Grant Thornton

LEGAL NEWS

New jurisprudential developments in labour law matters

This week, we bring you the analysis of interesting judgments that have recently appeared in the Spanish Courts.

- **Difference between promotion and salary increase.**

Promotion and pay rises do not always have to go together. This is the argument raised by the Supreme Court in its judgment of 10 November 2022.

The case in question analyses the promotion of employees who saw their salary reduced in subsequent pay slips. That modification was the result of an internal call for applications by the Company, to which employees could apply voluntarily and which clearly indicated the new remuneration to be received by those who were promoted to the position.

The Supreme Court established that the modification of the salary was perfectly appropriate in that the workers applied voluntarily, the company acted with total transparency in establishing the new salary in the aforementioned offer and, furthermore, it modified numerous working conditions that represented a clear improvement in the provision of services.

For this reason, the High Court considers that there are no circumstances preventing the implementation of these modifications, and that the salary modification applied is perfectly in accordance with the law.

- **Violation of the right to strike in the denial of the presence award**

On 9 February 2023, the Supreme Court decided that the right to strike had been violated in the case of a company that denied the attendance bonus to employees who had availed themselves of this constitutional right, counting as absenteeism the specific days of strike action.

The judgment analyses the specific case in which the Collective Bargaining Agreement provided that certain special situations, such as paid leave for marriage, death of family members or work-related accidents, would not be counted as absenteeism, without expressly excluding strike days. For this reason, the Supreme Court understands that, to affect the accrual of the attendance allowance, the exercise of the right to strike should be clearly excluded by the Collective Bargaining Agreement, without the company being able to unilaterally discount those days.

Therefore, companies which have a Collective Agreement establishing a salary supplement for attendance must consider the wording of the agreement to determine whether absences due to the exercise of the right to strike can be considered and, if not, not be taken into account for the purposes of payment of the supplement.

- **Use of the company's resources of communication by workers' representatives.**

The Supreme Court, in its judgment of 25 January 2023, has recognized the right of employees' representatives to use the electronic means of communication used by the company with its employees to send the information they consider relevant in the exercise of their duties.

The case in question concerns a company that has a system of internal electronic communication with employees via e-mail. The CCOO trade union section requested access to this communication system, which was denied by the company without any written justification.

According to the judgement under analysis, the company should have allowed access to the union unless it had justified this restriction with some objective data, such as the additional cost to the company, the disruption of production activity or any other objectively assessable circumstance.

The lack of access by the company was considered by the Supreme Court as a violation of the right to freedom of association, obliging the company to provide CCOO with access to the communication system and imposing a fine on the company for this reason.

- **Childbirth and childcare allowance for single-parent families**

The Supreme Court has decided, by means of a Judgement of Appeal in Unification of Doctrine dated 2 March 2023, that in the case of single-parent families, only one of the benefits for the birth and care of the child is available, not the accumulation of both.

The need to unify doctrine arose from the appearance of different rulings that allowed the accumulation of benefits for both parents in the case of a single-parent family. In this sense, the Supreme Court rejects the doctrine set out in certain rulings of the High Courts of Justice on the grounds that granting this duplicity in the benefit would mean the creation of a new right, to which only single-parent families would be entitled, and which exceeds the powers of the judiciary, since it is a prerogative of the legislative power.

Thus, the possibility of both parents receiving both periods of childbirth benefit in the case of single-parent families is denied, without prejudice to any ancillary benefits that may apply.

- **Absence from work once the INSS has issued a medical discharge in a TI process of less than 365 days is a valid cause for disciplinary dismissal, even if a prior claim has been filed.**

The Supreme Court, in its judgment 276/2023 of 17 April 2023, analyses the case of an employee who, after being granted medical discharge, did not go to work because she considered that the prior claim filed against the declaration of said discharge was not in accordance with the law.

The company dismissed the employee on disciplinary grounds as a result of unjustified absences. The employee had informed the company of the medical discharge, as well as her intention to contest it because she did not agree with it. The company, for its part, reiterated that, since it was a challenge to a medical discharge for common illness issued by the National Institute of Social Security before reaching the 365-day period, its challenge did not mean that the employee did not have the duty to return to her job.

In order to resolve this question, the High Court analyses the regulation of temporary incapacity processes in force at the time of the occurrence of the facts. In the case of a temporary incapacity that has not exhausted the 365-day period, the provisions of RD 625/2014 must be applied, which established that ***"****the medical discharge issued by the doctor extinguishes the TD process for common contingencies and determines the employee's obligation to inform the company [...], to which is added the employee's obligation to return to work".*

This interpretation must be understood as being in line with the regulation contained in article 71 of the Law Regulating the Social Jurisdiction, which contains two different regimes for challenging medical discharges depending on whether the 365-day period has been exhausted; once this period has expired, the regulation itself does not require the filing of a prior claim on the understanding that a prior administrative process has already taken place, whereas discharges issued before the 365-day period do require the corresponding prior claim precisely because there is no prior administrative procedure, so *" the employee who has been given a medical discharge before the 365 days of temporary incapacity benefits have expired is obliged to return to work, even if the medical discharge has been the subject of a prior claim ".*

- **The written determination of the probationary Period in which it is stated that it is established lin accordance with the provisions of the Collective Bargaining Agreement is not enforceable when it merely sets maximum duration.**

The Supreme Court reiterates the doctrine established in judgment 1246/2021 of 9 December, on the validity of the trial period in a contract, referring its duration to its establishment in the applicable Collective Bargaining Agreement.

The debate in the appeal arises from the termination of a temporary contract whose cause lies in the company's invocation that the probationary period was not successfully completed.

The claim having been dismissed at first and second instance, however, the employee appealed in cassation on a single ground of infringement of Article 14 of the Workers' Statute in that she considered the probationary period to be invalid. The ratio decidendi then consists of determining the validity of the probationary period agreed in a contract by referring it to the Collective Bargaining Agreement.

The legal question raised in this ruling is whether the fixing of the probationary period agreed by reference to the period regulated in the applicable Collective Bargaining Agreement or in Article 14 of the Workers' Statute deprives the agreement stipulated in the contract of its effectiveness. In other words, whether the fixing of the trial period in the contract must be expressly stated for it to be enforceable.

In order to resolve the controversy, it analyses the provisions contained in Article 14 of Workers' Statute, pointing out that *"Article 14 of the Workers' Statute imposes a formal requirement: the trial period must be agreed in writing and its duration must be stated"*, with the employee having the right to "*the exact duration of the trial period fixed in writing*", given that "*during the trial period, either of the contracting parties is entitled to withdraw from the contract, without the right to any compensation, a particularly serious consequence for the employee*".

As neither the applicable Collective Bargaining Agreement nor Article 14 of the Workers' Statute establishes a specific duration of the trial period, this generates serious insecurity for the employee, as they do not know at what point, within the margins established by those provisions, the trial period has ended. Therefore, the reference in the contract to the Collective Bargaining Agreement is not enforceable, and the trial period is therefore inapplicable and, consequently, the termination of the employment contract constitutes an **unfair dismissal.**

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