

The taking over of employment contracts in transfers of undertakings under the new Spanish Public Procurement Act

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In a provision aimed at laying down obligations to inform the Public Administration and transferee employers of their employment and Social Security obligations, the legislature has introduced special employee-related rules concerning transfers of undertakings. Under these rules, new employers are exempted from salary debts accrued and not paid to employees by former employers, as well as from social security contributions derived therefrom, all of which must be paid by the outgoing employers. All of this, though, is “without prejudice to the provisions of the Workers’ Statute Act”.

1. In the reform introduced, the legislature could not ignore employment-related effects of the transfer of undertakings in respect of public sector contracts. Article 130 of the new Public Procurement Act 9/2017 of 8 November (hereinafter, LCSP) addresses this issue in particular, and it does so under the heading “*information as to transfer conditions for employment contracts*”.

This same heading was also included in the former art. 120 of the previous Act, although both the content and scope of the provision are significantly altered. The economic vicissitudes and the judicial ups and downs that the transfer of undertakings has generated regarding employee transfers between old and new employers or between these ones and the Public Administration itself, have propitiated the amendment of this provision. Art. 130 LCSP now provides, despite the heading, a much more ambitious regulation than the mere obligation

to inform the new awardee. And so, although the first and second sub-articles of this article certainly regulate the obligation to inform the new employer, the remaining sub-articles provide a specific body of rules around the transfers of employment contracts.

2. In this regard, the scope of art. 130(6) LCSP deserves special consideration. Here the legislature provides that, without prejudice to the application, where appropriate, of the provisions of art. 44 of the Workers' Statute Act (which regulates employee-side effects of transfers of undertakings), *"administrative specifications shall always provide for an obligation on the part of the employer to answer for salaries unpaid to workers affected by a transfer of undertakings as well as for social security contributions accrued, even in the event that the contract is terminated and those [workers] are transferred to the new employer, and in no case shall the latter be under the aforementioned obligation. In this case, the Authority, once it has been proven that the above-mentioned salaries have not been paid, will proceed to withhold amounts owing to the employer to guarantee the payment of said salaries, and will not return the guarantee until the payment of said salaries has not been proven"*. An enunciation that is not without applicative difficulties.

On the one hand, it could be considered that, as there will always be administrative specifications and as the provision requires that, in any case, such specifications include the previous employer's obligation to answer for debts contracted and not satisfied in the terms described and without prejudice to the provisions of the law, the legislature lays down internal liability rules different from external ones. And, therefore, apart from what the application of the provision (external liability) involves for both employers, the specifications establish an internal passing-on regime between both employers, according to which the new one - in the event of paying the debt - will claim payment of the same from the old one and, if the latter does not satisfy it, the contracting authority will proceed to withhold the appropriate amounts and not return the guarantee. This idea is not that odd since, for example, art. 130(5) LCSP provides that if, once a transfer of undertakings has occurred, labour costs are higher than those resulting from the information provided, the new employer will have direct cause of action against the old employer. Thus, again in this case, it could be interpreted that such direct action exists between employers.

3. On the other hand, art. 130 LCSP may be the result of accumulated experience with regard to employee-side effects of administrative contracts. As is well known, the applicable case law rule is that a transfer of contract does not imply a transfer of undertakings because it is understood that the contract does not imply per se a transferable productive unit, and therefore, the provisions of art. 44 of the Workers' Statute Act should not apply. However, this general rule has been clarified at several levels. First, because courts have imposed a transfer of undertakings where a transfer of contract involves a transfer of staff. Secondly, because, in EU case law, the interpretation of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event

of transfers of undertakings, businesses or parts of undertakings or businesses, is broad and therefore a transfer of administrative contracts is not always outside its application. And thirdly, and among other reasons, because the sectors most immersed in the outsourcing of administrative services have chosen to include the transfer of employment contracts rule in the Collective Bargaining Agreement itself.

In this way, a transfer of undertakings will involve the transfer of employment contracts either legally (i.e., by operation of the law) when the requirements laid down by the law are met (affecting an economic entity that retains its identity, understood as an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary, art. 44(2) of the Workers' Statute Act), conventionally (i.e., as agreed) where the circumstances set out in the Collective Bargaining Agreement (if not all those laid down by law) are met, or contractually where so provided in a contract (administrative specifications, for example).

Art. 130(6) LCSP could be considered applicable only to those transfer events that are governed by the provisions of the administrative specifications and not by those that have as their source the law, the Collective Bargaining Agreement or a prior contract. On the one hand, because it provides such rules as a default measure, i.e. *“without prejudice to the application, where appropriate, of the provisions of Article 44 of the Workers' Statute”*, “provisions” that will therefore apply as a matter of priority if the transfer of undertakings requirements (economic entity retaining its identity) are met. And, on the other hand, because a systematic interpretation of art. 130 LCSP would support such an interpretation. In fact, according to its first sub-article, *“where a legal provision or a collective bargaining agreement imposes an obligation on the awardee to step into the position of an employer in certain working relationships”*, the information set out thereunder must be provided to such awardee. Therefore, if the new employer is provided with information on such conventional or contractual transfer of employment contracts, it is for him to comply with such in the terms already provided for in the Collective Bargaining Agreement or the contract.

Therefore, art. 130(6) LCSP will apply only when it is the administrative specifications that provide for the transfer between the former and the new employer. This gives a certain guarantee to new employers and confirms the Administration's exemption from employment liabilities. And it cannot apply outside the rules imposed either by law, collective agreement or contractual agreements, if any.

4. In this case, when the transfer rules are those imposed by administrative specifications, the legislature places on the outgoing employer the obligation to answer for the salaries unpaid to the employees affected by the transfer as well as for the social security contributions derived therefrom, even if the contract is terminated and the employees - all or some of them - are transferred to the new employer, without him being, in any case, under the aforementioned

obligation. Consequently, it exempts the new employer from the obligation to pay salary and contribution debts even if said employer takes over the employees' contracts.

This is a very different provision from that contained in art. 44 of the Workers' Statute Act, which extends to the new employer the rights and obligations of the former employer with regard to employment and social security and provides joint and several liability both of the outgoing and incoming employer "*for employment obligations arising prior to the transfer and which had not been satisfied*" for three years. In this manner, art. 130(6) LCSP would be converting the joint and several liability provided for in employment laws into a single liability of the outgoing company under the new administrative law.

It could be considered that the legislature's intention with this provision is precisely to deny that there is a transfer. But it would be difficult to admit such a hypothesis. Firstly, because it allows the new employer to take over the previous staff (without specifying the number of workers affected and, therefore, without considering this factor as decisive). And secondly, because, by creating specific liability rules between the old and the new employer, it admits the existence of a business link between one and the other (central element of a transfer). Therefore, there is a transfer, but one that does not meet the requirements laid down in the law or those set out in the applicable Collective Bargaining Agreement, if any, with the specifications thereby creating effects derived from employee continuation under the new employer.

However, it should be noted that, when the Collective Bargaining Agreements have acted along the same lines, i.e. incorporating their own liability rules with regards to the taking over of employment contracts in transfers of undertakings, employment courts have expressed doubts about their interpretation. Thus, the majority tendency in the Supreme Court is that, in such a case, not only the existence of such transfer of employment contracts prevails in the terms specified by the Collective Bargaining Agreement, but also the conditions and effects established therein. However, a minority but broad current within said court considers that a Collective Bargaining Agreement not only may determine whether or not there is a transfer of undertakings for employment purposes in a given case, but also that if such is found to be the case, then the legal regime contained in art. 44 of the Workers' Statute Act should apply.

5. Be it as it may, the new rules of art. 130(6) LCSP are limited to outstanding salary debts and contributions arising from such salary debts. Nothing is pointed out in connection with social security debts other than those arising from contributions derived from unpaid salaries (non-payment of contributions prior to salaries claimed, surcharge on benefits, direct benefits to be paid by the employer, etc.), sometimes of considerable value. And, since the legislature does not refer to them - and taking into account the significant economic volume of some of them - it could be considered that an exceptional exemption regime has not been established for the new employer, who is liable for payment in the general terms imposed by law for such

cases. It is not for nothing that the legislature specifies that this entire exceptional regime is imposed “*without prejudice to Article 44 of the Workers’ Statute Act*”, which as a general rule provides for joint and several liability.

But it would also be appropriate to understand that there is a recognition by the specifications of this particular regime different from the legal, collective or contractual one because there has not been a transfer of undertakings in the terms provided by law, in the Collective Bargaining Agreement or in the employment contract and, consequently, liability for any social security debts should not be applied to the new employer, and the Social Security must claim payment exclusively from the outgoing company. Since this is a radically different regime from that of the Worker’s Statute Act, a restrictive interpretation is likely to be required (only if art. 44 of the Workers’ Statute Act - or the Collective Bargaining Agreement or the contract - does not apply, and only for salary claims and contributions arising therefrom).

6. In any case, once the debt has been proven, the contracting authority will proceed to withhold the amounts owed to the employer and not return the guarantee until payment of these amounts has been proven. This is not always an easy task, as employees have one year to make any money claim. As a result, it may be the case that the claim for salary differences arises when the new employer has already become an employer by way of transfer of these claimants. Moreover, salary debts involve certain risks (determination of bonuses in the salary structure, non-recurrent payment of some of them, final amounts depending on the company’s profits and activity, inclusion of voluntary improvements or pension commitments and the impact of all of the foregoing on contributions due, among other issues) that, on occasions, make determining such debts a matter of dispute.

The new Public Procurement Act contains important employment-related clarifications. The one here analysed is but one of them. Note, however, that on it hinges that new employers assume salary debts alone, full employment-related debts, certain Social Security debts, or that their liability is exclusively limited to the content described in the administrative specifications. It will be difficult to interpret that, if a transfer of undertakings is determined, the employment law rules deriving from art. 44 of the Workers’ Statute Act are not imposed. However, in the face of doubt and in order to avoid the contracting authorities from having to take on debts contracted and not satisfied by its employers, this new provision is incorporated, not without applicative difficulties.