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NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

Ignacio Hidalgo & Miguel Capel

There were several new occurrences related to labour law that took place last month and, as always, #NewsLabour includes both the most significant judgements along with day-to-day practical aspects and an analysis of the cases.

We have also launched a new section that, although it is short, many of you will certainly find extremely useful: **Business advice!**

Lastly, since the summer is now here, this edition of #NewsLabour contains an article clarifying one of the issues that has caused the most headaches over the last few years and that all employers will certainly find very interesting: which contract should be used for employees substituting workers who are on holiday?

Siempre informando y siempre actualizando a nuestros lectores.

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Please do not hesitate to contact me should you require any further information about this issue.

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>Case of the Month

The holiday season will soon be upon us and i need to recruit substitute employees, but which type of employment contract should i use?

Rocío Vivo

Summer is upon us and our employees' main holiday season will soon be here. You could be faced with disruptions in your company's business activity and the staff available, so you must resort to using temporary employment contracts in order to fill some vacancies; but which type of contract is the most suitable?

Obviously, due to a clearly temporary need, such as merely filling a vacancy during a brief and specific period of time, you do not want to run any risks or that the employee acquires the position of a permanent worker that would unnecessarily increase your staff structure or, of course, run a risk of fines being imposed

Is there any employment contract that would allow me to cover holidays based on this situation?

Since the recent labour reform came into force the answer to this question is **YES THERE IS**, the contract for **production reasons**.

Since the new regulations came into force, the doubts we could have had up to such time about which of the terminated contracts was the right one (i) a temporary contract or (ii) a temporary contract for production reasons, have been resolved. This issue also went back and forth in case law doctrine and hence led to insecurity and risks.

The doubt has now been clarified for this summer because the new temporary contract for production reasons expressly includes covering holidays and, although there are many issues in the labour reform that could be subject to interpretation, this one in particular does not seem to be one of them.

The Spanish Labour Relations Act allows this contract to be entered into when there are fluctuations that, even though they are related to the company's normal business activity, could cause a temporary imbalance between the stable staff available and those required, holidays being expressly included in such fluctuations in Article 15.2 thereof:

*"Among the fluctuations referred to in the previous paragraph, those caused by the staff taking their **annual holidays** shall be deemed to be included."*

Therefore, since the regulation is clear, it is better not to hesitate and resorting to any other type of contract should be avoided.

Practical issues for the formalities of the contract:

Having clarified the suitable type of contract, what practical issues should I take into account to correctly carry out the formalities and not run any of the risks mentioned?

a. It is very important **to clearly specify the reason** for the temporary nature of the contract, i.e. to cover **the staff's holidays**, but not in a generic manner, the following must be specified:

   - The **full name** of the employee who is on holiday and,
   - The **period** he/she will take these holidays.

b. It is also crucial that the **term of the contract** for production reasons (fluctuations) is the same as the holiday period it is intended to cover; under no circumstances may it exceed the employee's holiday period.

NB! These practical words of advice are very important because if they are not observed the temporary reason could be deemed to "no longer exist", the contract would be considered to have been entered into fraudulently and it would become permanent with the consequences that would entail.

Lastly, the following should be taken into account:

An important point to consider when planning the next recruitments is that "short-term" contracts, of **less than 30 days**, also require an **additional contribution of €27.53** payable by the employer at the time of their termination.

The only exceptions are farm workers, domestic, mining and coal employees and substitution contracts. ■

Please do not hesitate to contact us should you have any doubts about these judgements or their application in your company.

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>The courts in a nutshell

What's new on the block?

As usual, every month we come across judgements and legal news that draw our attention due to their special features or importance, we provide a summary of some of them below:

Lara Conde and Roberto Villon

The judgement of the Supreme Court of 30 March 2022: The validity of evidence obtained from a video surveillance camera.

The Supreme Court considered that installing surveillance cameras on premises implied a justified measure for security reasons, in a broad sense, to prevent theft whenever there is a problem consisting of unidentified retail sales losses; are suitable for achieving these purposes, by enabling detection of possible infringing persons so that their conduct can be sanctioned, with a dissuasive effect, and are required due to the lack of any other less intrusive measures being available to achieve the same purpose; and are provided for the purposes sought, having used the data obtained in order to control the labour relationship but not for any other purposes apart from compliance with the contract. In this respect, having passed the proportionality test, as well as the fact the company had also placed posters informing the workers that such cameras had been installed, without the worker's express consent being required, the evidence obtained from the video surveillance cameras was thus deemed valid.

The judgement of the National Court of 22 March 2022: Deducting an amount from the worker's severance pay due to not having returned the equipment used to work from home.

The legality of a clause contained in a working from home agreement is discussed in the case analysed by the National Court, such clause determining the possibility to deduct an amount from the severance pay of a worker who did not return the equipment provided by the company in order to perform his professional work. The National Court did not consider there was any reason for the aforementioned clause to be ruled null and void since the equipment belonged to the employer and the worker failing to return it could be subject to an amount being deducted from his severance pay.

The judgement of the National Court of 28 March 2022: Can a company unilaterally modify the targets that must be achieved for the variable remuneration to be payable?

By virtue of this judgement, the National Court ruled on the possibility for a company to unilaterally impose new targets to be achieved for the variable remuneration to be payable to its employees. Setting such targets was challenged by the workers and the National Court admitted the claim they had filed due to considering that a change in targets implied greater difficulty in achieving them compared with the targets for the previous year; it hence deemed that the challenged measure implied a significant unjustified modification of the workers conditions.

The judgement of the National Court of 7 March 2022: Freedom for the company to set targets without needing to hold negotiations when it is authorised to do so by the Collective Bargaining Agreement.

The aforementioned judgement analyses a dispute arising due to the company unilaterally setting the required targets that had to be achieved to obtain the relevant variable remuneration. The trade unions that had challenged this considered such decision must be ruled unlawful for two reasons: it considered each group company, and not each business group, to be

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a business unit and due to failing to hold negotiations to set these targets. The National Court deemed that when the Collective Bargaining Agreement assigns the annual definition of targets to the employer, the latter is authorised to change the scope for measuring each organisational unit to be taken into account in order to achieve them, without this necessarily needing to be subject to negotiation. Similarly, the duty of information was not infringed either because the company held informative meetings with the workers' legal representatives related to setting such targets with no objection being raised thereby.

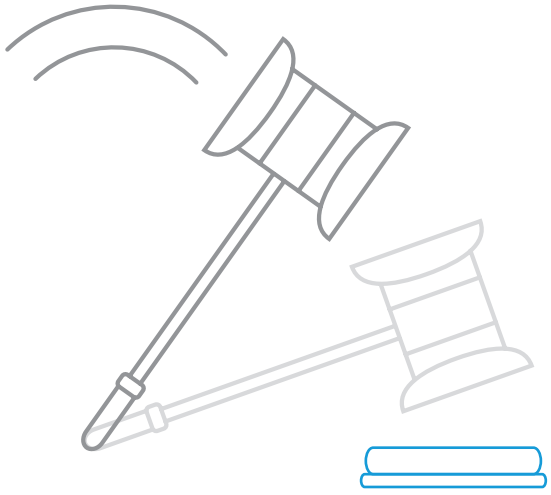
The judgement of the Supreme Court of 24 May 2022: Summoning a meeting in order to revoke the mandate of the worker's representatives.

A dispute was submitted to the Supreme Court regarding the revocation of the mandate of a workers' representative, which took place by means of the workers holding a meeting. The workers' representative at such time claimed that the way such revocation of the mandate took place was against the law, since the meeting should have been chaired by the works council or, if any, the union delegates, and the revocation of his mandate could not take place by holding a meeting because she had not taken part in the process to submit allegations. The appeal lodged by the worker was dismissed and the procedure used for revoking her duties was acknowledged as being appropriate, even though it did not take place by means of the most suitable procedure, and it was considered illogical that for the meeting to be valid it needed to be chaired by the workers' representative whose mandate had been revoked.

The judgement of the Supreme Court of 10 May 2022: Compensation of amounts of severance pay already received after reclassification of the termination.

We are dealing with a case here in which a labour relationship was terminated within the framework of withdrawal due to considering that the worker was in a job categorised as ''senior management'' and being granted the relevant severance pay. The worker filed a claim against the company due to deeming the withdrawal was fraudulent since his job should not have been considered senior management. The claim was admitted by the lower court due to it understanding that the termination should be considered unfair dismissal, the company being ordered to provide him with the relevant severance pay.

The company lodged an appeal due to considering that the amounts it had been ordered to pay were inadmissible because they had already been included in the severance pay the worker had received, the Chamber deemed that the amounts paid as compensation, corresponding to the prior notice period and severance pay, should be offset with the amount it had been ordered to pay. The Chamber once again recalled that under no circumstances can the amounts owed for variable remuneration be offset with the amount of the severance pay. ■



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>Practical Law

The importance of obtaining legal advice prior to adopting any business decision, even more so, if the decision is related to terminating an employment contract.

Carlos Díaz

Whenever we mention dismissal, we all imagine it is because there is a reason for it (disciplinary or objective) that has led to the company to draw up a dismissal letter to be provided to the worker affected by the decision.

However, the casuistic in labour law is vast and it is highly likely that, on certain occasions, we are faced with absolutely unexpected situations, such as a court ruling that a dismissal is null and void or unfair in situations when, in principle, there was no apparent reason for it.

The Corte Inglés department store was faced with a case like this in 2020, when it cancelled the registration of a worker in the social security system too soon after she had been ruled to be in a situation of total permanent disability for her usual profession. An action as -apparently- simple as that could turn against a company to the point that the cancellation would result in the dismissal being reversed with the consequences that would entail (reinstatement, compensation, etc.).

Therefore, the practical issue we will analyse in this article is the following: what is the exact time when a company should request the cancellation of a worker's social security registration who, by virtue of a court judgement, has been ruled to be in a situation of total or absolute permanent disability?

If this takes place at the wrong time, the dismissal could be considered unexpected.

Legal solution for the time to register the cancellation in these cases

First of all, it should be recalled that Article 49.1. e) of the Spanish Labour Relations Act stipulates that an employment contract is terminated due to death, severe disablement or total or absolute permanent disability, with the exception included in Article 48.2, which states that the labour relationship shall be suspended and the job shall be reserved for a period of two years when the situation of disability can be expected to be subject to review due to an improvement that would enable the worker to be reinstated in his/her job.

However, the following doubts can be raised when a worker is ruled to be in a situation of permanent disability, after needing to resort to judicial channels for such purpose: should the company immediately register the cancellation? What should it wait for? What are the risks if I make a mistake?

The High Court of Justice ruled the following in its Judgement of 24-1-2022 on a case similar to this one.

In that case, a worker was ruled to be in a situation of total permanent disability for her usual occupation by virtue of a Judgement ruled on 21-2-2020 and the company, el Corte Inglés department store, registered her cancellation in the social security system on 30-9-2020. However, the aforementioned judgement did not become absolute until 22-2-2021.

Due to this cancellation, the worker filed a legal action against her dismissal due to deeming that the company had registered such cancellation at a time that it should not have done so because the judgement was not yet absolute, claiming the termination of the labour relationship with the company up to such date was unjustified and there was no reason for it.

What was the result for the High Court of Justice of Madrid? Unfair dismissal.

The court deemed that the company registered the cancellation, by applying Article 49.1 c), too soon and should have waited until the judgement ruling that the worker was in a situation of permanent disability had become absolute. Up to such time, both the ruling on the disability and its level still needed to be decided and hence there was a possibility that the situation ruled could be reversed.

As a matter of interest, the court also ruled on the compatibility of receiving benefits for permanent

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disability with the severance pay for unfair dismissal and considered that they remedied different damages: on the one hand, the severance pay for dismissal covers the damages caused by unfairly depriving the worker of his/her job. On the other hand, the benefits for permanent disability cover the damages caused by an occupational accident that permanently restricts the employee's capacity to perform his/her work.

Conclusion?

In cases like this one, the company's action with the most guarantees will always be to wait until the judgement that ruled the worker in question was in a situation of permanent disability at any of its levels has become absolute.

Should you have any doubts, it is always crucial to obtain prior legal advice to avoid any unexpected situations that could be detrimental to the company, such as the one analysed in this article.

Please do not hesitate to contact me should you require any further information about the practical effects of this judgement.

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>Today's courts

The Supreme Court determined that the position of a workers' legal representative is automatically acquired: The judgement of the Supreme Court of 15-03-22.

Yolanda Tejera

The position of a workers' legal representative is a legally protected situation and, for such purpose, Article 68 of the Spanish Labour Relations Act (ET) acknowledges that a series of guarantees are granted to the members of the Works Council and Union Delegates. Therefore, if the dismissal of a workers' representative is ruled unfair through judicial channels, it would imply such person, instead of the employer, is the one who is entitled to choose between being reinstated in the company, with payment of his/her salary during the proceedings, or receiving severance pay.

This guarantee means that, before dismissing a member of the workers' legal representatives, companies must conduct an in-depth assessment of whether or not it would be in their interest to dismiss a worker who, in the case of being ruled unfair, could decide to remain in the company, with the unpleasant situation this would imply for both parties. However, what would happen if, at the time a worker is dismissed, both such worker and the company are unaware that he/she had acquired the position of a workers' legal representative? Would the guarantees granted to such position be applicable? Or, due to being unaware of such situation, the effects thereof would not yet be applicable?

In order to reply to these questions, this month we deal with a judgement ruled by the Labour Chamber of the Supreme Court number 229/2022 of 15 March 2022, which analyses, perhaps a rather unusual case but, precisely for this reason, quite curious.

What happened in this specific case?

In 2016, a worker that would later become the plaintiff in legal proceedings stood for election to the Works Council, being the first substitute for the only candidature that had been proposed.

Two years after holding the elections, one of the members of the Works Council resigned from office without notifying such resignation to the company, which was absolutely unaware of such resignation, and it dismissed the worker who would later become the plaintiff in the legal proceedings and who, two days earlier, had become a member of the Works Council to replace the resigning worker when her colleague resigned as a workers' legal representative.

Of course, the worker filed a claim against the dismissal by the company and the Labour Court ruled it was unfair and ordered the defendant company to reinstate the worker or provide her with the relevant severance pay within a term of five days, such option being at the discretion of the worker due to her position as a workers' legal representative, a position which was unexpected and unknown both by such worker and the company on the date the dismissal took place.

The High Court of Justice did not reach the same conclusion, but the Supreme Court unified doctrine.

The High Court of Catalonia took a different position to the one of the lower court, concluding that when there is a situation of substitution, revocation, resignation or termination of office by a member of the Works Council, such fact must be notified to the public office reporting to the labour authorities and to the employer and it must also be posted on the company's notice board. Therefore, after realising that, in this case, such formality had not taken place and the company was unaware of the worker's new situation, it could not be ruled that, at the time of the dismissal, the plaintiff held the position of a workers' legal representative nor that she held the right to exercise the guarantees granted to such office.

However, the Supreme Court overturned the judgement of the High Court of Catalonia and ruled in favour of the plaintiff, stating that, since her dismissal was ruled unfair, the worker was entitled to choose either severance pay or reinstatement.

The Chamber pointed out that Article 67.4 of the Spanish Labour Relations Act is clear when it states that, if there is a vacancy on the company committees, it shall be automatically filled by the next worker on the list and that a correct interpretation of such provision must be understood as follows:

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Si quieres más información sobre los efectos prácticos de esta sentencia, contacta conmigo.

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1. Acquiring the position of workers' legal representative is immediate, automatic and takes place at the time the former member of the committee resigned.

2. It is not necessary to report or notify that a worker has acquired the position of a workers' legal representative.

3. Acquiring the position of workers' legal representative is not subject to the company being informed of such fact because it takes place automatically and is valid for everyone regardless of whether or not it is known by third parties.

4. Lastly, when the position of workers' legal representative is acquired, the guarantees granted to such position are directly applicable, among which the right to option can be highlighted, inter alia.

Must we study the individual situation of all the workers before adopting a business decision to avoid any unexpected risks?

The following question arises from reading this judgement: Must companies investigate all the individual situations of the workers to exclude any possible situation for which protection is required?

In spite of how strange the case may seem, a priori, this judgement is highly relevant because it is based on the company not knowing about the substitution of the workers' representative taking place.

However, it was acknowledged that, at the time the dismissal took place, she had already acquired her new position as a workers' legal representative because the substitution takes place automatically and therefore the plaintiff already benefited from all the protection granted by the regulations to such position as a representative.

This draws our attention to the importance of conducting an analysis of the circumstances arising in each specific case before adopting any business decision to thus avoid any possible unexpected risks.

Once again, it is obvious that suitable preventive advice can avoid a great deal of surprises that could lead to companies needing to keep employees on their staff who otherwise would have been dismissed. ■

Please do not hesitate to contact us should you require any further information about this issue..

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>Tip of the month

Four simple pieces of advice for companies so that they can avoid labour risks.

María Rubio and Raquel Oltra

We realise that it is not easy for a company to forge ahead nowadays. We offer you four (4) simple pieces of advice below that could prevent your company from running some possible legal risks related to employment.

1. It is crucial that the POH is up-to-date.

It is crucial for all companies to fulfil the Prevention of Occupational Hazards Policy (POH). However, be careful, it is not sufficient just to hire an External Prevention Service and keep the manuals provided to you in a drawer simply collecting dust. The POH must really be implemented. Moreover, it must be kept up-to-date, in addition to being duly documented and filed. It is aimed at avoiding occupational accidents and the disastrous consequences these could imply both for the worker and the employer.

2. If you are a company group, do not mix things up.

Company groups are absolutely legitimate and risk-free for labour purposes unless they are considered "pathological". For this not to arise, one of things that must be avoided is the confusion of the companies belonging to the group due to situations such as workers rendering their services to any of them without this differentiation being duly stipulated and justified in their employment contracts or one of the companies in the group using the assets of another without any justification or payment of consideration.

3. Place the importance on the dismissal letter that it so rightly deserves

A rather common mistake made by companies is providing dismissal letters too soon, which include information that has not been sufficiently thought out and very often do not even include the real reason for the dismissal, even when it is justifiable. This usually results in the almost certain challenge of the dismissal and causes unnecessary difficulties for structuring a good defence in the case of legal proceedings. Legal advice for this situation must be obtained right from the start.

4. Recording working hours, not only for the workers "present at the workplace"

There are numerous mechanisms for recording employees' working hours, from recording them by means of mobile apps to physically recording the hours.

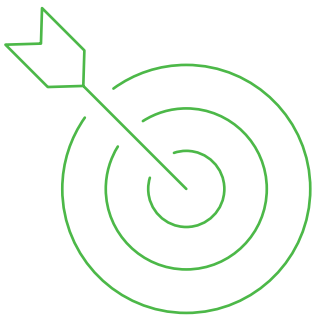
However, what happens in the case of workers that have no physical workplace?

It is important to remember that the compulsory record of working hours is not only applicable to workers who are present at the work centre to "clock-in and clock-out".

Attention must be paid to the different working methods of our workers and to set up a system so that they can record their working hours from any workplace.

Due to the increasing use of the working from home system, Human Resources Managers have needed to set up their own system for recording working hours whenever there is no physical work centre or, if there is one, the employees work from home.

In these cases, some of the useful and most practical systems could be recording the hours by means of mobile apps or online; however we can always use the traditional record of hours "on paper" to avoid fines being imposed by the Labour and Social Security Inspection Units. ■



Please do not hesitate to contact me should you require any advice about how to apply the Collective Bargaining Agreement for your employees to receive their extra payments..

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>Judgement of the month:

A further clarification on the possibility of employees to receive their extra payments proportionally if the collective bargaining agreement prohibits this.

Miguel Capel

Regarding employees proportionally receiving their extra payments, the Collective Bargaining Agreement applicable to my company includes a prohibition for these extra payments to be received proportionally over the twelve months of the year.

However, there are workers in the company who have always received such payments this way. Can my employees continue receiving these payments proportionally as they have done up to now or must I pay them on the dates stipulated in the Collective Bargaining Agreement? Otherwise what risks could I run?

In practice, companies' employees very often receive the amount of the extra payments spread over twelve months instead of receiving them on the dates stipulated for such purpose in the applicable Collective Bargaining Agreement. When the Collective Bargaining Agreement in question does not prohibit this practice and there is also an agreement with the worker and/or the workers' legal representatives that authorises this, such practice does not usually imply any serious problems. However, what happens in cases when the Collective Bargaining Agreement expressly prohibits the employees receiving such extra payments proportionally?

Regarding this issue, in the recent judgement number 452/2022 of 18 May 2022, by Unifying Doctrine, the Labour Chamber of the Supreme Court ruled that employees receiving extra payments proportionally, when accepted and tolerated by the worker with no objections being raised, terminates the obligation to pay them again on the dates specified in the Collective Bargaining Agreement, even if the regulation of the Collective Bargaining Agreement expressly prohibits such practice and whenever the consequences due to infringing such prohibition are not specified.

Background

In the case analysed, during the valid term of the worker's labour relationship, he had been receiving the amount of the extra payments on a proportional basis, being an accepted practice that he tacitly agreed to. Similarly, it was stated in the claim that the salary received by the worker included the proportional amount of such extra payments, hence the worker implicitly acknowledged such practice.

The Collective Bargaining Agreement in question (The VII State Framework Collective Bargaining Agreement for services to care for dependent persons and to develop the promotion of personal independence) determined that the amount of the two extra payments was payable every six months, the first from 1 June to 31 May, with payment on 15 June, and the second from 1 June to 30 November, with payment on 15 December, expressly stating that under no circumstances could the employees receive such extra payments proportionally on a monthly basis. The Collective Bargaining Agreement did not specify the penalty that would be imposed for infringing this prohibition.

What was the Supreme Court's ruling?

Up to now, doctrine of the Labour Chamber of the Supreme Court has been sustaining in numerous case law rulings that employees receiving the extra payments proportionally does not release the employer from its obligation to settle them at the time they are payable, in cases when the Collective Bargaining Agreement prohibits such corporate practice (proportional payment), even though the regulation of the Collective Bargaining Agreement does not contain any specific rule that explains the consequences of infringement, unilateral implementation by the employer of such proportional payment not being allowed (vid. The judgement of the Supreme Court of 08/02/2021, Appeal to the Supreme Court (cassation) for Unifying Doctrine 2044/2018, and the judgement of the Supreme Court of 19/01/2022, Appeal to the Supreme Court (cassation) for Unifying Doctrine 479/2019, among other significant ones).

After providing a brief summary of applicable case law doctrine, the Supreme Court concluded that, in

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Please do not hesitate to contact me should you require any advice about how to apply the Collective Bargaining Agreement for your employees to receive their extra payments..

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the case analysed, the employees receiving the extra payments on a proportional basis meant there was no possibility to claim their payment again on the dates specified in the applicable Collective Bargaining Agreement for the following reasons:

- During the valid term of the labour relationship, there was no record of the worker raising any objection whatsoever to receiving the amount of the extra payments on a proportional basis over the twelve months of the year.
- Even the worker acknowledged in the claim that he received the extra payments proportionally in twelve monthly payments, as an integral part of his salary.
- The applicable Collective Bargaining Agreement did not specify the consequences of infringing the prohibition of employees receiving the extra payments proportionally.

Conclusions

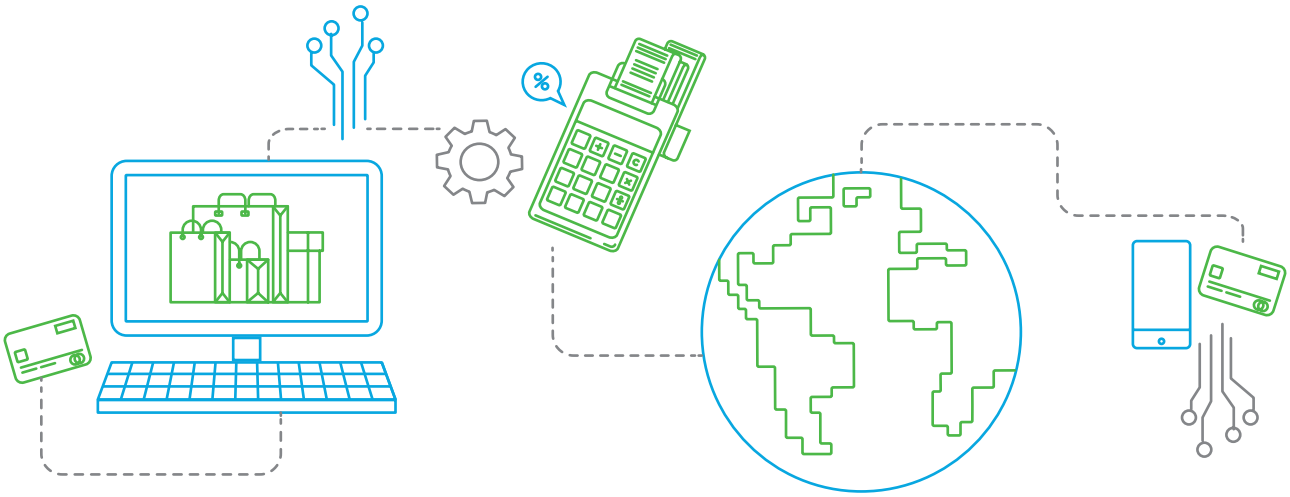
Bearing in mind the context and the circumstances explained above, the Supreme Court concluded that admitting the worker's claim would imply **unfair enrichment**, because it would result in **double payment of a salary item** (in this case, the extra payments), the regularity for payment thereof not having been disputed and had been accepted with no objections being raised by the worker during the valid term of the labour relationship.

Therefore, can my employees continue receiving the extra payments on a proportional basis, even though the Collective Bargaining Agreement prohibits it?

Although the opposite could be interpreted from reading the analysed judgement, it is always advisable to abide by the provisions in the applicable Collective Bargaining Agreement when settling the extra payments in order to avoid running unwanted risks, such as needing to pay them twice.

Similarly, in cases when the Collective Bargaining Agreement does not specify any prohibition whatsoever for the employees to receive the extra payments on a proportional basis, it is always advisable to sign a written agreement with the workers that authorises such practice.

Please do not hesitate to contact me should you have any queries about the way your employees can receive the extra payments in your company, it will probably surprise you to find out that the solutions adopted by our courts are not always applicable in the same way to all cases and the specific features of each case must be analysed in order to find the suitable solution. ■



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