



Post-contractual non-compete covenants in an employment contract cannot be left to the sole discretion of one of the contracting parties

Judgment of the Supreme Court, Fourth Chamber, of 8 of November of 2011, Appeal 409/2011

Background

An employee signed an employment contract with her company, subjecting the employee to a non-compete obligation, applicable during the term of the contract and during a period of six months after the expiry of such contract. In exchange for the non-compete obligation, the employee would receive, at the end of the employment relationship, a compensation equivalent to one third of the average salary of the last year. In the event that the employee should fail to comply with her non-compete obligation, she had to indemnify the company in the same proportion. The non-compete clause envisaged the possibility that the company exempted the employee from complying with such covenant, thereby avoiding the payment of compensation. After having worked in the company for several years, the employee notified the company of her voluntary resignation, informing the company about the fact that her new activity did not imply any competition for the company, and she requested payment of the agreed compensation. The company accepted the voluntary resignation, but did not agree to pay the compensation.

The Labour Court ruled in favor of the employee, and ordered the company to pay the amount claimed. The company appealed the judgment before the Superior Court of Justice, which revoked it. The employee filed an appeal for unification of doctrine before the Supreme Court against this second judgment.

Bilateral nature of the clause

In its judgment, the Supreme Court evokes its previous decisions, in which it already established that a post-contractual non-compete clause must meet three requirements in order to be valid and lawful: the existence of a commercial or industrial interest of the employer, a maximum term of two years, and a financial compensation for the employee. This double interest -for the company the fact that the knowledge acquired by the employee will not be used in other companies and, for the employee, financial stability once the contract is terminated- implies that we are dealing with bilateral or reciprocal obligations. And according to the Civil Code "the validity and enforceability of contracts cannot be left to the sole discretion of one of the contracting parties".

Since a post-contractual non-compete covenant creates rights and obligations for both parties, a clause providing for its unilateral modification or termination by one of the parties is null and void. The Supreme Court considers that if the non-compete clause contemplates the possibility that the company exempts the employee from complying with the covenant and does not pay her the compensation, what happens is that the very existence of a bilateral agreement is left to the discretion of one of the parties, the company in this case, which is not acceptable. Therefore, the Supreme Court grants the employee's appeal, confirming the judgment rendered in first instance and ordering the company to pay the agreed compensation.