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Company practice versus collective bargaining agreement in the formation of acquired rights (PT)

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Summary

The Supreme Court of Justice recently decided that the amount of time a practice has been observed in a collective bargaining agreement (in this case, four years) was not relevant to the acquisition of an entitlement. The entitlement in the case at hand was a public holiday on Shrove Tuesday.

Facts

The plaintiff – a labour union in the manufacturing sector, member of a federation of unions called FIEQUIMETAL (the 'Union') – filed an action against the defendant – a multinational manufacturer of multimedia equipment for cars (the 'Company'). It requested that the court rule the Company's decision to stop granting employees who were members of the Union a holiday on Shrove Tuesday was unlawful. Shrove Tuesday is, according to the Portuguese Labour Code, a non-mandatory public holiday.

The Union based its claim on the fact that since the commencement of the Company's activity (in 1990) and up to 2013 the company consistently granted every employee a paid holiday on Shrove Tuesday, with no interruptions. Due to the length and regularity of the practice, the Union argued that it constituted a right of the employees and that its unilateral cancellation 2014 by the employer should be ruled unlawful.

Conversely, the employer argued that the holiday had only been granted because in the collective bargaining agreement that applied to members of the Union, Shrove Tuesday was treated as a *mandatory* holiday (as opposed to an optional one, subject to the employer's discretion).

That particular collective bargaining agreement had in fact expired in 2009 and from its expiry until 2013 the Company had continued to grant the holiday because it was convinced – wrongly, as it turned out – that it was required to do so under the terms and conditions of another collective bargaining agreement (the 'FEBASE CBA'). It thought it was obliged to offer the holiday to *all* of its employees, including members of the FIEQUIMETAL, when in fact, that was incorrect.

Indeed, prior to the expiry of the original collective bargaining agreement in 2009, the Government had issued a Decree stating that the effects of the FETESE CBA extended to the Company's entire sector of activity. However, the Decree expressly excluded employees who were members of FIEQUIMETAL from its scope – which the Company had overlooked.

The Company therefore argued that the granting of Shrove Tuesday as a holiday over the years was not voluntary company practice, but rather, a strict observance of the FEBASE CBA. This meant that, just as with law, the terms and conditions could change or cease to apply without the need for consent.
The Court of First Instance accepted the Company's reasoning and ruled that there was no right to the holiday. Conversely, the Court of Appeal ruled in favour of the Union and judged the Company's decision unlawful. The Company appealed to the Supreme Court of Justice, presenting the same arguments as before.

Judgment

The Supreme Court of Justice upheld the decision of the Court of First Instance and ruled the Company's decision to stop granting employees the holiday lawful.

The Supreme Court agreed with the Company's arguments – i.e. that the key issue was not the period over which the holiday was granted – and therefore whether it had become an acquired right – but rather that the

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granting of the holiday resulted from the strict observance of the collective bargaining agreement in force during the period – making it not a company practice at all. This meant that the issue of how long is needed for a company practice to turn into an acquired right was irrelevant.

The Court only considered the period after the original collective bargaining agreement had expired, i.e. from 2009 onwards, to determine whether the holiday was an acquired right. The Court rejected the Company's argument that it had wrongly believed it needed to abide by the terms of the FETESE CBA. Indeed, the Court stated that even if it had been necessary under the terms of the FETESE CBA to grant the holiday, that would not have amounted to an acquired right – as four years was not sufficient for a company practice to be converted into an acquired right.

Commentary

Under Portuguese law, company practice is considered a source of employment law. Unlike a custom or customary law, company practice does not have to be thought of by the employer as a legal or contractual obligation in order for it to be legally binding. The only requirements needed for a company practice to be considered an acquired right are that: (i) it is not contrary to law or to any contractual instruments (e.g. collective bargaining agreements or individual contracts) and (ii) it is observed regularly over time.

However, the time threshold is not defined by law and is generally considered to be something that the courts should decide on a case-by-case basis. Which means that the dividing line between a discretionary and a binding company practice (i.e. an acquired right) is not easy to pinpoint. And that is quite evident in this case report: there was no controversy about the factual context and yet the higher courts disagreed when applying the law to the facts.

On another note, this case asks the following question: do contractual rights vest or 'survive' upon termination of a collective bargaining agreement? Although this issue was not addressed in the decision, under Portuguese law there are a number of rights that automatically remain in effect following termination of a collective bargaining agreement (though only up to their replacement by another collective agreement). The rights in question relate to employees' pay, job category, working time limits and social security benefits. These are considered the core conditions of any employment relationship and this justifies their survival, as this would avoid any abrupt changes to the employment conditions following termination of a collective bargaining agreement.

The question therefore became whether the duration of the collective bargaining agreement was relevant to an assessment of the survival of provisions of an expired collective bargaining agreement in a situation other than those mentioned above (i.e. for public holidays).

The view taken by the Court was that collective bargaining agreements do not create any permanent features. Unless otherwise provided for by law, the rights granted under a collective bargaining agreement last as long as the agreement lasts and end when it expires.

However, in late 2016 the Supreme Court of Justice ruled on a case with facts that were very similar to this one and concluded slightly differently. The only factual difference was that the collective bargaining agreement in that case entered into force in 2002 and from 1994 to 2002 the company had granted the holiday to its employees at its own discretion. The Supreme Court of Justice's understanding of that case was that the period prior to the entry into force of the collective bargaining agreement (eight years) had to be taken into consideration – meaning that the Court's understanding was that collective bargaining agreements suspend (but do not interrupt) the formation of acquired rights.

The issue surrounding company practice is complex and if employees are found to be entitled to a right, this may have significant financial consequences for the employer. Unlike in some other jurisdictions, the law in Portugal provides that an employee may claim credits from the employer throughout the period of his or her employment and up to a year following termination.

Although these cases are not quite consistent, the judgments do nonetheless offer some insights into what can happen when employers grant their employees terms that are more favourable than those provided by law.

Comments from other jurisdictions

Finland (Kaj Swanljung and Janne Nurminen, Roschier Attorneys Ltd): Similar questions regarding company practice and employers' mistakes in interpreting CBAs have also been under discussion in Finland. An employer's practice may turn into a binding term of employment even if the employer has not shown any intention or willingness to observe the practice.

A practice may bind the employer if it has continued for a long period. As it is not clear when this actually occurs it must be decided on a case-by-case basis. In general, if neither party has objected to the practice or expressed reservations about it, even a relatively short-term practice may be considered binding if it is repeated at short intervals. By contrast, if a practice is seldom observed, that practice may need to be followed for some time before it will become binding.

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Legal literature has it that practices based on an error do not bind the employer, at least if the erroneous practice is based on a provision of law or a collective bargaining agreement and the error is obvious. But if the practice concerns an explicit term of an employment contract, the assessment must take into account the employee's good faith and position as the weaker party.

It should be noted that it is the employer that has the right to decide how a collective bargaining agreement will be interpreted if the employer and employee disagree about this – at least, until the dispute has been settled (e.g. in court). But equally, the employer is responsible for the interpretation, and if it turns out to be wrong, it must compensate the employee for any loss caused by having interpreted it in that way.

Greece (Effie Mitsopoulou, KG Law Firm): Company practice is one of the most important sources of Greek labour law. For a practice to be established, two elements must exist: the practice must be uniform and not adapted to the individual circumstances of a specific employee and it must have been repeated for a certain period of time. The length of the period must be assessed on a case-by-case basis, as there is no exact period in law.

Note that if the employer expresses reservations about being legally bound by a practice, this is enough to stop it from becoming a practice, even if it is steady and uniform. Also, it is not sufficient that the employer's behaviour is steady and uniform – there needs to be an intention on the part of the employer to be bound by the practice and the employees should also believe that the employer will repeat the practice in future.

Company practice has a collective character and sometimes there is a need to decide whether this, the terms of a collective bargaining agreement, or internal work regulations (with legal force) should apply. In such cases, it has been argued (though not everyone agrees) that there should be an assessment as to which regime is more favourable to the employees as a whole, in other words the principle of preferential treatment should be applied.

Italy (Caterina Rucci, Bird and Bird): The general rule in Italy is that any right set by a collective bargaining agreement (CBA) can be cancelled by a successor CBA of the same level and, in the case of restructuring, also by a company level agreement, provided that the employer manages to get the company level agreement signed by the trade unions and, ideally, also individually by the employees.

The so-called 'usi aziendali' rules apply where there is no legal or collective agreement obligation, but certain business practices have been adopted over time. Curiously, under Italian law, practices of this kind are much more difficult to cancel – even though they are not enshrined in any CBA or legally binding rule.

This can be especially challenging in cases where part of a business is transferred. For example, where the IT department of a company that produces car wheels transfers. Let's imagine that the employees have been used to having their car wheels changed every year – but the transferee is not a car wheels producer and cannot easily replicate that benefit. Let's say that neither was the benefit ever within a CBA. Nevertheless, the transferee would normally have to replicate the benefit by buying the wheels on the open market. Usi aziendali are effectively inextinguishable. In practice, , as with any harmonisation process, this benefit could still be substituted by another benefit or a salary increase. Generally, usi aziendali are converted into rights under the transferee's CBA.

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