N° 31 | NOVEMBER-DECEMBER 2023

English version

NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

Ignacio Hidalgo and Miguel Capel

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

We deal with judgements of great interest in this edition, such as the one ruled by the Supreme Court on the impact of recruitments prior to eliminating a job for economic reasons.

Moreover, you should not miss our Advice of the Month in which, by analysing recent case law, we deal with how to act in the case of requests for specifying working hours when this could change the essential characteristics of the job.

Constantly informing and updating our readers.

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

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

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>The courts in a nutshell

What's new on the block?

As always, every month we can find judgements and legal news that particularly draw our attention due their special features or importance; we provide an overview of some of them below:

Roberto Villón

The judgement of the Supreme Court of 17 October 2023: Can a worker's dismissal for stealing €5.52 be ruled fair?

The Supreme Court ruled that the dismissal of a worker was fair after she was accused of labour infringements, among others, failing to act in good faith and abuse of trust. Such infringement was detected after inspecting her handbag and finding in it the products of the company, a supermarket, that the worker had not paid for. The value of the aforementioned products amounted to €5.52. The Chamber decided it was not reasonable to restrict the possibility to impose a sanction with the maximum consequences on a worker based on the low economic value of the stolen products. It deemed that the dismissal should be ruled fair, due to the intentional nature and deliberate action of the worker to the detriment of the company and without the fact she had never been sanctioned before being considered as an extenuating factor.

The judgement of the High Court of Justice of Madrid of 13 October 2023: Can an Equality Plan be unilaterally registered by a company?

In this case, the validity of an Equality Plan was studied. Such plan had been unilaterally registered by a company with more than 50 employees. The company in question had no unitary representation bodies and the most representative trade unions failed to appear after any of the calls to meetings had been sent by the company. Therefore, the Division of the High Court of Justice deemed that, in this case, the impossibility for negotiations could not harm the party that had provided all the means possible for such purpose. The aforementioned Equality Plan should hence be registered in the competent registry, such Plan being equivalent to those adopted when an agreement is not reached between the parties.

The judgement of the High Court of Justice of Madrid of 16 October 2023: Can dismissal be notified while the worker is on holiday?

In this case, a worker was dismissed for not locking the office where he had been rendering his services, which resulted in a vehicle the company had acquired disappearing. In the claim, it was petitioned for the dismissal to be revoked because the worker deemed that his right to honour and privacy had been violated due to him being dismissed while he was on holiday and he was notified of such dismissal by means of a registered fax (*burofax*). The judgment ratified the justification for the dismissal, dismissing its revocation and considered that the fact of being dismissed while on holiday only granted the worker the right to be paid for the remaining days of his holidays.

The judgement of the High Court of Justice of Castilla-La Mancha of 9 October 2023: Reporting the company does not grant workers' impunity for the labour infringements they commit.

The guarantee of indemnity is a right that protects workers from the reprisals that could be taken by their employer for claims or reports they file against the company; this right has been extended to even include internal complaints. However, this right does not grant impunity for the labour infringements that a worker could commit within the scope of his/her labour relationship. In this case, the worker reported his company to the Labour Inspection Department due to it failing to pay salaries or delaying their payment; however, a few days before, this worker had threatened his work colleagues with expressions such as *"I'm going to bring a knife and I'm going to stab them"*, among other insults. The Division of the High Court of Justice ruled out the revocation of the dismissal, because it considered there was no connection between the report and the dismissal and hence there was no violation of the right to effective judicial protection related to the guarantee of indemnity. ■

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

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>Practical Law

Can a company file a claim against a worker for damages caused by his/her attitude/conduct when rendering his/her services?

Guillermo Guevara

This question is related to whether or not a claim can be filed for damages against a worker.

If we analyse the rulings of the Spanish courts, we can traditionally find two opposing theses:

- One that considers it would be impossible to file a claim against workers for compensation of the damages caused due to performing their work, when the worker's breaches of contract do not imply liability for compensation but rather disciplinary liability, due to the employment relationship not being involved.

- The other that a worker's disciplinary liability is different and separate from civil liability, (labour, to be more precise), which could also be committed while performing his/her work, because to understand that the employment relationship is not involved prevents any claim for damages being filed against the worker is so drastic that it would make one consider that the worker has absolute immunity regarding the results that could be caused by his/her conduct when performing his/her work duties.

However, although these two positions exist, the Supreme Court ruled on this matter in its judgement of 14 November 2007, confirming there was liability for compensation by the worker even when the employment relationship between the employee and the employer was not involved.

This theory, also based on no employment relationship being involved, sustains that a mere breach of contract compatible with applying Article 1.101 of the Spanish Civil Code is not sufficient, since the lack of relationship includes in its scope the mistakes or negligence that the worker could commit and this does not imply that no liability whatsoever can be claimed against the worker, albeit limited to the most serious cases.

In this respect, the Supreme Court limited the possibility to claim damages against a worker, specifying that *"this means the traditional civil criteria of contractual liability for compensation must be defined and it is required that for this to arise within a labour scope the worker's misconduct or negligence must be serious, qualified or sufficiently important"*.

This criterion has also been accepted by the Spanish courts since then, an example of this being the judgement of the High Court of Justice of Madrid of 11 February 2022 or the judgement of the High Court of Justice of Asturias of 14 December 2022.

However, such judgement did not fully clarify the issue, since the requirements that the Spanish High Court considered necessary, such as *"negligence that is serious, qualified or sufficiently important"*, does not eliminate the subjective nature from such a controversial issue.

Similarly and along the same lines, the Supreme Court specified that *"not all errors, mistakes or negligence committed by a worker results in compensation of the damages that his/her conduct causes, which means we must take into account the circumstances of each case in order to assess the level of lack of attention paid to the measures and care required by everyone"* and it provided advance information that, due to the indispensable requirement for an appeal (cassation) for unification of doctrine consisting of a contradiction between judgements to be admitted and because of the difficulty in finding cases that have these same facts, judgements will not be ruled on this matter very often.

It is obvious that the possibility to claim compensation from a worker for the damages caused to the company is not a clear issue, since each case is unique and because the Supreme Court has determined certain subjective limits.

For such purpose, RSM is at your entire disposal to clear up all the doubts you may have related to this matter or any other and to provide you with advice in analysing whether or not it would be feasible to file this kind of claim against an employee. ■

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

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>Case of the month

Google Maps as a labour tool in cases of paid leave

Lara Conde Sánchez

As we all know, workers are allowed to take a series of paid leave in order to deal with their personal and family affairs that take place within their working hours and, among others, they can take paid leave to attend a doctor's appointment.

Taking these kinds of leave has led to conflictive situations due to issues arising, such as workers abusively using this paid leave, the calculation of the time for the leave, i.e. when it begins and ends, or the way/means for its justification.

The High Court of Justice of Madrid has ruled a new judgement on controlling the suitable use of the leave for the worker himself to attend a doctor's appointment or to accompany a relative to one. In this case, the company had implemented a control measure that directly limited the time that could be spent for these kinds of leave.

Specifically, it was stipulated that the time spent to travel to such doctor's appointments and to return must be the maximum time specified by Google Maps, plus twenty minutes to cover the time to find a parking space. Moreover, in cases when relatives are accompanied to an appointment, the required time is also included to return them to the place where they were picked up or to their homes according to the specifications of Google. Furthermore, the time the doctor's appointment lasts must be specified in the medical certificate.

The workers filed a claim by means of a class action, alleging that a significant change had been made to their working conditions since, prior to such change, the company only required prior notice and a certificate that the person had attended the doctor's appointment.

The judgement was focussed on assessing whether or not the employer could unilaterally implement this control measure, by virtue of Article 20 of the Spanish Labour Relations Act, according to which the capacity is stipulated to **"adopt the measures deemed most appropriate for vigilance and control to confirm the worker is fulfilling his/her labour obligations and duties"**. Previously, no control measure had been applied in the company nor did the applicable collective bargaining agreement regulate any limitation whatsoever.

The Labour Court deemed that the measure was fair and pointed out that the employer merely implemented a control and regulation system to verify the employees' working hours were being performed and fulfilled by exercising its right to corporate organisation and management, which did not imply any significant change whatsoever.

In the appeal for reversal, the High Court of Justice of Madrid pointed out there was a difference between justification and control: **"the former is used to prove that the worker or his/her relative have a doctor's appointment at a specific time and the time such appointment ends; the latter enables the employer to verify that the time spent by the employee to go to the health centre and to return to the company is in accordance with the standards for indispensability and need set forth in the regulations"**.

However, it deemed that the employer was entitled to implement control mechanisms that enabled it to check whether or not its employees use these kinds of paid leave pursuant to the rules of good faith, which, it should be remembered, are taken during working hours for which they are entitled to be paid.

It also stipulated that implementing this control measure did not cause any significant change or harm for the workers. This was because it deemed that they were granted greater legal security by not depending on their employer's subjective assessment about the travel time that could be considered too long in each case and it enabled them to have an objective reference. Moreover, it would also indirectly benefit them by guaranteeing that their colleagues correctly exercised their right to this leave because incorrect use could have a negative impact on their work due to obliging them to undertake a greater work load with no justification for this.

Based on the foregoing, the appeal for reversal was dismissed and the judgement ruled by the lower court was upheld, rejecting that there was any significant

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Si quieres más información sobre los efectos prácticos de esta sentencia, contacta conmigo.

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change in the employees' working conditions and hence it indirectly confirmed the possibility to use Google Maps as a measure to control the time spent when taking such leave.

However, it should be pointed out that this judgement did not directly assess the suitability and validity of the reference tool that the company had chosen because the workers did not question that. Therefore, we must wait and see whether or not the possibility is confirmed that this tool can be used for labour control in a case in which its validity is questioned.

RSM is at your entire disposal to provide you with advice, analyse any case and, of course, to advise you on which control measures are the most suitable in each case and how to implement them without violating your workers' rights. ■

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

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›Judgements of the month

Judgement of the month: recruitment prior to the dismissal of another worker who will perform various duties, among these the ones performed by the plaintiff worker, does not necessarily imply job elimination being infringed

Alejandro Alonso Díaz

In its judgement number 732/2023 of 10 October 2023, Appeal 3103/2021, the Supreme Court ruled on a recurrent matter that usually arouses great interest, this time it refers to the casuistic resulting from eliminating a job based on objective dismissals. In this respect, as we will see further below, the Supreme Court eventually admitted the appeal (cassation) for unification of doctrine lodged against the judgement of the High Court of Justice of Valencia, hence overturning and revoking it, and finally ruled that the objective dismissal was fair.

What process took place in the respective courts related to this case until it reached the Supreme Court?

The dispute arose in 2020, when the company dismissed an employee for economic reasons, such employee having performed, among other duties, those of chief financial officer since 2006 and immediately recruited another person to replace him.

The judgement of the lower court ruled by the Labour Court number 16 of Valencia fully dismissed the claim and ruled that the objective dismissal was fair.

After that, the judgement of the Labour Division of the High Court of Justice of the Community of Valencia of 8 June 2021, Appeal 667/2021, overturned the disputed ruling and, by partially admitting the claim, ruled the dismissal was unfair.

Replacement vs. elimination; the analysis and arguments of the Supreme Court.

The worker in this case, who was dismissed after the aforementioned recruitment, handled the financial management and also performed administrative duties.

The Supreme Court considered that **hence there was not a mere advance replacement of a worker** for another but reorganisation of human resources, which was unquestionably included in the actions of an employer's freedom to organise the company's human resources.

Therefore, a worker was recruited, which took place a month and a half before the plaintiff was dismissed, to the position of organisational manager and was assigned duties to coordinate departments, and tasks related to finance, human resources and systems. After such recruitment, the dismissed worker undertook the financial management and performed administrative duties so it could not be considered a mere advance replacement of one worker for another but reorganisation of human resources, which was included in the actions of an employer's freedom to organise the company's human resources.

The company dismissing another eight workers for the same reasons and the fact it belonged to a commercial group, expressly categorised as non-pathological, and that, prior to the dismissal, the company was purchased by other companies in the group that changed the organisational chart of the human resources department also serve to weaken any sign of discrimination.

The assessment of the specific circumstances in the life of the company, in principle, must be conducted by the employer, normally exceeding the judicial scope of control of the objective dismissal, since it is a control of the legality of the specific dismissals in the case, limited to deciding on the reasonability thereof by applying the standard of conduct of a good employer that cannot become an overall or joint assessment of the company's staff policy.

What impact did the objective reason, i.e. economic, have on the justification that the dismissal was fair?

In this case, the Chamber considered that the company's needs related to managing its staff did not allow it to be deduced that this would limit the replacement of some employment contracts for others but was an update of the economic reason that affected the dismissed worker's job, i.e. economic reasons, and since there was no factual element to allow it be sustained that, with a minimum *prima facie*

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

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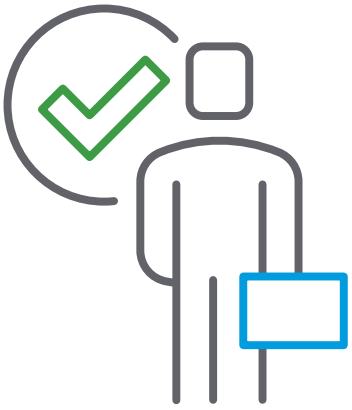
basis, instead of eliminating a job what was intended was to replace one employee for another; therefore the dismissal decision was not lacking reasonability, since the corporate action was within its freedom of management and, in any case, it was the worker who was the one who had to prove the lack of reasonability.

Conclusions and final decision of the High Court.

The appeal being admitted implied the objective dismissal was ruled fair due to having proven the economic reasons for it, which also affected other workers even though, due to the special internal features of the company's management, a new worker had been recruited that ended up undertaking, among others, the duties performed by the dismissed worker:

> *"The worker dismissed in this case after the aforementioned recruitment carried out the financial management and performed administrative duties.* ***Therefore, it was not a mere advanced replacement of one worker for another but a reorganisation of human resources, which was unquestionably included in the actions of an employer's freedom to organise the company's human resource****s.*
> *It is also shown that the defendant dismissed another eight workers for the same reasons as the plaintiff and it also formed part of a company group, expressly categorised as non-pathological and, prior to the dismissal involved in this case, the respondent was purchased by other companies in the group that changed the organisational chart of the human resources department. As stipulated in our judgement of the Supreme Court of 15 October 2003, appeal (cassation) 1205/2003 for unification of doctrine, applied in this case as a reference,* ***the assessment of these specific circumstances of the life of the company, in principle, must be conducted by the employer****, normally exceeding the judicial scope of control of the objective dismissal, since it is a control of legality of the specific dismissals in the case, limited to deciding on the reasonability of this by applying the standard of conduct of a good employer that cannot become an overall or joint assessment of the company's staff policy. Moreover, in the case we are examining hereby, the needs of the company related to managing its staff* ***means we cannot deduce that it merely replaced some employment contracts for others****.*
>
> *[...]*
>
> *Having been proven that the update of the economic reason affected the plaintiff's job, no violation was committed of the fundamental right of any worker* ***whose contract was terminated for economic reasons and since there is no factual element that would allow it to be sustained, with a minimum prima facie basis, that instead of eliminating a job what was intended was to replace one employee for another****, the decision on dismissal analysed hereby cannot be considered to lack reasonability, since the company's actions were included in its freedom of management and, in any case, it was the plaintiff that must prove such lack of reasonability by means of providing evidence of the facts with the required precision, since the company has complied, in principle, with the burden it held to prove the existence of the reason and its connection with the termination measure adopted".*

Did you find this ruling interesting? If, after reading this article, you have any doubts about this specific matter or it is similar to the labour situation in your company, please do not hesitate to contact RSM's Labour Department and we will take great pleasure in providing you with labour advice on this matter to clear up your doubts.



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>Advice of the mont

Can the right to reduced working hours render the essential features of a job meaningless?

Yolanda Tejera López

Articles 37.6 and 7 and 34.8 of the Spanish Labour Relations Act, (hereinafter referred by its initials in Spanish "ET"), acknowledges the workers' right to reduce and specify their working hours and to adapt the time and allotment of these hours in order to effectively exercise their right to balance their work and family life and to preserve the interests of minors and their parents' required duty to protect them.

The reduction of working hours, (Article 37.6 of the ET), is a worker's right that must be recognised by his/her employer, which can "modulate" the specific hours, (Article 37.6 of the ET), or the requested adaptation of working hours, (Article 34.8 of the ET), providing there are organisational or productive reasons not to allow this according to the terms requested.

In other words, when a worker requests to exercise his/her rights to balance his her/work and personal life, there is a contradiction of two interests: (i) that of the worker, who is entitled to reduce his/her working hours and, as far as possible, to specify and adapt such hours; (ii) and that of the company.

These opposing interests become even more accentuated in cases when workers are involved who, due to the specific and essential characteristics of their jobs, need to travel in national territory or even abroad. In these cases, the courts have been conducting a joint analysis of the following circumstances:

- The needs of the person, subject to protection.
- The personal and professional circumstances of the requesting parent.
- The circumstances of the employer company.

A recent judgement ruled by the High Court of Justice of Asturias of 17 October 2023 analysed a case of this kind, drawing the conclusion that the fact a worker with reduced working hours was assigned to travel nationally or internationally did not violate his/her right to balance his/her work and family life since the right to this work-life balance could not render the duties of his/her job meaningless.

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What was the case analysed by the court?

The Labour Division analysed a case in which a worker, an Electrical Fitter that had to travel to the customers' premises in Spain and abroad to render his services as an essential part of his duties, petitioned a ruling that his fundamental right to a balanced personal and work life had been violated due to the employer ordering him to travel to Soria and India. In the same way, the worker petitioned the court to rule that he was entitled to remain in national territory and that the company must cease its conduct.

In this case, there was a special feature that at the time the reduction in working hours was granted, the company then warned him that, even though the company would try to limit his travel as far as possible, such travel was an essential part of his job and the requested reduction in working hours could not result in his professional duties and commitments being limited.

The worker did not challenge the aforementioned response and when the company told him he needed to travel to Soria and India because there were no other workers available, he lodged an appeal petitioning a ruling that his fundamental right to equality had been violated related to his right to a balanced personal and work life.

What conclusion was drawn by the High Court of Justice of Asturias?

After conducting the analysis referred to above, the court concluded that the work performed by the employee required that he was obliged to make certain compulsory travel, which could not be limited by the reduction in working hours that the employee had requested.

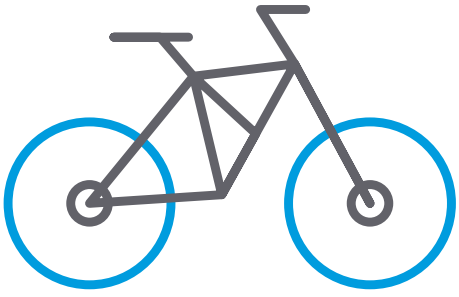
In this case, since the travel was "due to the requirements of his job", as expressly stipulated when his right to reduce his working hours was acknowledged, it could not be deemed that there was even *prima facie* evidence that the workers' fundamental rights had been violated as he had petitioned.

Lastly, the Division considered that, since evidence of the alleged violation of the right to equality and a balanced personal and work life had not been provided, the company did not even need to justify why the aforementioned travel had been assigned to the worker that, in any case, took place bearing in mind his circumstances and because no other employee of his category could be assigned.

In fact, the ruling of the Labour Division of the High Court of Justice of Asturias clarified that the workers' right to a balanced personal and work life could not lead to the work performed by workers becoming meaningless, because otherwise a dangerous mechanism would be authorised through their right to a balanced personal and work life that could be used unlawfully by workers to change some duties of their jobs, such as the need to travel to perform certain duties and tasks.

Nevertheless, companies must be extremely cautious because the courts have been analysing the right to a balanced personal and work life from a constitutional standpoint that implies any refusal of these rights must be fully justified in order to avoid a possible violation of fundamental rights.

In order to avoid any possible headaches, it is crucial to obtain specialised advice related to a balanced personal and work life. For such purpose, RSM is at your entire disposal to provide you with advice, analyse any case and, of course, to advise you which actions are the most suitable in each case. ■



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