NEWSLABOUR

N_39
November 2024

RSM Spain
Labour Department
Newsletter

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

CONTENTS



Editorial

Ignacio Hidalgo, Miguel Capel and Eduardo Gómez de Enterría.

Last month there were various new developments occurring related to labour law and, as always, #NewsLabour compiles both the most important judgements and practical aspects of daily issues as well as an analysis of cases.

We deal with judgements of great interest in this edition, such as the one ruled by the Spanish Supreme Court about the need for a statement of defence prior to any disciplinary dismissal.

You should neither miss our Case of the Month, in which, by analysing recent case law, we deal with the latest news about the parental leave granted.

Always informing and updating our readers. ■

Always at your entire disposal!

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

Gadea Saldaña
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> The courts in a nutshe

What's new on the block?

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

Gadea Saldaña

The judgement of the Court of Justice of the European Union of 24 October 2024: Can the workers of a recruitment company make claims about their working conditions to the main company?

Regarding a reference for a preliminary ruling submitted by the High Court of Justice of Madrid, the Court of Justice of the European Union clarified that workers who belong to a recruitment company are entitled to claim and obtain the same working conditions as those applied by the main company.

The judgement of the European Court offers a wide definition both of what it considers is a temporary employment company (ETT) and the application of its system, as well as the term "made available". The judgement implies a need for companies to be more aware and cautious when determining the working conditions of recruitment companies' employees and when exercising their management authority.

The judgement of the High Court of Justice of Castilla-La Mancha of 15 October 2024: Dismissal of a worker for eating a croquette that had not been sold during the day and would be thrown in the rubbish. Is this fair or unfair?

When a supermarket worker had finished his working day, he went to the ready-cooked food section and, seeing that everything that had not been sold during the day would be thrown in the rubbish, he decided to take a croquette from one of the ready meals in this section. This conduct was categorised in the applicable collective bargaining agreement as very serious conduct and finally the worker was notified he would be dismissed for disciplinary reasons.

Contrary to the allegations made by the company, the High Court of Justice considered that the worker's conduct could not be considered abuse of trust or fraudulent. The Division deemed that at that time the product had no market value because it was no longer on sale and was about to be thrown in the rubbish, dismissing the possibility of categorising the conduct as theft, robbery or misappropriation, finally ruling that the dismissal was unfair.

The judgement of the Supreme Court of 17 October 2024: Retirement on the last day of the month, when does this imply a triggering event?

The Supreme Court resolved a doubt about when workers' cease of activity actually takes place if their last working day is the last day of the month.

Due to this question, it was considered contradictory that two events, such as the employee ceasing to work and the fact he performed his work, take place at the same time and on the same date. Due to this, it was determined that the date when the labour relationship must be deemed terminated was the next day after the employee had worked for the last time, which would be the first day of the following month, the worker thus contributing to the social security system for the whole of the previous month. ■

Dismissal of a worker for eating a croquette that had not been sold during the day and would be thrown in the rubbish.

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

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› Case of the month

Single-parent families and their working rights: The impact of the judgement ruled by the Spanish Constitutional Court on parental leave.

Roberto Villón

The structure of parents' leave in Spain has undergone significant advances over the last few years aimed at achieving equality between parents and their work-life balance. However, these advances have not sufficiently taken into consideration the different family models that exist, leaving those that do not fit in with the traditional two-parent paradigm at a disadvantage. Among these, single-parent families face a regulatory situation that does not fully acknowledge their specific needs.

Article 48.4 of the Spanish Labour Relations Act, (ET), stipulates that workers are entitled to 16 weeks leave for childbirth, care of a minor and breastfeeding, divided between the parents. This system, which was updated in 2019 by Legislative Royal Decree 6/2019, seeks to make the rights of both parents the same; but this raises the following crucial question:

What happens in the case of single-parent families where there is only one parent?

This question was submitted to the Spanish Constitutional Court of 6 November 2024 and the answer was provided in its judgement, which we analyse below:

A family model with a disadvantage

The basis of the debate lies in Article 48.4 of the Spanish Labour Relations Act (ET). According to its current text, amended in 2019 to make the leave for both parents in two-parent families the same, this article stipulates that each parent is entitled to 16 weeks non-transferable leave. However, in single-parent families, where there is only one parent, there is a loophole: **The leave of the parent that does not exist cannot be added**, which implies a clear disadvantage for these households compared with two-parent families.

Article 357 of the Spanish General Social Security Act, (LGSS), stipulates the following: *"a single-parent family shall be deemed to consist of only one parent who lives with the child that is born or adopted and who acts as the sole supporter of the family"*. This article provides the regulatory framework defining single-parent families and suggests that a specific approach is needed to take into account this particular situation because, in practice, these parents are the only ones responsible for their children, without the support of the other parent in terms of leave from work.

This limitation directly affects the minors born in single-parent families, which are allowed a considerably shorter time with their parent than those born in families with two-parents.

Article 48.4 of the Spanish Labour Relations Act, (ET), stipulates that workers are entitled to 16 weeks leave for childbirth, care of a minor and breastfeeding, divided between the parents.

The disproportional impact on female workers

Although the regulations do not discriminate by gender, they mainly affect women, because in 81.4% of single-parent families, the only parent is a woman, according to the National Statistics Institute (INE). This leads to "indirect discrimination" that continues to create inequality and makes a work-life balance difficult to achieve. The High Court of Justice of Catalonia already warned that these regulations also harmed the minors, whose greater interest must prevail, according to national and international law.

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The grounds of the arguments in the judgement

After analysing the issue, the Spanish Constitutional Court reached the conclusion that the lack of any provisions for single-parent families implies a legislative omission that violates the principle of equality, included in Article 14 of the Spanish Constitution. Although the legislator is conferred a wide margin to structure the social security system, all the measures adopted must observe the principles of reasonability and proportionality.

The judgement stresses that the current design:

- Treats minors unequally depending on the family model: Children of single-parent families are granted less time for their attention and care in spite of having the same needs as those of two-parent families.
- Has a negative impact on female workers: The impossibility to extend the leave contributes to perpetuating the traditional gender roles and makes it difficult for these women to enter the labour market.

Transitory interpretation: 26 instead of 16 weeks

Until the legislator makes the required amendments, the Spanish Constitutional Court ruled a provisional solution: For single-parent families, the biological mother's leave of 16 weeks is extended by the additional 10 weeks that would correspond to the other parent, excluding the mandatory six weeks after childbirth. This means **mothers in single-parent families can take a total of 26 weeks' leave**, a substantial advance; however, this is still not enough to correct all the structural inequalities.

Can this criteria be retroactive?

The possible retroactivity of a judgement ruled by the Spanish Constitutional Court depends on whether its interpretation only clarifies rights that have already been acknowledged, such as those in Article 48.4 of the Spanish Labour Relations Act, without changing vested rights or violating legal certainty. In the case of single-parent families, it could be argued that this interpretation enables the leave to be extended to 26 weeks even for births prior to the judgement, providing the child is younger than 12 months old when requesting such leave, as stated in the regulation.

At RSM, we have focussed our attention on these changes and we are ready to provide advice both to companies and workers about their rights and obligations in this new situation. Please do not hesitate to contact us if you would like to know how this judgement could affect your situation. ■

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> Judgement of the month

A change in the game rules for disciplinary dismissals: regarding the Judgement of the Spanish Supreme Court number 1250/2024 of 18 november 2024, appeal number 4735/2023.

Alejandro Alonso

On 18 November 2024, the Plenary Session of the Labour Chamber of the Spanish Supreme Court published one of those judgements that determines a new paradigm in labour relations, more specifically related to the employer's sanctioning authority and its formalities.

In this respect, as is already known by the whole community of labour lawyers, the High Court unanimously agreed that companies cannot dismiss workers for disciplinary reasons without holding a previous hearing, (statement of defence or list of charges), in other words without offering the workers **the possibility to defend themselves from the charges or accusations on which the dismissal is based**.

This new judgement ends a debate and an uncertainty that has lasted months, after the High Court of Justice of the Balearic Islands opened pandora's box on this matter with its judgement of 13 February 2023, providing a possibility of the existence of a contradictory ruling in an appeal to the Supreme Court (Cassation).

In this respect, the Supreme Court drew the following conclusions regarding the need for the now famous "statement of defence", as shown below:

- as pointed out by the Senior Judges in the aforementioned judgement, Before the dismissal can take place the workers must be able to defend themselves from the irregularities/breaches of contract they are accused of, as stipulated in the Convention of the International Labour Organisation ("ILO") in force since 1982. This decision is based on the need to directly apply Article 7 of Convention 158 of this organisation.

- In this way, the Court has now changed its own doctrine, determined in the 1980s, justifying this change of criteria based on "the changes taking place in the Spanish legal system during this whole time", such as the International Treaties Act, Constitutional Doctrine, etc.

- The ILO Convention therefore requires this prior hearing before the dismissal, "unless the employer cannot be reasonably requested to hold it", as happened in the case analysed, in which the company was protected by case law criteria that, having remained in force over time and related to the same provision, released it from fulfilment of such requirement on the date it failed to do so.

- For the previous reasons, this doctrine can only be claimed for new dismissals, in other words, the judgement is not retroactively applicable, such formal requirement only being possible for new cases arising since the publication of the judgement, i.e. from 18 November 2024 and thereafter.

In a supplementary manner to the foregoing, such ruling is still positive, since it **ends a period of legal uncertainty on how to correctly act when faced with this issue**, even though the greatest guarantee, in the event of doubt, was to hold this hearing, something that has now become a formal issue of mandatory fulfilment, with the result, a priori, of the dismissal being categorised as unfair if this procedure is omitted.

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This judgement "implies a powerful blow" to the formalities of the applicable disciplinary system; even though it is certain and true that many applicable collective bargaining agreements already included this requirement, the problem lay in those that did not include it and, in this way, the workers were left "with no protection" in the case of disciplinary dismissals, above all the immediate or sudden ones.

However, in spite of the judgement ruled by Labour Chamber Four, there are still some loose ends that need to be tied up about how to act from now on:

- Does failing to hold this formal procedure imply that the dismissal is unfair or, for further clarification, could it lead to it being ruled null and void due to not observing the worker's right to defence?
- Could additional compensation even be payable due to not holding the hearing procedure?
- What does this statement of defence actually consist of? What is the reasonable term that must be granted for the worker to reply?
- Could this become an instrumental mechanism for the worker, who knows about his/her potential dismissal, to decide to "protect him/herself" using some of the mechanisms provided by law?

As you can see, the powerful blow by the Supreme Court also implies a series of doubts that are far from trivial; therefore the Labour Department of RSM remains at your entire disposal to clear up such doubts so that the dismissal you are planning to carry out in your company takes place with all the guarantees possible. ■

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> Advice of the month

Shorter working hours, a situation that is just around the corner and we must be ready for it.

Joaquín Rodriguez

As the months pass, we are coming closer to the legislative reform that is planned to take place in Spain in the early days of 2025, by means of which Article 34.1 of the Spanish Labour Relations Act will be amended. Due to this, **the ordinary working hours will be shortened from 40 hours to an average of 37.5 hours a week of effective work according to an annual calculation**. This legislative reform will imply that workers will be paid exactly the same wages even though their working hours will be shortened by an average of 2.5 hours, as a weekly calculation, resulting in an increase in the value of the hours they work. This fact will also lead to a rise in the partial coefficients of workers with part-time contracts, in turn their remuneration structures will also be increased in the same proportion to adapt them to the new maximum working hours.

Although, in the beginning, the shorter working hours were supposed to gradually come into force, in other words, being 38.5 horas in 2025 and 37.5 hours in 2026, everything seems to indicate, according to the latest news we have obtained from the Ministry of Labour and Social Economy, it will now **come fully into force at the beginning of 2025**, since its gradual and progressive implementation has been rejected.

In this respect, amendment of Article 34.1 will imply one of the most significant legislative reforms in recent years due to its special impact on all the workers who are included in the productive sector in Spain. In addition, it will not only affect labour, but will also directly involve the whole business sector, since the measure will de facto raise the price per hour of full-time workers and will increase the salaries of part-time workers, a circumstance that will certainly have an impact on the production prices of goods and services that companies attempt to sell on the market; the main handicap for the employers' association categorically opposing the measure.

The shorter working hours will mean an average annual number of 120 hours less work for each worker, in other words, 15 working days fewer in an accumulated calculation. Therefore, **companies will be forced to recruit new workers in order to take over the shifts** that up to now have been normally covered with existing labour; causing the aforementioned increase in costs that, almost certainly, will be charged to the end consumer.

For the aforementioned reasons, the Spanish production sector must be ready to deal with the social and economic impact that the legislative reform of Article 34.1 will certainly have on all business enterprises, whether public or private, although, as we know, the working hours of the majority of State public officials are already about 37.5 hours a week, a situation that is supported by some collective bargaining agreements; however we should mention that it is not usually common practice.

In fact, in order to mitigate and minimise the more than probable labour contingencies that will occur, we recommend having **plans to be ready for this impact**, where the extraordinary adverse effects resulting from the reduction to 37.5 hours a week must be budgeted and which must include, among other circumstances, the increase in wages of part-time workers, the cost incurred for new recruitments, possible overtime, according to the legally stipulated limits, a possibility to implement mechanisms for internal or external flexibility, as well as the trade margins being tighter; which is something of particular importance for the survival and profitability of any productive business. We also recommend approving alternative working schedules to speed up implementation of the measure and not cause organisational or production disruptions that would have a negative impact on your business interests. ■

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