The use of strike-breakers by a principal

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1. Violation of the right to strike by a company that does not employ the worker

1.1. Over the past year, Spanish employment courts have established a legal doctrine regarding the possibility of violating the right to strike by way of actions carried out, not by the workers' employer, but by parties related to such employer. Based on the constitutional doctrine that admits such violation by a party that, although not the employer, participates or interacts with the employer in direct connection with the employment relationship, the Supreme Court has not hesitated to endorse this view.

In this regard, the above constitutional doctrine was clear, positing that "the fragmentation of employment relations in cases of subcontracting" divested employees of protection. Specifically, "as a matter of fact, this lack of protection arises from what constitutes the essence of subcontracting, that is, the fragmentation of employment relations into two sets, one involving the worker's direct employer, which contracts the provision of such worker's services, and the other the party that actually receives such services mediately under a business agreement… In the case of the right to strike – which, if exercised, must by definition be mainly turned towards the principal's production activity inasmuch as served by the subcontract itself - the principal's freedom from liability in respect of any actions that may be taken in order to prevent, encroach on or sanction a legal exercise of the right to strike, under cover of its supposed separation from the employment relationship between the parties, would practically eliminate the right to strike in the context of such a relationship. Indeed, the prohibitions, guarantees and protections provided in employment legislation in connection with industrial actions harmful to the right to strike would be of scarce use if they should only apply to the contractor - the direct employer in the employment relationship - but not the principal, which is the party that should ultimately suffer the harmful economic effects of the strike and may, therefore, have an equal or greater interest than the contractor in combatting it" (Judgment of the Constitutional Court 75/2010, FJ 7).

In contrast to the employment rights and responsibilities provided in relation to subcontracting, art. 42 of the Spanish Employee (Rights and Responsibilities) Act (*Estatuto de los Trabajadores*), which regulates this simultaneity of employment relations, does not provide for correlative joint liability of the contractor in respect of possible violations of fundamental or non-fundamental rights by the principal, nor does it recognise workers any mechanisms to act directly against the former due to actions of the latter, perhaps because the rights of the contractor's workers supposedly cannot be affected by the actions of the principal, with which they have no contractual relationship. For the legislature, the scope of the principal's

relations ends with the business agreement that binds it to the contractor, so that none of the principal's actions can be regarded as affecting the workers' exercise of the rights under their employment relationship. Hence, when the conduct has not been found to be directly attributable to the contractor, whose collusion has been ruled out by the courts, it has been concluded that the workers may not act against any actions of the principal, which is regarded as unrelated to the employment contract. The Constitutional Court has reacted to this conclusion by stating that there are no situations in which fundamental rights can be excluded. "As subcontracting allows outside workers hired by a contractor to be related directly to a principal's production activity, even to the extent that the duration of their employment contracts directly depends on the validity of the business agreement that binds both companies, the effectiveness of the workers' rights can be affected not only by the actions of the contractor, but also by those of the principal, and the protection of the workers' fundamental rights in the scope of such actions must also be ensured" (Judgment of the Constitutional Court 75/2010, FJ 8).

1.2. With this doctrine as a backdrop, the judgment in the "Prisa Group Case" (judgment of the Supreme Court of 11 February 2015, Ar. 1011) concluded that there was "a special relationship between the striking workers who provide their services for the contractor and the principal's companies (group of companies), as they are directly related to these companies' production activity inasmuch as ultimate beneficiaries of their work. Therefore, the effectiveness of their fundamental rights, among them the right to strike, may be affected by the principal's actions and must consequently be safeguarded against any possible actions that would violate the right to strike, as the workers would otherwise be unprotected" (FJ 12).

Similarly, in the well-known "Coca-Cola Case" (Judgment of the Supreme Court of 20 April 2015, Ar. 1249), after examining the possibility of the workers' right to strike being violated by third parties related to their formal employer (in this case, by companies belonging to the same group), particularly when the strike is carried out concurrently with a consultation period as a lawful means of pressure, the Court invalidated the collective dismissal precisely due to the violation of this fundamental right. "The collective dismissal did not arise as a reprisal for a strike; rather, it was negotiated and adopted by the employer at the same time as it implemented production practices aimed at countering the impact of the strike, which was called in order to place pressure during the negotiation of the collective dismissal…[therefore] this is a case of industrial actions carried out in violation of fundamental rights and civil liberties" (FJ 5).

2. Strike-breakers not employed by the contractor

2.1. The judgment of the *Audiencia Nacional* of 30 November 2015 (appeal 278/2015, Ar. 305478) once again addresses a similar issue. In this case, on alleged economic grounds the company unilaterally decides and informs the workers of: a) the reduction of the workforce's fixed monthly wages to the minimum wages provided in the applicable Collective Bargaining Agreement in each case; b) the reduction of the workforce's variable pay or annual bonuses; c) the elimination of remuneration in kind consisting of the private use of company cars; and d) the limitation of on-call bonus amounts to 50% of the amount paid by the client to the company for such services. Here, as above, the workers complain of the violation of their right to strike (the strike was declared at one of the employer's worksites during the consultation period) as a result of strike-breaking (the use of workers who did not form part of the workforce prior to the strike). The company, on the other hand, contends that it at all times respected the right exercised by its workers and that the violation of the right to strike of which it is accused was a consequence of actions carried out by other companies, with which it simply had a business relationship for the provision of urgent work, and thus the employer was unrelated to such actions.

The right to strike is recognised in article 28(1) of the Constitution. In the absence of an entrenched act implementing such right, it is regulated by Royal Decree Act 17/1977 of 4 March (Official Journal of Spain [*BOE*] no. 58, of 9 March 1977), pursuant to the filter of constitutionality provided by the decisive Constitutional Court judgment 11/1981. Art. 6(5) of said law expressly bans "acts of strike-breaking", providing that "during the strike, workers on strike cannot be replaced by other workers that were not employed by the company at the time the strike was declared".

2.2. As in the cases described above, the claimant in this case seeks that the measures adopted by the company be held invalid, as they violated the workers' right to strike, or, in the alternative, that such measures be held contrary to law due to the absence of the economic grounds invoked by the employer. The Public Prosecutor's Office, a party to the proceedings, also requests a ruling of invalidity, deeming that it has been proven, at least prima facie, that the measures violated the right to strike, called by the workers in parallel to the consultation period.

To this end, the doctrine established by the *Audiencia Nacional* itself is recalled as to how rules regarding the distribution of the burden of proof should be implemented in cases of violations of fundamental rights and civil liberties. Pursuant to the provisions of art. 181 of the Employment Courts Act, once it has been shown at trial that there is prima facie evidence of a violation of a fundamental right or civil liberty, the defendant must provide a sufficiently proved objective and reasonable justification of its actions and the proportionality of the same (reversal of the burden of proof).

Prima facie evidence, however, has two parts, as set out in constitutional case law (for example, the judgment of the Constitutional Court 207/2001). The first one is the need for the worker to give *prima facie* evidence that the company's actions harmed his fundamental right; this initial or credible evidence is aimed at revealing the alleged ulterior motive. Under these circumstances, the prima facie evidence consists not only of the allegation of a constitutional violation, but must also allow for harm to be inferred. Only when this first, inexcusable, obligation has been met will the defendant have the burden of proving that the real causes of its actions were completely unrelated to the alleged violation and that they were well founded enough to justify its decision. Failure by the company to provide sufficient proof goes beyond the procedural setting to ultimately determine that the prima facie evidence provided by the claimant is fully effective for the court to find that the fundamental right in question has been harmed.

2.3. In the end, again the Employment Division of the *Audiencia Nacional* unsurprisingly concludes that the right to strike has been violated and invalidates the measures adopted unilaterally by the company. Firstly, because in view of everything submitted during the proceedings it can be concluded that actions in violation of the right to strike can be performed by third parties other than the company or worksite where the strike took place, provided such third party has a special relationship with the latter. In the case at hand, the defendant provides services to the same and the violation takes place through the actions of the principal, which engages the services of a new contractor to perform the work that should have been performed by the workers exercising their right to strike.

Secondly, because what has been submitted also indicates that when the effect of the violation is to neutralise the legal right to strike as a means of pressure in the negotiation of a consultation period, the measure in question is null and void, even in cases, like the one at hand, not of a collective dismissal but rather a collective and substantial modification of the work conditions communicated to the workers' representatives.

Third and lastly, because there are at least two pieces of prima facie evidence that support the existence of such violation and its significance in the consultations; on the

one hand, the prior action taken by the Labour and Social Security Inspectorate and, on the other hand, the references to such conduct in the consultation records. In spite of this, "the employer has not provided any rebuttal evidence, nor has it given a reasonable explanation for its clients' measures. In connection with the latter, the company only states that it engaged third parties for the execution of urgent work which, if not carried out, would have caused irreparable harm to the community. However, the company did not even attempt to negotiate minimum services, which would have been the logical thing to do if serious harm were really a possibility, nor is it clear that, between the declaration and commencement of the strike, it took any actions aimed at avoiding the supposedly imminent harm that the strike could cause to the town. To the contrary, the records seem to show that the only action it took was to notify its clients of the strike so that they could temporarily subcontract the work that would have been carried out by the company's employees during the time of the strike, not objecting to third parties using its own operating material" (judgment of the *Audiencia Nacional* of 30 November 2015, appeal 278/2015, Ar. 305478, FJ 4).

To conclude, one clarification is necessary. The absence of an entrenched act implementing the right to strike requires us to turn to pre-constitutional rules, interpreted by the Constitutional Court in the terms described. The prohibition on companies resorting to workers not employed by it at the time the strike was called could be understood as inapplicable to subcontracting due to the fact that the principal is not the employer of the striking workers. However, this argument has obviously not been successful in case law, perhaps because the courts have held that the employer is not only the party that directly hires the worker but also the one that "benefits" from the work of the employed individuals by making the unrelatedness and dependency conditional on the productive work. But this does not mean that the company (the principal or the contractor) cannot resort to its own workers or those of associated companies, provided such workers declare themselves to not be on strike, because, as with all fundamental rights, the protection of the right to strike (whose complexity stems from being an individual right that is executed collectively) also requires the protection of the right to not strike.