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English version

NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

Ignacio Hidalgo and Miguel Capel

Summer is unfortunately over now and the new season has started.

Although many of you have been able to enjoy some well-deserved time for rest and disconnection over the last few months, the world of labour law has not stopped.

Not only has there been more legislative news, there have also been numerous judicial rulings of great interest, such as the recent judgement of the Supreme Court on the position of an intern.

In this issue, we also deal with a question that could be of great interest to you: the use of social media in the workplace.

As we have been doing for almost two years now, we promise to pay careful attention and bring you all the new aspects as they arise, reply to any new doubts you may have and those that are resolved by the courts.

Welcome once again to NewsLabour!

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Please 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 can find judgements and legal news that, due to their special features or importance, particularly draw our attention. We provide an overview of some of them below:

Roberto Villon

Judgement of the High Court of Justice of Madrid of 15 June 2022: Violation of fundamental rights due to providing negative references to another company for a dismissed worker.

This judgement deals with a case of possible violation of a worker's fundamental rights by her former employer. In this respect, the company had provided negative references for the plaintiff resulting in her not being selected in various recruitment processes that she had signed up for. Due to deeming that the company's attitude clearly implied a reprisal against the worker and the references that the company had provided against her interests had a negative effect on her possible recruitment by other companies, the court hence considered such conduct violated the plaintiff's fundamental rights.

Judgement of the High Court of Justice of Madrid of 8 July 2022: Protection of the right to reduce working hours for the purpose of childcare.

The High Court of Justice was petitioned by a worker to rule revocation of her dismissal that was already acknowledged by the lower court as unfair, along with payment of compensation. The worker deemed that her dismissal violated her right to equal opportunities, because it was based on her intention to request a reduction in working hours in order to care for her child. Such violating intention was considered proven by means of an email sent to a member of the human resources department claiming a reduction in her working hours, even though the formalities for such request were never carried out afterwards. Based on this, the High Court of Justice deemed that such dismissal should be revoked, with the relevant payment of compensation, due to violation of the worker's fundamental rights.

Judgement of the Supreme Court of 7 July 2022: What regulatory salary would be payable in the case of termination of a contract that had been suspended?

The court analysed what the regulatory salary would be to calculate the severance pay for unfair dismissal in the case that the worker's contract had been suspended by the furlough system (ERTE) in the year before his dismissal. As the court explained, the regulatory salary to calculate the severance pay was the proportional salary with extra payments received by the worker in the last month prior to his dismissal. In this case, it was deemed that, if the worker's contract had been suspended before the dismissal, the period of suspension cannot be counted for the calculation to determine the relevant severance pay due to being a period with no activity and when no remuneration was paid and hence affected the remunerative amounts received.

Judgement of the High Court of Justice of Murcia of 18 July 2022: Leave cannot be automatically granted when it has been refused by the company.

The Labour Division of the High Court of Justice of Murcia discussed whether or not a dismissal could be considered fair when a worker had automatically taken holidays and, for such reason, his employer had dismissed him for disciplinary reasons.

The court considered the dismissal was fair due to deeming that, if the worker requests holidays and does not receive a reply from his employer, he cannot unilaterally consider that the holidays had been notified as accepted when the company had not replied to the worker stating it accepted that such period had been granted. ■

Please contact me should you require any further information about this new law.

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>Practical Law

Adjusting the hourly credit of union delegates depending on the real number of workers on the staff: is this a violation of the right to union freedom?

Carlos Díaz

Very often companies may have certain doubts about the rights of the workers' legal representatives, either unitary or as members of the trade union, but fearing they could violate their rights to union freedom they prefer to leave them as they are and not adopt decisions that could compromise them and lead to negative consequences in the form of claims, costly compensation or being smeared in some way through means of communication or social media.

However, there are specific and special situations that under no circumstances imply a violation of the rights of this group of workers bearing in mind their special position and the protection granted to them by law. Correct application of the law is a key factor to avoid compromising situations that could result in causing damages to a company.

Judgement of the Supreme Court of 14-07-2022: In the case of the number of staff being decreased, the company can unilaterally adjust the hourly credit of the union delegates, adapting it to the real number of workers in the company.

The Supreme Court recently repeated doctrine that had already been determined on previous occasions. As already mentioned in the introductory title of this section, companies can adjust the hourly credit of their union delegates providing such adjustment is in accordance with the criteria stipulated in Article 10.2 of the Spanish Union Freedom Act (with initials in Spanish "LOLS"). We refer to the contents of such provision below:

2. The number of delegates specified in the scale referred to in this section may be increased either by virtue of reaching an agreement or collective bargaining, bearing in mind the company's staff or, when appropriate, the work centres corresponding to each of them.

If there are no specific agreements in this respect, the number of union delegates for each union section of the unions that have obtained 10 per cent of the votes in the election of the Works Council or the representative body of the public authorities must be determined according to the following scale:

- From 250 to 750 workers: One.
- From 751 to 2000 workers: Two.
- From 2001 to 5000 workers: Three.
- From 5001 or more: Four.

Moreover, Article 68 e) of the Spanish Labour Relations Act (*Estatuto de los Trabajadores*), states that the workers' legal representatives must be allowed individual monthly remunerated hourly credit, enabling them to accumulate hours in one or several of its components, but without exceeding the total maximum number. The hours available will vary according to the following scale:

- Up to one hundred workers, fifteen hours.
- From one hundred and one to two hundred and fifty workers, twenty hours.
- From two hundred and fifty-one to five hundred workers, thirty hours.
- From five hundred and one to seven hundred and fifty workers, thirty-five hours.
- From seven hundred and fifty-one or more, forty hours.

The factual case of the judgement ruled by the Supreme Court of 14-07-2022:

In this case, there was only one union delegate appointed in a company that employed 763 workers on 23 March 2020, with an accumulated hourly credit of 80 hours, bearing in mind the aforementioned provisions.

However, after a series of contractual terminations, (termination of temporary contracts, disciplinary dismissals, declaration of permanent disabilities, etc.), on 20 April 2020 the company informed the union delegate that a number of fewer than 751 workers were employed on the staff at such time; therefore

Please contact me should you require any further information about this new law.

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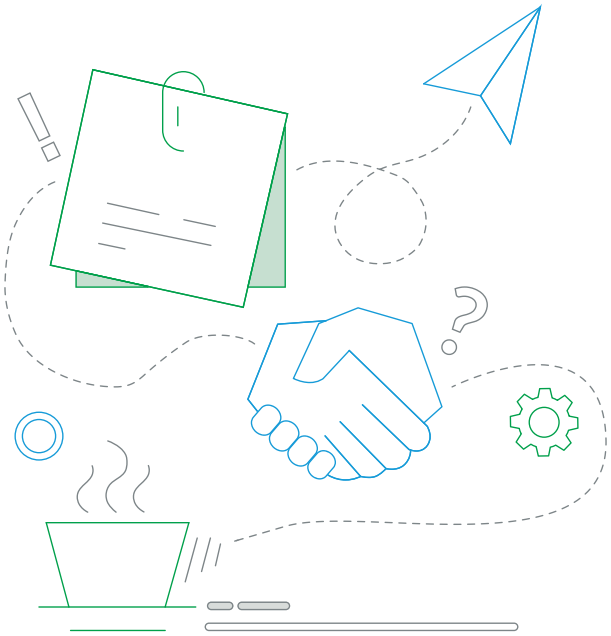
the union he belonged to was allowed to appoint one sole union delegate, with 35 hours of credit, therefore he would no longer be entitled to the 80 hours that he had previously been granted.

The trade union in question and the union delegate filed a claim against the company in order to protect his fundamental rights, petitioning that a credit of 80 hours was acknowledged, alleging that his union freedom had been violated and, for such reason, claiming compensation of €6,000.

The ruling of the Supreme Court

By applying case law doctrine already determined by the High Court, it was concluded that companies were allowed to adjust the hourly credit of union delegates when the staff of a company is decreased, adapting such hours to the real number of workers for which the union delegate must perform his/her duties, ruling that the fundamental right of the union delegate in question had not been violated, all the foregoing notwithstanding the fact that, if the company recovers the previous number of staff, the hourly credit must be adapted again.

The judgement reviewed the criteria stipulated to determine the calculation of the number of workers that must be taken into account regarding the total number of workers, which is no easy matter; however this is not subject to analysis in this article due to its special scope and complexity. Therefore, please do not hesitate to contact us if you have any doubts related to which workers must be counted in order to determine the exact number of staff to then find out the exact number of union delegates your company can appoint. We will be delighted to advise you about this or any other issue related to this matter. We look forward to hearing from you! . ■



Please contact me should you require any further information about this issue

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>Courts of today

The importance of not only performing training duties. Does an intern have a labour relationship?

Roberto Villon

The position of an intern was designed for students in order for them to obtain practical experience by performing different tasks in companies with which they have no labour relationship. Performing their work in the company is formalised by means of a collaboration agreement between the company and the intern's university that stipulates the elements regulating the labour relationship, such as working hours, tutor, maximum term for the internship, etc.

On various occasions case law has analysed the differences between this position and that of a worker, concluding that the intern's activity, unlike that of a paid worker, is aimed at learning and obtaining professional training, and not rendering services and creating benefits for the company.

This is the aspect analysed in the judgement of the Supreme Court of 1 June 2022, which studied whether or not an intern of the Spanish International Cooperation Agency for Development (AECID) holds a labour relationship due to performing equivalent duties to those of other workers in the company.

What situation was examined in the judgement of the Supreme Court?

After analysing the differences between an internship and a labour relationship, the aforementioned judgement of the High Court concluded that the plaintiff, who rendered services for a year and performed duties that were not only of an exclusively training nature, actually had a labour relationship.

The court considered that the duties in the company assigned to the plaintiff were performed with a level of autonomy typical of a labour relationship, since he did not only perform support and collaboration work but his activities were the same as those of any other worker.

In this case, the plaintiff had previous experience in the sector due to taking internships in other centres and performing duties as an external consultant, which the company took advantage of to its benefit by assigning him responsibilities and duties similar to those of any other worker on its staff.

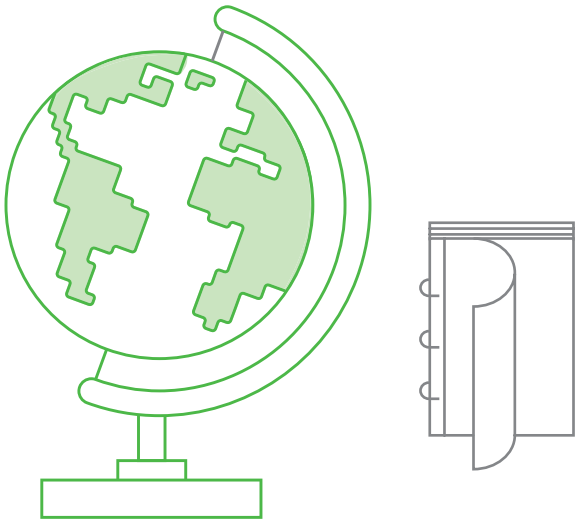
Contradiction in the judgements analysed by the Supreme Court

The contradictory judgements analysed in this case had the same facts, such as the same organisation where the plaintiffs rendered their services and the same working hours that they had every day, with a prior agreement with their tutors.

Unlike the previous cases, it was considered that the plaintiff in the proceedings analysed in the contradictory judgement carried out support and collaboration activities, performing his activities at all times according to the guidelines given by his assigned tutor and had no prior experience in the sector. Therefore, in this case, the Supreme Court concluded that his activities were those of an intern and hence did not acknowledge that there was a labour relationship.

Grounds for the judgement

In this case, performing activities that exceed those of an intern proves there is a labour relationship based on the following facts arising that prove the existence thereof:



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- Firstly, it was not proven that there was actually a position of tutor to supervise and provide the relevant guidelines for his role as intern. The supervision of the plaintiff was no different to what any hierarchical superior would apply to any other worker in the company, and

- Secondly, the plaintiff's prior experience would result in him being able to perform such activities with the same level of responsibility and autonomy as any other worker on the staff.

These circumstances led to the Supreme Court to consider there were marked differences between the cases submitted as a comparison, deeming that in fact the plaintiff's duties as an intern simply concealed a labour relationship that generated benefits for the company by taking advantage of his work and experience in the projects.

Conclusions and recommendations

The judgement studied referred to case law doctrine on the position of an intern, recalling that the ultimate aim for the interns is for the latter to obtain work experience and to supplement their mere academic training and that, if the intern's duties exceed such purpose, we can consider he/she is a real worker, with the consequences resulting from such position.

Defective management of the duties that can be performed by an intern could lead to serious repercussions for a company, such as acknowledgement of a labour relationship that could result in the relevant legal action being filed for all the rights that can be claimed against the company based on such consideration, along with administrative sanctions. ■

Please contact us should you require any further information about this issue

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>Advice of the month

Use of social media in the workplace

María Rubio and Raquel Oltra

It is quite normal to see people share information, state their opinions, post photos or videos on social media that have some kind of relation with the company where they work. This kind of information that workers previously disclosed within a more or less private circle of relatives and friends has nowadays become important within the public sphere and can hence have an impact on your company's interests.

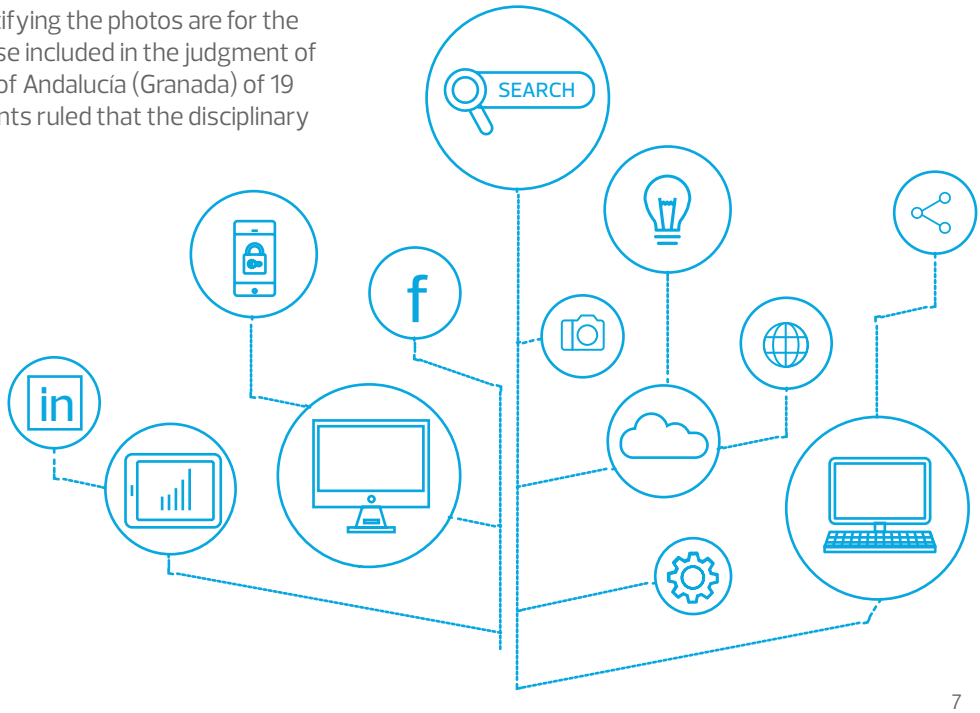
What can the company do?

Your employees being active on social media can be positive for the company (for example, it can have positive repercussions in the media and help strengthen your brand) but what happens when the company does not like the information that is disclosed? Can the worker be dismissed in these cases? What are the rulings of the Labour Courts?

The casuistic is varied and, within this scope, we can find (i) from workers uploading videos on TIK TOK recorded in their work centre during their working hours that express the inefficient support provided by the company to the public (video "two thousand years later, I was given support") and advice is even given about how to act fraudulently (video "how to steal kinder eggs"), in a case included in the judgment of the Labour Court of Cartagena number 3 of 27 July 2021; (ii) to a worker posting photos on INSTAGRAM in which he/she is shown undressed, specifying the photos are for the company's calendar, a case included in the judgment of the High Court of Justice of Andalucía (Granada) of 19 May 2022; both judgements ruled that the disciplinary dismissals were fair and seemed to deem, among other facts, that damage had indeed been caused to the corporate image.

However, the judgement of the High Court of Justice of Cantabria of 7 January 2019, in a case when a worker posted photos on INSTAGRAM in which he appeared in his workplace dressed up in children's clothes that were for sale (publication "this is what happens when you work on a Sunday"), deemed that such conduct had not caused damage to the company regarding the public and that it lacked sufficient importance or seriousness to justify dismissal, thus ruling the dismissal was unfair.

Companies that wish to avoid or prepare for the possible consequences of "uncontrolled" disclosure of content that their workers post on social media and the resulting damages caused to their corporate image or brand, can ask us and obtain advice on drawing up protocols, guides and instructions for the use of social media, hence avoiding damages being caused to the company and negative consequences for its workers. ■



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

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>Judgement of the month

Is it possible to claim joint compensation for damages caused by an occupational illness? The Supreme Court unified doctrine through its judgement of 21-7-22.

María Torres Ramos

A situation could arise within your business organisation in which a worker who renders or has rendered his/her services in your company suffers an occupational illness and, due to this, claims compensation for damages through the courts.

Unlike what happens with an occupational accident, even though it is exteriorised at a certain time, an occupational illness quietly and treacherously develops over time due to the worker being exposed to certain substances, elements or working conditions and, as a general rule, this exposure takes place in all the companies where the worker has rendered his/her services.

The Spanish courts have been considering that all the companies involved in causing the damage that has resulted in the occupational illness must be held severally and not jointly liable due to deeming that it is impossible to determine the level the liability can be claimed against each of them, but now the Supreme Court has unified doctrine, determining the joint liability of the companies responsible. What led to this change?

In order to better understand this situation, we will analyse the case in-depth:

What happened in this specific case?

In the case in question here, the worker who filed the claim rendered his services for specific temporary periods of time as a quarry worker in various companies. While rendering his services he was exposed to silica dust that caused complicated pneumoconiosis and a serious reduction in his total lung capacity.

Due to all this exposure, the worker was declared with absolute permanent disability and hence filed a claim against the companies where he had worked, petitioning compensation for the damages caused due to his occupational illness from being continually exposed to such silica dust.

In this case, the Labour Court admitted the claim and by virtue of its judgement ordered compensation to be paid for the damages, as petitioned, ruling that the liability must be jointly shared among the companies found at fault bearing in mind the time the worker had worked in each one.

After the relevant appeal for reversal had been lodged, the High Court of Justice ruled against the aforementioned judgement, declaring that the liability must be several and not joint, by deeming it was not possible to individualise the liability of each company involved in causing the damage.

What did the Supreme Court rule?

The Supreme Court concluded that the doctrine that the liability arising from the benefits for the occupational illness contingency acknowledged for the worker must be charged to the different companies in proportion to the time the worker was exposed to the aforementioned risks is fully applicable to the compensation for the damages caused by this occupational illness. Therefore, the liability for compensation, compensation for damages, must be imposed in proportion to the time the worker was exposed to the risk, which means that such liability must be individualised for each company depending on the time the worker rendered his services in each one.

However, liability is imposed severally in cases when multiple agents have been involved in the reason causing the damage and it is impossible to individualise the contribution of each one to such damage; therefore the specific liability cannot be determined.

Conclusions

We can conclude from this novating judgement of the Supreme Court that finding companies severally liable for the compensation of damages caused by an occupational illness must be ruled when it is impossible to individualise the liability of each company involved in causing such damages. However, when the worker has successively rendered his services in the companies causing the damages and the liability of each one can

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be individualised according to the time the worker rendered his services there, the companies can hence be found jointly liable.

Do any of your workers suffer from an occupational illness? Has a claim been filed against you for damages caused by an occupational illness? Please do not hesitate to contact me, judicial judgements are not always applicable in the same way to all cases and the special features of each case must be assessed in order to find the most suitable solution. ■

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

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› Legislative developments

What we are about to be faced with!

Guillermo Guevara

Royal Decree 629 of 26 July 2022 was published in July, which amended the Regulation of Act 4/2000 on foreigners' rights and freedoms in Spain and their social integration, after the reform of Act 2/2009, approved by Royal Decree 557 of 20 April 2011, the contents of which could have various repercussions on labour matters.

We provide an overview below of some of the points that we consider could be of the most interest to you:

Students

Regarding students, the amendment of Article 42 of Royal Decree 557/2011 allows students to combine work and training, providing that is compatible with the courses they take and for no more than 30 hours a week.

Residence permit due to training reasons

The reform has included a new kind of residence permit for reasons additional to those that already existed, i.e., labour, social and family: the permit due to training reasons.

This new system will allow foreigners who can prove they will continuously remain in Spain for a minimum period of two years to obtain a residence permit for a period of twelve months, which can be extended for a further twelve months.

Residence permit due to labour reasons

El nuevo arraigo laboral cuenta con dos novedades que son de suma importancia:

1. There is no longer an obligation to obtain a judicial ruling or an administrative decision confirming the infringement report issued by the Social Security and Work Inspection (ITSS) proving there is a labour relationship in force no shorter than six months, with any means of evidence that proves the existence of a prior labour relationship in force in a legal situation of a stay or residence.
2. It is included that a residence permit can be obtained by workers who are in an irregular situation at the time of the application.

The Processing Unit for Immigration Cases

The change that is possibly the most important is included in the Sole Additional Provision of Royal Decree 629/2022.

This provision stipulates that over the next few months the Processing Unit for Immigration Cases will be set up, reporting to the Directorate General of Immigration, which will perform the duties to manage and support processing of residence or work permits, in collaboration with the other competent bodies, and for the territorial area that is determined.

This unit could be a solution to one of the most dissuasive elements when needing to deal with immigration matters, recruitment of foreigners, etc.: the slowness of the procedure for cases related to immigration matters.

The Catalogue of Jobs that are Difficult to Cover

Article 65 has been amended so that determining the national employment situation aimed at structuring the Catalogue of Jobs that are Difficult to Cover is more flexible and enables a more accurate reflection of the needs of the job market.

Specifically, the terms have been considerably reduced for the whole process of proving the difficulty to cover vacant jobs with workers already employed in the domestic labour market, which means these situations will be handled faster.

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