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NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

Ignacio Hidalgo and Miguel Capel

There were several new situations arising last month related to labour law and, as always, #NewsLabour includes both the most important judgements and practical aspects of day-to-day matters with an analysis of cases.

We deal with very interesting judgements in this edition, such as the one ruled by the Supreme Court on the validity of a detective's evidence in labour proceedings.

Similarly, due to the Christmas season arriving soon and so that you can analyse it in good time, we have drawn up an #Advice of the Month in which we analyse the most common situations or issues arising related to the famous company Christmas dinners and the measures to be adopted in each case.

Constantly informing and updating our readers.

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

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Please contact us should you have any queries 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 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:

Roberto Villón

The judgement of the Supreme Court of 19 September 2023: Do break times represent effective working hours?

Within the scope of a collective dispute, the National Court ruled that, when working from home, if there are interruptions due to the electricity supply or the internet being cut off that is not caused by the workers, the company must consider such time as effective working hours without reducing their salary or requiring that such time is recuperated, providing the incident is justified by the company that supplies the service. In addition, the workers are acknowledged to be entitled to use the bathroom for their physiological needs during their working hours and the company must record these breaks separately from other rest periods.

After analysing the case, the Labour Chamber of the Supreme Court upheld the grounds of the National Court pointing out that physiological needs are an essential part of life and the company must provide the means so that its workers can take time for their needs without this affecting their rest periods or salaries.

The judgement of the High Court of Justice of Aragon of 23 October 2023: Does the modification of 30 minutes in working hours imply a significant change in working conditions?

In a recent judgement, the Labour Division of the High Court of Justice of Aragon dismissed the claim filed by the CC.OO. trade union against Alcampo. According to the claim, the modification of the workers' timetable was challenged after they had been transferred to Alcampo; a company that is open to the public from 9 am to 9.30 pm, whereas the timetable applied by the workers' previous employer was from 9 am to 9 pm.

The Division concluded that the change of working hours did not imply a significant change in working conditions since basically it did not affect the labour relationship of the employees on the afternoon shift and it was not proven that any significant damages were caused to the workers apart from the presumed inconvenience due to needing to leave half an hour later. Moreover, the court pointed out that this change of working hours did not affect other groups of employees, such as those working with shorter working hours, serving on counters or on the morning shift.

The judgement of the Supreme Court of 4 October 2023: The claimed payment of salaries to a worker can grant him a right to request termination of his employment contract with severance pay.

In this case, a worker filed a claim against his employer based on the company seriously breaching its obligation to promptly pay his wages; therefore the termination of his employment contract with severance pay was petitioned as stipulated in Article 50 of the Spanish Labour Relations Act.

In this respect, the judgement of the lower court acknowledged that there were proven delays and even some defaults in payment of salaries but did not accept that this was of sufficient importance to result in the termination of the worker's contract with severance pay, criteria that was upheld by the High Court of Justice.

However, the Chamber of the Supreme Court repeated doctrine determining that the company had seriously breached its obligation to pay the salaries on time, delaying their payment up to an average of 10.5 days over a year, even paying the worker' salary in instalments, with no apparent justification provided by the company; therefore the worker was entitled to terminate his employment contract with severance pay.

The judgement of the High Court of Justice of Madrid of 17 July 2023: Is termination null and void due to a worker on temporary disability leave not passing the trial period?

After publication of Act 15/2022, the termination of a contract during the trial period when an employee is on sick leave is a rather delicate situation. In this case, the High Court of Justice considered that the termination of the plaintiff worker's contract due to her not passing the trial period when she was in a situation of sick leave was legal. The Division justified its decision based on the fact there was an objective reason to justify termination of the contract, also bearing in mind that other workers in the company that had been in a situation of temporary disability had indeed passed the trial period.

In this respect, the company proved that the termination of the worker was not due to flagrante discrimination by not being justified based on the fact that the worker was in a situation of temporary disability, justifying that her performance was the same as her colleagues. ■

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>Practical Law

Terminations by mutual agreement are also counted after the judgement was ruled by the supreme court of 19 september 2023

Yolanda Tejera

Article 51.1 of the Spanish Labour Relations Act determines the numeric thresholds when considering whether or not contractual terminations taking place within a term of 90 consecutive days before or after must be considered included in collective dismissal.

Specifically, the aforementioned provision stipulates that the collective dismissal procedure, (Redundancy Plan (ERE)), must be applied when the terminations affect at least the following:

a) Ten workers in companies employing fewer than one hundred workers.

b) Ten per cent of the number of workers in companies employing between one hundred and three hundred workers.

c) Thirty workers in companies employing more than three hundred workers.

However, even though it is clear the number of terminations to be considered related to whether or not a Redundancy Plan (ERE) must be implemented, the terminations that are or are not countable have been disputed.

Although the labour regulations specify that when the number of workers involved in objective dismissals by means of a Temporary Redundancy Plan (ERTE) for Economic, Technical or Production Reasons (ETOP) exceeds the thresholds stipulated in Article 51 of the Spanish Labour Relations Act, companies must subsequently implement a Redundancy Plan (ERE) in a mandatory manner, stipulating that, for the purpose of the calculation, all other dismissal must be taken into account if they take place at the employer's initiative for other reasons not related to the worker of those included in Article 49.1.c).

It is obvious that the terminations of legal temporary contracts in Article 49.1.c) of the Spanish Labour Relations Act are not counted for the purpose of collective dismissal but the term "not related to the worker" has needed to be defined and interpreted by case law that is still being updated and modified, as explained below.

Which terminations are counted for the purpose of collective dismissal?

The Labour Chamber of the Supreme Court has ruled on several occasions which terminations must be taken into account for the purpose of calculating the numeric thresholds of collective dismissal, concluding that, in order to comply with the thresholds referred to in Article 51.1 of the Spanish Labour Relations Act, the following must be included in the calculation:

- Court judgements on contracts, according to Article 50 of the Spanish Labour Relations Act, because even if it is at the worker's request, a corporate breach of contract would be implied.
- Objective dismissals by means of a Temporary Redundancy Plan (ERTE) for Economic, Technical or Production Reasons (ETOP), whatever their legal categorisation may be.
- Disciplinary and objective dismissals ruled or acknowledged as unfair.
- Terminations of temporary contracts entered into by infringing the law and considered unfair as well as *"ante tempus"* terminations of temporary contracts.
- Contractual terminations with severance pay, within the scope of the provisions in Articles 40 and 41 of the Spanish Labour Relations Act, due to geographic relocation measures being adopted or a significant change in the employee's working conditions ("MSCT").
- Failure to call up discontinuous permanent workers at the normal time.
- Not passing the trial period when the planned term has been exceeded.
- Simultaneous terminations of contracts in a trial period carried out by infringing the law and that are unreasonable and disproportionate, (judgement of the Supreme Court of 23 September 2021).

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On the other hand, the following must be excluded from the calculation for the purpose of the thresholds:

- Disciplinary dismissal not challenged or that are considered fair.
- The objective dismissals referred to in Article 52 of the Spanish Labour Relations Act due to subsequent incompetence or failure to adapt, not challenged or that are considered fair.
- Legal terminations of temporary contracts.
- Terminations in a trial period.
- Resignations and retirements.
- Mutual agreements on termination.

As we have already mentioned, up to now case law has deemed that the term "not related to the worker" excludes cases when the worker's free consent has been granted for an agreement on termination, in the same way as when a worker freely resigns or retires.

However, the previous situation has changed since the recent judgement ruled by the Supreme Court of 19 September 2023, which has reversed the doctrine of the Spanish Supreme Court by specifying that contractual terminations by mutual agreement taking place in the reference period of 90 days must also be counted for the purpose of collective dismissal.

What change has taken place due to the judgement of the Supreme Court of 19 September 2023?

It is obvious that the Supreme Court has been making a broader and broader interpretation of the terminations that must be counted for the purpose of the corporate obligation to implement a Redundancy Plan (ERE), the most recent one up to now being the new one stipulated that the workers who do not pass the trial period must be counted when these *"imply a clear infringement of the law due to being absolutely unreasonable and disproportionate that such a high number of contracts are terminated at the same time for this reason"*.

However, the Labour Chamber of the Supreme Court ruled a judgement on 19 September 2023 in which it concluded that, even if the worker freely consents to termination by reaching a mutual agreement, in the case in suit, these must be counted for the purpose of thresholds since they would have taken place *"at the employer's initiative by being encompassed in the context of an overall reduction of staff in which the workers were offered the possibility to voluntarily terminate their employment contracts under certain conditions"*.

Specifically, the Supreme Court considered that the 7 terminations by mutual agreement did not occur in an isolated manner but were encompassed in a period of 90 days in which the company had carried out a reorganisation process in which it had little by little unilaterally dismissed another 8 workers.

The Chamber pointed out that, in these cases, as is obvious, it is true that the worker's consent was granted and that there should not be any reasons to consider that there were defects in such consent. However, due to the context of the corporate reorganisation in which it took place, it was concluded it was the result of the employer's initiative that, among other ways of reducing the staff, offered workers the possibility to reach this kind of agreement that, in any other situation, would have been an isolated occurrence and not linked to the staff reduction process and they would continue being excluded from the thresholds for the purpose of a Redundancy Plan (ERE).

It is obvious we must wait to find out how this doctrine will be developed that, as we have already mentioned, implies a clear change in the Supreme Court's criteria but it is also important to recall that companies must control and be perfectly-well advised every time they carry out a contractual termination because, as we have seen, there are more and more terminations that must be counted for the purpose of thresholds and if they are not controlled the legal thresholds could be exceeded, which is sufficient per se to consider we are facing a de facto collective dismissal with the consequences resulting from such decision.

For such purpose, RSM is at your entire disposal to resolve any doubts you may have about this matter or any other and to provide you with advice in order to control whether or not the contractual terminations carried out by your company must be counted for the purpose of thresholds. ■

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>Case of the month

Is a previous hearing of a dismissed worker required?

Guillermo Guevara

A great deal has been spoken, discussed and commented over the last few months about the judgement of the High Court of Justice of the Balearic Islands of 13 February 2023 in which the disciplinary dismissal of a worker was ruled unfair because the requirement had not been met to hold a previous hearing, as stipulated in Article 7 of Convention number 158 of the International Labour Organization ("ILO").

This is a disputed issue that has resulted in all kinds of rulings and, even more so, in numerous analyses, opinions and comments shared on the media. In any case, this situation must be taken into account and the discussion about it must be fully understood.

What is the basis for acknowledging the obligation to hold a previous hearing?

The answer is quite simple: The verbatim text of Article 7 of Convention number 158 of the ILO.

The verbatim text of such provision is as follows:

> *"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he/she is provided an opportunity to defend him/herself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity".*

It can be seen from the verbatim text of the previous provision that, prior to terminating employment for disciplinary reasons, a previous hearing must be held of the worker whose contract it is intended to terminate.

Therefore from now on must a previous hearing be held?

As duly specified, the interpretation consisting of acknowledging application of Article 7 of Convention number 158 of the ILO has been adopted by other courts apart from the High Court of Justice of the Balearic Islands.

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An example of this is the recent judgement of the High Court of Justice of Extremadura of 15 September 2023 (appeal 326/2023), which applied the same interpretation.

Moreover, the verbatim text of the aforementioned provision does not allow for many other interpretations. This is an issue that has been dealt with by some High Courts of Justice when considering this position.

However, other courts have adopted a criterion that is completely the opposite.

In this respect, it was deemed in the judgement of 7 July 2023 (appeal 1749/2023) ruled by the High Court of Justice of Catalonia that *"Article 7 is not directly applicable if there is subsequent internal regulatory development and, in this case, this development took place by virtue of Article 55.1 and 2 of the Redrafted Text of the Spanish Labour Relations Act and applicable case law, in spite of only encompassing certain groups of workers, (legal or trade union representatives or members of a trade union), for them the kind of infringements they are accused of is not taken into account"*.

A different interpretation and one that has received the most criticism is included in the judgement of the High Court of Justice of Castilla y León of 28 September 2023 (appeal 576/2023) that, recalling previous rulings of the Supreme Court, considered that *"the manner imposed by Article 55.1 of the Labour Relations Act (EDL 2015/182832) more than sufficiently fulfils such purpose since it requires that the facts on which the dismissal is based, the person who adopted the decision and its date of validity must be expressed in unambiguous terms and with this the worker can prepare his/her defence to be claimed in the conciliation procedure, at administrative levels and with the jurisdictional body"*.

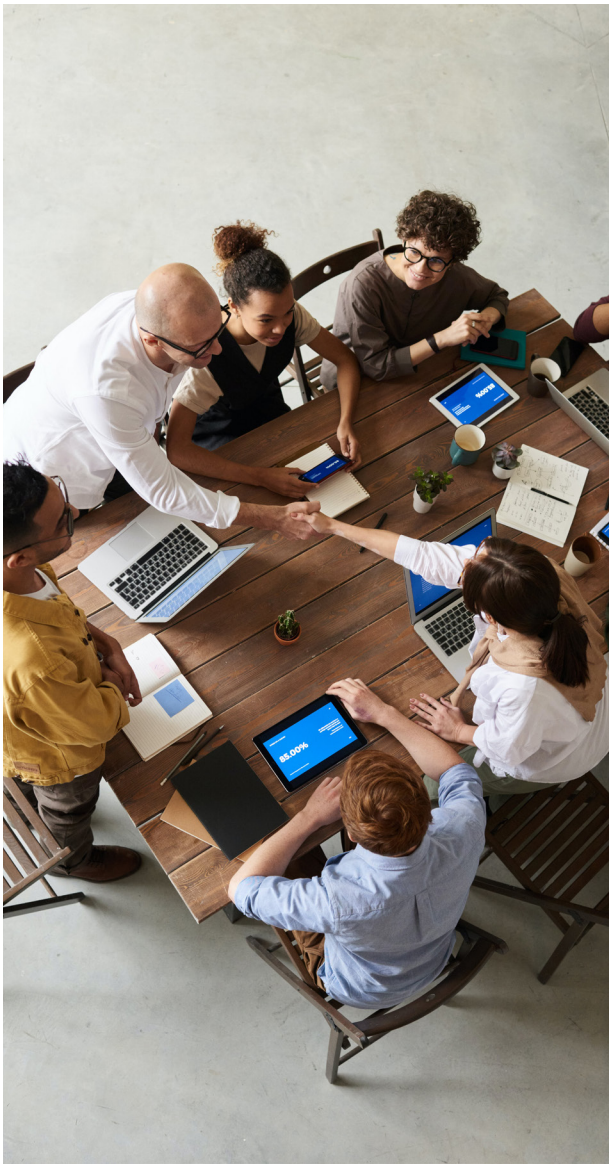
While waiting for the Supreme Court to rule its criteria on this issue

At the moment it is quite normal to feel concerned and insecure when deciding to terminate employment for disciplinary reasons, above all depending on the geographic area, without knowing whether or not a previous hearing must be held that is technically only stipulated in Spanish law for a series of specific employees, i.e. workers representatives, or when it is required in the applicable collective bargaining agreement.

Therefore, due to the lack of unified criteria, which we expect will soon be included in a judgement ruled by the Supreme Court, in some cases it could be advisable to hold such procedure in order to avoid possible rulings that a dismissal is unfair due to failing to fulfil the formal requirements.

However, each case is a world apart and must be analysed separately, it is hence crucial to ensure you have a legal team that can provide advice to companies and assist them in these kinds of procedures.

For such purpose, RSM is at your entire disposal to help you face the new corporate challenges to which we are subject to according to the new labour rules. ■



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

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>Judgements of the month

1. Validity of a detective's evidence in legal proceedings related to a dismissal. Judgement of the Supreme Court of 12-09-23

Lara Conde Sánchez

As we all know, an employer can hire a detective to prove the possible irregular conduct of any of its employees.

The Spanish Civil Procedures Act considers the evidence obtained through private detectives as a specific form of witness evidence.

In this respect, Article 265.5 of the aforementioned regulation considers the following are documents for evidence: *"Reports drawn up by legally authorised professional private investigators about relevant facts on which the claim is based"*.

Regarding the facts discovered by the detective, if they are not acknowledged as true, witness evidence is provided at the hearing, which is also limited, and only questions can be asked about the facts included in the report that such investigator has drawn up.

In this respect, case law doctrine has compared corporate control with the workers' right to privacy and there must be well-founded suspicions that the worker is committing irregular conduct as a requirement for the valid use of this system of evidence. In addition, the well-known triple opinion of proportionality must be met, in which the suitability, need and proportionality is assessed in the strict sense of the measure.

In other words, the measure the employer adopts must be the least invasive possible of the worker's right to privacy, being absolutely necessary that the labour obligations are fulfilled to achieve the objective of the surveillance and to provide the employer with a benefit greater than the harm that would be caused

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to the employee by him/her being subject to this control measure.

So, let's see what happened in this case...

What happened in this case?

In this case a worker who cleaned the windows of some sports facilities was dismissed, after verifications were obtained during the surveillance conducted by a detective hired by the company related to a series of irregular actions committed during his working hours.

Specifically, according to the dismissal letter, these irregular actions included working and driving under the influence of alcohol, inappropriately using the tools owned by the company, fraud, disloyalty and abuse of trust in the work assigned to him, being habitually intoxicated, a voluntary decrease in his work performance, disobedience and negligence when providing his services, leaving his workplace without a justified reason and constant failure to fulfil his working hours.

In spite of the numerous breaches of contract committed by the worker, the lower level, the Labour Court, ruled the dismissal was null and void due to the worker's fundamental right to privacy having been violated. This was because it considered that the company had not justified the use of the detective's evidence, in other words, no well-founded suspicion had been proven for the use of this means of evidence and hence the evidence obtained from such surveillance could not be taken into account.

This judgement was upheld by the Division of the High Court of Justice of the Basque Country, which repeated that illegal evidence had been provided that violated the plaintiff's right to privacy.

What did the company allege?

The appellant company questioned the interpretation for applying Article 18 of the Spanish Constitution to settle the issue submitted to debate and deemed that Articles 24 and 53.2 in the same legal text had been infringed. It sustained that surveillance of a worker in his workplace did not imply per se an intrusion in the sphere of his privacy but was a corporate action within the company's right to control the performance of the services rendered, the surveillance evidence submitted was hence legal and must be considered and assessed as such. In fact, it questioned whether the legality of a private detective's surveillance as evidence was subject to prior prima facie evidence or whether it should be based on effectively exceeding the limitation and infringement of fundamental rights, invoking Articles 24 and 53.2 of the Spanish Constitution.

What did the Supreme Court rule?

The crucial issue was based on whether or not there was a need for the company to provide prima facie evidence that the worker had infringed his labour duties for the detective's witness evidence to be legal.

The Chamber deemed that when, as occurs in the case in suit, the work had to be necessarily performed outside of the work centre and hence there was no admissible means of control other than external surveillance of the worker due to the suspicion that he was committing a breach of the work assigned to him, a reference cannot be randomly made to the worker's personal dignity and, much less so, to his personal privacy because to sustain the opposite would mean the right held by the company for its management would make no sense at all.

Nevertheless, the private detective's report consisted of evidence that had already been assessed by the lower court, resulting in its assessment in an extraordinary appeal not being allowed and since this was the only evidence submitted by the company to justify the dismissal the dismissal was finally ruled unfair due to the impossibility to analyse such evidence, even though the Chamber deemed it was valid and no fundamental rights had been violated.

RSM is at your entire disposal to clear up any doubts you may have about the use of detective's evidence and its validity in legal proceedings. ■

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

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>Judgements of the month

2. No appeal for reversal may be lodged against a judgement ruled on the significant changes in individual work conditions, (hereinafter referred to by its initials in spanish "MSCT")

Marta rico

Up to now, the doctrine of the Supreme Court, contained in judgement 210 of 10 March 2016 and judgement 555 of 22 June 2016, has considered that, even though in principle the individual MSCT system prohibits an appeal for reversal being lodged, an appeal is allowed in cases when the action challenging the modification is included in a joinder with an action for compensation for an amount higher than €3,000, according to the interpretation of the provisions in Article 138.7 of the Spanish Act regulating the Labour Jurisdiction, (hereinafter referred to by its initials in Spanish "LRJS"): *"The judgement that rules the measure is not justified must acknowledge the worker's right to be reinstated with his/her previous working conditions and payment for the damages that the corporate decision could have caused during the time it was in force".*

This broader *"pro recurso"* interpretation included the more verbatim and restrictive one in section e) of point 1 of Article 191 of the LRJS, which would mean understanding that the exception in such section, related to lodging an appeal for reversal when there is a joinder with another action that can be appealed, only refers to those involving a change of job or functional relocation; hence placing those related to significant changes in individual work conditions in a worse position.

Judgement of the Plenary of the Labour Chamber of the Supreme Court of 14 September 2023 amending previous doctrine

In its judgement number 556/2023 of 14 September 2023, ruled by the Plenary of the Labour Chamber amending doctrine, the Supreme Court has now concluded, **no appeal for reversal can be lodged in the High Court of Justice against a judgement ruled by the MSCT procedural system even if a claim is included for an amount higher than €3,000 due to the challenged corporate decision being applied**.

Background

In the claim, the plaintiff challenged what, in his opinion, a MSCT would imply and petitioned for it to be revoked. An action for €6,000 as compensation was included as a joinder with such claim due to violation of the worker's fundamental rights, (guarantee of indemnity). The pleadings in the claim petitioned, in a subsidiary manner, that the corporate measure was ruled unjustified and for the worker to be reinstated with his previous working conditions and payment, in all cases, of the salary he had not been paid while the measure was in force. The Labour Court number 2 of Cadiz dismissed this petition, against which an appeal for reversal was lodged by the worker in the High Court of Justice of Andalucía, which deemed that the MSCT action was not subject to reversal due to the plaintiff having withdrawn his petition for revocation based on violation of fundamental rights in his appeal that was in a joinder with the claim for the specified amount for compensation. However, the plaintiff maintained his petition claiming an equivalent amount to the salary he had not been paid while the challenged corporate decision was in force for an amount higher than €3,000.

The debate in the analysed judgment was focussed on deciding whether or not he could lodge an appeal for reversal against the judgement ruled in the MSCT proceedings, claiming the salary he had not been paid of a monthly amount during a period of time that exceeded €3,000.

What were the grounds for the interpretation by the High Court on which the amendment of its previous doctrine was based?

The judgement of the High Court examined application of Articles 26, 138.6, 138.7, 191.2 e) and g) and 192.2 of the Spanish Act regulating the Labour Jurisdiction and decided there was a need to change the doctrine from a systematic, teleological and verbatim interpretation of the procedural provisions in force and its understanding according to constitutional guarantees, (Article 24 of the Spanish Constitution).

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From the standpoint of a constitutional interpretation of the rules about lodging extraordinary appeals, the High Court deemed that the *pro actione* **principle was not applicable to the same extent when lodging an appeal in the jurisdiction**, since lodging appeals was only based on procedural laws that regulated such means for challenging a judgement and a broad and flexible interpretation of the procedural rules, usually claimed due to the need to provide suitable effective judicial protection to the litigating parties, cannot simply be also applicable to the requirements to lodge an extraordinary appeal, such as an appeal for reversal, this was because it deemed judicial protection was also applicable to the party that had already obtained a satisfactory judicial ruling and wanted it to become an absolute judgement as soon as possible.

Regarding the analysis of the rule regulating the procedural system, the judgement deemed that the three exceptions included in Article 138.6 of the LRJS as cases in which the appeal for reversal would be allowed did not refer to cases such as the one it was analysing, non-collective MSCT proceedings, the High Court clarifying that the omission and interpretation *contrario sensu* would lead it to consider that if a certain hypothesis had not been included it was because the legislator intended that the general rule should be applicable and hence **admitting an appeal in MSCT proceedings that did not coincide with any other of the stipulated exceptions would be against the procedural system designed by the rule**.

The Plenary made the same interpretation when analysing the regulatory provisions in Article 191.2.e) of the LRJS on the appeal for reversal, stating that it seemed unquestionable once again that it was intended the rule should exclude the second level of litigation in individual MSCT proceedings. **The Chamber recalled that procedural law did not offer a possibility to appeal a judgment ruled by the lower court only when the procedural system that must be applied is outline**d, but returns to the matter when designing the structure for extraordinary appeals, basically appeals to the Supreme Court (cassation) and reversal. It added that this was based on the impossibility to lodge an appeal in the relevant Labour Division of the High Court of Justice against the judgement ruled by the Labour Court in legal proceedings involving significant changes in working conditions.

Lastly, in its systematic interpretation, the judgement argued that if the legislator had intended that the economic threshold for the damages referred to in Article 138.7 of the LRJS, which refers to the consequences of the judgement admitting the claim due to the MSCT being unjustified, to be the criterion for the possibility of lodging an appeal, it would have omitted the inclusion of judgements on MSCT proceedings in the list of those against which an appeal could not be lodged, so nothing new was ruled. In this respect, it stated that, **if Article 26 of the LRJS did not allow a MSCT action to be included in a joinder with a claim for salary, this consideration meant the possibility was ruled out to admit the appeal for reversal by means of an extensive interpretation of the possibility offered at the end of Article 138.6 of the LRJS, concluding that, if a joinder was not possible of a claim for salary with MSCT proceedings, the reference provision could neither be applied to these legal proceedings**.

By closing its circle of arguments, the High Court interpreted that, regarding the provisions in Article 137.3 of the LRJS, *"A joinder may be made of an action claiming a professional category or group with a claim for the relevant salary differences. No appeal whatsoever can be lodged against the judgement ruled, unless the claimed salary differences reach the required amount for an appeal for reversal"*, the exception of a possible appeal makes sense for legal proceedings that admit a joinder of actions, such as those related to professional classification, but not for those for which there is no such possibility, like those of MSCT.

What are the consequences of this amendment to doctrinal criteria?

In conclusion, no appeal for reversal may be lodged against a judgement ruled according to the individual MSCT procedural system even if it includes a claim for an amount higher than €3,000 due to the challenged corporate decision being applied.

This change in doctrine has also raised alarm bells among the community of jurists who view with certain distrust the different legal and procedural consequences that could be implied by this interpretive trend of our procedural rules related to lodging extraordinary appeals, so it must be observed which interpretive criteria can result in being reviewed from now on regarding appeals for reversal and appeals to the Supreme Court (cassation). ■

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>Advice of the mont

Regarding the company dinners due to the upcoming Christmas season: The most common issues to take into account and the possible labour consequences that could arise.

Alejandro Alonso Díaz

Now, at the beginning of November, companies are often starting to plan and hold the famous company lunch or dinner. This traditional festive event held by the company for a merely fun and festive purpose also brings with it a series of doubts or even problems from a labour standpoint that we will analyse in this article.

Firstly, you could have a doubt about whether or not the company can cancel the Christmas lunch or dinner with the workers:
This issue has been dealt with by the courts too, as also arises with the very frequent doubt about offering or replacing the Christmas hampers. In the judgement ruled by the High Court of Justice of Galicia of 9 February 2021, appeal 4672/2021, it was considered that when a benefit for workers is involved, in this case the Christmas lunch or dinner that has been repeatedly held over the years, it becomes an acquired right that the workers have included in the contractual nexus over time and based on the employer's intention to hold this event. This would prevent it from being cancelled or changed based on a unilateral decision adopted by the employer.

However, if the employer wishes to cancel it anyway, this must be carried out by means of a significant change in working conditions or through negotiations and an agreement being reached with the workers.

Is it compulsory to attend the Christmas lunch or dinner? Can reprisals be taken against a worker who does not attend?
Although there is no legal rule that obliges a worker to attend the Christmas events held by the company, there is indeed certain pressure to attend, above all if it takes place during working hours.

For example a worker's dismissal was considered fair due to abuse of contractual good faith because such worker said he was unable to attend because he had

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to pick up his car from the mechanic on the "working" day when the company was holding the Christmas dinner with all its workers, leaving his workplace at 2 pm when his working hours normally ended at 6 pm, which meant he had left his workplace without authorisation.

However, since this event is not normally held in effective work time and due to merely being of a voluntary nature, attending it is not mandatory and neither can it be sanctioned.

Can inappropriate conduct at the Christmas dinner be sanctioned?

In spite of the previous explanations, there is certain conduct that could imply a disciplinary reprimand even though it does not take place in the work centre. This was deemed to have taken place in judgement number 494/2022 of 31 May 2022, appeal 1819/2020, ruled by the Supreme Court, which considered that the disciplinary dismissal by the company was fair. In the specific case, an employee had verbally and physically attacked his colleagues after a Christmas dinner once his superiors had already left. The court deemed the dismissal was legal since actions related to the labour relationship were involved and the facts affected the good coexistence among colleagues and indirectly affected the company, since this could result in the firm's bad name and poor image with third parties.

How should we handle the invitation of workers whose contracts have been suspended at the time of the event, for example due to temporary disability, taking leave to care for a child or similar situations?

As we have specified, although these events take place based on a labour relationship they are not considered part of the services rendered because they are merely for pleasure, hence it is not incompatible to attend them even though a worker's services have been suspended.

The company must avoid contacting workers who are on sick leave and must allow them the time to rest so that they can recover; it is hence crucial to include some kind of warning in the invitation in order to avoid the worker's condition becoming more serious due to attending the event.

It is essential to include these kinds of warnings in order to try and limit the company's liability should any undesired situation arise, even more so if we bear in mind that case law of the Spanish courts has determined that accidents occurring during these kinds of events, or even while travelling to or from them, could be categorised as occupational accidents; all the foregoing even though the time the event takes place is not considered effective working time.

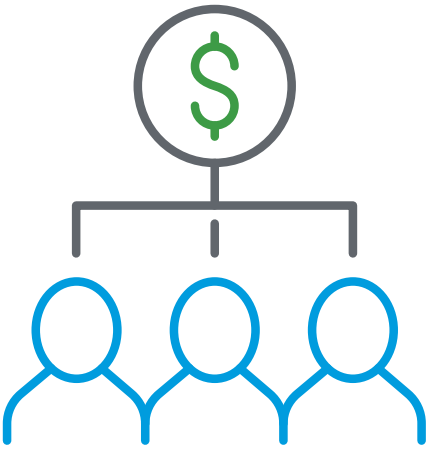
Lastly, we provide some recommendations when offering a gift or present to the staff at the Christmas lunch or dinner.

If the company offers the staff any present or gift during the lunch or dinner, it should be an offer made to all the workers in the same way, (even if they do not attend), above all if it is money or an object of considerable value, such as colognes, perfumes, lottery tickets etc.

For example, the judgement of 10 December 2009, appeal 74/2009, ruled by Supreme Court considered that any kind of different treatment could be deemed discriminatory.

However, bearing in mind the situations explained, the best thing would be for all the staff to be able to have a pleasant time, promoting social relationships among the workers, good companionship, team synergies and other similar value**s.**

For such purpose, if you have any doubts about organising your company's Christmas dinner, RSM is at your entire disposal to provide you with advice and analyse the specific case and of course we can provide you with more in-depth information about these issues or any others that could arise related to this matter. ■



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