English version

NEWSLABOUR

RSM

N_34
March 2024

RSM Spain
Labour Department
Newsletter

THE POWER OF BEING UNDERSTOOD
ASSURANCE | TAX | CONSULTING | LEGAL

CONTENTS

Editorial

Ignacio Hidalgo and Miguel Capel

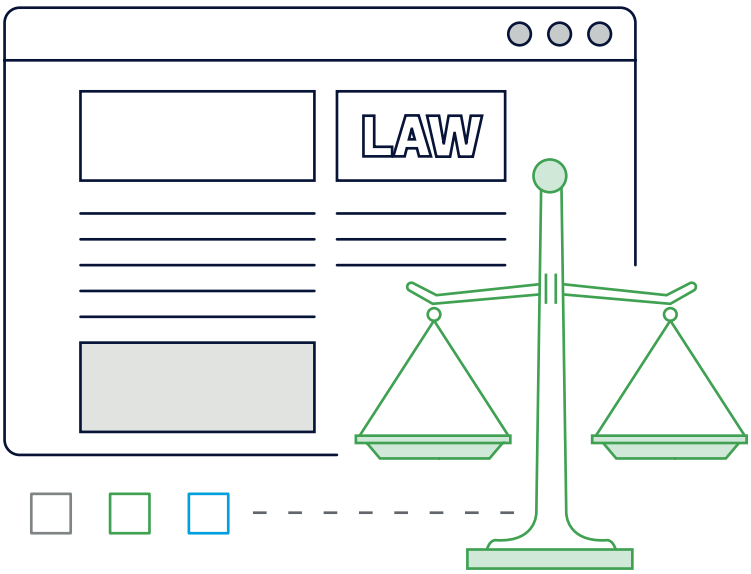
Labour news is constantly appearing and, just like every month, we inform you of this news through #NewsLabour.

In this edition, as always, we will deal with the latest judgements on labour cases with an article on a judgement that has had a great impact: The judgement of the Court of Justice of the European Union of 22 February 2024, which analysed when the company must hold consultations with the workers' legal representatives prior to carrying out collective redundancy.

You should neither miss our Case of the Month on the importance of a suitable text for post-contractual non-competition clauses.

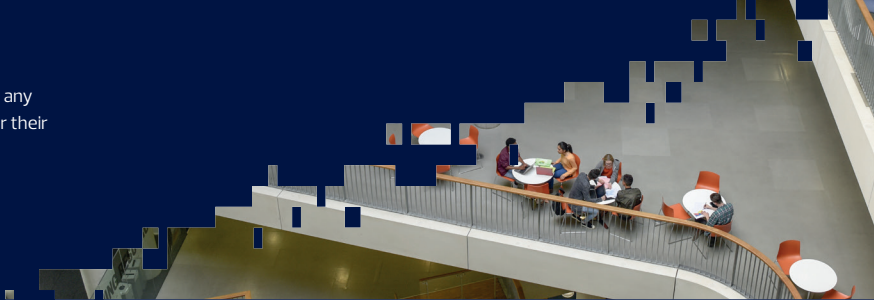
Constantly informing and updating our readers. ■

And, as always, we remain at your entire disposal!



Please contact us should you have any queries about these judgements or their application in your company.

Paula Hernández Seguí
phsegui@rsm.es



> The courts in a nutshell

What's new on the block?

As always, every month we can find judgements and legal news that particularly draw our attention due their special features or importance; we provide an overview of some of them below:

Paula Hernández Seguí

The judgement of the Supreme Court of 23 February 2024: Can the defendant allege defence of the statute of limitations for the first time at the hearing?

The Supreme Court dismissed the appeal (cassation) to unify doctrine lodged by the plaintiff against the judgement ruled by the High Court Justice of Castilla-La Mancha, which overturned the judgement of the lower court and ruled that the defence of the statute of limitations can indeed be raised for the first time when replying to the claim at the hearing even if it had not been invoked in the conciliation prior to the proceedings.

The judge concluded that there was a possibility for the defendant to be able to claim defence of the statute of limitations at the hearing without needing to have alleged this in the prior conciliation or mediation due to there being no impediment whatsoever in these cases, (since it is only prohibited that it is alleged for the first time in the counterclaim). However, this is not the case for the plaintiff because under no circumstances can it allege facts in its claim writ that were not invoked in the prior conciliation or mediation.

The judgement of the Supreme Court of 5 March 2024: Can a company pay a bonus if this is subject to an event that has not yet taken place?

The Supreme Court dismissed the appeal (cassation) lodged by the Nursing Union (SATSE) against the judgement ruled by the High Court of Justice that dismissed the claim filed by such union in which it was petitioned that the staff was acknowledged to be entitled to payment of the bonus for MBO targets.

Although it is true that the company breached its obligation to set targets related to the MBO variable remuneration scheme and that the appellant deemed that, due to failing to set the targets to be achieved, it must be determined per se there is a right to receive such bonus; this bonus was also subject to the company achieving a financial and budgetary balance in the financial year, which did not happen. Therefore, due to such condition to achieve a financial and budgetary balance not being met, the failure by the company to set targets cannot result in a right to receive such bonus.

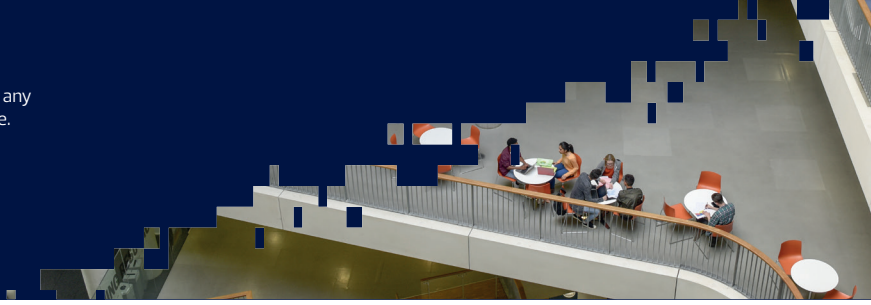
The judgement of the High Court of Justice of the Basque Country of 6 February 2024: Should the accident a worker suffered when leaving the company to attend a doctor's appointment be considered an occupational accident?

The Labour Division of the High Court of Justice of the Basque Country admitted the appeal for reversal lodged by a worker who had suffered a traffic accident when leaving the company to attend a doctor's appointment against the judgement of the Labour Court that ruled the worker's temporary disability was not due to an occupational accident. However, the worker petitioned that such accident be ruled an in itinere accident.

In this respect, the decision was based on a study of the teleological, geographical, chronological and suitability elements of the means to examine whether or not it was an in itinere accident. A study of the teleological elements was used as the basis, (since it was the only one that could be disputed), in other words, the element that places a focus on the purpose for which the travel took place and that must exist in all in itinere occupational accidents, concluding that there was a connection between the doctor's appointment and occupational health and that the fact of the worker visiting the hospital due to having an appointment before returning to his home cannot be considered to eliminate this nexus causal. ■

Please contact me if you would like any further information about this issue.

Guillermo Guevara
gguevara@rsm.es



> Practical law

Activities incompatible with a situation of temporary disability. What is the limit?

Guillermo Guevara

Article 54.2.d) on infringement of contractual good faith and abuse of trust when performing the work has very often been used to terminate the labour relationship of workers who, during a period of temporary disability, perform activities that are incompatible with their disability and hence are detrimental to their recovery process.

In this respect, these cases must not be confused with those related to simulating an illness, since, in these cases, what is claimed against the worker is that they are performing activities detrimental to the efficiency of their prescribed treatment, delaying or preventing the results of this and the person's recovery with damages being caused to both the public interests of the health care system and the private interests of their employers.

> This judgement is a mere example of the numerous cases in which an activity that a priori would justify a worker in a situation of temporary disability

Nevertheless, although such reasons have been accepted by Spanish courts as a justification for terminating the labour relationship, it must be taken into account that, apart from specific cases, it is often not quite so clear because it is not always easy to determine which activities are detrimental to a person's recovery process.

For example, this can be seen from the recent judgement of the High Court of Justice of the Basque Country of 6 February 2024, which dealt with a case in which a worker was dismissed after his employer found out he had been playing the guitar in a rock concert when he was in a situation of temporary disability due to tendinopathy of the rotator cuff in his right shoulder with partial breakage of the supraspinatus muscle causing pain and limiting movement above the cephalic plane.

At first sight it could seem that this activity would be clearly detrimental to the recovery process of the worker in question.

However, the dismissal was ruled unfair by the High Court of Justice because (i) playing the guitar does not imply an activity involving physical effort using his upper limbs nor does it require that he lifts his right shoulder, as is well-known, and even less so above a horizontal position and (ii) the fact he was playing the guitar in a concert had not disrupted or delayed this worker being cured, since he was on a waiting list for a surgical operation on his right shoulder, so that the date of him being cured, in principle, would be known after such surgical operation and this would not be changed by playing the guitar before his operation.

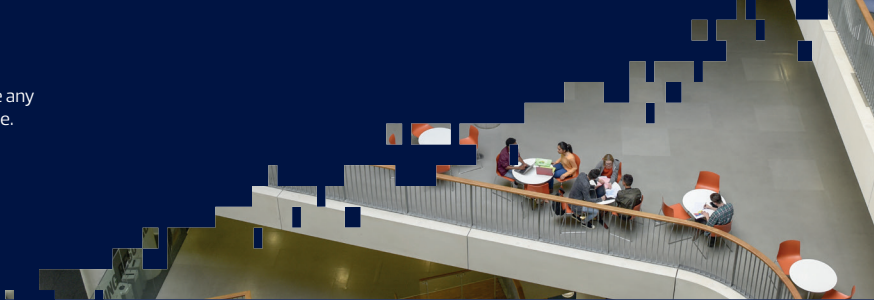
This judgement is a mere example of the numerous cases in which an activity that *a priori* would justify a worker in a situation of temporary disability being dismissed is finally not considered a justification and the termination of the employment contract is ruled unfair.

This certainly shows that there could be a high risk in these kinds of situations, except in very clear cases, even more so if we take into consideration that, over the last few years, illnesses of a psychological nature are being more and more accepted and, in such cases, it is much more complicated to determine which activities could be considered detrimental to the worker's recovery process.

An example would be the judgement of the High Court of Justice of Catalonia of 4 February 2010, which dealt with a case in which the dismissal of a worker who was in a situation of temporary disability, caused by a mixed adaptation disorder with anxiety and depression, decided to go on a trip, was ruled unfair, since such activity could even be considered beneficial for her disorder.

Please contact me if you would like any further information about this issue.

Guillermo Guevara
gguevara@rsm.es

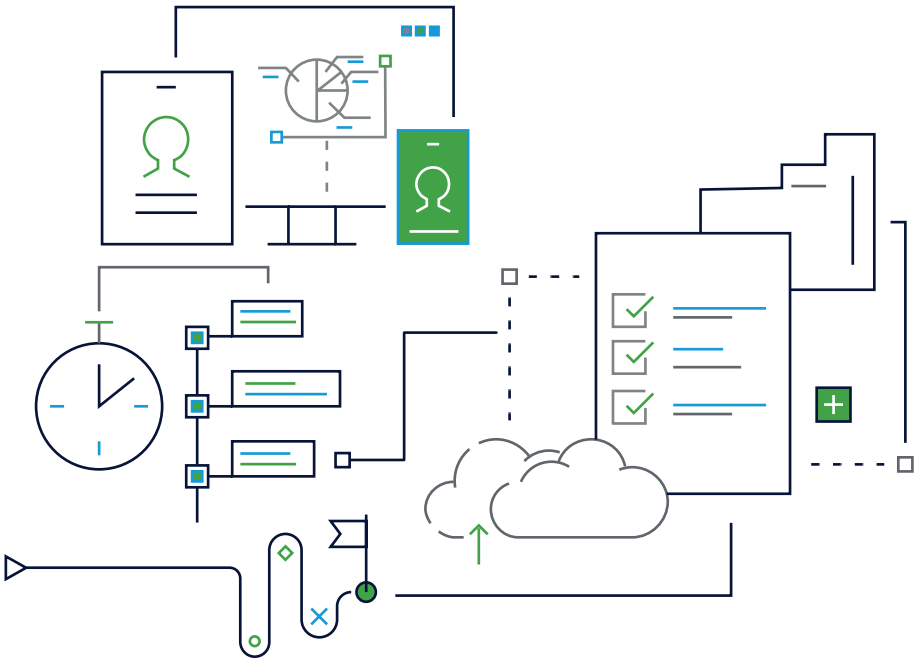


Conclusions

As can be seen from the previous comments, using the dismissal channel in cases when workers in a situation of temporary disability perform activities that could be considered detrimental to their recovery process is not always easy and can lead to serious risks for a company.

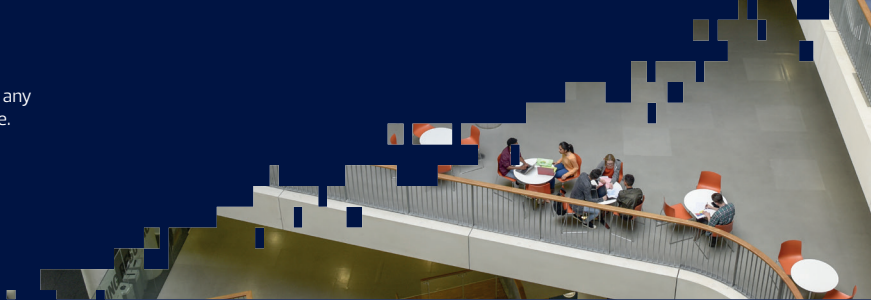
Therefore, in these kinds of situations, it is crucial to obtain suitable legal-labour advice based on each specific case before making any company decision on termination.

For such purpose, at RSM we are at your disposal to analyse cases in which workers who are in a temporary disability are performing activities that could be detrimental to their recovery process and the risks that could arise due to adopting a possible decision to terminate their contracts. ■



Please contact me if you would like any further information about this issue.

Alejandro Duque
aduque@rsm.es



> Case of the month

Is the employees' sandwich break considered effective working time? Some considerations about the recent controversial judgement ruled by the Supreme Court, (Fourth Chamber,Labour Division) number 410 of 5 march 2024

Alejandro duque

In the era of instant information, the need for a fast narrative frequently means there is a lack of legal precision in the press coverage of court judgements. We very often find sensationalist headlines that reduce complex court decisions to mere simplifications, thus preventing readers from precisely understanding the details of their legal aspects.

> that Article 34.4 of the Spanish Labour Relations Act grants the right to employees who are subject to continuous daily working hours of more than 6 hours to take a break no shorter than 15 minutes

In this respect, there have been quite a few press headlines and publications in some means of communication that, referring to a recent judgement ruled by the Spanish courts in March, have ended up categorically and universally claiming that employees' time spent for their sandwich break is considered effective working time. However, this conclusion is very far from the truth in most cases, as explained below.

In particular, we are referring to the recent judgement of the Labour Division of the Supreme Court number 4010 of 5 March 2024 that, within the scope of the proceedings related to a class action dispute, analysed whether or not the company practice of not considering the time recorded by certain employees of a well-known banking institution as effective working time was in accordance with the law, such time being taken in the fifteen minutes after the agreed time to begin their working hours, hence infringing the contents of the collective bargaining agreement signed for such purpose in 1991.

First of all, it should be recalled that Article 34.4 of the Spanish Labour Relations Act grants the right to employees who are subject to continuous daily working hours of more than 6 hours to take a break no shorter than 15 minutes, without this being considered effective working time, unless an agreement is reached otherwise.

As mentioned, the judgement analysed here dealt with a very particular case related to interpreting a collective agreement from 1991 on recording working hours and related to the consideration of effective working time. By virtue of this agreement, the following was expressly acknowledged as effective working time: *"The 15 minutes recorded after the agreed time to begin the working hours of those who have a strict time control and are not employees who are managers or in a similar post"*.

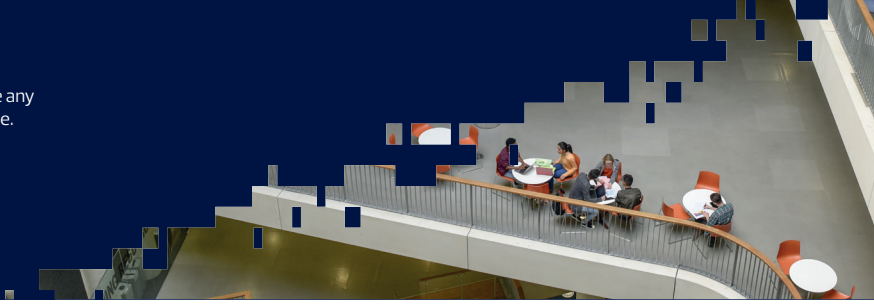
Taking advantage of the pretext of Legislative Royal Decree 8 of 8 March 2019 coming into force on urgent measures for social protection and combating job instability in working hours by virtue of which the obligation was implemented to guarantee that the staff's working hours are recorded, the employer endeavoured to justify its conduct by such circumstance to make the contents of the agreement it had signed null and void.

Based on a verbatim interpretation of the terms of the collective bargaining agreement of 1991, the High Court found in favour of the appellant trade unions, in such case concluding that, if recording the hours took place within fifteen minutes after the agreed time to start work, bearing in mind the particular circumstances of the parties involved, it considered that such working

→

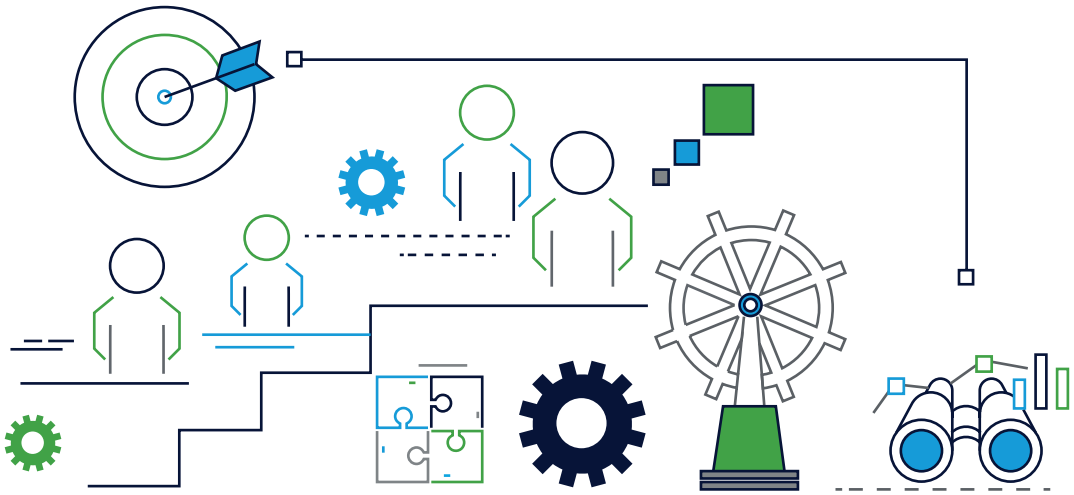
Please contact me if you would like any further information about this issue.

Alejandro Duque
aduque@rsm.es



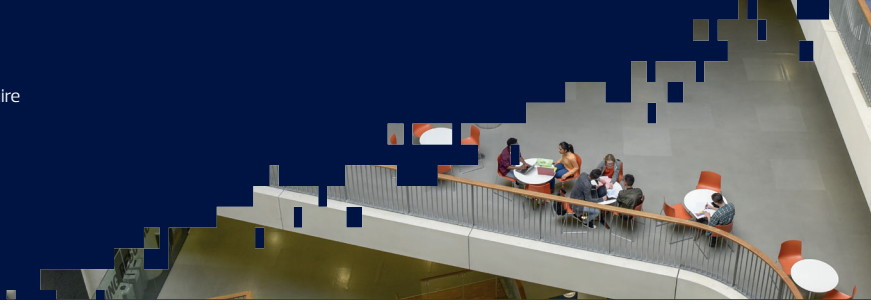
hours had started and thus must be counted as effective working time for such group of employees, (in other words for workers subject to a strict control of their working hours and who are not managers or in a similar post) and, for such purpose, the corporate guidelines for recording working hours did not result in a change in the working conditions that such employees had been applying according to the aforementioned agreement.

At RSM we are at your disposal to provide you with advice, analyse any case and assist you if you have any doubts related to applying the ruling in the previously analysed judgement in your company in order to determine whether or not it is applicable to your specific situation. ■



Please contact me should you require any further information about the practical effects of this judgement.

Alejandro Alonso Díaz
adiaz@rsm.es



> Judgement of the month

The Court of Justice of the European Union rules on the exact time for beginning a collective redundancy process, (The Judgement of the Court of Justice of the European Union of 22 february 2024, case C-589/2022)

Alejandro Alonso

The Court of Justice of the European Union dealt with resolving a question that, even though it was already regulated in Article 2 of Directive 98/59/EC of the Council of 20 July 1998, was not of practical application, above all by employers, in a large number of cases of collective redundancy.

Therefore, the European Court analysed the time when the company must hold consultations with the workers' legal representatives before carrying out collective redundancy.

The background of the case and the reference for a preliminary ruling submitted by the High Court of Justice of the Balearic Islands:

In the legal action that we analyse here, a company notified the Commercial Court of Palma de Mallorca of its intention to hold negotiations to obtain refinancing agreements or an agreement with its creditors. After this, it decreased the number of hotels it was managing by entering into agreements that implied employees would be transferred to other companies in the group. A few months later, the company asked its staff about the possibility of being interviewed by their new employers. Therefore, 9 workers voluntarily agreed to leave the company and were recruited by another company in the same group. In the following month, the company dismissed 9 workers for organisational and production reasons. The workers in question challenged the dismissals, claiming that the company should have held a collective redundancy process and hence had acted fraudulently by encouraging its employees to leave the company. Under these circumstances, the High Court of Justice of the Balearic Islands decided to suspend the proceedings and submit two references for a preliminary ruling to the Court of Justice of the European Union.

Specifically, the Spanish court asked the European Court whether these employees previously leaving the company, extenuating the use of collective redundancy due to a lower number employees being involved than the thresholds stipulated in Article 51 of the Spanish Labour Relations Act, to the point they managed to avoid such process, but not the individual objective dismissals, should have been discussed in the consultation period of a collective redundancy process.

The criteria of the Court of the Justice of the European Union and application of Directive 98/59

In this context, while waiting for Spanish case law to be issued, from Europe it was deemed that companies planning to reduce their staff must act with greater caution when the number thereof, considered as a

In this context, while waiting for Spanish case law to be issued, from Europe it was deemed that companies planning to reduce their staff must act with greater caution when the number thereof, considered as a whole, exceeds the thresholds for collective redundancy.

Please contact me should you require any further information about the practical effects of this judgement.

Alejandro Alonso Díaz
adiaz@rsm.es

whole, exceeds the thresholds for collective redundancy. In these cases, as interpreted in the judgement, the Directive intends that the time to start the collective redundancy process must occur before any measure of relief so that this whole series of staff movements is discussed with the workers' legal representatives at the precise time the reason for them is known.

As we have already mentioned, this "obligation" to hold a consultation process was already determined prior to the judgement subject to analysis, in Directive 98/59/EC, which states that this must take place from the time the company, within the scope of a reorganisation plan, proposes or plans to decrease the number of employees when these could exceed the thresholds for dismissing staff stipulated in such Directive.

In other words, it could be deemed mandatory that the consultation period takes place with the workers' representatives prior to adopting the decision and not at the time, after having adopted the measures for termination, the company is certain it will need to effectively dismiss a number of workers higher than such thresholds.

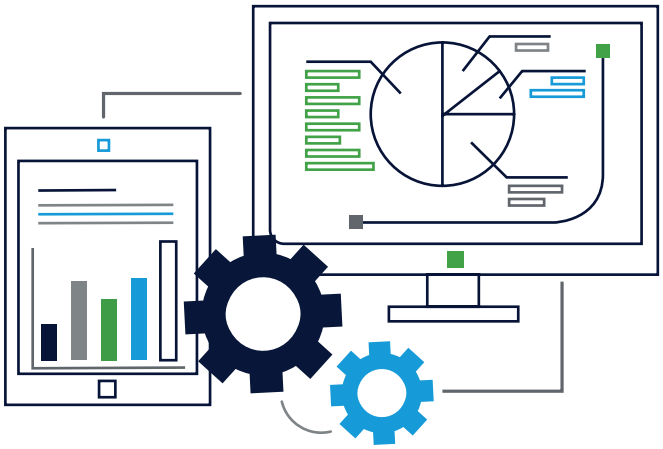
Conclusions and possible consequences in the future:

In this case, as cannot be otherwise, the Directive and the judgement agree on the same interpretation; however it is certain and true that neither of them deal with the legal consequences in sufficient depth that the proceedings would have by not fulfilling such obligation; would the dismissals be considered fraudulent? Would the future collective redundancy process (ERE) be considered fraudulent? These doubts have not been cleared up even though this issue is of the utmost importance.

The complicated effort to provide evidence must be added to this, when it is intended to prove that the employer already knew the reason beforehand but failed to fulfil the legal obligation to carry out this collective redundancy afterwards due to this merely being convenient for the company.

It must hence be seen how application of this judgement will be developed in cases when something similar occurs to the case explained here in order to understand the real basis of the law and, even more important, its potential consequences.

Did you find this ruling interesting? If after reading this article you have any questions related to this specific matter or the case is similar to your labour situation, please do not hesitate to contact RSM's Labour Department and we will be delighted to provide you with labour advice that will clear up your queries. ■



Please contact me if you would like any further information about this issue.go.

Lara Conde
lconde@rsm.es

> Advice of the mont

The post-contractual non-competition clause: the importance of a suitable text for the economic compensation clause.

Lara Conde

A post-contractual non-competition clause, as its name implies, is aimed at avoiding competition once the labour relationship has been terminated for any reason. As we know, by accepting these clauses, the worker undertakes not to perform competitive activities, (e.g. not to work for a competing company to perform the same duties) once the labour relationship has been terminated and the company undertakes to pay sufficient economic compensation for such purpose.

This kind of clause is governed by that stipulated by the parties in the agreement drawn up for such purpose, while observing the minimum requirements regulated in Article 21 of the Spanish Labour Relations Act.

In this respect, the aforementioned article states that these non-competition clauses must fulfil the following requirements: a) they must not have a term longer than 2 years for qualified technical workers and 6 months for other workers; b) the employer must have a valid industrial or commercial interest in including such clause; and c) the employer must pay sufficient economic compensation.

Labour legislation does not regulate any kind of formal obligation when these clauses are applied. In other words, the clauses that are deemed relevant by the parties can be included, providing the previous conditions are met. However, case law has issued a series of guidelines that must be taken into account when drawing up these clauses.

In this article we deal with the clause in which the economic compensation is agreed:

The importance of a clear and transparent text for the economic compensation clause

A clear determination of the economic compensation offered to the worker for accepting the post-contractual non-competition agreement is one of the essential requirements for the clause to be deemed valid.

The worker must precisely know the amount of the compensation, which must be clearly determined and without being confused with the salary paid to such worker. This means it must be individualised in the pay slip, since the reason for such amount is for compensation and hence cannot be included as part of the worker's salary.

In this respect, in the Supreme Court's judgement number 1163/2023 of 14 December 2023, in a case in which the post-contractual non-competition clause specified monthly payment of a fixed amount of €115.73 as compensation in the worker's pay slip, which was stated in such clause of the agreement as an integral part of the worker's salary for all purposes, it was ruled there was no compensation by virtue of such clause and hence it was deemed null and void.

The Chamber pointed out that the figure paid by the employer in the non-competition clause was salary remuneration and not compensation for the subsequent contractual restriction once the worker's contract had been terminated.

Therefore, due to the payment of any amount not being specifically stated in detail and confusing the intended economic compensation with the worker's salary, even though the worker had breached the obligation, the clause was deemed null and void and did not have any validity whatsoever.

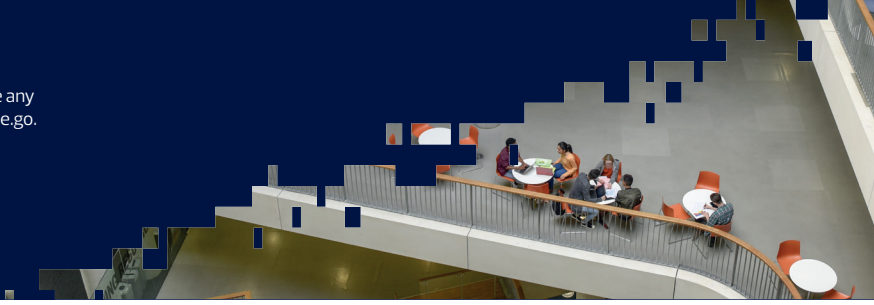
Guidelines for determining sufficient economic compensation

The economic compensation for the post-contractual non-competition clause can be paid at any time, either during the valid term of the contract, by being included in the severance pay when the labour relationship is terminated or when the term of the clause expires.

Case law has specified that the amount of the compensation must ensure that the worker can survive

Please contact me if you would like any further information about this issue.go.

Lara Conde
lconde@rsm.es



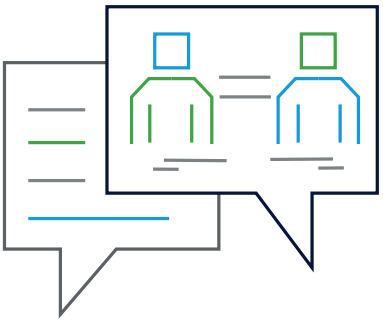
while he/she is unable to work and there must be some proportional criteria between the amount of the compensation and the amount payable to the company in the event such clause is breached. Therefore, there must be sufficient proportionality between the obligations of both parties for the clause not to be considered abusive and hence null and void.

The judgement of the Supreme Court number 1018/2021 of 18 October 2021 ruled that the following factors must be assessed in order to determine whether the economic compensation is sufficient: a) The term the non-competition clause remains in force; b) the economic compensation payable to the worker; and c) the amount payable by the worker to the company in the case such clause is breached.

Different court rulings have pointed out that, in order for it to be considered that the post-contractual non-competition is proportional and sufficient, it is advisable that it is remunerated by payment to the worker of between 50% and 70% of his/her annual fixed gross salary for each of the years in which such worker is unable to render his/her professional services to competing companies.

Lastly, it should be borne in mind that, if the worker breaches the clause, he/she must return the amounts received for non-competition. Moreover, the company can claim the damages caused by such breach of contract and a penalty clause can even be included in the agreement that would enable an additional amount of compensation to be claimed.

At RSM we are at your disposal to provide you with advice about how to draw up a valid post-contractual non-competition clause to ensure it fulfils the legal and case law requirements and is fully valid between the parties. ■



THE POWER OF BEING UNDERSTOOD
ASSURANCE | TAX | CONSULTING | LEGAL

RSM

RSM Spain
BARCELONA | MADRID | GRAN CANARIA | PALMA DE MALLORCA | TARRAGONA | VALENCIA | SEVILLA