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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.

- **The National Court considers that companies are free to form a national agreement and leave the regional agreement.**

  On 18 May 2023, the Social Division of the National Court ruled on the lawsuit challenging the collective agreement, brought by the most representative trade unions of the Autonomous Communities of the Basque Country and Galicia (ELA and CIG) against the Business Association of Catering Brands (AEMR).

  On 27 November 2022, the State collective agreement for modern catering brands was published. The unions decided to challenge the agreement on the grounds that the fixing of its functional scope did not comply with the legal requirements of "*reasonableness, objectivity, stability and homogeneity*", thus contravening the provisions of Article 83.1 of the Workers' Statute and, in particular, the limited freedom of the parties when agreeing a collective agreement. In addition, trade unions ELA and CIG also decided to challenge the agreement on the grounds that it pursues a fraudulent objective by setting wage conditions that are more detrimental to those provided for in the sectoral agreements of a lower scope.

Although it is true that the agreement under discussion delimits the functional scope, as it is necessary to have a minimum workforce of 1,000 employees and to have at least one workplace in four or more autonomous communities in order to apply it, the National Court considers that the agreement is not unlawful. It bases its decision mainly on the fact that the modern hotel and catering industry is a growing sub-sector that is alien to the activity of the traditional hotel and catering industry, as it differs in many substantial aspects such as working methods, business management techniques and the offer of new products compared to existing ones under a common brand image and a significant presence in the sector.

Specifically, it considers that "*collective bargaining agreement is not static: it must seek to improve the working conditions of hitherto non-existent sectors or sub-sectors of activity*". Therefore, the National Court points out that the agreement cannot be considered illegal, insofar as the functional limitation respects the criteria of objectivity and homogeneity indirectly required by article 83.1 of the Workers' Statute, arguing that the parties enjoy full freedom to set the scope of bargaining.

On the other hand, with regard to the claimants' assertions that the collective bargaining agreement violates the law, the Court rejects the claim on two grounds. The first is that neither of the two unions provided sufficient information to conclude that the agreement provides for wage conditions that are more disadvantageous for the employees. The second one is that the second Additional Provision of the collective bargaining agreement provides for a clause guaranteeing ad personam the conditions that had previously been applied to the employees, respecting the overall amount of the remuneration they had been receiving. Therefore, the Court understands that the agreement does not pursue any fraudulent objective by which it establishes more unfavourable conditions for the employees and, therefore, it is perfectly legal and applicable.

- **The Supreme Court confirms that the employer's refusal to specify working hours for reasons of conciliation entails damages.**

On 26t April 2023, the Supreme Court handed down a judgement rejecting an appeal for the unification of doctrine, confirming that the employer's refusal to specify working hours can lead to compensation for damages in favour of the employee.

The case involved an employee who, following a change in the Company's business hours, her working hours changed, causing her to suffer damages due to the impossibility of taking her underage child to school. The other parent worked at the same workplace and was therefore unable to fulfil the legal guardianship of their child. For this reason, the employee requested a reduction in working hours on the grounds of the right to reconcile work and family life under article 37.6 of Workers' Statute, and this was denied by the Company on the grounds of organisational and production problems. In this regard, the employee filed a lawsuit that was dismissed by the Social Court No. 2 of Coruña. However, However, in the second instance, it upheld the claim brought by the employee, declaring her right to provide her services with the specific hours requested and ordered the Company to pay the sum of 6,000 euros (€) for the damages caused.

The Company therefore lodged an appeal in cassation for the unification of doctrine, alleging the contradiction between the two judgments. The Supreme Court did not focus on analysing whether or not the worker has the right to the specific working hours, but exclusively on determining whether the Company's refusal to specify the working hours entails the right to compensation for damages. In this sense, the Court argued that, on the basis of article 139.1 a) Law Regulating Social Jurisdiction, the action for the damages

derived from the denial of the right or the delay in the effectiveness of the measure can be accumulated, detailing that the employer would only be exonerated if it had complied, at least provisionally, with the measure requested by the employee. The impossibility of the parents to take their underage child to school for more than two years is a concrete damage (non-pecuniary damage that has been caused and proven) and, although no fundamental right has been violated, the damage must be compensated.

Finally, the Supreme Court considered that this compensation does not only apply in cases of refusal to reduce and specify working hours, but can also be considered in cases of refusal to the right to adapt working hours, regulated in article 34.8 of Workers' Statute.

- **The High Court of Justice of Catalonia recognises an additional and complementary compensation for dismissal.**

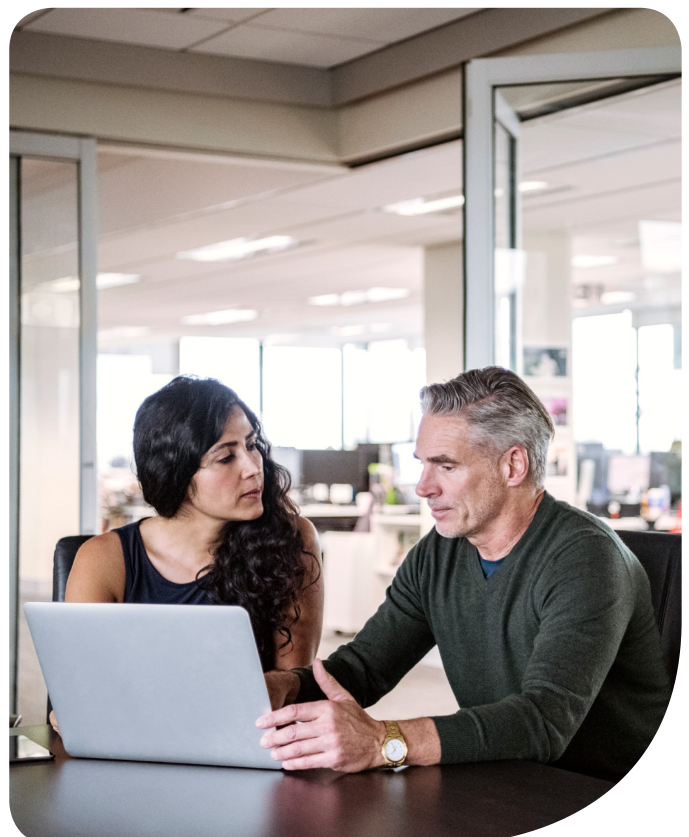
On 30th January 2023, the Social Division of the High Court of Justice of Catalonia upheld the appeal filed by a employee against the Judgment handed down by the Social Court no. 6 of Barcelona, which declared her dismissal to be fair.

The worker was dismissed objectively for productive reasons caused by the situation of COVID-19. After the dismissal, the Company has taken a Temporary Redundancy Proceeding (ERTE) on the same objective reasons as those alleged in the dismissal. The employee appealed on the grounds that the employer's action was fraudulent, as well as discriminatory.

On the one hand, the Court described the Company's conduct as abusive because it considered that the action was detrimental to the employee as it prevented her from keeping her job, as well as from benefiting from unemployment benefits because she was not included in the Employment Regulation Procedure. However, the Court considered that no fundamental right had been violated since discrimination on the grounds of seniority is not covered by Article 14 of the Spanish Constitution.

On the other hand, and for the purposes of this judgment, the Chamber found that the compensation for unfair dismissal, was *"clearly insignificant, did not compensate for the damage caused by the loss of the job, nor did it have a dissuasive effect"*. In this sense, the Court considered that there should be additional compensation for loss of earnings since the worker could have been entitled to the extraordinary COVID benefit if she had not been dismissed. Therefore, it declared the objective dismissal to be unfair, ordering the Company to pay a supplementary compensation.

In short, the jurisprudence opens the possibility of additional compensation, even if no fundamental right is violated, as long as there is abusive business conduct that harms the employee, depending on them personal circumstances.



- **The maternity supplement can be enjoyed simultaneously by both parents.**

  The Supreme Court has ruled in its judgment of May 17th, that the maternity supplement for demographic contribution (in force between 2016 and 2021) can be received at the same time by both parents if both fulfil the requirements established by the regulation.

  The controversy that is the subject of the dispute consists of determining whether the maternity supplement for demographic contribution can be enjoyed simultaneously by both parents.

  The regulation prior to Royal Decree Law 3/2021, in force between 1 January 2016 and 3 February 2021, omitted the reference to the possibility of requesting this allowance when the parent other than the applicant was already receiving the allowance. Therefore, it considers that *"there is no legal basis for denying the supplement on the grounds that it is already being received"* as the *"restrictive and interpretative rule according to which this benefit may only be received by one of the parents if both are pensioners does not correspond to the literal wording of this provision"*.

  The judgement adds that the right to the supplement should be recognised regardless of the gender of the person who receiving it, because *"it would be paradoxical and illogical for a benefit designed to compensate for the unfavourable situation suffered by many women to end up being denied to one of them on the grounds that the male parent is already receiving it"*.

  In this way, the pensions granted from 1 January 2016 until 3 February 2021, when the regulations governing the maternity supplement for demographic contribution were in force, can be obtained by a woman or a man if they meet the requirements set out in the regulations, regardless of whether the other parent has been receiving this supplement, and, therefore, the possibility of their simultaneous enjoyment by both.

- **The High Court of Justice of Madrid considers that the omission of a prior hearing in disciplinary dismissals is not a ground for unfair dismissal.**

  On 28 April, the High Court of Justice of Madrid declared that a disciplinary dismissal that was carried out without a prior hearing was fair, thus contradicting what was established by the Social Division of the High Court of Justice of the Balearic Islands, in its ruling 68/2023 of 13 February.

  The case arose from the disciplinary dismissal of an employee for breach of good faith, derived from the unlawful appropriation of an amount of money from the Company.

  Once the dismissal had been declared lawful at first instance, the employee appealed on the ground of the infringement of Articles 55.1 of the Workers' Statute and 108 of the LRJS in relation to Article 24 of the Spanish Constitution, as well as Article 7 of ILO Convention No. 158, following the doctrine established by the High Court of Justice of the Balearic Islands, since the company had not complied with the obligation to hear the employee.

  The Madrid High Court of Justice held that the Company **had not complied with the possibility of defence provided for in that article**, since it did not inform the worker of the allegations and reasons for dismissal until the letter terminating the employment relationship had been delivered to him.

  However, the Madrid High Court analysed whether, for the purposes of article 55.2 of the Workers' Statute, the violation of article 7 of ILO Convention No. 158 could determine the unfairness of the dismissal. To this end, it considers that *"the prior hearing required by article 7 of ILO Convention 158 does not appear in number 1 of article 55 of the Workers' Statute, except when the worker is a legal representative of the workers or a trade*

union delegate". The majority opinion of the Chamber does not opt for an interpretation of the legal provision that goes beyond the mere literal interpretation, as the High Court of Justice of the Balearic Islands does, and therefore understands that **the omission of the prior hearing prescribed by article 7 of ILO Convention 158 is not a cause of unfairness in accordance with article 55.2 of the Workers' Statute because it is not included in its number 1.**

Therefore, and by way of conclusion, the Court affirms that the contradictory file under Article 7 of ILO Convention 158 is not a requirement whose non-compliance with Spanish law is grounds for declaring the dismissal unlawful, except in the case of a legal representative of the workers or trade union delegate, or when it is a formal requirement imposed by a collective bargaining agreement.

For the time being, we are in a situation of legal uncertainty derived from the contradiction between courts. We will therefore have to wait for the Supreme Court's pronouncement to resolve this divergence.

- **The Social Court No. 5 of Valladolid considers that dismissal on the grounds of illness is not automatically null and void.**

On 31 March 2023, Social Court no. 5 of Valladolid declared the disciplinary dismissal of an employee who had been on temporary disability for more than five months to be unjustified, as there was no evidence of discrimination to justify its nullity.

The case began with the disciplinary dismissal of the employee for breach of contractual good faith, fraud, disloyalty, breach of trust, breach of discipline and breach of health and safety at work regulations. The latter brought an action for annulment of the dismissal, alleging discrimination on health grounds, considering that the Company had terminated the employment relationship due to the temporary incapacity in which he found himself.

The Court examined the merits of the case and ruled, on the one hand, that the dismissal was unlawful, upholding the plaintiff's claim on the grounds that the letter of dismissal lacked the legal requirements.

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On the other hand, it analyses the possible consideration of nullity of the dismissal and, in this case, rejects the claim on the understanding that the employee does not provide any evidence that the Company has violated his right not to be discriminated against on the grounds of health. In this sense, the judgement states that *"illness as such"*, or *considered solely and abstractly as an illness, does not fall within the grounds for discrimination"* and specifies that *"while maintaining the concept of disability, this must be maintained in the long term"*. In other words, there is no absolute protection for the mere fact of incurring any illness, and consequently, a worker who is dismissed and is affected by an illness is not automatically protected by a disability.

The judge also emphasises Law 15/2022, of 12 July, on equal treatment and non-discrimination. To this effect, considers that despite the fact that the dismissal of a employee for being ill is regulated as discriminatory, this situation should not be understood as a case of objective nullity, but rather that *"whoever alleges discrimination must provide well-founded evidence of its existence, and in such a case it will be up to the defendant to provide an objective and reasonable justification, sufficiently proven, of the measures adopted and of their proportionality"*.

In conclusion, Social Court no. 5 of Valladolid partially upheld the claim brought by the plaintiff, as it found the dismissal to be unfair, but rejected the nullity of the dismissal. For the nullity to be assessed, it is a prerequisite that the plaintiff provides some indication that allows the existence of possible discrimination to be assessed.

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