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NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

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Although Summer and our time to rest approach, developments in labour regulations never cease to amaze us. That's why #NewsLabour exists, to keep you updated even when Summer starts.

At RSM we want to be your trusted advisor, accompany you and help you clearly understand what is happening every month regarding labour matters and in our courts. Having the knowledge is important, but for us the most important thing is knowing how to transmit it: *"written by lawyers in a way that you understand us"*.

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Please do not hesitate to contact me should you require any further information on the matter discussed in this article.

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›Case of the Month

Calculating moral damages and the latest interpretation of the Supreme Court

Oscar Cano

Moral damages: The judgements of the Supreme Court of 23-02-22 and 20-04-22

Forensic practice has enabled us to observe how petitions for moral damages are included in the claims for infringement of fundamental rights on quite a few occasions. For anyone who is not familiar with them, moral damages are basically associated with physical or mental suffering, pain or impairment and are different from equity damages (such as loss of profits and consequential damages).

Section three in Article 179 of the Spanish Act regulating the Labour Jurisdiction requires that claims petitioning protection of public fundamental rights and freedoms must clearly express the right or freedom that has been violated and the amount of the compensation claimed, suitably specifying the damages caused and determining the relevant circumstances in order to calculate the compensation petitioned, including the seriousness, term, consequences of the damages and the calculation basis for the estimated harm caused to the worker **unless moral damages are petitioned** and it is difficult to estimate them.

Case law includes this in, among others, the judgement of the Supreme Court of 5 February 2015, Appeal 77/2014, which ruled that when petitioning compensation for having been caused moral damages and bearing in mind that the pain, suffering or impairment involved had no direct or sequential conversion in economic terms, there was a greater margin of discretion in their assessment, reducing the importance of determining objective parameters in order to calculate them.

However, although such argument, in a theoretical manner, makes complete sense, in practice it implies a real headache for the courts and legal operators because, due to such lack of precision and, as a lesser evil, it was determined that applying the sanctions stipulated in the Spanish Labour Offences and Sanctions Act (LISOS) was valid guideline criteria to undertake the difficult task of calculating the moral damages claimed (among others, the judgement of the Supreme Court of 2 February 2015, Appeal 279/2013).

Greater flexibility when calculating the amount of the compensation

Along these lines, the screw has recently been tightened even more for us, with two recent judgements ruled by the Supreme Court on 23 February and 20 April 2022.

The first of the judgements (Appeal 4322/2019) analyses a case in which the plaintiff, in addition to the revocation of the dismissal due to violation of fundamental rights committed by the company, petitioned a ruling admitting moral damages, without having made even the least effort to specify the precise moral damages caused or to provide grounds for the economic petition. In this respect, in this judgement, the Supreme Court fully opted for the route of flexibility and pointed out that *"the appealed judgement should have admitted the claim to acknowledge compensation for moral damages in favour of the worker, due to* ***the pleadings related to this specific aspect explained in the claim writ being sufficient for such purpose,*** *greater specification not necessarily being required in the explanation of the objective parameters that are very difficult to provide bearing in mind the very nature of the moral damages claimed"*.

Regarding the calculation of moral damages, the judgement decided that *"the compensation for moral damages opens the path to the possibility that it is the judicial body that must cautiously calculate the amount for the compensation without being able to require that the plaintiff provides a more exact or specific basis for its calculation"*.

In order to estimate the amount, the court deemed it was appropriate to use criteria such as the workers' seniority or average salary: *"As far as its calculation is concerned, it should be taken into account that the labour relationship barely lasted two years (...), the worker's average salary during that time being about €1,300 a month; therefore the amount claimed for moral damages of €15,525 is far too high and disproportionate since the ruling that the dismissal was revoked already implied that the worker must be reinstated and receive the salary he had not been*

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paid (...) The amount of the sanction referred to in Article 40 of the LISOS, which the plaintiff uses as a reference parameter, is based on a minimum amount of €6,251 up to a maximum of €25,000, therefore it would be more reasonable and suitable to set the compensation at the lowest amount of this fine (...)"

Are we heading towards an increase in compensation?

The second of the aforementioned judgements of 20 April 2022, Appeal 2391/2022, on a case that was also for revocation of dismissal with violation of fundamental rights, the Supreme Court applied the flexibility of the requirements to admit moral damages and calculate the amount of compensation in cases of violation of fundamental rights.

However, this is not the new aspect that can be observed by reading this judgement but instead what the judgement specifies explicitly is with regards to overcoming excess use of the sanctions in the LISOS when calculating the compensation for moral damages, the court pointing out the following: *"it is not, per se, sufficient to fulfil the twofold function of compensating damages with relative precision and the use as a dissuasive element to discourage future violations of fundamental rights (...) since the range for calculating the sanctions in the LISOS for the same type of offence (minor, serious, very serious) is excessively broad".*

Here is what turns out to be the most important aspect since, according to the court, the use of the sanctions in the LISOS must be *"accompanied by an assessment of the circumstances arising in each specific case. Aspects such as the worker's seniority in the company, the time the violation of the fundamental right took place, the seriousness or infringement of the right, the consequences caused to the worker's personal or social situation or the subject who holds the infringed right, possible recidivism of the infringing conduct, the multi-offence nature of the injury, the context in which the conduct could have taken place or an attitude tending towards preventing the defence and protection of the violated right, among others, which could be assessed bearing in mind the circumstances of each case, must all be used as elements to be taken into account in order to calculate the compensation."*

What is the future holding for us?

Well, how will all this end up? The judgement itself provides us with another clue about its application in practice due to ruling on the compensation for moral damages petitioned by the plaintiff in the case in suit that, although firstly the amount claimed was €150,000, in a subsidiary manner, €76,087.80 was petitioned, equivalent to two and a half times the worker's average salary.

Therefore, the Chamber decided that the company should be ordered to pay the amount of €60,000, which implied about two annual payments of the worker's salary and was within the average range of the sanctions stipulated in the LISOS, bearing in mind such amount was within the framework of Article 40 of the LISOS, taking into account the seniority of the labour relationship (18 years) and that the worker was in a situation of temporary disability, the origin of which led to the claimed violation of fundamental rights.

This new step taken by the Spanish Supreme Court means the following conclusions can be drawn; the violation of fundamental rights will be irrefutably related to it being found that moral damages have been caused, since these are presumed, which now, in order to calculate the compensation will not only be subject to the sanctions stipulated in the LISOS, but they must also be weighed up with a series of elements, such as the worker's seniority, the seriousness of the violation of rights, etc., their calculation being subject to the "caution" of the judicial body.

As a result of these new judicial rulings, the requirements for moral damages included in claims that are filed for violation of fundamental rights will be more stringent, being fully subject to judicial criteria and the "caution" of the judge in order to calculate the amount of the compensation, resulting in an interesting situation over the next few months that we will pay a great deal of attention to. ■

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 can find judgements and legal news that, due to their special nature or relevance, particularly draw our attention. We explain an overview of some of them below::

Roberto Villon

Judgement of the National Court number 50/2022 of 31 March 2022. Appeal 331/2021: Admissibility of a bonus payable for night shift work and working on public holidays, paid leave or time off..

In this class action, the decision of the company not to pay the bonuses agreed in the collective bargaining agreement for night shift and work was questioned. The company claimed that such work was already remunerated because it was related to rendering services; therefore the workers could not be paid on public holidays or during paid leave or time off. However, the National Court considered that the company was obliged to pay them due to the payment obligation not being expressly excluded in these specific cases in the collective bargaining agreement.

Judgement of the Supreme Court number 1479/2022 of 19 April 2022. Appeal 379/2021: Compensation in the pay slip of the costs incurred for a training course was acknowledged.

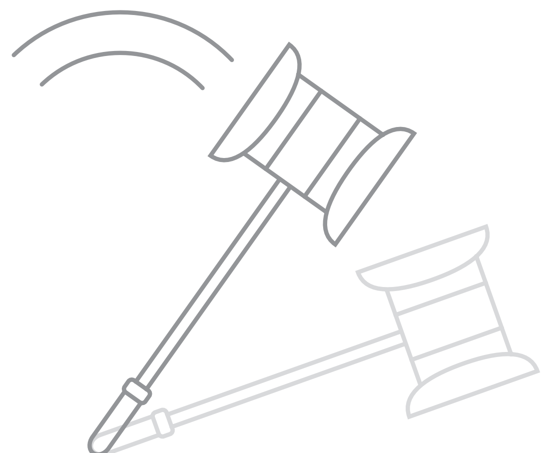
The case of a worker who performed his duties as an airline operator and pilot was submitted to the Supreme Court because, when performing his duties as a pilot, he needed specific qualifications and, for such purpose, the company had paid the cost of the course in advance. By virtue of an agreement reached between the parties, the worker accepted that the cost would be deducted from his monthly salary. Afterwards he was dismissed and, due to that, the company claimed that the worker must reimburse these amounts, the court considering that the agreement was perfectly valid and hence the worker should have effectively reimbursed the amount even after the termination of his employment contract.

Judgement of the Supreme Court number 100/2022 of 12 January 2022. Appeal 57/2019: It is valid to inspect a private office without applying Article 18 of the Spanish Labour Relations Act (ET).

In this case, it was examined whether or not it was legal to inspect the office of a manager of a bank branch, carried out without prior notice and without the worker being present. The court contested the private nature of the manager's office, mentioning that, no matter how separated it was from the other offices, it did not automatically become a private place. Therefore, it was concluded that the inspection of the office was justified due to the excessive number of documents found on the worker's desk and recalled that the obligations stemming from inspections of lockers, included in Article 18 of the Spanish Labour Relations Act, were not applicable to inspecting an office where a person works, ruling that the inspection was admissible and considering that everything found during such inspection could result in disciplinary measures being adopted.

Judgement of the High Court of Justice of Galicia of 8 April 2022. Appeal 662/2022: Dismissal of a call operator due to poor performance.

The court analysed the case of a call operator who was dismissed, claiming repeated poor performance and justifying such poor performance with objective indicators and KPIs, the existence of which was known by all the workers. The fact prior warnings were provided and tools were offered to improve her performance (in this case, by means of coaching) led to the court considering that the decision adopted by the company was absolutely proportional, based on the diligence with which company dealt with the worker's situation, her dismissal thus being ruled duly justified. ■



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>Today's courts

The agreement for net salaries: Is this recommendable practice?

María Rubio & Raquel Oltra

Why should salaries not be agreed net?

There are still companies today that agree on salaries with the workers, or their increase, based on the "net" amount included in their pay slips, without actually observing the worker's annual gross salary, which not only infringes Article 26.4 of the Spanish Labour Relations Act, but is also not very beneficial for companies due to the additional cost that could be incurred by reaching these kinds of agreements.

As is well known, companies have a direct cost of around 31.55% of the gross salary paid, an amount they must pay in addition to the percentages corresponding to the worker for social security contributions and personal income tax withholding.

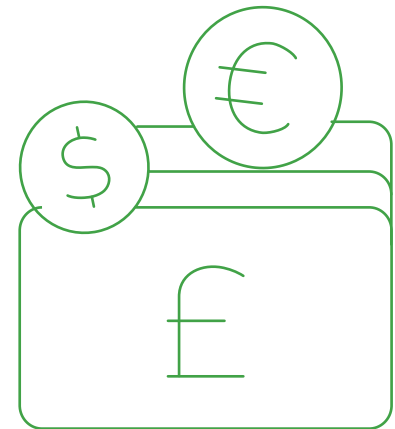
These latter percentages are the ones that could cause a conflict for the company because, if the company wants to maintain the net salary, it would directly need to pay the costs incurred at the time any change occurs in the worker's situation. They are variable percentages and do not depend on circumstances that can be decided by the company and, due to their very nature, often change (e.g. change in number of children, etc).

We will provide some practical examples

In a situation of temporary disability leave in which the Collective Bargaining Agreement stipulates that no salary is payable for the first three days, if the salary is agreed net, this would be more beneficial to a worker who is absent due to illness compared with a worker who is not absent for such reason.

Another case could be the government increasing the part of the contributions payable by the worker, a cost that the company would need to pay in order to cover the agreed net salary, because the higher the contribution percentage is, the less net salary would be payable to the worker.

Another case could be a worker who has 3 children, for whom the percentage of personal income tax withholding would normally be much lower than for a worker who has no children, whose taxation would usually be higher. In this case, involving two workers with the same net salary agreement, the worker with 3 children would be paid a lower amount of gross salary than the worker who has no children.



Therefore, the company would need to pay the costs for the contributions payable by the worker, an issue that is incompatible with the contents of Article 26. 4 of Legislative Royal Decree 2 of 23 October 2015, which approved the Redrafted Text of the Spanish Labour Relations Act: All the tax and social security charges of the worker shall be paid by the latter and any agreement otherwise shall be deemed null and void.

Therefore, how can a salary raise be agreed with the workers?

In order to avoid discrepancies when the salary agreements are updated, the salary that is recommendable to state in the new contract or annex to the employment contact must be for a specific gross amount and not a net amount.

It is important to inform the workers that the mandatory discounts will be deducted from such gross amounts, both for social security and personal income tax withholding.

In this way, two workers in different situations for the purpose of contributions and their personal family situations would be guaranteed the same gross salary, avoiding any extra costs being incurred by the company and a possible dispute if the gross amount is compared for the purpose of the worker's benefits. ■

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

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>Courts of today

The limits applicable to attendance tracking systems are determined again: The Judgement of the Spanish Supreme Court of 22-2-22

Guillermo Guevara Fernández

Tracking attendance is a topic that has been widely discussed in the press since Royal Decree 8 of 8 March 2019, amending Article 34 of the Spanish Labour Relations Act (ET) by adding a new section nine by virtue of which the obligation was stipulated that all companies must install such systems.

Although case law on this matter is becoming more and more consolidated, the real situation is that, due to the insufficiency of the regulation in determining the minimum contents of attendance tracking, we are faced with a large number of different systems and thus many judgements that analyse such attendance tracking systems.

This is the case of the judgement of the National Court of 19-4-22, Appeal 39/2022, which analysed the characteristics of the attendance tracking system used by a banking institution.

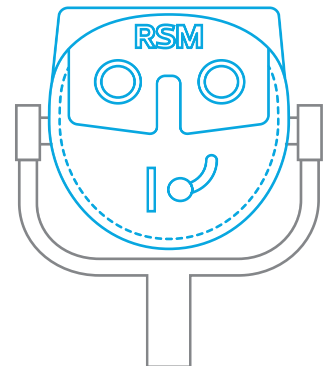
¿Qué es lo que sucede en ese caso concreto?

Among all the characteristics of the attendance tracking system used by the institution in question, the plaintiff trade unions claimed that the workers' right must be acknowledged for the following:

1. The attendance tracking system used contains traceable information and, hence, the workers' representatives must be informed of each of the changes made to the records included in them and when such changes took place.
2. A record must be provided of the entry of non-working breaks and the time taken.
3. The automatic nature of the system used must be eliminated because, by means of this, it was considered that, by default, the time that exceeded the time after the worker left his/her work was calculated as personal time in the system.
4. The authorisation a posteriori of the worker's superior must be eliminated so that the self-recorded time was the one that was actually included in the tracking system.
5. The worker's identity (full name), province and town/city corresponding to each entry must be provided.

What was the ruling of the National Court?

The National Court dealt with these issues and provided clarification about the limitations both of the workers' representatives' rights to information and the contents of the attendance tracking system.



Regarding the first petition submitted by the trade unions, related to the records containing traceable information and that the workers' representatives must be notified of all the changes made, the National Court was quite clear when it deemed that the information the workers' representatives were entitled to receive was that referred to in both the Spanish Labour Relations Act and the Collective Bargaining Agreement; therefore such petition was dismissed, in any case they were entitled to the possibility to access the data stored by the operator of the software used.

Moreover, regarding the record of breaks and the time taken for them, using reasonable logic, the National Court deemed that a system in which the beginning and end of the working day is recorded and that also records the so-called personal time fulfils the purpose of being able to inform the workers' representatives and the labour authorities of the time of the breaks taken by each of the workers during their working hours and hence dismissed the petition submitted by the trade unions.

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The third and fourth petitions are the ones that could be of the greatest interest from a business standpoint, since they deal with how overtime must be regulated through the attendance tracking system.

It should be mentioned that the system analysed recorded all the hours that exceeded the ordinary working day and automatically catalogued them as personal time, requiring approval afterwards by the worker's hierarchical superior in order to be considered overtime.

In this respect, the National Court was transparent when dealing with this issue. Recalling its judgement of 10-12-19 and Article 35 of the Spanish Labour Relations Act, it expressed that, although it is valid that working overtime is prohibited without the company's express authorisation, it deemed that a system requiring their being recorded to be authorised by the company lacks any credibility whatsoever and hence dismissed the petitions submitted by the plaintiff.

Lastly, regarding the petition related to providing the identity, province and town/city, although it referred to the Worten judgement (Judgement of the CJEU 30-05-13), which considered that the workers' data included in the attendance tracking system implied personal data, the National Court admitted the petition due to considering that, by developing Article 34.9 of the Spanish Labour Relations Act, the parties agreed that the company would provide the attendance tracking of the company's workers to the workers' representatives every month and the legal provision that develops the agreed regulation has a clear purpose that is simply to assist in the supervisory and control duties included in Article 64.7 a), and it would be detrimental to such supervisory and control duties if the workers' representatives were not informed of the worker's identity that each specific working day record referred to.

What can we expect in the future?

The judgement analysed above is of great interest, not only due to the fact it clarifies various issues related to attendance tracking, but also because it conducts an interesting review about the latest case law on this matter.

However, as we have already mentioned, there is an endless number of possible systems available for attendance tracking. Although each specific case must be considered to a certain extent, these kinds of judgements provide guidelines to companies about the limitations when deciding on the system they will use or to check whether or not the system they currently use is in accordance with the rulings of Spanish courts.

In fact, further doctrine seems to be provided related to attendance tracking as each judgement is ruled, which certainly needs to continue to be developed, and makes it important to be attentive to future judgements, which we will keep you informed of as soon as they are ruled!. ■

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>Advice of the month:

New doctrine on the Spanish Working from Home Act: LA SAN OF 22-3-22

Miguel Capel de Villegas

Rendering services according to the working from home system increased enormously during the pandemic, proving its feasibility in certain sectors with optimum results as far as productivity was concerned. This measure, which enabled continuity of the businesses of companies and many jobs during the pandemic, underwent regulatory development by virtue of Legislative Royal Decree 28 of 22 September 2020 on working from home, which was repealed by the Spanish Working from Home Act 10 of 9 July 2021.

Just like all new regulations, its interpretation and implementation require that a certain period of time must elapse and, of course, court judgements must be ruled that deal with the interpretative criteria thereof.

What happened in this specific case?

In this respect, today we refer to judgement number 44/2022 of the Labour Division of the National Court of 22/03/2022 (Appeal number 33/2022). In such judgement, different trade union agents challenged the working from home agreement signed by Teleperformance España S.A. with 1,029 employees working from home, questioning aspects such as the lack of specification of the compensation payable for expenses, writing off the IT equipment provided, using the employee's own resources, assessing occupational hazards, among others. However, for the purpose of this article, there are two aspects that are the most interesting for us and we consider are significant, the first, the digital disconnection commitment, and the second, reversal of the working from home agreement.

Before beginning the analysis, we should take into account that: (i) Additional Provision One of the Spanish Working from Home Act subjects the regulation of aspects to collective bargaining such as the conditions for applicability and development according to this system and the maximum term or reversibility; (ii) the 2nd Collective Bargaining Agreement for Contact Centers, applicable to the case under examination here, did not regulate working from home; and (iii) the company did not reach an agreement with the workers representatives about the contents of the working from home agreement.

Regarding the first issue, i.e. **digital disconnection**, the working from home agreement makes its fulfilment subject to a generic exception, which is the lack of *"justified urgent situations in cases that could be to the detriment of the company or business, when such temporary urgency requires an immediate response by the worker or his/her attention." In this case, based on the provisions in Article 88 of the Spanish Data Protection Act (LOPD) and Article 18 of the Spanish Working from Home Act, the judgement ruled such condition was null and void because "no right shows absolute profiles from the time that it is exercised with other rights that could sometimes be in conflict with it; however the limits to the right to digital disconnection when working from home cannot be unilaterally determined by the employer but, as specified in Article 88 of the LOPD, they are subject to the provisions determined by collective bargaining or, otherwise, to that agreed between the company and the workers' representatives".*

Regarding the second issue that we would like to highlight here, i.e. the **reversal of the working from home agreement**, in the case under examination, the working from home document that the court considered the workers "entered into", contained the conditions for reversal by the company and stipulated in which cases the worker could exercise such action. The court sustained that, although there was nothing to prevent the company from being able to stipulate or even limit the possibility to exercise the reversal right, it cannot impose an authorisation on the worker for situations when the working from home agreement can be reversed because *"when drawing up these clauses the employer based them on a serious conceptual error. Working from home is not a decision that only depends on the employer and it can, as stated, "authorise" the worker, but it is an agreement of intentions that is reversible by both parties. Therefore, both of them can, if they decide to*

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do so, reverse the working from home agreement." Therefore, this clause was also ruled null and void.

Therefore ...

The main conclusion we can draw from the explanations provided above is that, if there is no provision in the collective bargaining agreement, the employer cannot impose a document without holding negotiations (an "adhesion" agreement as referred to by the court) either with the workers' representatives or with the workers involved, because otherwise its clauses could be subject to being ruled null and void, a revocation that could lead to claims being filed for damages and even the termination of the employment contract by virtue of Article 50.1 of the Spanish Labour Relations Act due to deeming that the employer had seriously breached its obligations.

Lastly, the importance of providing a mutually accepted digital disconnection agreement should be recalled, which is in accordance with the regulations in force and adapted to the demand for existing and future technological resources.

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