to a Labour Tribunal, who may declare the dismissal either duly established, or not duly established or null and void. If not duly established the worker has right to a compensation of 45 days'pay per year of service. The same if it is null, but in case of "radical" nullity (if the worker has been discriminated on grounds of union activity, political ideas, sex, etcc...) or of a dismissal of a workers' representative, the Court must order his reinstatement.

Mass dismissals (or collective redundancies) is a term not known in Spanish labour law. There is a termination of contract because of economic or technolácal reasons, which applies to dismissal of two or more workers (and even one's, if the enterprise employing 50 or more workers).

The procedure, known as "regulation of employment" is the following one. Employer must give a month notice and during this time inform and consult workers'representatives (delegates or work council). At the same time, he must notify the labour authorities. If he reaches an agreement with the representatives the labour authority will automatically authorise the intended dismissals. If there is no agreement, the employer will make a petition of authorisation, the authority's decision taking place in a period of other 30 days. In small enterprises (less than 50) or small-scale redundancies (5% of the workforce), periods are halved.

There may be appeals to the central authorities and, afterwards, issue will continue at the Courts.

There is no legal order of redundancies, and only workers' legal representatives have a preferential right to keep their job.

Severance pay amounts to 20 days'pay for a year of servie (up to a total amount of 12 months salary), but employers' organisations claim that in order to reach an agreement, severance pay is actually higher.

Should this procedure change after membership in the EEC? The common opinion is that the requiremnt of an authorisation for dismissals is a case of a legal provision more favourable or advantageous to the workers in the sense of art. 5 of the Directive.

5.- The Social and Economic Agreement (1985-86) and the current debate on flexibility.

Nevertheless, the signing in 9 October 1984 of an Economic and Social Agreement (AES), concluded on a tripartite basis between the Government, the employers'organisations (CEOE and CEPYME) and the socialist-oriented trade union (UGT), opened a not-ending debate about flexibility, centered on the procedure for mass dismissals.

Art. 17 of the first part of the AES stated as follows: "Employment legislation. The Government is demonstrating its desire to adapt and harmonize Spanish domestic legislation, in labour matters, to the common good, hence the Directive of 17 February 1975, an to the standard practice of the Member States of the European Economic Community in this respect" To this end, the signatory organisations should submit within 6 months proposals to the Government by means of a bipartite Commission.

Art. 17 declared Government's commitment to adapt Spanish law to both EC's legislation and to the standard of other member states. As for the first, we saw that the 1975 Directive is a minimum; as for the standard practice , at that moment authorisation was requested in 3 countries (France, Netherlands, Greece) among 9, and, now, in 3 among 11 not including Spain (Netherlands, Greece, Portugal)

UGT's proposals made clear that they did not accept a change in the procedure for economic dismissals, considering that there was enough flexibility by way of facilities for temporary hiring and part-time employment.

CEOE and CEPYME, on the contrary, insisted on the need to eliminate the request of authorisation, specially for middle and small enterprises, even if they accepted that the workers would always have the chance to appeal to labour Courts in order to control economic or technological reasons for dismissals.

As for the Government, he made clear at the end of 1986 that he did not intend to introduce further legal changes for more flexibility and that this had to be done through agreements between social partners.

6.- Other Directives and projects.

The other Directives about protection of employment will not require important adjustments in Spanish labour law.

Directive n. 77/187 on transfer on enterprises finds enough development in art. 44 of the Statute of the Workers, which gives even wider rprotection by establishing the responsability of both the transferrer and the transferee over pending credits against the former, during three years, and over obligations after the transfer if this has been qualified as a social crime. Only duties of information have a further reach in the Directive and should be developed in domestic law.

Directive n. 80/987 on protection in case of insolvency of the employer is also sufficiently developed in art. 33 of the Statute (Warranty of Wages Fund). The definition of insolvency is even wider than that of the Directive. Some minor adjustments are, however, required mainly because the Directive speaks about "unpaid credits", without requirement of its being in an executive title (sentence, etc.) as in domestic law. Also, warranty is not extended to unpaid Social Security contributions as required by the Directive.

As proposals are concerned, there are two 1984 amended pro-

posals on temporay work and on voluntary part-time work. If these proposals are finally aproved, it will mean the need to legalize private temporary employment agencies (now forbidden by art. 43 of the Workers'Statute) and, perhapts, the suppression of the contract of fixed-duration not justified by temporary needs of the enterprise (now admitted, as an instrument of empleyment policy, by arts. 15 and 17 of the Statute). As for part-time work, its is now regulated by art. 12 of the Statute and fastly increasing; EEC's provisions on this matter will need of no changes in domestic law.