N° 19 | AUGUST 2022

English version

NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

Ignacio Hidalgo & Miguel Capel

The holiday season is finally here!

However, the fact that the holiday season is close does not prevent new aspects arising in labour cases, interesting judgements and practical aspects in our day-to-day operations that are worthwhile taking into consideration.

In addition, this month the full Act 15/2022 on equal opportunities and non-discrimination has been published, the text of which has set off alarm bells in companies, but its interpretation and application are yet to be seen and, of course, it must still be analysed and discussed in #NewsLabour.

We also deal with an issue that has been very much discussed recently and that has been pushed to the forefront by the General Workers Union (UGT): Will the severance pay for unfair dismissal that has been applied up to now no longer be sufficient?

We hope that both these topics and the latest judgements discussed in this edition will be of interest to you and give you food for thought over the summer.

Lastly, we would just like to remind you that there will be no new edition of #NewsLabour in August, but don't worry, we will be back in September full of energy to bring you the latest news.

Have a wonderful summer!

CONTENTS

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

Roberto Villon
rvillon@rsm.es

>The courts in a nutshell

What's new on the block?

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

Roberto Villon

Judgement of the Supreme Court of 15 June 2022: The assessment must be made on the net amount.

A dispute was submitted to the Supreme Court on how the default interest must be calculated for the salaries payable during the proceedings, regarding whether this should be calculated on the net amount or the gross amount. In this respect, the Supreme Court sustained a very logical argument when confirming that the calculation must be made on the net amount, i.e. the amount resulting after deducting the withholdings on account of personal income tax and social security contributions in its assessment, because otherwise the tax authorities or social security system would end up benefiting from the employer's delay in paying salaries during the proceedings and the amount owed by the payer will be much higher than the amount considered in the enforcement.

Judgement of the Supreme Court of 22 June 2022: Not including the most representative trade union in the collective bargaining process, due to it not having set up a trade union section in the company, implies violation of the right to trade union freedom.

This judgement analysed a case in which a company, when negotiating a collective bargaining agreement within a corporate scope, had only held the bargaining process with one trade union that had set up a union section within the company, the Workers' Commission Trade Union (CCOO), even though the General Workers' Trade Union (UGT), which had not set up a union section, held 13.46% of the workers' representation. The latter union filed a claim against the company due to deeming that it should have taken part in the bargaining process and that its right to union freedom had been violated. The Supreme Court upheld the judgement of the National Court, which stipulated that the verbatim text of Article 87.1 of the Spanish Labour Relations Act does not allow trade unions to be excluded if they have sufficient representation in the company and that, if within the company's scope it was required to hold negotiations for a collective bargaining agreement, all the trade union representations, whether they have set up union sections or not and have this authority for bargaining or not, must be summoned, at least to take part in the preliminary talks.

Judgement of the Supreme Court of 28 June 2022: Who must prove that the targets have been achieved to receive a bonus?

The question raised to the Labour Chamber of the Supreme Court consisted of deciding who holds the burden of the proof of whether or not the targets have been achieved to receive a bonus in a case when the company notified a worker that she could obtain the aforementioned bonus and this was subject to achieving a series of targets, without ever notifying these. After recalling some of the previous judgements related to receiving a bonus and due to the specific circumstances, the Supreme Court upheld that the burden of the proof for determining the targets and their level of achievement was fully held by the company, i.e. the party that has "the availability of evidence and the facility to provide it".

Judgement of the Supreme Court of 1 June 2022: Should transport expenses be payable to employees working from home?

The Labour Chamber of the Supreme Court discussed whether or not the employer was obliged to pay the transport supplement to employees working from home, since such amount was remuneration paid to employees whose working hours began and ended between midnight and 6 am. The plaintiff workers claimed that such expenses must be considered equivalent to the night shift bonus, deeming that it was not due to the travel made by the workers but rather as a supplement paid for the more serious difficulties in the work performed on the night shift. By virtue of its ruling, dismissing the appeal that had been lodged, the Supreme Court upheld that the purpose of the transport supplement was to compensate workers who needed to travel to the work centre at times when public transport was less frequent, which meant that the payment was excluded for employees working from home. ■

Please do not hesitate to contact me should you require further information related to the risks and problems that could arise in a situation of illegal assignment of workers.

Yolanda Tejera
ytejera@rsm.es

>Practical Law

Will the severance pay for unfair dismissal that has been applicable up to now ... no longer be deemed "sufficient"?

Yolanda Tejera

Almost on the anniversary of the ratification by the Spanish State of the revised European Social Charter (hereinafter referred to as the "rESC" or the "Charter"), the Spanish General Workers Trade Union (UGT) launched a legal battle against Spanish labour law, specifically against Article 56 of the Spanish Labour Relations Act, claiming to the European Committee of Social Rights that the severance pay for unfair dismissal in Spain violates both Article 24 of the revised European Social Charter and Article 10 of Convention 158 of the International Labour Organisation (ILO).

In the opinion of the plaintiff trade unions, the – assessed - severance pay determined in Article 56 of the Spanish Labour Relations Act for unfair dismissal is neither sufficient to remedy the damage caused nor sufficient to dissuade the employer from carrying out other unjustified dismissals in the future and hence it is against the rESC.

However... what does the rESC and Convention 158 of the International Labour Organisation (ILO) actually say?

Article 24 of the rESC states "the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief", on the other hand, Articles 10 and 12 of Convention 158 of the International Labour Organisation (ILO) specify that, in cases of unfair dismissals, the company must "order payment of adequate compensation or such other relief as may be deemed appropriate".

It is obvious that both regulations agree that "adequate" compensation must be determined, but what is adequate compensation apart from an obviously undetermined and diffused legal concept that prevents, or at least hinders, State laws –whatever they may be – being in accordance with the contents of the Charter?

In spite of the interpretation of such articles in the report proposed to the European Committee of Social Rights ("ECSR"), if we bear in mind the verbatim text of Article 24, we can see that it does not determine (i) either an obligation for full reinstatement; (ii) nor, much less so, the need for the compensation to have a dissuasive effect for the employer.

Therefore, pursuant to the verbatim text of the aforementioned provisions and according to the contents of Annex II of the Charter, which directly refers to national law as an instrument for determining adequate compensation, it can be perfectly understood that the assessed compensation in the Spanish system is in accordance with and adapted to the specifications in the rRESC.

So what is the problem with the Spanish system for compensation?

Doubts have been raised based on the decisions of the ECSR that, when analysing the legal systems in other States, among them, the Italian one, has "abstractly" concluded the assessed compensation systems that do not take into account the damage individually caused to each worker and are not sufficiently dissuasive are not in accordance with the Charter.

This therefore leads to the question we raise first of all about whether or not the assessed compensation, as we know it, does not already have this dissuasive component that the social party has been claiming.

In the case of Spain, where severance pay has been set as 33 days per year worked with a cap of 24 monthly payments, only for unfair dismissal, prior to the ratification of the rESC, the Supreme Court has already considered that the Spanish compensation system, in spite of being assessed, did indeed include this dissuasive nature, stipulating that "the fact that it is unnecessary to prove the damage caused to the dismissed worker who, in some cases, could be working in another company from the day after being dismissed; hence without suffering any economic harm", in some way implies that the employer is being punished, which must pay the legally assessed severance pay regardless of whether the worker has been caused any damage or has proven it.

Nevertheless, it seems that the plaintiff trade union does not agree with this "compensating" component in the current severance pay, sustaining that the

Please do not hesitate to contact me should you require further information related to the risks and problems that could arise in a situation of illegal assignment of workers.

Yolanda Tejera
ytejera@rsm.es

Spanish compensation system was not adequate even before 2012 and much less so after the labour reform that took place in that year, which was ignored by the legislator in 2021 that, at that time, could have remedied the "defects" in the Spanish compensation system but neither took a step forward in adapting the system to the contents of the European treaties.

In this context of uncertainty and ambiguity of the Charter and the supreme interpreter thereof, the European Committee of Social Rights, the following important question arises ...

So what could be considered adequate and compensating severance pay that would be sufficiently dissuasive?

The answer to this question, for which there is still no reply and no opinion has been provided by the European Committee of Social Rights to the claim filed by the UGT, would require that other questions must also be answered:

1. Could a higher amount of severance pay be considered more in accordance with the Charter, for example, 45 days, as was determined prior to the 2012 reform?

   Personally, bearing in mind what has been specified by the Committee, I deem that generally increasing the severance pay would neither be valid for the European Committee because, in spite of being "more dissuasive", in the same way as occurs at present, the severance pay would neither take into account the individual situation of each worker.

2. In line with that specified by the plaintiff trade union, would payment of the salary while the proceedings are in process, which was eliminated by virtue of the 2012 reform, if severance pay is chosen, in addition to the severance pay, function to make the current severance pay adequate?

   Similarly, in my opinion, the formula for salaries might neither be in accordance with the provisions in the rESC because it would depend to a large extent, not on the personal situation of the workers, but rather the speed in which the court rules a judgement, which would neither be in accordance with that specified by the Committee.

Due to the lack of replies and assessed methods that could be "adequate", for several months different courts have been making us think that the future of severance pay is little by little resulting in the written rules becoming inapplicable and their being replaced perhaps for greater judicial discretion when determining the amount of the severance pay.

Not having clear references is not a good solution, because the only definite effect of a situation like this is greater legal uncertainty and more disputes being submitted to the courts. ■

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

Marta Rico
mrico@rsm.es

›Courts of today

Can the compensation payable in the case of termination of a senior executive, judicially ruled as an ordinary worker, be offset?

Marta Rico

Article 2.1 a) of the Spanish Labour Relations Act considers a special labour relationship as that of senior management staff not included in Article 1.3 c) of the same regulation and therefore it has its own system by virtue of which the ordinary rules of the other workers are not imposed. However, we can very often find in the real situations of companies that it is legally complicated to determine whether a contract is a senior management contract or an ordinary employment contract, which can lead to serious consequences when the contract is terminated.

The system that regulates senior management contracts is governed by Royal Decree 1382 of 1 August 1985, (The Special Labour Relationship of Senior Management Staff), and this states that a senior management contract can be terminated when decided by the employer by means of withdrawal, which we will deal with below, or by disciplinary dismissal, in the latter case the dismissal letter must meet the formal requirements and basis required according to the ordinary employment system.

Which requirements must the company meet in order to terminate the Senior Executive's contract?

In order to **terminate a senior management contract by means of the company's withdrawal**, the company must meet the following requirements:

1. **Written notification** of the senior executive's termination, with no need to state any reason that could justify it.

2. Such notification of termination must be provided to the senior executive **with at least 3 months prior notice** before the effective date of termination and, in the case of partial or full breach of the obligation to provide such prior notice, the senior executive would be entitled to **compensation equivalent to the salary**

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

Marta Rico
mrico@rsm.es

payable during the period that has been breached, in other words, the employee's cash salary plus any salary supplements (e.g. bonus).

3. The senior executive must be paid the **legal severance pay equivalent to 7 days cash salary per year worked, up to a cap of 6 monthly payments**, or the amount agreed in the contract, which may never be lower than the legal severance pay.

What are the legal and financial consequences if the senior executive challenges the termination?

This dual termination system, either by withdrawal or disciplinary dismissal, means that if a senior management relationship is judicially categorised as an ordinary relationship and the dismissal is ruled unfair, this results in the compensation due to lack of prior notice not being possible and that for withdrawal from the executive contract, already paid at the time the contract was terminated, cannot be offset with the compensation for unfair dismissal ruled in the judgement, resulting in the **company needing to file a claim against the worker in separate proceedings for the extra amount that could have been paid to him/her due to payment of the severance pay for unfair dismissal stipulated in the judgement**.

What judgement did the Supreme Court rule?

In this respect, the Labour Chamber of the Supreme Court finally ruled on this in the recent judgement of 10-5-2022 on an appeal (cassation) for unifying doctrine in which it determined that the **compensation for failure to provide prior notice in a case of withdrawal from a special senior management relationship can be compensated with the severance pay for unfair dismissal** stipulated in the judgement that ruled the labour relationship between the parties was an ordinary one.

In the case the judgement refers to, the worker's dismissal was ruled unfair, due to having been carried out under the presumption of withdrawal from a senior management contract when in fact the labour relationship was actually an ordinary one and the question to be resolved consisted of determining whether or not the compensation paid due to failure to provide prior notice and for termination of the contract in the case of withdrawal from the special senior management relationship can be compensated with the severance pay for unfair dismissal stipulated in the judgement that, after examining the challenge against such withdrawal, ruled that the labour relationship between the parties was an ordinary one and in which it did not acknowledge the right for it to be compensated with the amount paid due to lack of prior notice.

The Supreme Court ruled that the company was indeed entitled to be able to make this relevant compensation for the following two reasons:

- The debt owed due to the error made regarding the categorisation of the labour relationship had already been paid and the judgement imposed the obligation to pay, for the same termination concept, the amount corresponding to the ruling of unfair dismissal.

- Receiving both kinds of compensation would imply the worker's unfair enrichment, because he would receive, on the one hand, the amounts payable for termination of a non-existent labour relationship and, on the other hand, those payable for termination of an ordinary labour relationship, as categorised in the judgement.

The Supreme Court stated that we are faced with a method for terminating obligations (in accordance with the provisions contained in Articles 1156, 1195 et seq. and 1202 of the Spanish Civil Code, the first describing the reasons for termination of the obligations and the last one the effects of the compensation) and that, in view of the provisions in Article 26.5 of the Spanish Labour Relations Act, the rule for compensating the salaries referred to in such provision is valid since such provision includes the principles for compensation contained in Article 1195 of the Spanish Civil Code, as in the case referred to in the judgement in question hereby and in which it is clearly sustained that the worker was the debtor and his debt was due, liquid and payable. This is why the High Court deemed that the compensation must be automatically payable and **therefore the company can validly make the relevant deductions in the amounts that it must finally pay the worker**, due to being debts in which the legally stipulated requirements have been met, even more so when the second debt arises by virtue of a judicial order that categorises the relationship as an ordinary one and the payment made by the company becomes erroneous that was made when terminating the relationship that was considered to be a senior management type. The aforementioned termination effect hence avoids, as stated by the court, unnecessary transactions, without it being necessary to claim what the worker would need to fulfil. ■

Please do not hesitate to contact me should you require any advice on how to approach the defence of your interests within the scope of a possible claim for payment of overtime.

Irene Ferriols
iferriols@rsm.es

>Advice of the month

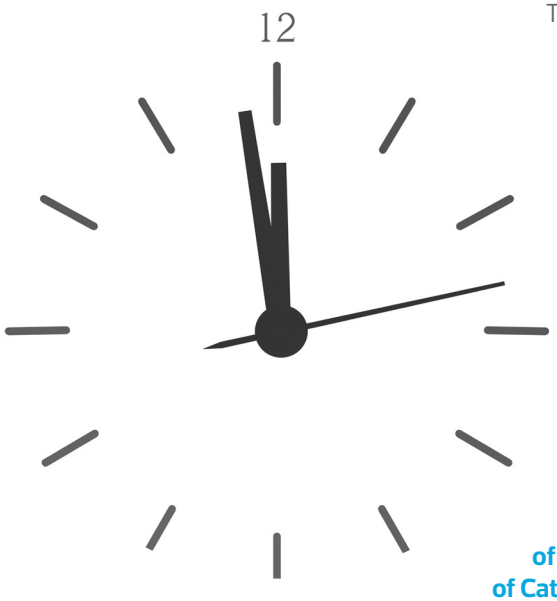
How do we defend ourselves against an overtime lawsuit?

Irene Ferriols

An employee has filed a legal claim with no grounds against my company, petitioning payment of the salary differences for working overtime. What options do I have available to be able to defend my interests in the courts? Could the worker's claim simply be successful, if I have not implemented a daily record system of the staff's working hours?

There are many companies that in their day-to-day operations are faced with legal claims filed by some of their workers claiming payment of salary differences due to their working overtime.

In this respect, it is useful to recall that, prior to 13 May 2019, in these cases the worker was the one that had to undertake the burden of the proof at the hearing that the overtime had been worked day by day, hour by hour, as well as the specific circumstances in which such overtime had actually taken place and this was unless the worker could prove he/she had recurrently and habitually worked the overtime.



As of such time, due to the Legislative Royal Decree 8 of 8 March 2019 coming into force on urgent measures for social protection and combating job instability in working hours, the game rules were changed because all companies were obliged to guarantee a documented record system for the working hours of their staff, including the specific time for beginning and ending their working day because, pursuant to the principle of the facility to provide evidence governing the labour process, it was easier to assign the burden of the proof to the company through such system to prove that the claimed overtime had not been worked by their employees, and accrued as of such date.

So what happens? As our keen readers may have already seen, due to this new paradigm, there have been many workers who, knowing that their companies have failed to implement a system for recording working hours (or, having implemented one, it does not meet the requirements stipulated for such purpose in the labour regulations in force) have been encouraged to file claims against their employers, petitioning the salary differences arising by possibly and hypothetically working overtime that, even though they have not worked it, has led the courts to tip the scales in their favour, without their needing to submit any evidence whatsoever to prove their claims.

Therefore, be careful! Regarding this issue, the Labour Division of the High Court of Justice of Catalonia, in its recent judgement number 2353/2022 of 14/04/2022, ruled that, even in such cases, the worker is not exonerated from providing the minimum prima facie evidence proving that he/she had worked such overtime in order for his/her claim to be successful.

Judgement number 2353/2022 of the High Court of Justice of Catalonia (Labour Division), of 14/04/2022 (Appeal for Reversal Number 6963/2021).

In the case analysed, a worker filed a claim by virtue of which he petitioned, among other items, payment of a total of 743 hours overtime, allegedly worked between January 2019 and January 2021, without their nature as such being specified in such claim nor was any evidence or prima facie proof whatsoever submitted that could allow it to be considered that the services were rendered in the hours alleged in his claim. Based on the previous explanations, the appealed judgement dismissed the claim filed by the worker related to this issue due to considering working such overtime had not been proven.

Please do not hesitate to contact me should you require any advice on how to approach the defence of your interests within the scope of a possible claim for payment of overtime.

Irene Ferriols
iferriols@rsm.es

The plaintiff lodged an appeal for reversal against such judgement, petitioning partial revocation of the ruling, in the sense of stating it had been proven that the claimed overtime had been worked and hence it must be compensated, contrary to the criteria adopted by the senior judge of the lower court.

The Labour Division of the High Court of Justice of Catalonia upheld the ruling of the lower court and hence dismissed the appeal lodged by the worker, based on the following grounds:

- By applying the rules for assigning the burden of the proof stipulated in Article 217.7 of the Spanish Civil Procedures Act, failure to implement a system for recording working hours in the company implies a presumption in favour of the worker regarding the claimed overtime being worked.

- However, the foregoing does not imply that working such overtime must be accepted as proven if the worker fails to submit any kind of evidence (not even prima facie evidence) proving he had worked such overtime since only in such cases can the burden of the proof be reversed in favour of the worker so that the company is the one that must prove that such overtime was not partially or fully worked or that such overtime had already been compensated.

In conclusion, does this mean that, as a company, I can avoid implementing a system for recording working hours without running any risks?

Absolutely not! According to the provisions in Article 34.9 of the Spanish Labour Relations Act, the company must always guarantee there is a daily record of its employees' working hours and must keep the relevant records for the legally stipulated term (4 years). In fact, the Spanish Labour Infringements and Penalties Act states that infringement of the legal regulations governing the system for recording working hours implies a serious labour infringement for which fines of up to €7,500 could be imposed.

However, the fact that the company has not implemented the system for recording working hours does not necessarily lead to the worker's claim petitioning the overtime being admitted, if such worker has not invoked or submitted any prima facie evidence that such overtime had effectively been worked.

In any case, it is always advisable to meticulously comply with the legally stipulated obligations related to recording working hours, as well as the technical criteria published by the Work Inspection Unit related to this matter, in order to avoid any possible claims being filed by workers petitioning overtime being successful, in particular in cases when they lack any grounds and the facts claimed are not in accordance with the real situation.

Please do not hesitate to contact us should you have any doubts about complying with the obligations related to recording working hours or if you require advice within the scope of a possible claim filed for salary differences related to overtime and you will probably be surprised to know that the solutions adopted by the Spanish courts are not always applicable to all the cases in the same way 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 practical effects of this judgement.

Lara Conde
lconde@rsm.es

>Judgement of the month

The worker's right to receive a supplement does not expire 9 years later, only the claim for the amounts payable but not received or demanded expires: Judgement of the Supreme Court of 13-06-2022.

Lara Conde Sánchez

Among the aspects regulated in Article 41 of the Spanish Labour Relations Act ("ET") on significant changes in working conditions are the remuneration system and the amount of the salary.

For such purpose, eliminating or reducing a salary supplement, even more so when it consists of a reduction to half the amount planned in an undefined manner, as occurs in this case, is certainly a change that must be carried out by virtue of Article 41 of the ET. Moreover, the term for challenging this change would therefore be 20 days, counted from when the company notified the worker of its decision.

However, in this case, such term is not applicable because the Supreme Court sustained that it was not a significant change in working conditions but a breach of contract by the company related to salary aspects.

In order to understand this matter better, we analyse the case in detail below:

What happened in this specific case?

A teacher of a cooperative had received a bonus in her salary for years but, when a new company that was awarded the service took it over in 2009, the bonus she had been receiving was reduced to half the amount.

It was not until 9 years later that such employee claimed the salary differences and various questions were raised in this respect.

Did the company make a significant change in her working conditions? Therefore, has the statute of limitations expired in order to claim the right to this supplement? Has the reduction to half the amount of this salary supplement been consolidated due to the lack of action by the worker for 9 years?

The High Court of Justice deemed that the reduction of the remunerative supplement to half the amount implied a significant change in the employee's working conditions (Article 41.1 c) of the ET) and, due to the long period of time that had elapsed since such reduction took place, around 9 years, with no record of any claim in this respect having been filed by the worker, implied tacit acceptance of such change and that it has been permanently included in the contract.

Therefore, the worker had no right to be paid the aforementioned supplement or to claim the salary differences due to not having challenged the modifying decision within the legally stipulated term.

In this respect, after the High Court of Justice revoked the judgement ruled by the lower court in her favour, the worker appealed to the Supreme Court (cassation) claiming infringement of Article 41.1 d) of the ET, related to Article 59 of the ET.

What was the Supreme Court's judgement?

The Supreme Court deemed that the company had not made a significant change to the employee's working conditions, according to Article 41 of the ET, for the following reasons:

- The company did not apply the procedure mentioned in Article 41 of the ET nor did it allege any of the reasons to allow that.
- The company did not notify the worker of its decision, which is compulsory according to Article 41 of the ET, nor did it inform her of the legal consequences: The possibility to terminate the contract with severance pay or to challenge the decision.
- At the time the supplement was reduced, the change in salary was not regulated in the aforementioned legal provision.

Therefore, the conclusion reached by the Supreme Court was that this reduction in the supplement was simply a breach of contract by the company related to salary aspects that violated the worker's right to

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

Lara Conde
lconde@rsm.es

receive the agreed remuneration according to Article 4.2.f) of the ET.

In this respect, salary obligations have a successive course and, as such, the action remains possible while this continues in force; hence the right to payment of the supplement does not expire. However, the right to claim the amounts payable and not received or demanded does indeed expire, which is governed by the general statute of limitation of one year.

Therefore, the claim for salary differences for the last year worked by the employee was admitted.

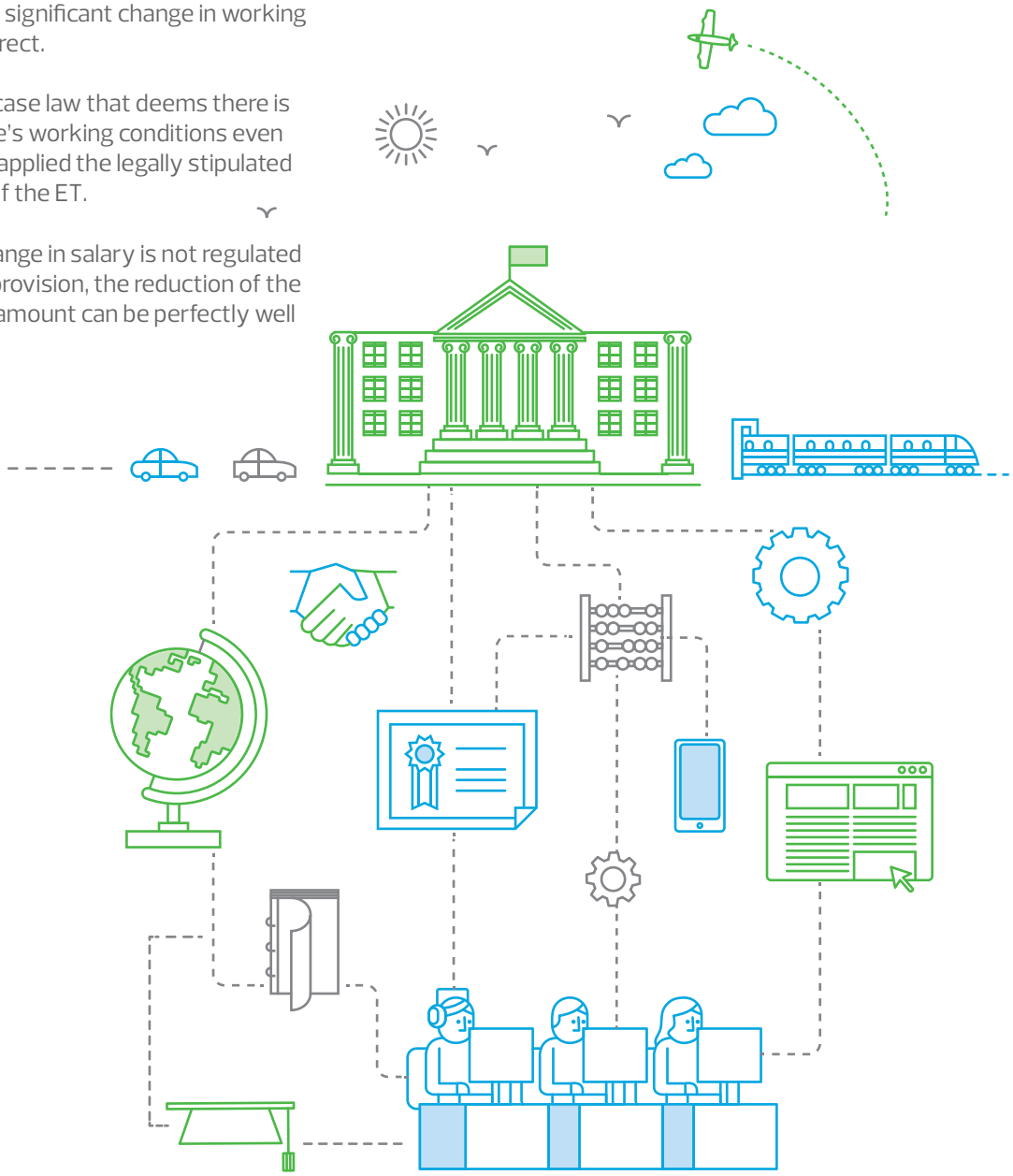
Conclusions

The grounds offered by the Supreme Court for its ruling that there was no significant change in working conditions were not correct.

There is a great deal of case law that deems there is a change in an employee's working conditions even if the company has not applied the legally stipulated procedure in Article 41 of the ET.

Similarly, even if the change in salary is not regulated in the aforementioned provision, the reduction of the supplement to half the amount can be perfectly well understood as such because a significant change was made to her salary and also bearing in mind that the list in Article 41 of the ET is not numerus clausus, in my opinion, the justification of the Supreme Court to deny that a change has been made according to Article 41 of the ET is inadmissible.

Please do not hesitate to contact me if you have made any change to your workers' salaries and have doubts about the application of this judgement or the practical impact it could have on your company. 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 this new law.

Carlos Díaz
cdiaz@rsm.es

› Legislative developments

The full new Act 15 of 12 July 2022 on equal opportunities and non-discrimination also contains important new aspects that affect the labour field.

Carlos Díaz

On 14 July 2022, the new law came into force, the main object of which is to prevent, deal with and eliminate any possible channel of discrimination in Spain. Moreover, as could not be otherwise, several of its provisions are directly applicable to the labour field, as we specify and briefly explain below:

Act 15/2022 includes new reasons for discrimination and creates new types of discrimination.

One of the legislator's main objectives was to expand the range of reasons for which no discrimination can be made against anyone, whatever field such person may be in.

Therefore, in addition to the reasons already applicable (gender, racial or ethnic origin, disability, age, religion or beliefs and sexual orientation) the new regulation includes other elements of non-discrimination. Specifically, they are those caused by illness or a health condition, serological status and/or genetic predisposition to suffer illnesses and disorders, language, socioeconomic situations or any other personal or social situation or circumstance.

Moreover, there are also new definitions of the types or kinds of discrimination that, as defined by the regulation, could acquire certain importance in the world of labour relations. We refer to the following:

- Discrimination by association (when a person or group to which a person belongs, due to his/her relationship with another person who is affected by any of the reasons included in section one of Article 2 of the same law) and discrimination by error (incorrectly considering the characteristics of the discriminated person or persons).

- Multiple discrimination (when there is discrimination against a person simultaneously or consecutively for two or more reasons included in Act 15/2022) and intersectional discrimination (when there are different reasons occurring or interaction between those included in this law, creating a specific form of discrimination)

This also occurs with the definition provided on discriminatory harassment and the field of reprisals, since both of them can also easily occur in a relationship between a worker and a company.

Chapter II of the law: The right to equal opportunities and non-discrimination in certain fields of political, economic, cultural and social life

Moreover, the legislator has also decided to specify situations in the social and employment field in which under no circumstances may workers be restricted, separated or excluded for any of the discriminatory reasons included in this law.

In this respect, no discrimination may be made against a worker in recruitment processes to public or private employment, imposing an obligation on the employer that it is unable to ask the job candidate about his/her health condition.

The same happens in other fields, such as job training, professional promotion, remuneration, working hours and other working conditions as well as the suspension of the employment contract, dismissal and other reasons for terminating the employment contract, job criteria and recruitment systems also being protected or working conditions that cause situations of indirect discrimination.

Other issues that show the importance of this section being converted into a duty that the law imposes to ensure respect of the rights to equal opportunities and no indirect discrimination by public employment services, their collaborating placement institutions and agencies and authorised institutions. This obligation is also imposed on the Work Inspection Unit that, in this case, must ensure this in its own job recruitment process and working conditions for its employees. It also includes development of specific plans for equal opportunities and non-discrimination in job recruitment and working conditions in its annual integrated action plan.

Moreover, collective bargaining also plays an important role in order to eradicate any trace of

Si quieres más información sobre esta novedad legislativa, contacta conmigo.

Carlos Díaz
cdiaz@rsm.es

discrimination, since holding such process promotes the measures for positive action to prevent, eliminate and correct all forms of discrimination in the field of employment and working conditions for the reasons included in Act 15/2022.

Procedural law also plays a leading role

Act 15/2022 is also aimed at clarifying issues related to judicial proceedings. Specifically, it does so by determining the rules governing the burden of the proof, highlighting something that has already been included in other regulations: When the plaintiff or the person concerned alleges discrimination and submits prima facie evidence with due grounds about its existence, the defendant or the one against whom the discriminating situation is claimed must provide sufficiently proven objective and reasonable justification of the measures adopted and their proportionality. In other words, the situation arises that in procedural law we call the reversal of the burden of the proof.

The Labour Infringement and Penalty Act (LISOS) continues to be applicable regarding infringements and penalties within a labour scope.

Lastly, it is also interesting that, in the case of infringements and penalties related to equal opportunities and non-discrimination, Act 15/2022 stipulates that, within a labour scope, the applicable system will be regulated by the Labour Infringement and Penalty Act, according to the redrafted text approved by Legislative Royal Decree 5 of 4 August 2000. Regarding disabled persons, the provisions in the Redrafted Text of the General Act on Disabled Persons and their Social Inclusion, approved by Legislative Royal Decree 1 of 29 November 2013, will be applicable.

Do not hesitate to contact any of our attorneys specialised in labour law at RSM Spain, should you have any doubts about the contents of this new Act 15/2022 and we will be delighted to help you.

RSM Spain
BARCELONA | MADRID | GRAN CANARIAS | PALMA DE MALLORCA | TARRAGONA | VALENCIA

rsm.es

RSM Spain Holding Company, SL and the related parties companies are members of the RSM network and trades as RSM. RSM is the trading name used by the members of the RSM network. Each member of the RSM network is an independent accounting and consulting firm each of which practices in its own right. The RSM network is not itself a separate legal entity of any description in any jurisdiction. The RSM network is administered by RSM International Limited, a company registered in England and Wales (company number 4040598) whose registered office is at 50 Cannon Street, London EC4N 6JJ. The brand and trademark RSM and other intellectual property rights used by members of the network are owned by RSM International Association, an association governed

© RSM International Association, 2022

THE POWER OF BEING UNDERSTOOD
AUDIT | TAX | CONSULTING