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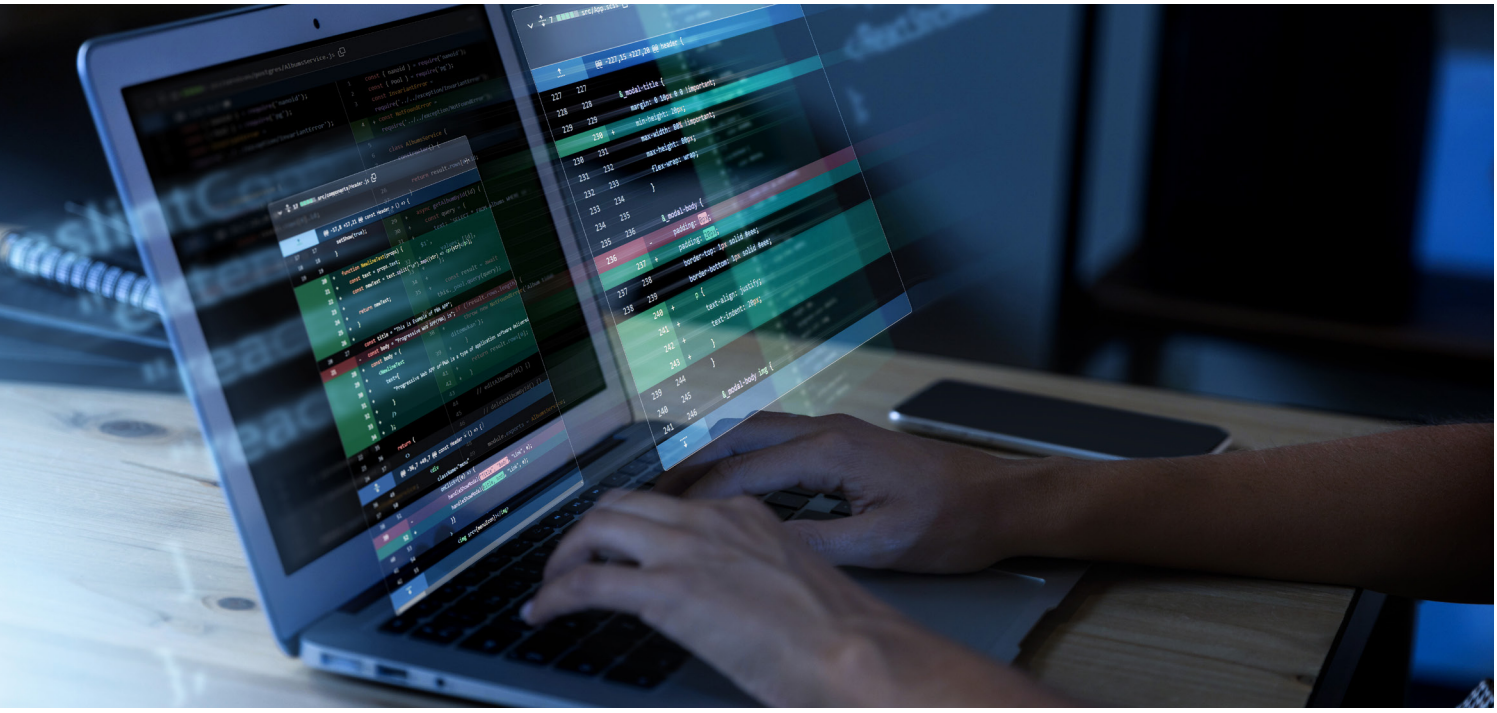
NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER



Ignacio Hidalgo and Miguel Capel

Unfortunately, summer is now over and a new working period has begun.

Although over the last few months many people have been able to enjoy a well-deserved time for rest and disconnection, the world of labour law has not taken a break.

As is normal, numerous judgements have been published since our last edition and, in this one, we analyse some of them that we think are the most interesting, such as the recent judgement of the Supreme Court on in itinere accidents.

In this edition, we also deal with a matter that could be of great interest: Surveillance of employees' work using IT resources.

As we have been doing for more than two years, we promise to be alert and bring you all the news that arises, along with replies to new doubts that you may have for us and that are ruled by the courts. ■

Welcome, once again, to NewsLabour!!

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

Lucía Castelao
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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:

Lucía Castelao

The judgement of the Supreme Court of 5 July 2023: Does subsequent notification to the worker's representatives of a dismissal imply that such dismissal should be ruled unfair?

One of the legal requirements that must be met for an objective dismissal for economic, technical, organisational or production reasons by virtue of the Spanish Labour Relations Act is that a copy of the dismissal notice must be provided to the workers' legal representatives. However, in this case, the copy was provided four days after the workers' dismissal. The Supreme Court recalled that doctrine sustains the intention of the law is for a copy to be provided of the dismissal letter that was sent to the worker. This statement makes it impossible for the notification to the workers' legal representatives to take place beforehand. However, notifying the dismissal afterwards is valid providing it takes place within a prudential term so that the purpose of the notification per se is not hindered: The workers can obtain advice about the termination decision. In this respect, the Chamber deemed that the notice provided four days after the date it was sent to the worker did not affect this purpose and upheld the ruling that the dismissal was fair.

The judgement of the High Court of Justice of La Rioja of 26 July 2023: The date for providing the report drawn up by a detective sets the time for the start of the statute of limitations for the worker to be sanctioned.

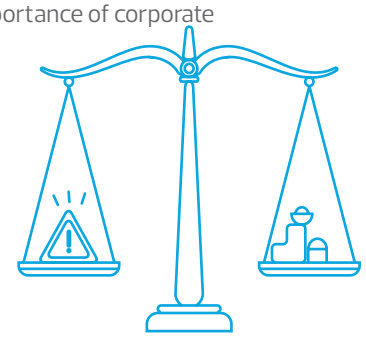
In this case, a worker was dismissed for disciplinary reasons after the company realised she was rendering her services to another company in the same functional sector without her employer's authorisation. After being warned by a customer, the company hired a detective agency to investigate whether or not the aforementioned irregular conduct was actually being committed. When challenging the dismissal, the worker sustained that the statute of limitations for the infringement had expired due to more than 60 days having elapsed, the start of calculating the start of the statute of limitations being the date of the last fact she was charged with, alleging that the existing relationship between the company and the detective allowed it to be informed of the findings of the investigation. Repeating case law on this matter, the High Court of Justice concluded that the dies a quo for the statute of limitations to begin is when the company had full, effective and real knowledge of the offences committed, not being sufficient mere superficial or prima facie knowledge of them. In this case, it had full knowledge of the facts when the detective's report was received, the date when the term of the statute of limitations for the infringement must be deemed to have begun.

The judgement of the High Court of Justice of Catalonia of 26 July 2023: The period for taking paternity leave originally acknowledged may be changed if the parent so wishes.

The High Court of Justice upheld the judgement of the lower court in which the father's right was acknowledged to change the time for suspending his contract due to the birth and care of a minor after it had been acknowledged, and hence the period for payment of the benefits would be changed, providing a prior agreement had been reached with the company. In the case in suit, the Spanish Social Security Institute (INSS) refused to accept the worker's proposal due to considering that, in order to change the system or leave, there must be an assessed and justified reason. By applying the gender standpoint in its grounds and bearing in mind there is no prohibition whatsoever to prevent the time of such leave from being changed, the High Court of Justice ruled that if the beneficiary had reached an agreement with his company, providing the rest of the legal requirements had been met to take the leave, he could change the period of leave that was originally set.

The judgement of the High Court of Justice of Extremadura of 18 July 2023: Corporate tolerance and disciplinary dismissals.

In this case, the company dismissed a worker for disciplinary reasons due to him consuming the company's products in the petrol station where he worked without recording or paying for them. The judgement of the lower court ruled that the dismissal was unfair for the following reasons: (i) The worker had proven that the products consumed had been paid for and recorded and secondly, (ii) Consuming products without paying and recording them was conduct that the company had tolerated. The High Court of Justice recalled the importance of corporate tolerance and when there are practices the company has more or less accepted, the worker must be previously warned and ordered to cease such conduct in order to sanction him. ■



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>Practical Law

What is the limit for surveillance of workers?

Oscar Canno

The employer, in its position as such, is entitled to control its economic activity and therefore it can also control its employees who perform the work. In this respect, by virtue of Article 20.3 of the Spanish Labour Relations Act, it may adopt the surveillance and control measures it deems fit in order to check that the workers are fulfilling their labour obligations.

However, when the employer conducts such surveillance it must observe the workers' rights to dignity and privacy. In this respect, Article 20 bis of the Spanish Labour Relations Act stipulates the following: "Workers are entitled to privacy when using the digital devices provided to them by their employer and to digital disconnection and privacy in the use of video surveillance cameras and global positioning systems ..."

However, it must be taken into account that there are various interests at stake when monitoring and controlling the workers, on the one hand, the company's freedom and, on the other hand, fundamental rights, such as the right to privacy and data protection.

It is hence crucial to assess which measure is the most suitable in each situation.

In order to assess the validity of the surveillance and control measures adopted by an employer, in the case of a legal action, the court will analyse compliance from a threefold opinion of proportionality, in which the suitability, need and proportionality will be assessed in the strict sense of the measure.

In other words, the measure the employer implements must be the least invasive possible of the worker's privacy, must be fully needed to achieve the objective of monitoring compliance with the workers' labour obligations and must provide the employer with a greater benefit compared with the harm that will be caused to the employees subject to such surveillance measure.

Therefore, it is of crucial importance to take into consideration this opinion of proportionality, because, if it is deemed that the employer has exceeded its supervisory power and fundamental rights have been violated, the evidence obtained

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by means of these surveillance measures will be considered illegal and will not be admitted in legal proceedings.

We provide some tips below of the most commonly used surveillance methods used by companies.

Video surveillance cameras

The employer can install video surveillance cameras in the place where the employees work.

However, the cameras may only be installed in areas where they work, hence rest areas, canteens, changing rooms etc. cannot be recorded to ensure the workers' right to privacy is observed.

It must be borne in mind that these cameras can only record images unless it is absolutely necessary to record sound for the security of the facilities and employees.

Lastly, one of the most important factors is that the workers must be informed of the measures implemented. They must know that such cameras exist and the courts accept that if an informative poster is displayed such information has been duly provided.

All general rules have exceptions and in this case hidden cameras can only be installed for a limited time when there are well-founded suspicions that a worker is not complying with his/her labour obligations and if such measure is the only way to be able to verify such non-compliance.

Monitoring IT equipment/examining computers/emails

The IT equipment belongs to the company; hence the employer can access such equipment to ensure that its workers are complying with their labour obligations, providing they have been informed of the criteria for the use of the devices and that the employer is allowed to monitor such devices.

The most advisable thing to do is to regulate a protocol for the use of digital resources in which it is specified that the equipment belongs to the company and hence can only be used for work purposes and to regulate the criteria for its use and the possibility for the company to access such equipment.

It is important to be aware that this kind of monitoring cannot take place indiscriminately and must be conducted at a time when the worker or a legal representative is present.

Global positioning systems

Global positioning systems must be installed in devices belonging to the company, in other words the workers do not need to provide their own resources or submit personal data.

As occurs with the previous monitoring measures, the employer must expressly, clearly and unambiguously inform the workers that this monitoring measure exists.

One of the key factors with this kind of measure is that the employer must guarantee that the GPS does not report data to the company after working hours, in other words, this device must only be connected during working hours; otherwise there would certainly be an invasion of the workers' private lives.

Conclusions

As can be seen from our previous comments, the employer can implement the measure it deems fit to ensure that its employees fulfil their labour obligations.

As we have seen, each of these measures has its particular features.

However, the key factor when implementing all of them is to assess which measure is the least invasive and to inform the workers that such measure has been implemented. In this way you can guarantee the validity of the surveillance measure and that it can be used in legal proceedings.

For such purpose, RSM is at your entire disposal to resolve any doubts you may have about the types of control and surveillance measures in a working environment and the internal protocols that must be implemented to ensure these measures will be deemed valid in legal proceedings. ■

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>Case of the month

Age as a reason for labour discrimination

Alejandro Alonso Díaz

Article 14 of the Spanish Constitution includes the following as one of its most important provisions: The fundamental right to equality and hence to non-discrimination. Such article stipulates that Spanish citizens are equal according to the law and no discrimination whatsoever can prevail for reasons of birth, race, gender, religion, opinion or any other personal or social condition or circumstance, among which is age.

From the standpoint of labour relations, age can be data that hinders workers' professional careers, in particular when such workers are young or when they are older, for such purpose the laws and courts, by applying such laws, are the guarantors that these situations do not harm groups that could be vulnerable due to being in a specific age range.

How does the law protect workers from this kind of discrimination?

The regulations expressly state that discrimination due to age is prohibited; hence this protection encompasses not only job recruitment but also the specific development of employment contracts and working conditions, professional promotion and even the termination of a labour relationship or the stages prior to the expiry of the term of a contract. There are therefore several articles in the Spanish Labour Relations Act (4.2.c), 17.1 and 55.5) and in Act 15/2022 on equal treatment and non-discrimination that protect workers from being victims of corporate conduct that could violate the aforementioned right to non-discrimination.

The aforementioned legislation is not the only one protecting workers from this discrimination, but European regulations also prohibit these possible attitudes through various original legal community provisions, (Article 21 of the EU Charter of Fundamental Rights and Articles 10 and 19 of the Treaty on the Functioning of the European Union) and related regulations (Directive 79/7/EEC and Directive 2000/78/EC)

Based on the previous explanations, the regulatory provisions, clauses in collective bargaining

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agreements, individual agreements and unilateral decisions adopted by employers are deemed null and void if they result in detrimental situations of direct or indirect discrimination due to, among other issues, age, and the dismissals resulting from such situations.

What have the Spanish courts ruled on this specific kind of discrimination?

Not only is this discriminatory conduct prohibited, as we have just seen, by virtue of substantive law, in other words legislation, but the courts are the ones that have guaranteed its objective by applying it and have ruled against this specific kind of discrimination.

An example of this is the **judgement of the High Court of Madrid of 20 October 2022, Appeal 326/2022** in which an objective dismissal was ruled and categorised as null and void due to discrimination based on age.

It can be seen in such judgement that the worker was the only one affected by the termination measure; his job was not eliminated, but was filled by a younger worker, in spite of the dismissed worker having good performance assessments. Moreover, it was proven that the company was promoting generational renewal of its staff by recruiting younger employees, resulting in a higher percentage of dismissals among the older workers. All the foregoing led to discrimination based on age being admitted and the dismissal being ruled null and void.

Similarly, **the judgement of the Labour Court Number 33 of Madrid of 28 November 2020**, the ruling judge being Mr. Pablo Aramendi, deemed that the termination of the contracts of five workers over 50 years old implied a strategic decision adopted by the company for the purpose of generational renewal of its staff by means of dismissing the older workers and that there was no objective reason to justify this.

Such conduct implies discrimination based on age and therefore the dismissals were ruled null and void, whereas the dismissal of another worker in the company, younger than this age, was considered unfair, since there was no discrimination in such case; compensation for moral damages was ruled for the dismissals deemed null and void and such compensation was calculated according to the provisions on penalties in the Redrafted Text of the Spanish Labour and Penalties Act (LISOS).

Such judgement deemed that the additional harm caused by this situation to the person suffering discrimination based on his age in the following manner:

> *"Such blatant corporate philosophy, for the purpose of the employer obtaining the maximum economic profits and corporate power, is not in line with many of the values of this old Europe in which we live where people's dignity implies the basic factor of our legal system, Article 2 of the Treaty on European Union and Article 10.1 of the Spanish Constitution (EDL 1978/3879).*
>
> *If workers lose their jobs due to applying the principle that "old things" are no longer of value and must be replaced by "new things", harm is caused because the reason for claiming such principle has not been proven.*
>
> *In addition, the dismissed worker is placed in a situation where he feels suffering, pain, uncertainty, distress and anxiousness merely due to having reached a certain age.*
>
> *The person who was unfairly dismissed for this reason would question his/her self-esteem and feels anxiety due to losing his/her job and, precisely based on his/her age, would be faced with the well-known difficulty of finding another job".*

By virtue of the foregoing, after all the considerations had been assessed as a whole and compared with the proven facts, the court deemed that the compensation for moral damages must be calculated at the amount of €20,000 for each plaintiff.

This judgement is just one example of how this type of discrimination can lead to high amounts being payable for the related damages caused to workers when calculating possible compensation.

Therefore, RSM is at your entire disposal to resolve any queries you may have about this kind of discrimination and, of course, we offer you our collaboration from a legal standpoint if you feel you are discriminated against due to the simple fact of having reached a certain age. ■

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

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>Judgement of the month

Should a worker's accident that occurs when returning home from work always be considered an "In tinere Occupational Accident"?

Roberto Villón

Article 156 of the Spanish General Social Security Act, (hereinafter referred to by its initials in Spanish "LGSS"), considers that any bodily injury caused to employees as a direct result of the work performed for their jobs to be an occupational accident including, among others, incidents taking place while travelling from the work centre to the workers' normal residence and vice versa.

Doctrine and case law of the Spanish courts have determined the specific requirements or elements that must occur for an incident to be defined as an "in itinere" or "on route" occupational accident, which we explain below and, as can be seen from the judgement of the High Court of Justice of the Canary Islands of 15 March 2023 where it was determined that the aforementioned essential requirements can be summarised in four large blocks:

1. **Teleological Requirement:** The travel must have a single exclusive purpose, i.e. the employees' work as such. In other words, the reason for the travel must be rendering or completing the employees' work. However, an accident that occurs in situations directly related to the work performed for an employer is also accepted as an in itinere accident, such as workers travelling to receive their salary, obtaining medical treatment related to their work, business travel, among others.

2. **Topographical Requirement:** The accident must occur on the way to or from the workers' home and their workplace. Moreover, the workers must have taken a suitable route, in other words one that is normal, usual or customary.

3. **Mechanical Requirement:** The means of transport used when the accident occurs must be reasonable and suitable to travel the distance from the work

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centre to the workers' home or vice versa. Normal or customary transport is considered suitable when its use does not imply a serious and imminent risk; however the transport does not need to be the one systematically used.

4. Chronological Element: The time taken for the travel must be reasonable and be within the normal time range for the route. Unjustified and prolonged delays in beginning the travel means the nexus causal with the work will no longer exist and the accident will be considered non-occupational. However, certain flexibility is allowed in cases of short and justified interruptions for business reasons.

Furthermore, the aforementioned judgement also stated that a worker's testimony could be deemed sufficient evidence to determine whether or not an accident occurring under such conditions would be of an occupational kind.

Notwithstanding the foregoing, the judgement analysed this month ruled by the Supreme Court of 4 July 2023 offers us another standpoint by placing the focus of attention on a worker's recklessness, which could rule out the occupational nature of an accident in spite of it meeting the aforementioned requirements.

What happened in this specific case?

The focal point of this discussion is placed on a worker who, after finishing his work, unfortunately began his journey home with other work colleagues. The employees who, for work reasons had to travel from Majorca to Manises, Valencia, decided to avoid the high amount charged to park their cars at the airport and opted to park them in an industrial estate nearby.

However, when the workers were on their way to their cars they decided to cross a wide and busy road between the airport and where their cars were parked resulting in one of them being run over.

The Civil Guard conducted an exhaustive investigation and concluded that the main reasons for the accident were the following: (i) It was against the regulations for the three pedestrians to cross the road, (ii) they were not wearing hi-visibility clothing, (iii) the driver of the car that ran over the worker was not paying attention and (iv) the fact there was no direct lighting meant they could only rely on the indirect lighting from a light tower illuminating the airport.

According to the foregoing, the basis of the legal debate in this case was related to determining whether or not the worker crossing the road implied reckless negligence, which could lead to the accident being ruled out as an occupational accident, according to Article 156.4.b) of the LGSS.

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

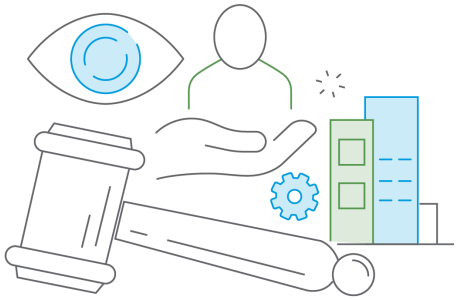
The Supreme Court drew the following conclusions:

– Spanish case law stipulates that reckless negligence implies the worker having accepted obvious, unnecessary and particularly serious risks that cannot be deemed within the scope of people's normal behaviour. In other words, the law requires a clear lack of precaution and care that could jeopardise the life or physical integrity of the person involved.

– In this case, the circumstances of the accident suggest that the worker's conduct was reckless and irresponsible, all this based on the following: (i) He crossed a road with several lanes at night, without wearing hi-visibility clothing, (ii) He was carrying luggage and (iii) He did not cross the road at a place where that was authorised, implying an obvious and unnecessary risk.

Pursuant to the previous explanations, in this case the Supreme Court admitted the appeal for unifying doctrine (cassation) and dismissed the occupational nature of the worker's accident. As previously mentioned in this article, this shows that these cases depend to a large extent on the casuistic of each situation and it cannot be considered that all accidents of this kind can automatically be deemed occupational accidents.

Therefore, please do not hesitate to contact me should you require any further information about how to handle similar situations related to occupational accidents. ■



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>Advice of the month

Have you implemented a variable remuneration system? Some practical advice to take into consideration

Yolanda Tejera López

More and more companies are deciding to implement a remuneration system based on performance within the scope of their remuneration policy. This variable remuneration system links each worker's performance with the organisation's targets, individual targets the company sets and certain results or profits being achieved.

By companies endeavouring to improve their employee's remuneration without this having a serious impact on their accounts, an extremely feasible option is to implement a variable remuneration system, in addition to the one stipulated in the contract, which incentivises and improves the workers' motivation and commitment.

However, even though it seems this type of remuneration only has good points, its lack of regulation and the fact that it could be left to the free discretion of only one of the parties could result in certain problems for the company.

It is hence important to take the following aspects into consideration:

1. The targets of the variable remuneration system must be set and the employees must be able to achieve them

Failure to set clear targets would prevent the workers from being able to meet the conditions for them to receive the bonus, a typical example of variable remuneration, implying that this remuneration system would have no meaning.

Therefore, wrongly setting targets, or not providing them at all, has been one of the claims that has been the most often filed in the Spanish courts.

Among the court judgements, most of the judgements have implied a decision to rule that, due to the failure of companies to set clear targets or even in cases when targets are set that cannot be achieved, i.e. impossible to fulfil, the workers are entitled to be paid the bonus in full regardless of whether or not they have achieved the stipulated targets.

Therefore, since the courts have considered the employer is responsible for clearly and precisely setting and determining the targets and that

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abstract specification is not allowed according to which it could be deduced that meeting the condition is left to the company's unilateral discretion, in order to avoid future problems it is crucial to determine a precise variable remuneration system that meets all the requirements stipulated from a case law standpoint. The proposed targets that, in addition to being clear and precise, must hence be able to be achieved, duly identified and notified to the workers.

2. Must contributions to the social security system be paid for the amounts received as variable remuneration, i.e. bonus? How must this be done?

Contributions must obviously be paid to the social security system for the amounts received as variable remuneration or bonus, but how must this be done?

A common mistake made by companies when paying contributions for these amounts is that they include them in the pay slip of the month when the bonus is paid, which is a mistake because that is incorrect unless the amount was received in a period shorter than such monthly period.

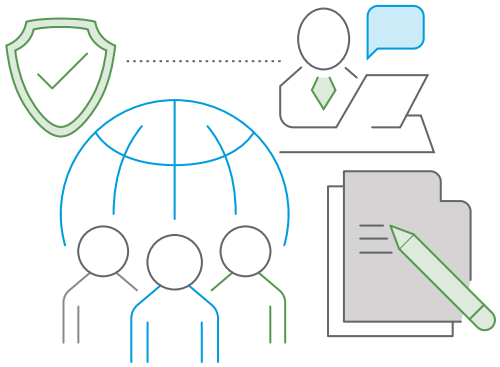
The Royal Decree that approved the regulations on contribution and settlement of other rights to the social security system stipulates that the amounts paid with a due date longer than one month must be paid proportionally in the contributions over the 12 months in the year because otherwise, in other words, by paying the contribution in a specific month, that would imply a significant increase in the contribution base and could mean that contributions are not paid for the part of the bonus that exceeds the maximum contribution base.

Moreover, it could also influence the benefits requested by the worker in which the regulatory base of the benefit is higher than the correct base.

3. Must the variable salary be taken into consideration for the purpose of calculating severance pay?

The answer to this question is clear: Yes.

Doctrine of the Supreme Court has stated that the bonus or variable salary must have been payable in order to be able to count it for the purpose of severance pay.



In this respect, the Labour Chamber required that the obligation must be liquid at the time of the dismissal but that has not prevented many courts from considering that, if the dismissal takes place when the worker's bonus is payable but he/she has not yet received it, he/she would also be entitled to its inclusion in the severance pay because, in these cases, the dismissal by the employer could be considered a corporate "strategy" to avoid paying it.

Therefore, before any dismissal is decided in which payment of the full bonus could be claimed in the future, it is important to know, not only whether or not the bonus is payable to the worker at the time of his/her dismissal, but also the period for its payment.

In fact, there are several issues to take into account when we are planning to implement a variable remuneration system; hence it is important to obtain good preventive and corrective advice on labour matters.

Therefore, RSM is at your entire disposal to help you implement a variable remuneration system or to clear up any doubts you may have about this matter or any other.

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