NEWSLABOUR

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RSM Spain
Labour Department
Newsletter

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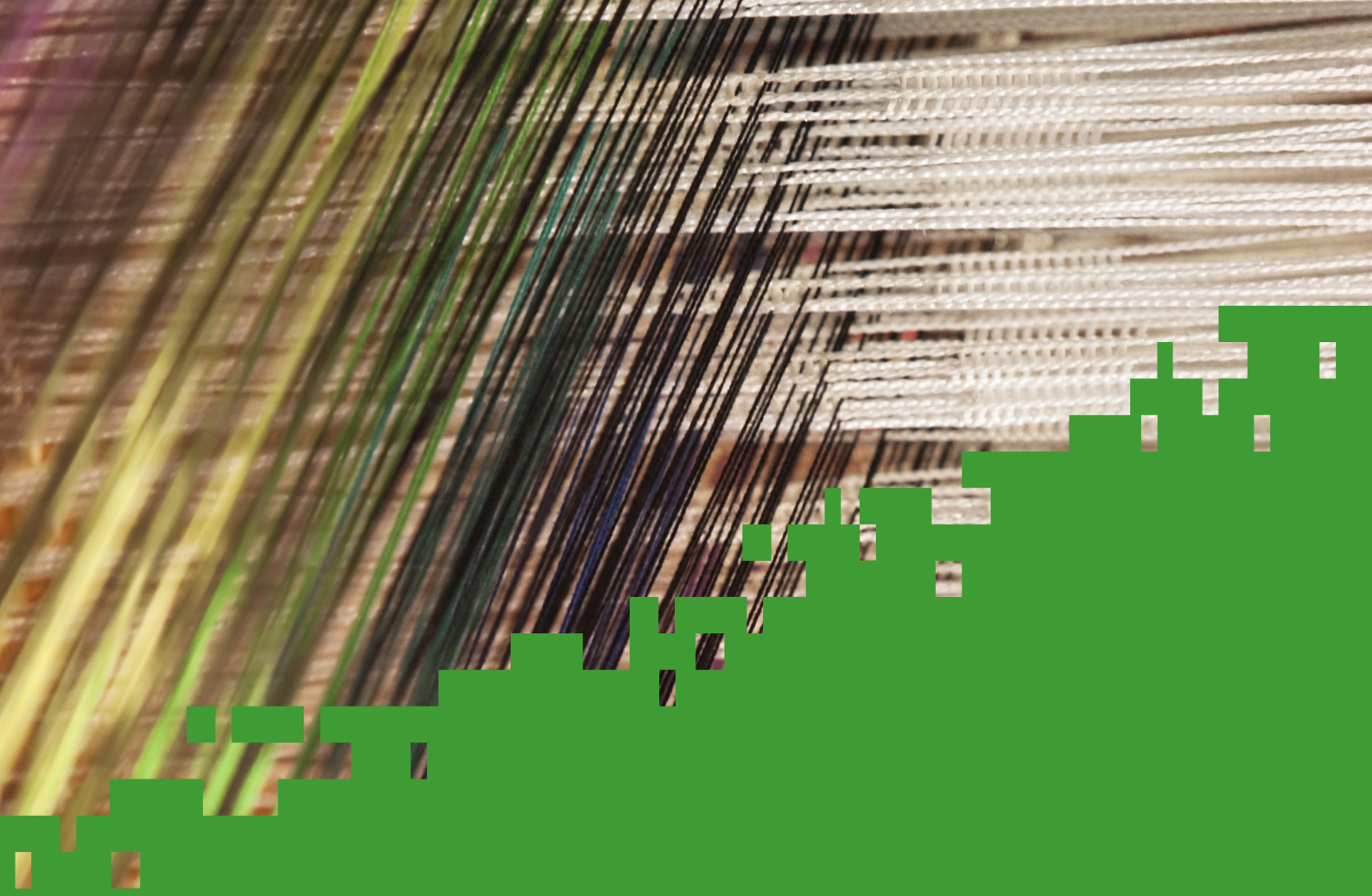

CONTENTS



Editorial

Ignacio Hidalgo | Miguel Capel | Borja Ortas

Labour news is constantly appearing and, just like every month, we inform you of this news through #NewsLabour.

In this edition, as always, we will deal with the latest judgements on labour cases, providing an article about a judgement that deals with an issue of great interest: Is it possible for a company to revoke its decision for a worker's disciplinary dismissal?

You should neither miss our #Adviceofthemonth related to the right to digital disconnection, a topic that has led to a great deal of discussion over the last few months.

Constantly informing and updating our readers. ■

And, as always, we remain at your entire disposal!

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

Nela Yustres
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> The courts in a nutshel

What's new on the block?

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

Nela Yustres

The judgement of the High Court of Justice of Asturias of 22 May 2024: Training scholarship prior to entering into an employment contract. Must the training scholarship period be counted in the worker's seniority?

Within the scope of ordinary proceedings claiming an amount, the employer lodged an appeal for reversal against the judgement ruled by the lower court that acknowledged the worker was entitled to the seniority corresponding to the training scholarship that he had had in the company prior to entering into his employment contract.

The High Court of Justice of Asturias concluded that the worker's scholarship did not imply a labour relationship since there was no remuneration or salary for his work, but it was merely training with assignment of economic support for the material needs of such training. In other words, since there was no labour relationship whatsoever, such training could not be counted for the purpose of the worker's seniority.

The judgement of the High Court of Justice of Murcia of 7 May 2024: In the case of non-recoverable negative assessment, is termination of the labour relationship in accordance with the law?

In a recent judgement, the High Court of Justice of Murcia admitted the appeal for reversal lodged by the Health Service of Andalusia and hence overturned the judgement ruled by the lower court that the plaintiff's dismissal was unfair after termination of his employment contract due to having obtained a non-recoverable negative categorisation by the Assessment Committee.

In this respect, the court concluded that the dismissal was fair since the defendant used all the legal resources available to terminate the labour relationship, in other words, it extended the worker's employment contract prior to a report being issued by the relevant Teaching

Commission and the Ministry of Health, Social Services and Equality adopting a decision on the proposal for the claim, after a report had been issued by the Teaching Commission. Therefore, the court ruled that the agreed termination was in accordance with the law.

The judgement of the High Court of Justice of the Community of Valencia of 11 April 2024: Is it "posturing" to post content on social media advertising products during a temporary disability period?

In this case, the worker took sick leave due to her temporary disability because she was suffering from depression, meanwhile she promoted well-being, nutrition and beauty products, she shared images on the beach and encouraged her followers to join her team and try out her products. In addition, the worker even repeated on her social media page that she worked two hours a day and could combine her professional life with her personal life.

The High Court of Justice of the Community of Valencia dismissed the appeal for reversal lodged by the plaintiff by ruling that the worker's conduct proved she was able to work; hence she did not meet the requirement

the worker took sick leave due to her temporary disability because she was suffering from depression, meanwhile she promoted well-being, nutrition and beauty products, she shared images on the beach...

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

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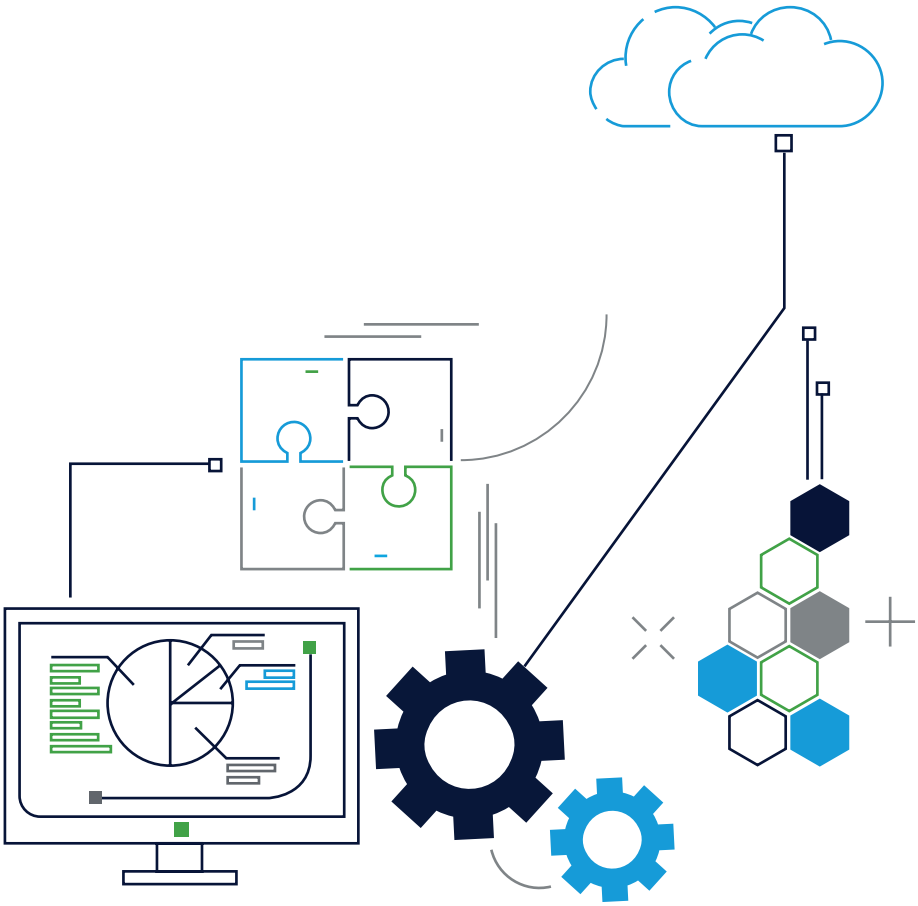
of needing health care. Therefore, the worker had infringed the good contractual faith of her employment contract by continuing her temporary disability when this situation was not real, committing fraud against the social security system, the health system and her employer.

The judgement of the High Court of Justice of Catalonia of 10 April 2024: Can a dismissal notified by email be deemed fair?

In this case the worker lodged an appeal for reversal, claiming that the dismissal letter was not sent correctly because the company that was used to send and sign the documents, certified the mail had been sent, but not the owner of the email address where it was sent nor could it be proven that the worker granted her consent to receive notices through this channel, implying that she did not know the true reasons for her dismissal and she lacked defence.

The judgement of the High Court of Justice of Catalonia admitted the appeal for reversal lodged by the worker, overturning the judgement ruled by the lower court, and concluded that the dismissal sent by email, certified by the company that was used to send and sign the documents, could not be deemed to have been correctly notified, since there was no record that the worker had accepted to receive messages to her email address where the letter had been sent nor that the workers had been duly informed that the notices would be sent through this channel. ■



Please contact me if you would like further information about this or any other issues.

Alejandro Alonso Díaz
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> Practical law

Can the company conduct a search of its workers and their personal belongings?

Alejandro Alonso Díaz

The doubt raised is more common than it may seem and involves certain situations, conduct or attitudes by the workers within a company that make it necessary for the company to need to search one of its workers or his/her belongings at a specific time.

As seems logical to state based on this brief introduction, we are not dealing with a simple issue but it depends on having sufficient justification to conduct this search along with other requirements that we will analyse below since in these cases we are in a position of conflict between parties and rights.

In this respect, Article 18 of the Spanish Labour Relations Act, (hereinafter referred to by its initials in Spanish "ET"), "inviolability of the worker", only enables the company to search workers when this is necessary to protect the business equity and that of other workers in the company.

As we have mentioned above, in spite of the text of the article, the worker's right to inviolability and privacy is in conflict in these cases with the right to the employer's property, the latter prevailing whenever the procedure is conducted and the limits are sufficiently observed.

The right to personal privacy referred to in Article 18.1 of the Spanish Constitution implies an individual stronghold provided with full legal content that must be protected from any kind of external interference; no matter the legitimacy such actions could have. Therefore, there is absolutely no doubt at all that the company can exercise the corporate right to require correct fulfilment of the duties imposed on the worker at all times and, for such purpose, it can implement the relevant monitoring mechanisms that enable it, if need be, to carry out the subsequent justified actions of the sanctioning activity that must be imposed.

In this respect, Article 18 of the Spanish Labour Relations Act, (hereinafter referred to by its initials in Spanish "ET"), "inviolability of the worker", only enables the company to search workers when this is necessary to protect the business equity and that of other workers in the company.

Therefore, the employer is granted power of control by becoming a kind of "private police force", which must however be subject to the following limits and/or requirements stipulated in the legal regulations, (according to Article 18 of the ET):

- When conducting the search, the worker's dignity and privacy must be observed to the maximum, as specifically imposed according to Articles 18 and 20.3 of the ET.
- It must be conducted in areas of the work centre and during working hours.
- A workers' legal representative, (hereinafter referred to by its initials in Spanish "RLPT"), must attend or be present or, if the work centre has no workers' representatives, another of the company's workers must be present, whenever this is possible.

In these cases, the representative being present implies a guarantee of the objectivity and effectiveness of the evidence but is not related to protecting the privacy of the worker being searched, as explained in the ***judgement of the High Court of Justice of Catalonia of 4 December 2017, Appeal number 6007/2017***.

Breach of such requirement hence does not imply violation of this specific fundamental right and determines that the evidence provided is not effective but not that it is null and void.

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- There must be specific justification for the search and any claim that it is a routine or preventive search is not considered sufficient, as sustained in the ***judgement of the High Court of Justice of Catalonia of 23 May 2000, Appeal number 2000/2000***.

- The guarantee of objectivity provided by the representative being present is accepted when, even though there is no representative, the search is conducted in the presence of the police, as stated in the ***judgement of the High Court of Justice of Catalonia of 4 December 2017, Appeal number 6007/2017***.

- The legal requirement that a representative is present during the search is only applicable when it is conducted in a mandatory manner but not if the worker voluntarily accepts that such search is conducted, this was the interpretation in the ***judgement of the High Court of Justice of Catalonia of 14 January 2009, Appeal number 7117/2008***.

Can the worker's bag and belongings be searched if there is suspicion of theft?

In the specific case of this judgement, a worker rendered her services in a shopping centre and, when she left the premises through the staff exit door, the anti-theft alarm went off. A security guard searched her bag and found four articles she had not paid for: The company decided on her disciplinary dismissal.

The recent ***judgement of the Labour Chamber of the Supreme Court of 5 June 2024, appeal (cassation) 5761/2022 for unification of doctrine***, ruled that searching a worker's bag without a legal representative, a staff delegate, works council being present or, if there are none of these, another employee, was illegal.

The requirement that when a search is conducted a worker's representative or another worker must be present is not related to protecting the worker's privacy but is a guarantee for the objectivity and effectiveness of the evidence. The evidence is not valid if this requirement has not been met.

The ineffectiveness of the evidence of the search of the bag conducted by violating the regulations resulted in the disciplinary dismissal being ruled unfair. However, in the case in question, since the worker had shorter working hours in order to care for her underage child, "objective nullity" was applicable, as stated in Article 55.5 of the ET, hence this shows the importance of meticulously meeting the legal requirements when carrying out the actions.

Can the company generically adopt measures, such as searching handbags, bags, backpacks or similar items for monitoring and control purposes?

In this respect, the measure must always be limited and proportional and cannot be general and indiscriminate.

This issue was dealt with in the ***judgement of the Labour Division of the National Court of 30 November 2021***, Appeal number 226/2021, which analysed the legality of the company's practice of imposing an obligation to show the contents of the workers' handbags, bags, backpacks or similar items every day when they left the premises in the presence of the shop's manager.

In the case analysed, adopting this measure, based on the purpose of generically monitoring and controlling the shop without having proven there were any thefts in the shops or unidentified losses, was ruled null and void due to not being a measure that was either proportional, suitable or necessary since the principle of proportionality was not observed and, for further clarification, was not conducted with the RLPT being present.

As a consequence of the previous explanations, it is true, as we have already stated, Article 18 of the ET allows the company to conduct searches to protect the company's property and that of the other workers in the company, but such searches must be conducted by respecting the worker's personal dignity and privacy and observing the fundamental rights and other guarantees provided for it to be correctly conducted and no indiscriminate controlling practices are allowed.

After reading this article, if you have any doubts, queries about the explanations, would like further information about any of them or raise other queries related to the real situation in your company, please do not hesitate to contact us and we will be delighted to help you and provide you with advice on all the questions you could have about this matter. ■

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

Guillermo Guevara
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> Case of the month

Voluntary leave – dismissal due to not providing the prior notice stipulated in the collective bargaining agreement.

Guillermo Guevara

The issue of voluntary leave has always led to a great deal of discussion. In fact, disputes due to voluntary leave are an everyday occurrence in many companies.

However, in this article we will focus on those related to the issue of prior notice to request the worker's reinstatement and the possible consequences of not providing such prior notice.

How is voluntary leave regulated?

The reply to this question is very simple: By virtue of the verbatim text of Article 46 of the Spanish Labour Relations Act, specifically its sections 2 and 5.

The verbatim text of such provisions is as follows:

> *"2. A worker with at least one year's seniority in a company is entitled to be granted the possibility of taking voluntary leave for a term no shorter than four months and no longer than five years. This right may only be exercised again by the same worker once four years have elapsed since the end of the previous voluntary leave period.*
>
> *[...]*
>
> *5. A worker on voluntary leave only maintains a preferential right to reinstatement for the vacancies that occur or will occur in the company of the same or similar category to the job he/she had".*

Based on the verbatim text of these provisions, cases can be seen in which this kind of leave can be requested and the situation of the worker during its valid term; however nothing is mentioned about how the workers' reinstatement must take place or how it functions.

So does prior notice need to be provided? How long must this notice be provided beforehand?

As we have already stated, the law does not include any regulation on the need to provide prior notice or the way this must take place. However, the Spanish courts have agreed to consider that workers must request this reinstatement before the end of their leave as a necessary requirement to effectively exercise their expected right.

Nevertheless, at no time do they stipulate what the term must be to request reinstatement, either from a legal or case law standpoint and this is where in many cases the collective bargaining comes into play.

In this respect, different collective bargaining agreements determine a more complete or detailed regulation than the one in the Spanish Labour Relations Act and many specify a prior notice period for workers to request their reinstatement.

This article is focussed on determining what happens if such prior notice period is not observed.

A worker with at least one year's seniority in a company is entitled to be granted the possibility of taking voluntary leave for a term no shorter than four months and no longer than five years.

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

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What are the consequences of not observing the prior notice period stipulated in the collective bargaining agreement?

Although there are collective bargaining agreements that specify the consequences if the minimum stipulated prior notice period is not observed, i.e. forfeiting the right to preferential reinstatement, but there are others that do not and, after analysing both cases, the Supreme Court has reached the same conclusion: Under no circumstances can determining a prior notice period for requesting reinstatement result in failure to observe it leads to this right being forfeited and hence termination of the employment contract.

Examples of this are the recent judgements of the Supreme Court on 22-05-24 and 25-1-22.

This interpretation by the Spanish Supreme Court basically means it cannot be accepted that a bargaining agreement determines effects that the law has neither included or allows, which would imply diminishing the legally stipulated rights in the collective bargaining agreement to the detriment of the worker.

Nevertheless, in the same way, it should be recalled that the Supreme Court considered a specific term to submit the request for reinstatement could indeed be determined through collective bargaining along with the relevant consequences that can be included for not observing such term.

However, such effects must be proportional and must bear in mind the relevant circumstances related to exercising the right.

It must thus be taken into consideration that not all the provisions in collective bargaining agreements are valid and their use must be previously analysed in order to avoid committing acts that infringe the law, above all in cases in which they are used to justify a more severe penalty within a labour scope, in other words, dismissal.

Each case is unique and must be analysed independently; it is hence crucial to have a legal team that can provide advice to companies and help them in these kinds of processes.

For such purpose, RSM is at your entire disposal to help you face the new company challenges that we are subject to due to the new labour regulations. ■

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

Roberto Villon
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> Judgement of the month

The High Court of Justice of Castile and Leon admitted the revocation of a disciplinary dismissal before such dismissal came into force.

Roberto Villón

Disciplinary dismissal, (according to Articles 54 and 55 of the Spanish Labour Relations Act, hereinafter referred to by its initials in "ET"), is applicable in the case of an employee's serious and culpable breach of contract. For this purpose, the ET refers to some cases in which this kind of penalty can be imposed on a worker, being the collective bargaining agreements that can extend and detail more specifically the specific breaches of contact that can merit such reprisal.

In summary, Article 55 of the ET determines that, as requirements for disciplinary dismissal, the employer must notify the worker in writing about the specific reasons for his/her dismissal. This notice must be clear and detailed, stipulating the specific facts that implied the worker's serious and culpable breach of contract.

Disciplinary dismissal, unlike objective dismissal, does not include immediate severance pay by the employer, due to being the maximum penalty that a worker can undergo if he/she commits a very serious breach of contract.

However... must the prior notice period be observed?
In general terms, disciplinary dismissal does not require any prior notice. Nevertheless, the regulations do not determine an express prohibition in this respect; therefore, in principle, it should not be a reason to detract from the facts claimed in the notice.

But... bearing in mind that disciplinary dismissal is a sanctioning measure imposed on a worker due to very serious breach of contract, **can the company revoke it once it has been imposed?**

This situation was analysed in the judgement of the High Court of Justice of Castile and Leon of 20 May 2024.

What happened in this specific case?

On 31 July 2023, the company sent written notice to the worker of her disciplinary dismissal due to her decreased performance, valid as of 24 August 2023. Because of this, the worker submitted the relevant settlement form on 17 August 2023.

However, on 22 August 2023, the company sent notice to the worker specifying that it had revoked the dismissal notified on 31 July 2023 and that the labour relationship would continue in force, requesting her to resume her job on 24 August 2023. This decision was notified by registered fax (*burofax*), (received on 31 August), and by WhatsApp on 22 August 2023.

After this, on 23 August 2023, the worker began a situation of temporary disability, one day before her reinstatement in the company.

What did the judgement of the High Court of Justice of Castile and Leon of 20 May 2024 rule? Is the right to revoke disciplinary dismissal in accordance with the law?

The worker sustained that her dismissal effectively took place on 31 July 2023; therefore the notices of revocation sent by the company took place after this date and were received on 31 August. She sustained that there was no "prior notice period" due to the difference in dates between the dismissal notice and its validity, considering that the dismissal had already taken place and the labour relationship had been terminated and she also specified she was on holiday until 24 August.

Such grounds were rejected by the Division of the High Court of Justice, based on the consolidated case law of the Supreme Court that determined while the dismissal

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

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had not become valid the labour relationship had not been terminated and the revocation could be valid if it took place prior to the valid date thereof; therefore, the labour relationship remained in force during the prior notice period.

Specifically, the judgement referred to the grounds of the judgement of the Supreme Court of 28 October 2014, Appeal number 2268/2013 that sustained the revocation of the dismissal during the prior notice period was valid, since it was a solution coherent with the principle of maintaining the job and the legal business.

Therefore, bearing in mind the facts in this case, the court ruled that the employer had revoked the dismissal and such revocation was valid, since it was expressly revoked prior to the valid date of the dismissal. It could hence not be considered that the labour relationship had been terminated because the company notified the revocation during the prior notice period, maintaining the worker registered in the social security system and without terminating her contract; it hence dismissed the appeal for reversal lodged by the worker.

¿Te ha parecido un pronunciamiento interesante?

After reading this article, if you have any questions about this specific matter or the situation is similar to the labour situation in your company, please do not hesitate to contact RSM's Labour Department and we will be delighted to provide you with labour advice to clear up your doubts. ■

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

Lara Conde
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> Advice of the mont

What are the implications of the right to digital disconnection?

Lara Conde

The use of digital tools has helped contacts in labour relations, which has led to the false need to obtain an immediate reply to any doubt that arises and therefore has harmed the workers' disconnection from working time and their rest time.

This excessive connectivity can lead to labour risks such as stress and anxiety due to the mental burden that the lack of disconnection and excessive interference of work can cause to the other areas of life and hence regulations have been developed to protect the workers' right to digital disconnection.

In the section on fundamental rights, Article 18.4 of the Spanish Constitution regulates the following: *"The law must limit the use of IT to guarantee the honour and personal and family privacy of citizens and that they can fully exercise their rights"*. In this respect, Act 3/2018 of 5 December 2018 on personal data protection and the guarantee of digital rights has regulated the right to digital disconnection within a working scope.

Article 88 of the aforementioned law stipulates that all workers have a right to digital disconnection in order to guarantee they can take their rest time after their working hours and their personal and family privacy are respected. However, apart from regulating the employer's obligation to provide an internal policy that defines training measures and courses and raising the staff's awareness about reasonable use of technological tools, nothing else is regulated.

The legal structure of this right is quite brief; therefore, this right had been developed by means of collective bargaining and it has been regulated in the texts of collective bargaining agreements for implementation in employers' practice. Moreover, doctrine and case law have been developing and interpreting the legal and collective bargaining regulations in this respect.

We can see what the Spanish courts have been ruling up to now.

What does the right to digital disconnection imply?

The court rulings are clear; the right to digital disconnection prevents the employer from imposing the obligation on its employees to be connected and reply to work questions after their working hours.

The courts have supported the possibility for workers to disconnect their devices to avoid receiving messages during their rest times that prevent them from exercising their right to disconnection:

"Workers have a right to digital disconnection during their rest times, this means they can turn off their devices and means of communication so that they do not receive messages from the company or their work colleagues for work-related reasons", (the judgement of the High Court of Justice of Madrid of 9 June 2021, Appeal number 318/2021)

A company sending messages after working hours has not been sanctioned up to now, providing the obligation is not imposed on the worker to reply to or deal with an order.

What have been the rulings of the Spanish courts this year?

The Spanish courts have recently ruled in contradictory ways, paying special attention to the policy the employer has implemented or the regulation in the applicable collective bargaining agreement in the company related to this issue.

The judgement of the High Court of Justice of Galicia of 4 March 2024, Appeal number 5647/2023 deemed that a worker's right to digital disconnection had been violated due to the company sending emails in which it gave him work orders after his working hours.

In this case, two key factors must be considered: (i) The worker had sent notification to the company expressly requesting that no kind of message must be sent after his working hours and (ii) The applicable collective bargaining

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agreement regulated both the duty of the company to abstain from contacting the worker and his right not to reply to messages from his employer or third parties, (colleagues, customers).

The lower court ruled in the same way as the courts have been ruling up to now, dismissing the claim and considered that the right to digital disconnection had not been violated since the emails sent by the company to the plaintiff through the service coordinator did not show there was any obligation to read or reply to the messages sent after his working hours.

However, the High Court of Justice of Galicia ruled in favour of the worker and, based on the regulation in the collective bargaining agreement applicable to him, in which the duty was stipulated that the company must abstain from contacting the worker; it admitted the right to digital disconnection had been violated.

Nevertheless, other courts have recently ruled that contacting the worker about issues that are not "purely" work-related during rest time did not violate his right to digital disconnection.

Furthermore, the same High Court of Justice of Galicia, in its judgement of 19 March 2024, Appeal number 167/2024, dismissed the claim filed by a trade union (CCOO) and stated that the employer's duty to guarantee disconnection implied a limitation in the use of technological business communication and work resources during rest periods along with observing the maximum working hours and any limits and precautions related to working hours stated in the legal regulations or applicable collective bargaining agreement, but pointed out that by having sent messages to workers in a situation of temporary disability so that they were not excluded from the protocol for holidays, did not imply a violation of the right to digital disconnection.

The judgement of the High Court of Justice of Castile La Mancha of 15 February 2024, Appeal number 7/2024 ruled along the same lines, which stipulated that the company attempting to contact the worker during her sick leave in order to inform her that she could take some courses was not considered a breach or significant interference in the worker's private life.

Therefore, as shown from the case law analysed above, the right to digital disconnection does not only imply that an obligation cannot be imposed on workers to reply to the company's messages after their working hours, but the employer must, as far as possible, abstain from contacting its employees after their working hours.

Practical advice

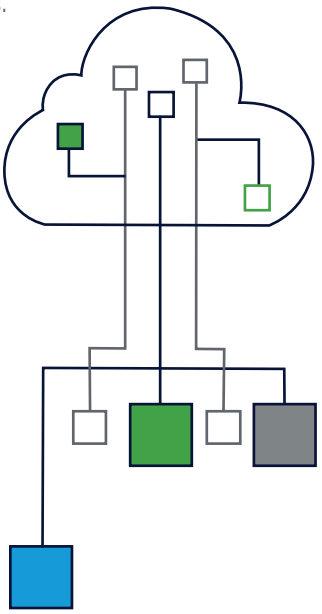
The following measures must be adopted in order to comply with the obligations in the law and the collective bargaining agreements related to the right to digital disconnection:

- A policy must be drawn up that will enable you not only to avoid the administrative fines that could be imposed due to breaching such legal obligation, but measures must also be adopted that, in addition to ensuring compliance with the law, are in line with the company's productive needs.

- When drawing up such policy, you should bear in mind that any vague or generic clauses could imply a ruling that the right to digital disconnection has been violated, (judgement of the National Court of 22 March 2022); therefore, the practical application of this right and the related measures must be clearly defined.

- Suitable expert advice could help you ensure you have a digital disconnection policy that is in line with your needs so that it acts as your ally should any dispute arise in this respect

Please do not hesitate to contact me if you would like to implement a digital disconnection protocol or review and update your current one to obtain a greater advantage, RSM Spain's Labour Department has the keys to ensure this policy is in line with your needs and complies with the regulations.



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