NEWSLABOUR

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RSM Spain
Labour Department
Newsletter

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

CONTENTS

Editorial

Ignacio Hidalgo and Miguel Capel

Unfortunately, the summer has come to an end and a new period has now begun.

Although over the last few months many of us have been able to enjoy a well-deserved time for rest and to switch off from routine, the world of labour law has remained active.

As usual, a large number of judgements have been published since the last edition and we analyse some of them in this edition that we consider of great importance, including the recent judgement ruled by the High Court of Justice of Catalonia on paid hospitalisation leave.

In addition, we also deal with a topic of great interest in this edition: Labour inspections.

As we have been doing now for more than three years, we promise we will be on the lookout for all the new aspects arising and will inform you about them, with replies to new queries that we provide and those that are ruled by the courts. ■

Welcome once again to NewsLabour!

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

Nela Yustres
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> The courts in a nutshel

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:

Nela Yustres and Gadea Saldaña

The judgement ruled by the Supreme Court of 9 July 2024: Unemployment benefits for people older than 52 years of age, from when must former employees be registered as job applicants?

The dispute began when the High Court of Justice of Cantabria admitted the consideration of a worker that sustained the requirement for continuous registration as a job applicant was only applicable after reaching 52 years of age. The Spanish State Employment Service (SEPE) lodged an appeal in the High Court against this decision, which ended with a ruling in its favour.

The Supreme Court determined that any party interested in receiving unemployment benefits must be continuously registered as a job applicant from the time that he/she is in a situation of need, prior to reaching 52 years of age, so that when he/she reaches that age he/she is entitled to receive such benefits. The purpose of this doctrine mainly consists of offering the deserved protection to those who have been actively seeking employment up to such date and to restrict it to those that, being in a situation of unemployment prior to reaching 52 years of age, decide to leave the labour market and claim the benefits when such date is reached.

The judgement ruled by the High Court of Justice of Madrid of 18 June 2024: Disciplinary dismissal due to harassment of 4 colleagues. Is the dismissal fair if a statement was not taken from the accused, even though the procedure of a preliminary hearing had been granted to the trade union?

Within the framework of an investigation of harassment, consisting of unconsented touching, attempts at physical contact and comments of a sexual nature, a statement was taken from the reporting parties but not from the accused. Once the interview period had ended, the dismissal of the accused was notified to the trade union section and the worker on the same day.

The High Court of Justice of Madrid admitted the appeal for reversal lodged by the worker and overturned the judgement of the lower court, ruling that the dismissal of the worker was unfair due to formal defects by not having heard the worker's statement and not allowing him to defend himself from the accusations made against him.

The judgement of the Supreme Court of 11 June 2024: Time credit, can the company require that this must be justified in order to pay it?

In this judgement, the High Court discussed whether or not the need for justification by the company about the use of the time considered as time credit and not paying the period for which there were no explanations implied a violation of the right to trade union freedom.

El The Supreme Court determined that any party interested in receiving unemployment benefits must be continuously registered as a job applicant from the time that he/she is in a situation of need, prior to reaching 52 years of age.

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

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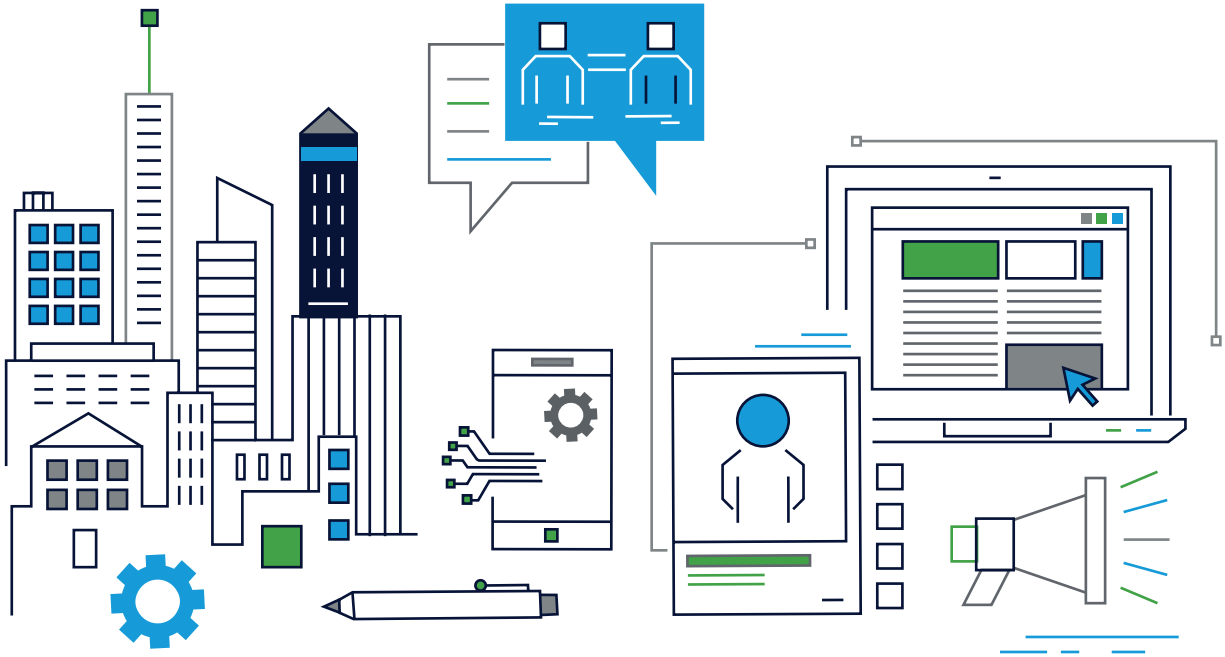
Considering the provision studied as leave offered by the company for specific services related to the job also being paid, the Supreme Court concluded that the explanations required by the company about the use of this available period of time did not imply a violation of the right to trade union freedom. Therefore, it was clarified that the measure of not paying the periods of time for which there was no justification was in accordance with the law and the worker that made incorrect use of such leave could be sanctioned.

The judgement ruled by the High Court of Justice of Madrid of 7 June 2024: Disciplinary dismissal for fraudulent records, does access by the company to the IP address through the worker's VPN violate his right to privacy?

The employer dismissed a member of the Works Council for disciplinary reasons because he had been using his VPN to fraudulently record his working hours, the beginning of his working day being recorded even though he had not even been present in the work centre.

The High Court of Justice of Madrid upheld the judgement of the lower court and admitted that the disciplinary dismissal was fair due to the employer considering that such fraud implied a severe blow to the trust required for the labour relationship and under no circumstances had the worker's right to privacy been violated because the company only had access to the IP address that did not allow it to know the employee's exact whereabouts. ■



Please contact me should you have any queries about this issue or any others.

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> Practical law

How should a company handle a labour inspection in Spain?

Miguel Capel

The idea that you could be faced with a labour inspection always causes some concern and can even become a real headache. In fact, labour inspections are often just routine processes that should not imply a serious problem if they are suitably handled.

Labour Inspections are procedures that were created by a Regulation in 1906. It is currently regulated by Act 23 of 21 July 2015 on the Labour and Social Security Inspection Department. As a public service, its object is to monitor and supervise compliance with the labour and social security regulations in Spain and is structured as a public service harmonising labour relations. The law also vests the Labour Inspection Department with technical assistance, mediation, conciliation and arbitration duties.

What is a labour inspection?

If you have never been faced with a labour inspection, you could well ask this question. It is a special administrative procedure carried out by Labour and Social Security Inspectors or else by Labour Sub-Inspectors for issues that the law has granted them competence.

In the inspection it is checked that the company under investigation is complying with labour legislation and the possible liabilities are claimed. The inspections can be of a routine nature, due to a report, or else they can be part of specific inspection campaigns. There is a presumption of certainty about the facts recorded by the acting officials and the areas subject to an inspection are the labour relations system, prevention of occupational hazards, the social security system, employment, migration and cooperatives.

What can the inspectors ask for?

In order to successfully pass an inspection, you must obviously comply with all your legal obligations, but the first step towards success will be to ensure that all the documents you must submit are well organised. The inspectors can request a wide range of documents and information and among the most common are the following:

1. **Employment contracts:** In order to check they are in accordance with the regulations in force and to avoid fraudulent use of temporary contracts.
2. **Payslips:** To check the salary structure is in accordance with the applicable collective bargaining agreement and whether the salaries are paid for the right amounts and at correct times.
3. **Social security:** The inspector checks registrations and contributions in order to avoid fraudulent conduct.
4. **Working hours:** They check compliance with the obligations related to working hours, from both a formal and material standpoint, specifically verifying the records of daily working hours, overtime, night shifts, other shifts and compliance with the rest period system.
5. **Prevention of occupational hazards:** It is checked that the obligations related to prevention of occupational hazards are fulfilled.
6. **Equality and LGTBI plans:** When appropriate, it is checked there are equality and LGTBI plans and their contents.

Who conducts the inspections and the terms for the procedures?

As we have already mentioned, the inspections are mainly conducted by Labour and Social Security Inspectors, who are specialised officials that act as public authorities and are authorised to freely enter any work centre at any time, with no prior notice, and to remain in them.

The inspections must be scheduled, unless needs arise or reports are made. However, we should bear in mind that an inspection of a work centre does not require any prior notice. An order for appearance may also be requested or a direct administrative case may be filed, providing the information has been previously checked.

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Please contact me should you have any queries about this issue or any others.

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The time that an inspection can last varies depending on different factors such as the complexity and volume of the required documents and information. The inspection procedures can last for a maximum of nine months, a term that can be extended for a further nine months in certain cases and they cannot be suspended for more than five months. Moreover, the maximum term to adopt a decision on sanctioning cases due to infringement of the labour system is six months.

What should I prepare in order to be ready for an inspection?

It is crucial that all the company's documents are up to date and available. The information must be submitted clearly, in an organised manner and preferably on a digital device. Some recommendations in this respect are as follows: Keep your files up to date: Keep the labour and social security documents up to date; Digitalise documents: Make digital copies of all the documents; Train your staff: Those responsible for human resources and other key employees must be able to respond to the requests made by the inspectors.

When can a company be sanctioned?

There are different reasons why companies can be sanctioned for breaching the labour regulations; the most common reasons are specified below:

1. **Irregular contracts:** Employing workers without contacts, fraudulent temporary contracts or failing to register employees in the social security system.
2. **Social security:** Lower contribution by paying lower salaries than those specified in the collective bargaining agreement, not paying or contributing for overtime or payments not included in the pay slip.
3. **Lack of safety measures:** Not sufficiently implementing the measures for prevention of occupational hazards.
4. **Time records – Overtime:** Lack of suitable control of the working hours records and overtime worked.
5. **Discrimination:** Breach of the regulations governing labour equality and discrimination.

Once the inspection has ended, a sanctioning procedure may be filed in various ways, depending on the kind and seriousness of the infringement detected:

1. **Infringement certificate:** If the inspector detects an infringement, he/she will issue an infringement certificate that will list the irregularities detected.
2. **Infringement certificate due to obstruction:** If you fail to collaborate, you will be charged with an infringement due to obstruction.
3. **Term for remedy:** In some cases, a term may be granted to the company so that it can remedy its irregularities before issuing the certificate.
4. **Administrative sanction:** If the irregularities are not remedied or they are serious, an economic sanction and ancillary sanctions may be imposed.
5. **Appeals and pleadings:** The company is entitled to submit pleadings and lodge an appeal through administrative and judicial channels.

Therefore, it is of crucial importance to be suitably prepared for a labour inspection. Strictly managing your labour obligations, documents and processes, implementing good corporate practices and guaranteeing ongoing training on labour issues will enable you to minimise the risks and avoid possible sanctions. Please do not hesitate to contact us should you need advice on this matter. ■

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

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> Case of the month

Regarding the scope of the obligation imposed on companies to make reasonable adjustments to the job when an employee has been declared in a situation of total permanent or absolute disability.

Alejandro Alonso

According to the judgement ruled by the high court of justice of the balearic islands of 19 march 2024, appeal number 75/2022.

Everyone knows that the government has recently approved the reform of Article 49.1.e) in the Spanish Labour Relations Act, pursuant to a proposal made by the Ministry of Employment and Social Economy along with the Ministry of Social Rights, Consumers and Agenda 2030. This amendment means that a worker's permanent disability, as an automatic reason for termination of the labour relationship, will be eliminated.

The elimination of the automatic termination of the employment contract, in cases when the employee is declared in a situation of total, permanent or absolute disability or the level currently called severe disablement, will enable the employment of disabled persons to be more efficiently protected from such automatic reason for termination at their employer's discretion due to the simple fact of being declared disabled.

The possibility to terminate the employment contract, as already mentioned, has been decided by the company up to now but is now subject to the employee's choice, who may request the following:

- Adaptation of his/her job,
- Change to another vacant and available job, according to his/her professional profile and that is compatible with his/her new situation.

After this change, the following question will almost certainly be asked: Up to which point are companies obliged to adapt or make reasonable adjustments to the job of an employee who has requested this?

In this respect, bearing in mind the legislative uncertainty that has arisen regarding the elimination of the aforementioned provision, it seems logical to ask up to which point this obligation of adaptation is applicable, how it should be carried out with full guarantees and what would the consequences be if it is not diligently applied.

> The government has recently approved the reform of Article 49.1.e) in the Spanish Labour Relations Act.

However, the ***Judgement of the High Court of Justice of the Balearic Islands of 19 March 2024, Appeal number 75/2022*** is very useful in this respect since it clarified or interpreted certain issues that could lead to doubts or disputes.

In a nutshell, this judgement deemed that the General Act on disabled persons' rights, approved by ***Legislative Royal Decree 1 of 29 November 2013***, would be applicable in these cases and the High Court of Justice of the European Union has also made the same interpretation in several of its decisions.

The following questions and answers can be derived from the aforementioned law:

What can be understood as reasonable adjustments?

Firstly, Article 2 of this law defines reasonable adjustments as the changes and adaptations required and suitable to be made to the physical, social and attitudinal situation based on the specific needs of disabled persons, providing they do not imply a disproportional or unfair burden for the employer.

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Which of these actions or measures for adaptation are required?

In this respect, Article 40, under the heading "Adopting measures to prevent or compensate the disadvantages caused by disability as a guarantee for full equality in the workplace", stipulates that, in order to guarantee full equality in the workplace, employers must adopt sufficient measures to adapt the job and for accessibility to the company depending on the needs in each specific situation so that disabled persons can access the job, perform their work, make professional progress and obtain training, unless such measures imply an excessive burden for the employer.

Lastly, as a determining factor, when are such adjustments deemed as violated or breached?

In this case, bearing in mind that Article 63 of the aforementioned law includes the violation of the right to equal opportunities, stipulating that the right of disabled persons to equal opportunities, as defined in Article 4.1, is deemed to have been violated when, due to or based on their disability, there is direct or indirect discrimination, discrimination by association, harassment, infringement of the requirements for accessibility and making reasonable adjustments as well as infringement of the legally stipulated positive action measures.

Therefore, in conclusion, both from the standpoint of European Union law and Spanish regulations, the requirement of the mandate to make reasonable adjustments for disabled persons is clear and it will be of mandatory fulfilment for the employer to make this effort to adapt the job, although it is true that this is a particularly casuistic matter and depends on the employee's limitations.

Conclusions regarding the previous explanations:

According to the previous explanations, the guidelines in the regulations recently announced must be seriously considered before drawing the conclusion that there is a clear failure to adapt the employee's job, after a term of 3 months has elapsed in order to assess whether the impact of the reasonable adjustments has achieved the intended purpose, which is simply the intention that the labour relationship prevails over the termination of the contract. It must be recalled once again that termination is not automatically applicable in these cases, and you must be aware that if the dismissal takes place in this way there could be possible risks that it will be categorised as null and void due to being discriminatory, with its inherent consequences.

Therefore, we at RSM are at your entire disposal to clarify any doubts you may have about this or any other matters and to guide you when handling situations arising from this required adaptation of a disabled person's job. ■

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> Judgement of the month

Regarding paid hospitalisation leave: the judgement ruled by the High Court of Justice of Catalonia of 6 june 2024 concluded that the term of 5 days is not automatic.

Yolanda Tejera

Until mid-2023, leave due to an accident or serious illness, hospitalisation or a surgical operation without hospitalisation that requires a rest period at home was granted for 2 days but, as of June 2023 and since the publication of Legislative Royal Decree 5 of 28 June 2023 in the Official State Gazette (BOE), workers can take 5 days paid leave for an *"accident or serious illness, hospitalisation or a surgical operation without hospitalisation that requires a rest period at home of a spouse, common law partner or relatives up to the second degree of consanguinity or kinship, including the consanguine family member of a common law partner and any persons other than the previous ones who live with the worker in the same home and require effective care by such worker"*.

Since its publication, the new text of Article 37.3 b) of the Spanish Labour Relations Act has certainly raised some interpretive doubts that have needed to be resolved one by one in various ways by the Spanish Courts of Justice.

Is the leave of 5 days counted in working days or calendar days?

At the time it was published, the regulation determined the quantity parameter for the leave as 5 days, but it forgot to define whether these five days are working days or calendar days and it has been the judges who have needed to clarify this regulatory provision, specifying in the judgement of the National Court of 25 January 2024 that, since the regulatory amendment stems from the transposition of the European Directive, the leave must be counted in working days, no other interpretation is applicable hence it must be concluded that the days of leave for various cases of illness, accident or hospitalisation are "working days" and not "calendar days".

This specification, as was obvious, has had an impact on the regulations of collective bargaining agreements, stating several conventional provisions null and void that count the leave in calendar days and that now, after the amendment made by Legislative Royal Decree 5/2023, are no longer in accordance with Directive 2019/1158, which expressly states they are working days, or the new text of the Spanish Labour Relations Act.

However, this has not been the only issue that Spanish case law has needed to deal with; it has also examined other issues such as whether or not **the leave for hospitalisation automatically lasts 5 days.**

The **judgement ruled by the High Court of Justice of Catalonia of 6 June 2024** analysed a claim related to a collective bargaining dispute filed by a trade union petitioning that the entire 5 days leave could be taken for serious illness, hospitalisation or a surgical operation of a family member, without needing to justify the reasons for this on a daily basis but it ruled that the leave **does not automatically last 5 days**.

The Labour Division dismissed the trade union's claim specifying that the leave for hospitalisation is a causal or conclusive paid leave and therefore *"the employee is entitled to use the five days leave whenever it is proven that the reasons occur by means of ex post justification so that, if the needs for care of the family member only requires availability of, for example, three working days, which do not necessarily need to be taken continuously, the most logical, reasonable and coherent interpretation is that this person can take these three days leave but not the five days, since there is no reason to justify being absent from work for the other two days"*.

The judicial interpretation is clear: The term of the leave is linked to the legal reason occurring that justifies it in order to avoid it being used and taken because of *"laziness*

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or for holidays or personal affairs" but, be careful, its application must be flexible.

The Labour Division has repeated in numerous rulings by stressing that taking the leave must be flexible and the following must be taken into account:

- It is not necessary to justify the reason by submitting daily proof because it is sufficient to prove that such reason continues afterwards.
- Discharge from hospital does not mean the leave ends and it will remain in force if home care or a rest period is required.

This flexibility was stipulated even more so in the recent judgement of the National Court of 12 September 2024 that ruled, even if the leave is conclusive and must have a "certain immediate need" linked to the basic reason, the workers must be able to take it flexibly, either consecutively of even in several fractions, and they can determine the date it begins while the basic reason continues, depending on their needs for work-life balance.

It is obvious we need to be up to date with case law decisions because they determine the nature of the leave and therefore the best option is to obtain good preventive advice that considers all the new legal and case law developments that could affect your company. ■

Please contact me should you require any further information about the regulation analysed below.

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› Legislative developments

The most important aspects of the new provisions included in the Spanish Act 2 of 1 August 2024 on equal representation and a balanced presence of men and women.

Guillermo Guevara

Spanish Act 2 of 1 August 2024 on equal representation and a balanced presence of men and women, (hereinafter referred to as "Act 2/2024"), amends and includes various provisions aimed at, as its name implies, achieving gender equality in the Spanish economy.

Regarding the labour jurisdictional system, a reform has been made of Legislative Royal Decree 2 of 23 October 2015, which approved the Redrafted Text of the Spanish Labour Relations Act, (hereinafter referred to by its initials in Spanish "ET"), which focuses on, among other things, providing victims of sexual violence protection/rights that were already acknowledged for other groups.

The amendments made by Act 2/2024, which came into force on 22 August 2024, mainly affect the following aspects

Rights in Article 37.8 of the ET

The aforementioned article provides the possibility for victims of gender violence and victims of terrorism to exercise their rights to shorter working hours, timetable adaptation, flexi-hours or working from home, pursuant to the terms for these cases stipulated in the collective bargaining agreements or in the agreements reached between the company and the worker's legal representatives or according to an agreement reached between the company and employees concerned.

However, after the reform, such rights are also granted to victims of sexual violence and can be exercised without applying the limits stipulated in the collective bargaining agreements or those that may have been agreed.

Geographic relocation

This law includes victims of sexual violence as a group that is entitled to request a transfer to another of the company's work centres to ensure their protection or their right to integral labour assistance. They are also granted the right to choose termination of their contract with compensation of 20 days salary per year worked, up to a maximum of 12 monthly payments or they may choose to keep their new job or return to the previous one after the initial transfer has ended.

The reform, such rights are also granted to victims of sexual violence and can be exercised without applying the limits stipulated in the collective bargaining agreements or those that may have been agreed.

Suspension and termination of the contract

By virtue of Act 2/2024, victims of sexual violence are granted the following possibilities:

- To suspend their employment contract due to being in such situation (Article 45).
- To terminate their employment contract due to being in such situation (Article 49).

Elimination of the objective reasons for dismissals being null and void

Apart from the amendments, or rather additions, arising from Act 2/2024 regarding victims of sexual violence, this regulation has also eliminated the protection, by

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their dismissal being automatically null and void if it is ruled unfair, which was acknowledged for the following groups:·

- Workers who have been granted five days leave for illness or hospitalisation of family members or other relatives according to Article 37.3.b of the ET.
- Workers who have requested, or have been granted, the adaptations of their working hours to achieve a work-life balance, which includes being able to request to work from home, referred to in Article 34.8 of the ET.

If you find the explanations in this article interesting and you would like to obtain a more specific details or you have any doubts about the aspects that have been subject to amendment, please do not hesitate to contact RSM's Labour Department and we will be delighted to deal with your questions and reply to them.. ■

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