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ANALYSIS

Employment

Emails sent by a company to its staff during collective bargaining do not always violate freedom of association

Emails sent by a company to its staff during a negotiation process do not, in and of themselves, constitute anti-union interference or unlawful pressure, provided they fall within the scope of the company's freedom of expression and the legitimate defence of its business interests.

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September 2026

1. In collective bargaining, the good faith of the negotiating parties not only constitutes a principle governing the conduct of each party but may also, in the labour sphere and if a breach is proven, result in the invalidity of the agreement reached. In this specific case, the challenging union alleges that the agreement signed between the company and the unions regarding telework was reached through "pressure" exerted by the company by sending emails to each of its employees. This corporate action is considered a violation of the right to freedom of association, specifically the right to collective bargaining, as it nullified the union's bargaining capacity; in the union's view, this conduct amounted, *de facto*, to direct, mass, and individual negotiations by the company with the employees, rather than negotiations with the union branches that subsequently sat at the bargaining table.

   Indeed, in Supreme Court judgment no. 534/2026 of 10 June — the subject matter of this paper — it is considered an established fact that, during the negotiation process, both the unions and the company sent mass communications to the entire workforce, with such a practice being routine and not limited to employees affected by telework. The company sent an email to the entire workforce titled "We have a new approach to telework that requires everyone's consensus". This is one of the emails that the appellant union identifies as violating its right to freedom of association. It stated, among other things, that telework "is not an obligation for the company", even if the company were keen to continue with a hybrid telework model.

   The proposal required consensus, as a lack of unanimous union approval could lead to "a legal dispute". Without such unanimous agreement — and to prevent the teleworking system from being challenged and, as the case might be, invalidated after its approval — the model applied thus far (one day of telework) would remain in place. The email outlined the company's proposal, which consisted, among other elements, of three days in the office and two days working from home.

   Subsequently, the company issued a second statement at 7:31 a.m. titled "Telework: we must reach an agreement now for the benefit of all". The statement reiterated the need for unanimous support, for which the company would offer greater flexibility in the hope that all union branches would back the proposal. Two of the unions conducted a survey among their members, with 56% of them considering the company's proposal insufficient and 44% considering it sufficient.

   For the challenging union, these communications constitute a threat or coercion that violates the right to collective bargaining, thereby contravening the principle of good faith in negotiations. The employer's conduct does not constitute a mere exercise of the right to freedom of expression or a mere provision of information, but rather genuine pressure aimed at forcing the signing of the agreement "with a waiver of legal action"; therefore, the unlawfulness of the conduct must be assessed on its own merits, without conditioning the violation on the final outcome, in which the agreement was signed without reservations.

2. In order to determine whether the company's actions did, in fact, constitute conduct that violated a fundamental right — which

could lead to the invalidity of the agreement reached (in which the appellant union also participated) — the Employment Division of the Supreme Court recalls the relevant constitutional case law. It emphasizes that the right to freedom of association encompasses the right to engage in free trade union activity, including the exercise of all lawful means to that end and without undue interference by third parties (Constitutional Court judgments 94/1995; 127/1995; 107/2000; 121/2001; 213/2002, and 198/2004, among others). Therefore, the carrying out of such union activities grants the union a broad scope of action, extending even beyond the most characteristic and significant aspects of the right (collective bargaining, strikes, and industrial disputes). This conduct encompasses any lawful form of action that union organisations deem appropriate for the purposes for which they are established (Constitutional Court judgments 1423/1991; 1/1998; 213/2002; 185/2003, and 198/2004, among others).

The company sent the electronic communications in exercise of its right to freedom of expression and to inform all employees

However, since these are proceedings to protect fundamental rights, the claimant must present prima facie evidence. Thus, for the protective mechanism of the reversal of the burden of proof to take effect, it is an unavoidable procedural requirement that the claimant establishes reasonable prima facie evidence demonstrating the violation of a fundamental right. Mere suspicions or conjecture are insufficient; therefore, if no such evidence is found, the reversal of the burden of proof will not occur, and the claim must be dismissed. Conversely, if sufficient prima facie evidence is established, it will be up to the company to prove that the contested conduct was based on legitimate grounds entirely unrelated to the breach of the right. If the employer fails to provide any conclusive evidence regarding the legality of its decision or merely offers formal and empty justifications, the contested measure or conduct must be declared invalid due to a constitutional violation. However, if the company presents solid arguments and evidence that objectively and reasonably justify its actions, the evidence presented by the employee or the union will be fully rebutted, thereby requiring the dismissal of the claim for the protection of fundamental rights.

3. In this context, the ruling, in agreement with the contested judicial decision, finds that there has been no breach of the right to freedom of association in the present case. It further holds that the emails did not, in and of themselves, constitute anti-union interference or unlawful pressure, since they fall within the scope of the employer's freedom of expression and the legitimate defence of the company's interests, without sufficient evidence of bad faith or of an intent to exclude union representatives. In this regard, the court finds as follows:

> … there was a genuine, protracted negotiation process involving the active participation of the union that is now the appellant; and that it was standard practice for both the unions — including the [appellant union] — and the company to send mass communications to employees. The content of the company's emails had already been disclosed to the unions in prior meetings, and the company's requirement for unanimity — known to all — […] is nothing more than an expression of its bargaining position and a precaution to avoid future challenges — which would cause disruption for everyone — the company and employees alike — if, months after the new telework system was implemented, it were to be invalidated for any reason. [4th point of law]

It should be added that the agreement was signed unanimously by all union branches, including that of the challenging union, "which could well have raised any reservation, doubt, or objection, if not directly at the time of signing the agreement, then by making its "mental reservation" known in some other way at the time of giving its consent, if it understood at that time — and following those emails from the company — that the agreement was tainted by the company's 'theoretical' threat or demand" (4th point of law). The company's track record contributes to all of this, and it adds:

> The fact that the company, following a challenge to the previous Telework Agreement — in which this Court had to intervene to declare certain provisions invalid — finds itself compelled to enter into another agreement on this matter and expresses its desire for unanimity among the labour representatives regarding the agreement reached does not constitute any threat or coercion, but rather simply the outward expression of its bargaining position. This is not a matter of striking a balance between the company's right to information and the right to freedom of association, by prioritizing one over the other. The company sent these electronic communications — the content of which was essentially already known to the unions — in exercise of its right to freedom of expression and to inform all employees and unions of its position following the previous experience with the other telework agreement. [4th point of law]

However, the ruling notes that, generally speaking, the requirement of unanimity in entering into an agreement — when the law only requires a majority from each party for it to be valid — can be interpreted as a delaying or blocking tactic on the part of the company. If the company refused to sign an agreement that has the legal majority of the workforce, under the pretext — for example — that a minority union is missing, it would be rendering the majority's right to bargain and reach an agreement meaningless. However, this ground for invalidity does not apply in this case, since here "the absence of telework was not linked to the lack of an agreement, but rather to the continuation of a pre-existing telework system". Furthermore, the requirement for unanimity was not unconditional but was also subject to an examination of improvements to the flexibility of the telework system, involving numerous meetings and a final consultation with the workers; and, finally, such unanimity arose naturally, without any objection from any union to date, and without any reservation whatsoever on the part of [the appellant union]. We are dealing with corporate conduct that, taking all circumstances into account, was proportionate, appropriate, and necessary to articulate its position in the negotiations" (4th point of law). Consequently, based on the evidence presented and the behaviour of the parties involved, the court concludes that the company's conduct was in accordance with the law and respectful of the fundamental rights at stake, and that it had neither the intent nor the effect — not even an unintended or collateral consequence — of breaching the claimant union's right to freedom of association.

> *There was a genuine, protracted negotiation process involving the active participation of the union that is now the appellant as well as signatory*

4. Among many others, two points of interest stand out in this judgment:

— First, the latter reference concerns the *requirement of unanimity* in negotiations when the law requires only a majority.

The court finds, after assessing the circumstances, that such unanimity was not a *sine qua non* requirement for reaching an agreement with the union representatives because the issue involved replacing one telework system with another; thus, should the proposed system fail, the previously established one would remain in place. However, it is not true that this requirement does not condition the negotiation. It does so to the extent that any union will feel responsible for the consequences of refusing to sign it. It is true that there is a precedent that, in a way, conditions — explains and justifies — the employer's position, namely the prior case of a majority agreement that was challenged and declared invalid in court. The employer's caution allows it to stipulate that, if not all representatives agree, the company will withdraw its proposal — a practice, incidentally, that is common in any negotiation, including collective bargaining.

— And another factor — perhaps of greater significance, even though it did not influence the ruling either procedurally or on the merits of the case — is the *fact that the challenging union itself is a signatory* to the agreement.

A party that signs a collective agreement and then challenges it is not acting contrary to its own conduct. Classical civil law doctrine establishes, among other exceptions, that the principle of estoppel does not apply when the agreement or any of its clauses is void because it was entered into in violation of a statutory prohibition. It is true that this principle is part of a broader one, namely the principle that seeks to protect good faith — the trust that one party's conduct inspires in another. However, that good faith and that reliance can be maintained if the signatory reserves the right to challenge the agreement or warns of the possibility of exercising that right; moreover, even if such a reservation or warning is not expressly stated, it may be inferred from the actions of the negotiating parties. Moreover, even if the illegality of a rule, contract, or collective agreement could not be inferred, it could be argued that a signatory who challenges a collective agreement is not acting contrary to their own conduct.

In fact, the claim may be quite different, and this may be what has occurred in this case: when good faith is ensured solely by accepting illegal clauses to conclude a negotiation that, otherwise, would not have reached an agreement due to an obstacle posed by one of the two parties, it is justified to challenge those provisions deemed contrary to law. Thus, the loophole that allows for challenging such a collective agreement — despite having been signed by the challenging party with knowledge of its partial illegality — serves as a safeguard for collective bargaining. The problem is that here, partial invalidity of the agreement reached is not being alleged; rather, based on the argument inferred from the proceedings, the entire agreement would be void due to a violation of the freedom of association of the negotiating parties, all of whom are signatories. And, that being the case, there are two possibilities: either the union was not a signatory — in which case it would have standing to challenge the agreement —or the challenging union had expressed some kind of reservation, warning, or caveat during the proceedings to question the outcome reached without intending to block the agreement due to a lack of unanimity.