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Labour Department
Newsletter

THE POWER OF BEING UNDERSTOOD
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Editorial

Ignacio Hidalgo and Miguel Capel

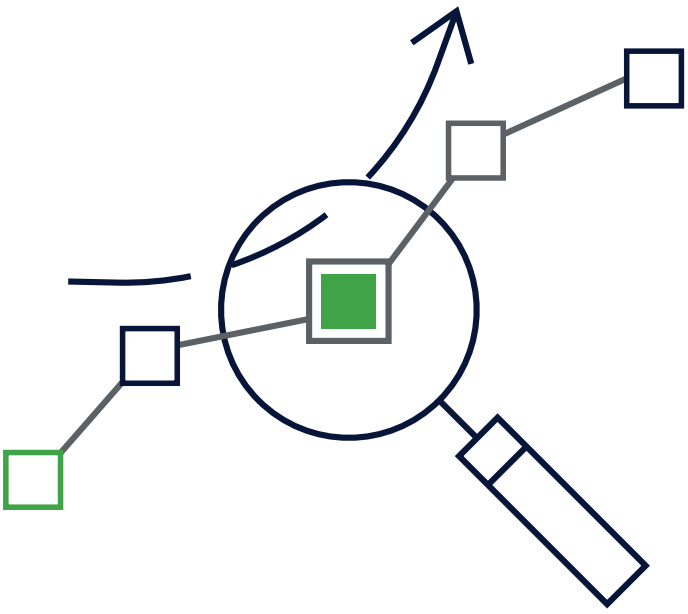
Labour news is constantly appearing and, just like every month, we inform you of this news through #NewsLabour.

In this edition, as always, we will deal with the latest judgements on labour cases, such as the one ruled by the Supreme Court on post-contractual non-competition clauses or the one ruled by the National Court on the obligation of a worker in a situation of temporary disability to inform his/her employer of such circumstance.

You should neither miss our article on the new legislative aspects that will come into force very soon, specifically the reform of the Spanish Act regulating the Labour Jurisdiction, which will certainly give rise to a great deal of discussion.

Constantly informing and updating our readers. ■

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



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

Paula Hernández Seguí
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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 to their special features or importance; we provide an overview of some of them below:

Paula Hernández Seguí

The judgement of the Labour Court of Vigo of 19 January 2024: Can an employer automatically and unilaterally dismiss a worker in the case of his/her total permanent disability?

The Labour Court of Vigo admitted the claim filed by a worker who, after processing his leave on the basis of temporary disability, was declared in a situation of total permanent disability. After being informed of this, the company notified the plaintiff by email that he had been withdrawn from the social security system. This dismissal was ruled null and void by the court bearing in mind the recent judgement ruled by the Court of Justice of the European Union of 18 January 2024 and the contents of Act 15/2022 on equal treatment and non-discrimination, hence concluding that the decision of contractual termination adopted by the company was on the basis of disability, (a fact that was already known by the company due to the worker's previous long period of sick leave on the basis of his temporary disability that had been processed by the worker), the company was therefore considered to have violated the right to non-discrimination on the basis of disability and the company was ordered to reinstate the worker in a job that was compatible with his limitations and with the social security benefits he received. The court deemed that the company could not terminate the contract for no reason and without offering objective justification that measures had been adopted for reasonable accommodation for the job or, when appropriate, the impossibility to adopt such measures due to being an excessive burden for the company.

The judgement of the Supreme Court of 6 February 2024: Are the changes made to the policy for the use of digital devices fair if the workers' legal representatives do not take part in the decision?

This judgement dealt with a case related to a class action filed by a trade union that petitioned revocation of the new company policy for the use of digital devices due to not having been negotiated with the workers' legal representatives. The National Court ruled a judgement admitting the claim that had been filed and therefore found that the notification of the company's new policy to the staff was null and void. The defendant company appealed such judgment to the Supreme Court (cassation) because it deemed that the notification sent by the company was a *"mere reminder and not implementation of a new policy for IT resources"* and hence it considered that the involvement of the workers' representatives was not necessary to issue such reminder since the workers' representatives had already participated when the rules for use were drawn up and hence it was not necessary to recall a prohibition in the company's subsequent messages that had already been implemented. The Supreme Court concluded by dismissing the appeal (cassation) and hence upheld the appealed judgement by deeming that the message implied a modification and not a mere reminder because the criteria in force in the company had been updated and hence such message should have been issued in compliance with the regulations in force.

The judgement of the National Court of 13 February 2024: Is leave due to force majeure remunerated even if that is not expressly stated in the collective bargaining agreement or a company agreement?

The National Court admitted the claim filed by the CIG, CGT and USO trade unions, ruling that the recent leave due to force majeure of up to four days can be remunerated even if this is not expressly stated in the collective bargaining agreement or a company agreement. The defendant company deemed that, from a grammatical interpretation of the regulations, the remunerated nature should have been expressly stated in the collective bargaining agreement or in a company agreement otherwise it could not be considered paid leave. Finally, the division ruled in favour of the trade unions by taking into consideration the grammatical and systematic aspect of the provision in question and after conducting a historical and final analysis, concluding, with no room for any doubt, that such leave must be remunerated. Otherwise, the labour gender gap would be maintained due to the collective remuneration that has traditionally been paid for care of family members and cohabitants possibly undergoing a reduction. ■

Please contact me if you would like further information about this issue.

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> Case of the month

Must workers notify the company that they have been declared on sick leave due to temporary disability? analysis of the judgement ruled by the National Court (labour division, section 1) number 136 of 18 december 2023.

Alejandro Duque

The issue of prior notice in cases of sick leave due to temporary disability (IT) has been subject to extensive discussion in the labour field, in particular since Royal Decree 1060 of 27 December 2022 was published and came into force. This decree, which amended Royal Decree 625/2014, made significant changes in the regulation for managing and controlling temporary disability processes in the first three hundred and sixty-five days it lasts.

> Although Royal Decree 1060/2022 finally eliminated the obligation to provide a copy of the sick leave certificate to the company as of 1 April 2023, the judgement concluded that this must not be confused nor is it incompatible with the duty of the workers to notify such situation to their employers.

In this respect, it is important to recall that Royal Decree 1060/2022 implied a significant change by eliminating the obligation that the worker must provide a copy of the sick leave certificate to the company during the first three hundred and sixty-five days such leave lasts, because since 1 April 2023 it is the Spanish social security institute, collaborating mutual societies and the Public Health Services that must guarantee the companies are informed of the data related to the sick leave certificates, confirmation and the employees' medical discharge. This measure was for the main purpose of updating and improving the procedures related to temporary disability situations through the use of new technologies, providing new guidelines for processing medical certificates and issuing medical discharges, granting the Public Health Service, collaborating mutual societies and the Spanish social security institute a more active role in these situations, in this way simplifying the procedures and bureaucratic obligations that are sometimes burdensome for workers.

However, the aforementioned Royal Decree does not specifically deal with the issue of prior notice in the case of sick leave, leaving a legal loophole that has created some uncertainty and different criteria when interpreting and applying the labour regulations.

In this context, the recent judgement number 136/2023 ruled by the National Court on 18 December 2023 contributed to shedding some light on this issue, within the scope of a class action filed by the *Confederación General de Trabajo* (CGT) trade union against a well-known company in the Contact Center sector, the basis of which dealt with, among other issues, the legality of the company's practice consisting of requiring that workers must notify any possible situation of sick leave that could be declared. In this respect, it should be pointed out that, in the case analysed, the company sent its workers an internal memo in which it notified them that they needed to inform the relevant department of any sick leave situation that could possibly be declared, also in accordance with the provisions in the applicable collective bargaining agreement that classified "failing to provide prior notification of absence" as a minor offence.

Please contact me if you would like further information about this issue.

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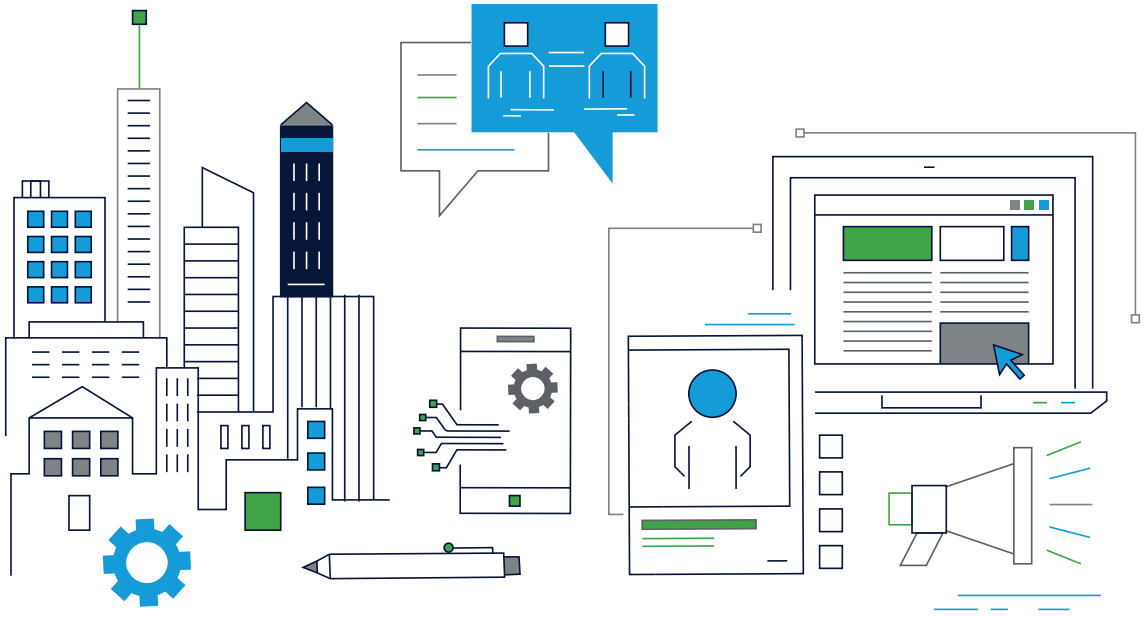
Regarding this issue, although Royal Decree 1060/2022 finally eliminated the obligation to provide a copy of the sick leave certificate to the company as of 1 April 2023, the judgement concluded that this must not be confused nor is it incompatible with the duty of the workers to notify such situation to their employers.

This was sustained by the judgement by making a difference between the obligation to "justify" the sick leave, (which must continue to be carried out by the Public Health Services or mutual societies providing the company with the relevant certificate), and the term to "inform", (based on the need that the workers' absence must not negatively affect the organisation of work). The National Court concluded that what is sought through such informative procedure is merely to avoid harm being caused to the company and to guarantee, as far as possible, suitable organisation of the work, without this implying an excessive burden for the worker.

In short, apart from the casuistic of the judgement, (which, it should be mentioned, is still not absolute), the National Court upheld the employer's right to adopt reasonable control measures related to possible situations of its employees' sick leave, enabling social dialogue and collective bargaining in order to apply policies that ensure correct and suitable organisation of the work in these cases as well as protection of the workers' rights.

RSM is at your entire disposal to provide you with advice and analyse any case related to the possible internal policies to be applied by the company in order to guarantee suitable organisation of its work in the event of its staff's possible sick leave. ■



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

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> Judgement of the month

Regarding the post-contractual non-competition clause, is a unilateral waiver considered valid if this is stated in the clause of the contract signed? (Judgement of the Supreme Court 25-01-24, number 144/2024, Appeal number 3361/2022)

Paula Navarro

A company and a worker entering into a post-contractual non-competition clause suggests there is a twofold interest for both parties. For the company, the know-how acquired by the worker not being used in other companies and, for the worker, ensuring his/her economic stability once the contract has been terminated.

The regulating framework of the post-contractual non-competition clause can be found in Article 21.2 of the Spanish Labour Relations Act, which determines the following essential requirements that must be met for it to be valid:

(i) A maximum term must be stated (2 years for technicians and 6 months for other workers);

(ii) The need that there is an effective industrial or commercial interest in it; and

(iii) Sufficient economic compensation must have been agreed.

In this recent appeal (cassation) for unifying doctrine, the Supreme Court ruled on the validity of a clause whereby the company reserved the possibility to unilaterally waive the non-competition clause. Moreover, in the same way, it recalled its previous rulings on this matter.

What happened in this specific case?

The case in question was focussed on a special senior management relationship in which the senior executive had rendered his services to the defendant from 1 July 2018 until 31 December 2019, as its content officer, with a fixed salary of €120,000, a functional bonus of €40,000 and a variable salary of up to 25% of his fixed salary, providing he achieved the targets set by the company's management.

A post-contractual non-competition clause was agreed in the contract entered into between the parties that included the following provisions:

"However, both parties agree that the Company, **depending on the consideration that the latter (the company) may have about it having an effective industrial or commercial interest, may choose whether or not to apply this clause so that, if it chooses not to apply the clause**, it must notify the executive of such fact at the same time as the termination of the contract or otherwise within a maximum term of fifteen (15) business days after the effective date of termination of this contract.

In such case, the executive shall be released from any restriction in his activity imposed by virtue of this clause and may freely perform his professional activity with no limitation, **therefore the Company need not pay him any amount for the concept referred to in this clause"**.

On 23 December 2019, the worker sent notice to the company of his resignation to which the employer replied by email that the company would not be applying the post-contractual non-competition clause and hence the worker was released from any restriction in his activity due to the clause and the company did not need to pay him any amount whatsoever.

The plaintiff filed a claim petitioning the amount of €80,000, which he supported by applying the compensation stated in the agreed clause.

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

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Judgements ruled in the proceedings:

(i) The Labour Court number 15 of Madrid decided to fully admit the worker's claim.

Specifically, it considered that what had happened in this case, where the employer was authorised to unilaterally revoke the non-competition clause, was null and void within the scope of Article 1256 of the Spanish Civil Code, in other words, the validity and fulfilment of contracts **cannot be left to the discretion of only one of the contracting parties**.

Article 1256: The validity and fulfilment of contracts cannot be left to the discretion of only one of the contracting parties.

(ii) However, the decision of the High Court of Justice of Madrid, (after the company had filed an appeal), contradicted the foregoing and admitted the appeal lodged by the company considering that this was not a case included in Article 1256 of the Spanish Civil Code since it was not based on the existence of a contractual obligation that was unilaterally breached but rather a contractual **option** that had been exercised, which meant the option to fulfil or not to fulfil the agreed obligation.

The High Court of Justice of Madrid added that acknowledgement of the right to "backtrack on" an agreed obligation was not stated but rather it was a simple defining element of the obligation. Moreover, the court clarified that the recognised option of the company made sense because it was at the time of termination when the commercial harm could be precisely assessed that could be caused by the executive's future activity, bearing in mind the functional experience he had acquired.

So... what did the Supreme Court rule?

The Supreme Court recalled its previous rulings on this matter and concluded that, regardless of the clarity of the clause, the post-contractual non-competition agreement could not be revoked by a unilateral decision adopted by the employer.

More specifically, it recalled that the non-competition clause generated not only an expectation for the worker that he would receive compensation but also the need to be ready for a future or possible future activity with new expectations.

In fact, there is no doubt at all that the legal nature of the post-contractual non-competition clause is that of a **bilateral** clause or agreement since it generates rights and obligations for both parties; hence the possibility of changing or cancelling it cannot be allowed by means of a unilateral decision adopted by only one of the parties and, therefore, the clause that stipulated this must be deemed null and void.

> The High Court of Justice of Madrid added that acknowledgement of the right to "backtrack on" an agreed obligation.

In conclusion, whether or not the post-contractual non-competition clause will be applied cannot be left to the free discretion of only one of the parties.

Did you find this ruling interesting? If, after reading this article, you have any queries about this specific matter or the case is similar to the labour situation in your company, please do not hesitate to contact RSM's Labour Department and we will be delighted to provide you with labour advice to clear up your queries. Therefore, please do not hesitate to contact us if you would like to obtain further information about this new judgement and how this issue is developing. ■

Please contact me if you would like further information about this issue.

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> Advice of the mont

Dismissal in cases of temporary disability: what do the spanish courts say about this?

Roberto Villón

Since Act 15 of 12 July 2022 came into force, integral for equal treatment and non-discrimination, there have been more cases considered to be discriminatory, in addition to those that were already acknowledged according to the *Daouidi* doctrine, among others, in other words, this regulation acknowledges that dismissal on the basis of illness is a case of discrimination, which could result in such dismissal being ruled null and void.

The Spanish courts have ruled a series of judgements regarding the classification of workers in these situations. It is therefore essential to obtain suitable legal and labour advice adapted to each specific case before adopting any company decision against workers in a temporary disability situation.

It is important to bear in mind that dismissals of workers in a situation of disability are not automatically null and void since they are covered by the so-called "objective revocation". Therefore, in these cases, the plaintiff must submit sufficient *prima facie* evidence to reverse the burden of proof so that the company is the one that must prove the company's dismissal decision was not for discriminatory reasons. The dismissals in these situations could hence be considered fair, unfair or, if it is confirmed they were discriminatory, null and void.

Two recent judgements provide us with an analysis of the aforementioned law and its application to specific cases, including some of the guidelines that the different divisions are considering when classifying the termination of the labour relationship with a worker in a situation of temporary disability.

When is dismissal considered unfair?

On 9 January 2024, the judgement of the High Court of Justice of the Community of Valencia considered the termination of a worker's temporary contract was unfair. The court categorised the worker's dismissal as unfair in spite of his temporary disability, because it considered that sufficient prima facie evidence had not been submitted to prove such dismissal was null and void. In this case, the division reached this conclusion based on the following considerations:

- It had not been proven that the worker was particularly vulnerable to occupational hazards or that his clinical condition would imply a permanent hindrance for him to perform his work.
- **Although the temporary disability prevented him from working for a certain period of time based on medical prescriptions, that did not mean he was permanently unable to perform his work.**
- The plaintiff was discharged from his medical treatment and began working again in another company.
- Temporary disability does not automatically imply the dismissal is null and void; sufficient evidence of discrimination on the basis of illness is required, followed by objective and reasonable justification for the dismissal by the employer, which was not provided in this case.

In addition, the judgement pointed out that the termination took place when the worker had a temporary contract with a specific term, which ruled out the alleged discrimination, because the termination of the labour relationship would have occurred even if the worker had not been in a situation of temporary disability.

When is dismissal considered null and void?

Moreover, the judgement of the High Court of Justice of Castilla-La Mancha of 18 January 2024 ruled that a worker's dismissal was null and void that had been categorised as unfair by the lower court.

In this case, it was considered that the company's decision was for discriminatory reasons since the worker had had numerous periods of short-term sick leave on the basis of temporary disability during her labour relationship with the company; however, her last sick leave was categorised as long term, which is when the termination of her labour relationship took place. In this respect, the court considered that the company's decision to terminate her labour relationship was based on the frequency of the

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worker's periods of sick leave on the basis of temporary disability, without the company being able to objectively and reasonably justify that the reasons for the dismissal were different from those specified by virtue of such prima facie evidence.

Therefore, the dismissal was ruled null and void and the defendant company was ordered to pay the worker compensation for an amount of €4,000 due to having violated her fundamental rights..

Key considerations in the cases studied above::

It is obvious that in the judgements explained above, the courts considered that the prima facie evidence to be taken into account when considering whether or not there was possible discrimination was based on the continuance over time of the worker's situation of temporary disability and whether or not this could be repeated in the long term.

Notwithstanding the foregoing, each specific case must be analysed in order to find out the possible risks of a dismissal being ruled null and void due to the company's decision to terminate the labour relationship of a worker in a situation of temporary disability.

Other topics of interest in this scope, (the judgement of the Court of Justice of the European Union of 18 January 2024):

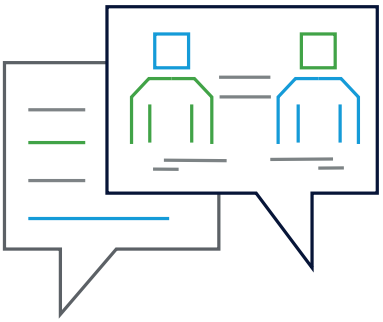
The Court of Justice of the European Union, within the scope of protection of the rights of disabled persons, recently clarified the connection between the United Nations Convention on the Rights of Persons with Disabilities and European Directive 2000/78, resulting in coherency and effective application of measures required to promote labour inclusion.

The chamber that had been assigned the case sustained the provisions in the United Nations Convention could and must be invoked in order to interpret the EU Directive so that an interpretation is guaranteed in accordance with international human rights standards. The basis of this interpretation is the definition of discrimination on the basis of disability, which encompasses the refusal to make reasonable accommodation as stipulated in the Convention.

However, what does this term "reasonable accommodation" mean? This term refers to measures that enable disabled persons to take part in the labour field on an equal basis, such as changing the worker's job when the person can no longer perform his/her duties due to an acquired disability.

Nevertheless, this criterion is not in accordance with national regulations, specifically Article 49.1 e) of the Spanish Labour Relations Act. This article allows a worker to be dismissed if he/she is considered to be unsuitable on the basis of a disability without the employer needing to adopt suitable measures, such as reasonable accommodation, before carrying out the dismissal.

In this respect, the judgement pointed out the need for national law to be adapted to the principles and standards stipulated in international treaties, such as the United Nations Convention. This does not mean merely complying with the legal obligations but also promoting a truly inclusive labour environment in which disabled persons have the possibility to fully contribute to society. ■



Please contact me if you would like further information about the regulation analysed below.

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> Legislative developments

The most important aspects of the pioneer reform on procedural-labour matters based on the Legislative Royal Decree 6/2023.

Alejandro Alonso

The Legislative Royal Decree 6 of 19 December 2023, (published in the Official State Gazette (BOE) on 20 December), approved urgent measures for implementation of the Recovery, Transformation and Resilience Plan related to public judicial service, public duties, local system and patronage.

Regarding the social jurisdictional system, the Spanish Labour Jurisdiction Act 36 of 10 October 2011, ("hereinafter referred to by its initials in Spanish "LRJS"), has been reformed continuing the reform of Act 13 of 3 November 2009, in which the competence of the legal counsel of the Judicial Authorities in the instructions of the proceedings was redefined, including measures for procedural efficiency of the public judicial service in order to harmonise the civil, criminal, contentious-administrative and social procedural regulations within the context of digital processing.

The amendments made to the LRJS, which will come into force on 20 March 2024, basically involve the following aspects:

Suspension and deferral of enforcement of judgements

In this respect, Article 244 of the LRJS has been amended, now covering the possibility to suspend or defer enforcement in the following manner:

- By reaching a mutual agreement, the parties may request suspension of enforcement for a period of time no longer than fifteen days in order to submit discrepancies raised within the scope of enforcement of mediation proceedings.

- If an agreement is reached, it must be submitted for judicial approval in the manner and with the effects stipulated for the agreement in Article 246 of the same regulatory text, otherwise the suspension will be lifted and the processing will continue.

Are there costs in the labour jurisdiction?

The aforementioned Royal Decree states that judgements, with due grounds, can impose a pecuniary penalty in the following cases:

- If the litigating party fails to appear at the conciliation or mediation proceedings with no justification.

- If the litigating party acts in bad faith.

- If the judgement is basically the same as the claim in the conciliation or mediation slip.

What outcome will any of these actions have?

In these cases, if the party found at fault is the employer, it will also need to pay the fees of the other party's legal counsel up to an amount of €600. .

Identical proceedings

This new aspect is theoretically important, even though its practical development is yet to be seen, and allows the jurisdictional body to optionally and preferentially process one of several proceedings with the same object and the same defendant, providing that, pursuant to the law, they are not subject to a joinder or had not been able to be filed as a joinder. Once the judgement is absolute, this will be recorded in the suspended proceedings and notice will be served to the parties so that the plaintiffs can request an extension of the effects thereof, pursuant to the new Article 247 bis, continuance of the proceedings or withdraw the claim.

When several proceedings with the same object and the same defendant are pending in a court or tribunal, providing that they are not subject to a joinder or had not been able to be filed as a joinder, the first of them will be held, and the other proceedings will be processed so that the allegations deemed appropriate can be submitted within a term of 5 days, the rest being suspended until a judgement has been ruled on the first of the appeals.

Please contact me if you would like further information about the regulation analysed below.

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Once the judgement on the identical proceedings is absolute, the other parties whose cases have been suspended will be notified so that, within a term of 5 days, one of the following options can be chosen: request an extension of the effects of the judgement ruled on the identical proceedings, continue the proceedings that had been suspended according to the claim as filed or withdraw the claim.

Joinder of actions and proceedings

We can find another important aspect regarding the previous provision whenever it is classified that the following cases must be included as a joinder in the same proceedings, unless the joinder could cause disproportionate harm to the effective judicial protection of the other parties involved:

- Actions based on the same facts or the same or similar company decision or various similar company decisions.
- In claims related to an occupational accident, the actions filed by the parties affected by such accident.
- When the challenged administrative act involves various parties.
- Actions related to substantial modification of working conditions filed by different plaintiffs against the same defendant, providing they are based on the same facts or the same company decision.
- Actions related to dismissal for objective reasons, providing they are based on dismissal letters stating the same cause.

Documents submitted in the proceedings

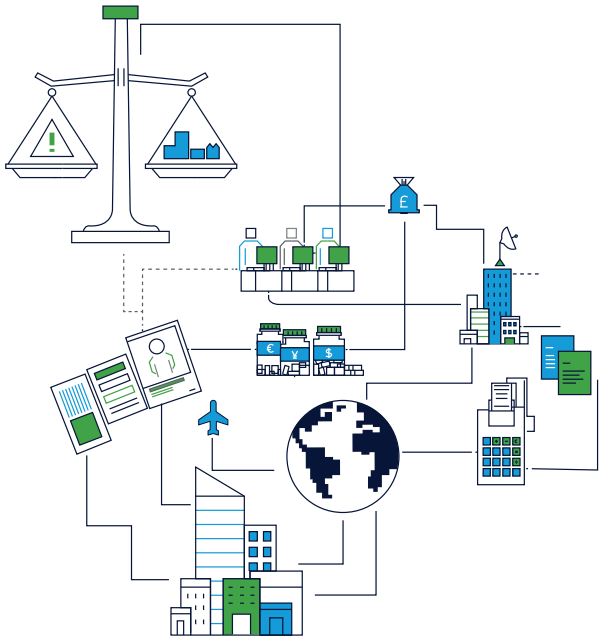
Article 41.1 is related to the way documents must be submitted and explains that the parties or persons involved must submit all kinds of documents and actions by digital means to be included in the digital judicial file.

There is a good reason for including this provision and it is worthwhile explaining the recent ***judgement ruled by the National Court, Labour Division, of 5 February 2024, Appeal 297/2023***, which invokes this provision, accepting that the documental evidence submitted in hard copy by the employer's legal counsel at the trial must be duly rejected because Article 41.1 of Legislative Royal Decree 6/2023 states that all kinds of documents and actions to be included in the digital judicial file must be submitted digitally, it is hence an obligation and not an option.

Preference placed on dismissal proceedings providing certain requirements are met.

Dismissal proceedings are considered urgent and preferential if the company has not processed the cancellation of the worker in the General Social Security Treasury and for cases when the labour relationship is terminated due to failure or continued delay in payment of the agreed salary.

If you find the contents of this article interesting and you would like more specific explanations or you have any doubts about the aspects that have been subject to amendment, please do not hesitate to contact RSM's Labour Department and we will be delighted to deal with them and resolve your queries. ■



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