Nº 28 | JUNE DE 2023

English version

NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

Ignacio Hidalgo and Miguel Capel

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 has given rise to a great deal of discussion: what happens with workers' legal representatives performing their duties once they have been dismissed.

Similarly, now the hot weather is here it also brings with it numerous disputes related to a specific topic: Holidays.

In this respect you can find a short guide in our advice of the month on how they function, which you will certainly find useful.

Constantly informing and updating our readers. ■

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

CONTENTS

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

Roberto Villon
rvillon@rsm.es

>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:

The judgement of the Supreme Court of 24 May 2023: Does the reinstatement of a part-time employee on voluntary leave imply a modification of her contract?

In this case a worker with a full-time contract requested voluntary leave of absence and, after requesting on numerous occasions to return to work under the same terms and conditions she previously had, she accepted to work part-time expressly stating that such acceptance did not imply a waiver of her effective reinstatement according to the original terms and conditions. In this respect, the Supreme Court recalled that a full-time contract being converted into a part-time one (or vice versa) must be a voluntary decision adopted by the worker and the company cannot unilaterally impose this. Therefore, the Chamber acknowledged the worker's right to be reinstated according to her previous terms and conditions and even the right to be paid the salary differences during the period she rendered her services on a part-time basis.

The judgement of the High Court of Justice of Madrid of 10 May 2023: Does the dismissal of a worker while on sick leave always imply that such dismissal would be null and void?

The High Court of Justice of Madrid discussed whether or not the termination of a fraudulent temporary contract could be considered discriminatory and therefore null and void if the worker was on sick leave, according to Act 15/2022. The Chamber ruled that the dismissal was unfair due to considering that the temporary contract was illegal and ruled out the dismissal being null and void. The High Court of Justice sustained that under these circumstances the dismissal was not considered illegal providing the different treatment was objectively justified with a legitimate purpose and that it was suitable, necessary and proportional. Therefore, it was not observed there had been any discrimination since the temporary contract was terminated as had been agreed, even though its validity could be questioned, furthermore the worker's sick leave was for a short period of time and there were no elements that would suggest that the contract would have been extended if such leave had not taken place.

The judgement of the Supreme Court of 26 April 2023: Leave for childcare is unconditional.

Leave for childcare guarantees the right to be reinstated in the same job during the first year and, after such time, the right to be reinstated in any job in the same professional group or equivalent category. In both cases, such reinstatement is unconditional because, even though it is not specifically mentioned as compulsory leave, its effects are similar. Therefore, providing the reinstatement is requested in the legal time and manner, the worker's unconditional right must be acknowledged to return to her job or a similar one. However, the Supreme Court recalled that, even if it is illegal for the company to refuse the request due to lack of suitable vacancies, this does not imply final termination of the employment contract, nor dismissal, unless it can be considered that this was wanted.

The judgement of the Labour Court number 3 of León: Dismissal by discrimination.

In this case it was petitioned that the dismissal of a worker was ruled null and void, which was allegedly based on the fact that the worker was of gypsy ethnicity. The court admitted the claim filed by the worker since it was not proven either that the worker had resigned nor that he had been absent from his job, only numerous discriminatory actions were proven based on his ethnicity, a practice that is absolutely prohibited according to Act 15/2022. Furthermore, the company was ordered to pay compensation for moral damages because the aforementioned law acknowledges that the protection from discrimination also requires that preventive and corrective measures are adopted, ordering the company to pay €7,501 for such purpose. ■

Please contact me should you have any doubts related to this issue.

Yolanda Tejera
ytejera@rsm.es

>Practical Law

Can the representation duties continue being performed after disciplinary dismissal? The supreme court concluded that the duties of the workers' legal representatives can no longer be performed until an absolute judgement is ruled

Article 68 of the Spanish Labour Relations Act states that the members of the works council and staff union delegates, as the workers' legal representatives, are granted a series of guarantees among which is the right not to be dismissed or sanctioned while performing their duties nor in the year after expiry of their term of office, unless the collective bargaining agreement states otherwise and with the exceptions regarding such guarantee provided in Article 68.c) of the Spanish Labour Relations Act (ET).

This provision, along with the provisions in Article 67.3 of the same regulation, grants the workers' legal representatives a series of stronger guarantees related to performing their duties that now seems to be showing some cracks after the recent ruling of the Supreme Court of 25 April 2023.

What was the factual case analysed by the Supreme Court?

The Labour Chamber of the Supreme Court ruled on a very repetitive situation that occurs in companies: Can workers' legal representatives, who were dismissed for disciplinary reasons, be allowed to enter the work centre to perform their representation duties?

In this case, several workers, workers' legal representatives and one of them also a trade union delegate, had been dismissed for disciplinary reasons and the company, due to different orders, sent by both the employees and the Social Security and Labour Inspection Department (ITSS), refused to allow them to enter the work centre to attend the works council meetings.

The company deemed that the employees' labour relationship had terminated and that, even though they could be reinstated if there was an absolute judgement that the dismissal was null and void or unfair, they no longer held the position as workers' legal representatives up to such time and since their dismissal.

This case, which is extremely common, as we have already mentioned, was based on a simple question: do the dismissed workers' legal representatives, who had challenged their dismissal, forfeit their positions as representatives? Or do they keep such position, being able to exercise their rights and perform their duties until an absolute judgement is ruled?

What was the situation we were faced with?

There have been different case law criteria up to now related to the termination of the term of office of workers' legal representatives, all of them based on constitutional doctrine, the judgement of the Constitutional Court 78/1982, which stipulated that union freedom would be violated if the position of the workers' legal representatives was not acknowledged to be held by the workers in the period from when the lower court ruled its judgement until it becomes absolute or an absolute judgment is ruled.

Obviously this doctrine meant there was one issue that still needed to be resolved: what happens until the lower court rules its judgement?

On the one hand, the courts have deemed that the rights of representation do not depend on performing any kind of working activity but, on the other hand, have stipulated that they are not independent from the fact there was a labour relationship. However, even though it made the situation we would be in during the appeal stage very clear, when the worker could continue performing his duties, nothing was specified about the previous stage: the stage of the proceedings prior to the appeal.

Many companies have been found in a rather difficult situation due to needing to decide whether or not they must allow the representatives to perform their duties until the judgment is ruled, since there is no rule whatsoever that, at least directly, states that the workers' legal representatives have a guarantee they can perform their representation duties until a judgement is ruled.

Please contact me should you have any doubts related to this issue.

Yolanda Tejera
ytejera@rsm.es

Article 284 c) is clear: when the employer does not fulfil "the judgement" it will be agreed that the staff delegate, member of the works council or union delegate will continue performing the duties and activities of his/her office in the company.

However, this change of situation of the workers' legal representatives' position "after the judgement" is not the same as a situation in which they keep their position "until the judgement is ruled".

What were the Supreme Court's conclusions?

The Plenary Session of the Chamber of the Supreme Court found a solution, based on the regulations and case law, which seems, at least at the moment, quite concise, concluding that the fact there are provisions determining the employees "being reinstated in their positions as the workers' legal representatives" implies that, up to such time, in other words, until the lower court has ruled a judgement that judicially states the dismissal is unfair or null and void, the stronger guarantee is not maintained for performing the representation duties.

In any case, we must wait to find out how this doctrine will be developed in the future because it is strange, based on the guarantees granted in Articles 67 and 68 of the Spanish Labour Relations Act (ET), it has been admitted that employers can unilaterally revoke the office of a workers' legal representative by means of disciplinary dismissal.

Numerous damages caused both to companies and workers can be avoided by being up to date in the development of this doctrine. ■

Please contact me should you require any further information about this case.

Guillermo Guevara
gguevara@rsm.es

>Case of the month

How is paid leave of absence taken?

There are very different questions raised about paid leave: From which date can the leave begin to be taken? Are public holidays counted? Can leave of absence/time off be accumulated? What happens when they overlap?

To answer these questions we need to analyse how Spanish courts have interpreted this matter and, among all the rulings on it, the recent judgement of the Supreme Court of 7 June 2023 should be taken into consideration.

Dies a quo by virtue of the provisions in the Spanish Labour Relations Act (ET)

In addition to the aforementioned judgement analysing the latest case law on this matter it also included a correct and clear summary of the current situation.

Firstly, it referred to the paid leave regulation included in the Spanish Labour Relations Act (ET), which is clear since its verbatim text does not allow for a great deal of interpretation. In this respect, the following points should be taken into consideration:

a) If the event triggering the leave takes place on a working day, this is considered the start date for the leave.

b) If the event triggering the leave takes place on a non-working day, the leave begins on the next working date immediately afterwards.

   Article 37.3 of the Spanish Labour Relations Act (ET) states the following: *"to be absent from work with right to payment"*. Therefore, based on its verbatim text, the Supreme Court deemed that the start date for taking this leave cannot be a non-working day but must be the first working day after the one when the event triggering the leave takes place.

c) The leave is only plausible if it is foreseen for a period of time when there is an obligation to be at work because otherwise it would make no sense that its main effect is *"to be absent from work"*. For such purpose, once again it is normal that the leave refers to working days, unless there is a regulatory provision stating otherwise.

e) Article 37.3 of the Spanish Labour Relations Act (ET) corroborates this interpretation. When regulating the weekly rest periods, free days and leaves of absence, this rule states the following: *"The worker [...] can be absent from work with a right to payment"* in the cases listed, in terms that prove the leave is granted to be absent from work on a working day, because it is not necessary to request it for public holidays.

In conclusion, if the law does not stipulate another different rule for its calculation, the leave of absence must be taken from the time the worker is no longer present in his/her workplace (working day) and not from a date when he/she is not obliged to be there.

What happens in the case of collective redundancy?

The difficulty arises in cases when, as occurs in the judgement ruled by the Supreme Court, it is analysed what the correct interpretation is of a clause included in a collective bargaining agreement.

Specifically, the aforementioned judgement analysed a case in which the text of a collective bargaining agreement was too ambiguous to clarify when the paid leave contained in it must be counted from.

The issue that was discussed was whether this leave had to be taken on calendar days or effective working days, even though the collective bargaining agreement specified the start date for taking this leave (the first working day).

Due to this standpoint, the Supreme Court recalled an essential element: the collective bargaining regulation can only be an improvement of the system for rest periods, public holidays and leave stipulated in Article 37.3 of the Spanish Labour Relations Act (ET).

Therefore, due to this situation in which the collective bargaining agreement did not specify when this leave could be taken, it is hardly surprising the Supreme Court deemed it must be interpreted that the period for taking the leave must coincide with effective working days and not make the calculation taking calendar days into consideration.

Please contact me should you require any further information about this case.

Guillermo Guevara
gguevara@rsm.es

However, this issue has its nuances, like so many others in labour law. In the same way, the Supreme Court recalled that *"the general rule is that this paid leave must be taken on effective working days, unless the collective bargaining agreement accepts that it is taken on calendar days when determining an improvement in the leave stipulated in the Spanish Labour Relations Act (ET)"*.

Therefore, in these kinds of situations, the specific text included in the collective bargaining agreement must be carefully analysed in order to determine how and when the different types of paid leave can be taken. ■

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

Víctor Salso
vsalso@rsm.es

>Judgement of the month

What term is granted to companies to claim salaries during proceedings from the State because the legal proceedings took too long?

In cases when a Labour Court rules that a dismissal is unfair it is normal to immediately choose the option of severance pay for the labour relationship, regardless of whether or not the judgement will be appealed, since otherwise reinstatement is applicable by default.

Why? Not only because of the awkward and unpleasant situation that would be implied by reinstating an employee who not only knows that he/she is no longer wanted but also he/she would be protected from subsequent organisational and/or disciplinary measures, (according to Article 24 of the Spanish Constitution, which provides the guarantee of indemnity), but also because very often the economic cost could potentially be much higher if the legal proceedings take a very long time. Moreover, reinstatement means there would be an obligation to pay the worker his/her salary during the proceedings, (the salary that would have been payable if he/she had continued working), until the date of effective reinstatement, an amount that can only be modified (i.e. reduced) if the worker had received remuneration from another employer during such period.

Therefore, due to being an option that is mainly unused, most litigating parties are unaware there are legal provisions that limit such amount and that the parties are authorised to claim them from the State, specifically the employer, if the proceedings are delayed, and the worker if the employer is in a situation of insolvency.

Chapter III of the Spanish Act regulating the Labour Jurisdiction ("LRJS"), (i.e. Articles 116 to 119), specifically deals with this issue stipulating that, if more than 90 business days elapse from the time the claim is filed until the dismissal is ruled unfair, the employer can claim the salaries during the proceedings after such term expires.

There is a statute of limitations of one year to file this action against the State, (pursuant to the provisions in Article 117.3 of the LRJS), counted *"from the time when the employer undergoes a decrease in its equity caused by needing to pay the salaries during the proceedings and, if a claim is filed by the worker, from the date notice is served to him/her of the court's decision that the employer is insolvent."*

However, the specific regulations regulating the process for claiming salaries during the proceedings from the State, Royal Decree 418/2014, seem to determine when the time begins to be counted or dies a quo in different ways, since Article 4.1 stipulates that *"The employer, or the worker in the event of the employers' provisional insolvency, may claim the relevant amounts within a term of one year counted from when the judgement is absolute."*

Therefore, from when must the term be counted? From when the judgement is absolute or from the time the salary during the proceedings is paid?

Judgement number 247/2023 of 11 April 2023 of the Supreme Court has answered this question and resolved the previously existing confusion, ruling that the term for filing this claim is one year counted from when the salary during the proceedings is paid because the requirement for the judgement to be absolute refers to the previous requirement of having exhausted the administrative channels.

For further clarification, we will analyse the case in detail below:

What happened in this specific case?

In the case in question here, the plaintiff worker challenged his dismissal through the courts by means of filing a claim on 31 March 2009, this claim was dismissed by a judgement ruled on 27 December 2011.

The employee lodged an appeal for reversal in the High Court of Justice of Andalusia, which ruled a judgement on 13 February 2013 in which it admitted the appeal for reversal lodged by the worker and ordered the company to reinstate him and pay him his salary during the proceedings.

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

Víctor Salso
vsalso@rsm.es

After depositing the payments for the salaries during the proceedings, (specifically on 16 May 2014), the company filed a written petition for payment of salaries during the proceedings on 16 March 2015, a petition that was dismissed by the Directorate General of Relations with the Judicial Authorities due to considering such claim had expired, which was subsequently challenged through judicial channels. The Supreme Court concluded that the claim for salaries during the proceedings had not expired due to having been filed within the stipulated legal term and hence it had to be admitted.

So... what was the judgement of the court?

The Supreme Court reached the following conclusions:

1) The following two prior requirements must be met in order for the employer to be able to claim the salaries during the proceedings (i) the judgement must be absolute and (ii) the amounts of the salaries during the proceedings must have been paid.

2) There is only one term to claim the salaries during the proceedings through the courts, which is one year counted from payment of the salaries during the proceedings; although these amounts must have been previously claimed through administrative channels.

3) The claim for salaries during the proceedings is an action to compensate the damages caused due to the excessive time the proceedings took, which obviously can only be claimed once the damage has been caused and can be calculated.

4) Article 4.1. of Royal Decree 418/2014 must be applied according to the previous provisions, according to the foregoing and since there could be procedural difficulties in the judgement enforcement stage that, being beyond the control of the parties in the proceedings, could cause a delay in the effective payment of the salaries during the proceedings, which would imply an unfair and unjustified restriction in the term for the parties to file a claim.

For the previous reasons the Supreme Court admitted the appeal (cassation) for unification of doctrine and ruled that the claim had been filed by the company in due time and manner.

Have you needed to reinstate a worker after the legal proceedings were delayed for a long period of time? Are you planning to claim the salaries during the proceedings caused due to the endemic delay the Spanish judicial system is undergoing? Please do not hesitate to contact me so that the particular features of your specific case can be assessed and we can find the most suitable defence for your company. ■

Please contact me should you require any further information about this issue.

Alejandro Alonso Díaz
adiaz@rsm.es

>Advice of the month

Taking holidays: most frequent queries and questions

We are close to the summer period now when most of the working population exercise its right to take the most highly anticipated holidays of the year, i.e. the summer holidays. Regarding this occurrence, a series of doubts often arise related to taking these holidays and other related aspects that we deal with and resolve below:

Firstly, it should be mentioned that the right to take annual holidays is referred to in Article 40.2 of the Spanish Constitution ("CE"), which guarantees the right for employees to take some regular paid holidays, which is also acknowledged in Convention 132 of 24 June 1970 of the International Labour Organization ("ILO"), according to which *"Every person to whom this Convention applies shall be entitled to an annual paid holiday of a specified minimum length"*; it is designed as a principle of community labour law related to the guarantee of workers' health and safety and against which no type of exception is admissible and is for the purpose of ensuring that all workers have the necessary rest time to be able to recover from their physical and psychological exhaustion caused by their working activity, also providing employees with a longer time than their daily and weekly rest periods in order to allow them a sufficiently continuous period to spend on their recreational activities.

The classification and development of these holidays are defined in Article 38 of the Spanish Labour Relations Act ("ET"); similarly it is customary to mention them in collective bargaining agreements and the workers' contracts, even improving their conditions in some situations.

Secondly, having analysed the legal framework covering holidays, we will now explain the most common doubts that usually arise when we refer to holidays:

How long are workers' holidays?

Holidays must be granted for a minimum term of 30 calendar days (22 working days), although this may be extended or improved though the collective bargaining agreement or employment contract. If the employee has not worked for the whole year, his/her holidays are calculated in proportion to the time actually worked; for such purpose the holidays are accrued month to month.

If they are determined in calendar days, Saturdays, Sundays and public holidays are included in the calculation. However, if the employee does not work on weekends, the first day of holidays would be the following working day.

What happens if the employee only works part time?

The length of the holidays is the same as if the employee works full time; otherwise it would imply discriminating treatment.

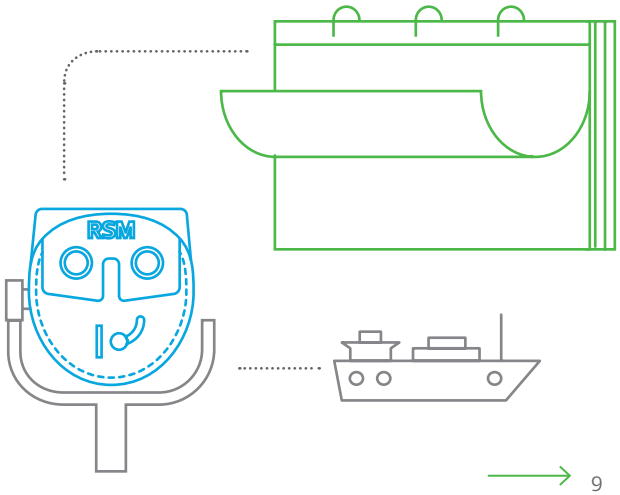
How long are the holidays for employees included in a Temporary Redundancy Plan (ERTE)?

No holidays are granted during the period an employee is included in a Temporary Redundancy Plan (ERTE), hence this time must be deducted from his/her annual holidays, unless the company and the workers' legal representatives agree that the employee can take all of them.

The holidays will not be affected if the Temporary Redundancy Plan (ERTE) is partial or with shorter working hours, i.e. some hours are worked and others are not.

Does an employee going on strike affect the calculation of holidays?

Going on strike does not imply fewer holidays nor are the rights related to them forfeited.



Please contact me should you require any further information about this issue.

Alejandro Alonso Díaz
adiaz@rsm.es

Can the workers choose the days they wish to take their holidays?

The company must determine the holiday schedule. Within the holiday period determined by the company, workers are free to choose the days when they wish to take their holidays, providing this is notified in advance. The workers can freely request those they wish to take and the company must answer them with at least two months prior notice. Therefore, the dates for taking holidays are determined by mutual agreement. If the collective bargaining agreement or the company does not specify a period for the workers to take their holidays, this must be determined by mutual agreement between the company and the worker.

If for years the company has allowed its employees to freely choose the time for taking their holidays, such freedom must be considered an acquired right and hence the company cannot unilaterally change it, (judgement of the Labour Chamber of the Supreme Court of 7 January 2020).

Their holidays can be taken in different periods if nothing is determined in that respect.

No agreement has been reached, what should be done?

If an agreement is not reached on the dates the worker can take his/her holidays, an individual claim or class action can be filed in the labour jurisdiction by means of urgent proceedings.

Can forfeiture of holidays be used as a penalty?

The company cannot impose penalties consisting of reducing the length of the workers' holidays or any other decrease in their rights to rest periods.

When must the dates of the holidays be notified?

The dates of the holidays must be notified at least 2 months in advance so that the workers have enough time to plan them, (Article 38.2 of the Spanish Labour Relations Act ("ET")).

Can the company change the holidays that have already been decided?

This can only take place when the worker voluntarily accepts such change.

When must the holidays be taken?

The holidays must be taken in the calendar year when they are accrued unless the collective bargaining agreement stipulates otherwise or an agreement is reached with the company in this respect.

Do workers forfeit the holidays they have not taken?

Yes. In principle, if the holidays are not taken in the calendar year they will expire, unless the reason for not being able to take them was caused by the company, the worker was in a situation of temporary disability leave ("IT") or he/she was on leave due to the birth of a child.

Can holidays be paid instead of taking them?

The holidays rest periods cannot be waived or be unavailable for the workers; therefore no substitution for any economic compensation whatsoever can be agreed.

The holidays not taken can only be paid in the case of termination of the labour relationship. These workers are entitled to payment of the amount equivalent to the holidays accrued but that they have not taken.

Taking holidays after temporary disability leave, what happens if a worker must request sick leave while on holiday?

If sick leave must be requested while the worker is on holiday, the remaining days can be taken when the employee is discharged providing 18 months have not elapsed after the end of the year when they were accrued.

Can workers be dismissed while on holiday?

Yes. There is no difference whatsoever between them and the dismissal of a worker who is actively rendering his/her services.

In the case of dismissal, can employees be forced to take their holidays during the prior notice period?

No, because, as we have mentioned, the holidays must be decided by means of an agreement reached between the company and the worker.

Can an employee be asked to return to work before the end of his/her holidays?

The company can request this, but the worker is not obliged to return to work until the date when his/her holidays end.

Did you find this information useful? Do you have any other questions that have not been dealt with in this article? Please do not hesitate to contact me or any member of the Labour Law Department of RSM if you have any doubts or comments about issues related to holidays and we will be delighted to advise you. ■

RSM Spain
BARCELONA | MADRID | GRAN CANARIA | PALMA DE MALLORCA | TARRAGONA | VALENCIA

rsm.es

THE POWER OF BEING UNDERSTOOD
ASSURANCE | TAX | CONSULTING