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Labour Law Department

THE COURT OF JUSTICE OF THE EUROPEAN UNION CONSIDERS THAT THE CURRENT JURISPRUDENTIAL CRITERION ON CALCULATING COLLECTIVE REDUNDANCY THRESHOLDS IS CONTRARY TO EUROPEAN REGULATIONS

The Court of Justice of the European Union (**"CJEU"**) has just delivered a far-reaching judgment (CJUE of 11 November 2020, Case C300/19 – Marclean) addressing a question for a preliminary ruling concerning the interpretation to be given to article 51 of Royal Legislative Decree 2/2015 of 23 October, approving the consolidated text of the Law on the Statute of Workers (**"ET"**) and article 1.1 of Council Directive 98/59/EC of 20 July 1998, on the approximation of the laws of Member States relating to collective redundancies (**"OJ 98/59"**).

The question was referred for a preliminary ruling by the *Juzgado de lo Social* (Labour Court) no. 3 of Barcelona in a dispute involving the dismissal of the applicant, which took place on 31 May 2018, its unfairness being recognised on the same day.

The worker made a claim for redundancy on 11 June 2018. The referring court states that *"over the next 90 days from the date of UQ's dismissal, for the purpose of calculating the number of redundancies, a total of 35 countable terminations of employment contracts occurred at Marclean Technologies."*

In the light of these circumstances and the doctrine of the Supreme Court, which uses for its calculations redundancies taking place 90 days prior to the date of the relevant dismissal, but within the 90 days following it only in cases where there is evidence of fraud, three questions were sent to the CJEU: (i) Whether the calculation of redundancies in order to determine if there is a collective redundancy must be made prior to the date on which the individual dismissal subject matter of the claim took place; (ii) Whether it may be calculated following the date on which the individual dismissal subject matter of the claim took place, without the need for said subsequent terminations to be considered fraudulent, or (iii) whether the reference periods in article 1 of OJ 98/59 can be interpreted so that any dismissals or terminations falling within 30 or 90 days of the dismissal subject matter of the claim can be taken into account.

The CJEU observed that of the three calculation methods set out by the referring court, the third approach, according to which the reference period consists of any 30- or 90-day period falling within the date on which the individual dismissal at issue took place, is the only approach consistent with the purpose of OJ 98/59.

As a result, the CJEU concludes that OJ 98/59 must be interpreted as meaning that to assess whether a challenged individual redundancy is part of a collective redundancy, the reference period for determining the existence of a collective redundancy must be calculated by taking into account any 30- or 90-day period of consecutive days falling within the date

on which that individual dismissal took place, and during which the largest number of redundancies, for one or more reasons not inherent to the person of the workers, made by the employer took place, within the meaning of that same provision.

Therefore, as with the CJEU decision of 13 May 2015 (ref. in our AJ of May 2015), it is quite possible for the Supreme Court to take the opportunity in the coming months to determine the full scope of this decision, insofar as it entails an amendment to its traditional doctrine on the calculation of redundancies to be considered to determine the existence of a collective redundancy.

On the other hand, if a reform of the current labour legislation is to be finally undertaken, it would be advisable for it to include clarifications about the issues that the CJEU has been addressing in recent years.