N° 26 | APRIL 2023

English version

NEWSLABOUR

RSM SPAIN LABOUR DEPARTMENT NEWSLETTER

Ignacio Hidalgo and Miguel Capel

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

In this edition, as always, we will deal with the latest judgements on labour cases, in which issues are dealt with such as whether or not the dismissal of a worker who will soon become a father could be deemed null and void due to discrimination or what the effect would be of exercising the right to strike on the calculation of attendance bonuses.

We also analyse the situation of illegal assignment of workers and we offer several pieces of advice to avoid you being found in such situation.

Neither should you miss out on our #JudgementoftheMonth related to the alleged need to hold a preliminary hearing before disciplinary dismissal even if the collective bargaining agreement does not mention it.

We are 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.

Roberto Villon
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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 Villon

The judgement of the Supreme Court of 14 March 2023: Seniority is counted from the time the formalities are carried out for the first temporary employment contract signed.

The Supreme Court repeats the doctrine related to seniority to be taken into consideration in cases of temporary contracts being entered into fraudulently. In this case the worker had carried out the formalities for a large number of temporary employment contracts in certain annual periods during her professional career in the company, which proved the cyclical need for this service. In this respect, due to not having justified the reasons for this temporary situation, the Chamber acknowledged the fraudulent nature of the temporary contracts entered into with the worker, since these in fact concealed the permanent but discontinuous nature of the labour relationship and therefore it deemed that the seniority to be taken into consideration was from the date the first temporary employment contract was signed.

The judgement of the Supreme Court of 9 February 2023: When is exercising the right to strike considered absence for the purpose of the attendance bonus?

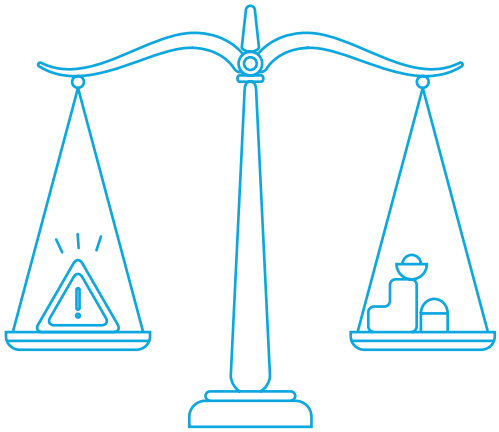
This time a case was analysed in which the company counted the time the workers exercised their right to strike as absence for the purpose of their attendance bonus. The Supreme Court concluded that, in order for the time of strike to have a negative impact on the calculation of the relevant supplement or bonus, this must have been expressly stated in the applicable collective bargaining agreement and, if there was nothing stipulated in the collective bargaining agreement, it cannot be interpreted as authorisation for the company to consider the time of strike as unjustified absence from work.

The judgement of the Supreme Court of 22 March 2023: When does the action expire for reinstatement of a worker on voluntary leave?

The Supreme Court discussed the term of expiry to exercise the action for reinstatement of a worker on leave. It was determined that the term of one year included in Article 59 of the Spanish Labour Relations Act would be applicable when the employer openly, clearly and categorically refused to reinstate the worker on leave and removed him/her from its staff, equivalent to dismissal. On the other hand, when the employer accepted the right of the worker but refused to reinstate him/her due to a lack of vacancies, the term would begin when there was a vacancy that is known to the worker. The Supreme Court dismissed the expiry of the reinstatement action after voluntary leave because the company failed to notify either the reinstatement phase or the vacancies available to the worker; therefore the action could not be filed due to reasons caused by the company.

The judgement of the Labour Court of Cartagena of 1 February 2023: Is the dismissal of a worker who will become a father null and void?

This time a case was analysed in which it was questioned whether or not the dismissal of a worker must be considered null and void due to violating fundamental rights or for discriminating reasons because he would soon become a father. Although paternity is not expressly included as a discriminating factor in the law, it is included in the open formula that contains these provisions. In this case, the situation explained in Act 15 of 12 July 2022 was deemed to be related for there to be *prima facie* evidence that the dismissal could have been due to the worker soon becoming a father. Therefore, the dismissal was ruled null and void and compensation of €10,000 was granted for moral damages. ■



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

Lara Conde Sánchez
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›Practical Law

Salaries during proceedings at the expense of the State, when can companies claim them and how does this work?

Lara Conde Sánchez

As we all know, if a dismissal is ruled unfair, within a term of five business days, the company must choose to either reinstate the worker or settle the legal severance pay.

If it chooses to reinstate the worker, the employer must pay the salaries during the proceedings from the date of dismissal until the date the judgement is ruled.

However, if more than ninety business days elapse, counted from the date the claim was filed until the judgement is ruled, the company may request the State to pay part of the salaries during the proceedings that exceed this time period and the related social security contributions (Article 56.5 of the Spanish Labour Relations Act).

In March this year the Supreme Court ruled on three cases in which a claim was made to the State for payment of the salaries during the proceedings. In these judgements the Chamber repeated doctrine and recalled situations in which such term had been suspended or the salaries paid during this period were deducted in cases of a claim for them.

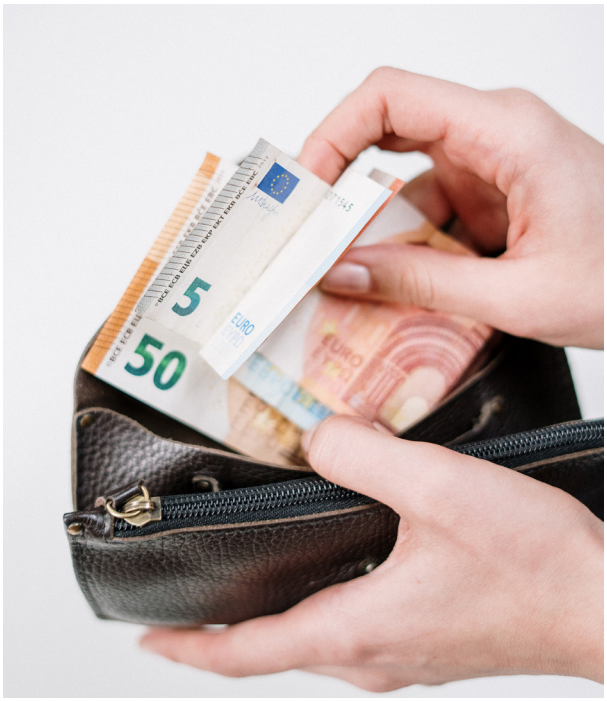
Bearing in mind this recent case law, a review should be conducted of what this claim for salaries during the proceedings actually consists of.

Can the salaries during the proceedings be claimed in all cases?

It must be considered that these salaries during the proceedings cannot be claimed in all cases of dismissal because there are certain exceptions or limitations.

Companies should be aware that these salaries during the proceedings can only be claimed in cases of unfair dismissal. This means that, if the dismissal is ruled null and void, the salaries during the proceedings are fully payable by the employer, regardless of the time that has elapsed for the judgement to be ruled, due to reinstatement being mandatory.

They should also be aware that these salaries can neither be claimed if the unfair dismissal is acknowledged or if reinstatement takes place due to an agreement being reached between the parties, whether in the administrative or judicial conciliation phases, precisely because there would be no judicial judgement in this respect.



Procedure: How are these salaries during the proceedings claimed?

The company is allowed one year, counted from the payment of the salaries to the worker and the contributions to the social security, to claim these salaries during the proceedings from the State.

First of all, they must be claimed through administrative channels at the Ministry's online office, by complying with the requirements regulated in Royal Decree 418/2014, and the Ministry must adopt a decision within a term of one month. If such request is refused or there is no express decision, then the company can file legal proceedings to claim them and submit its writ in the same court that had held the dismissal proceedings, in which both the State and the worker must be parties.

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

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It must be taken into consideration that the amounts the worker has received must be deducted from these salaries during the proceedings if he/she found another job during the period between the date the claim was filed and when the judgement was ruled. Nevertheless, if the worker's salary is lower than the one ruled in the dismissal judgement, only such amount must be deducted and the difference between both salaries must be paid (judgement of the Supreme Court of 14 March 2023).

In which situations is the term of 90 days suspended?

Article 119 of the Spanish Act regulating the Labour Jurisdiction determines a number of *numerus clausus* cases in which the calculation of the term of 90 business days is suspended, consisting of the following:

- Suspension in cases of the claim needing to be remedied.

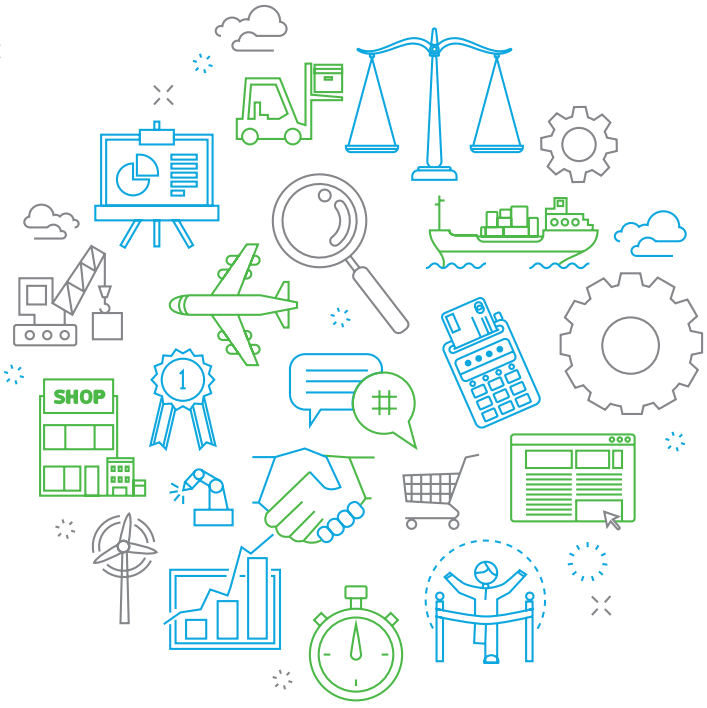
  However, in the recent judgement of the Supreme Court of 21 March 2023, the Chamber ruled that a delay in the proceedings due to a need to extend the claim against other companies did not suspend the term of 90 days because *"this situation cannot be compared, by analogy, with the time spent to remedy the claim, because under no circumstances could the need to extend the claim be related to delaying or negligent conduct of the plaintiff workers"*. This is also because the delay is not only caused by one of the parties, but also the irregular actions of the Judicial Authorities, which did not observe the term of 10 business days to set a new date for the trial.

- Suspension petitioned by any of the parties.

- Suspension to prove the legal action has been filed, in cases when any of the parties allege a document has been falsified.

As can be seen, the cases for suspending the term of 90 business days are those occurring as a result of any action by the parties, the term not being suspended longer than the situations regulated by law and cases of delays due to the actions of the Judicial Authorities – see the innovative judgement of the Supreme Court of 24 March 2023 in which it was ruled that raising a question of unconstitutional conduct by the court did not suspend the term –.

The possibility to claim the salaries during the proceedings from the State when they are delayed is a chance that is worthwhile considering both for economic and strategic reasons. Therefore, RSM remains at your entire disposal to clear up any queries about this matter or help you to process any claim you would like to file. ■



Please contact me if you would like further information about the practical effects of this conduct.

Alejandro Alonso Díaz
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>Case of the month

Illegal assignment of workers and working from home.

Alejandro Alonso Díaz

Could rendering services by working from home be considered an illegal assignment of labour?

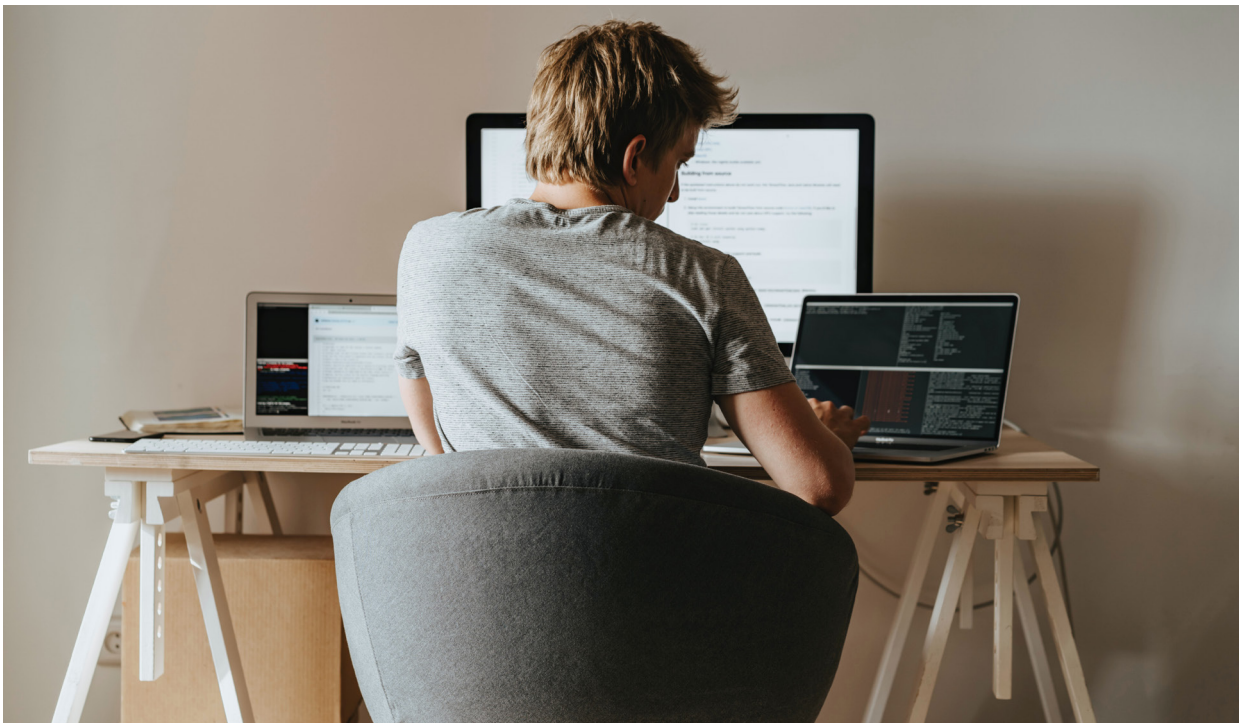
Regarding this issue and in order to consider there is an illegal assignment of workers due to rendering services by working from home or by remote means, the same parameters stipulated in the Spanish legal system are applicable to determine whether an assignment of workers is legal or illegal.

There is hence no prohibition to prevent an employer from resorting to external recruitment of workers to be assigned to its production activity (Article 42.1 of the Spanish Labour Relations Act), which means that, in general terms, so-called production decentralisation is legitimate, regardless of the required legal and interpretive precautions that must be taken to avoid this system violating the workers' rights.

The consideration about whether or not there is an illegal assignment has been defined by the latest doctrine on this matter as "providing labour without contributing any of the personal and material elements used for its business structure".

In order to consider there is an illegal assignment of workers by them working from home or by remote means and due to the lack of specification in the statutory regulation and the Spanish Working from Home Act 10 of 9 July 2021, the same parameters are applicable as those that the Spanish legal system has stipulated to determine whether an assignment of workers is legal or illegal. In any case, it is deemed that an illegal assignment of workers occurs when any of the following circumstances arise: If the object of the service agreements between the companies is limited to merely making the assignor company's workers available to the assignee company, if the assignor company does not have its own stable activity or organisation, if the assignor company does not have the required resources to perform its activity or if it does not perform the duties inherent to its position as employer.

There is judicial doctrine that has adapted these specifications to a situation of working from home, for example the judgement of the High Court of Justice of Castile and León of 2 July 2020, Appeal 216/2020, which analysed a case in which the recruited worker



Si quieres tener más información sobre esta cuestión, contacta conmigo.

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had been working at centres of the defendant authorities until November 2018, then at such time she began working in other departments by working from home, her duties being those of the Regional Ministry related to civil protection emergencies that were performed within such Ministry, *"and it had not been proven there was any significant material, technical or organisational contribution by the employer institution other than an exchange of emails with colleagues of the Regional Ministry regarding holidays after consulting the relevant supervisor of the Ministry and ensuring the service was duly covered"*. Therefore, the judgement of the lower court did not infringe any provision whatsoever when it ruled there had been an illegal assignment of the worker by the co-defendant Regional Ministry and as the claim was formulated in this sense, the ruling against the Regional Ministry did not imply any legal infringement.

More recently, the judgement of the High Court of Justice of Galicia of 25 October 2022, Appeal 3069/2022, ruled there had been an illegal assignment of labour in a case in which, due to the declaration of the state of alert in March 2020, services were rendered according to the working from home system and after an exhaustive review of existing case law on the issue of illegal assignment of workers, the High Court of Justice drew the conclusion that the possible – assigned – recruitments between the co-defendants should be categorised as a determining factor of an illegal assignment, for the following reasons:

The worker had remained within the scope of the management control of the main contracting party (the Autonomous Government - Xunta), which had acted at all times as her real and true employer.

The other institutions (contractors) had only acted as mere formal employers due to not using their organisation or any instrument whatsoever to manage or organise the employee's work and had failed to take the position of company in its own defining aspects.

The worker received her work instructions from the general sub-directorate of waste, without reporting her daily activity to the coordinator of the assignment and it was the head of department who individually assigned the different tasks either to the plaintiff or the staff of the Autonomous Government - Xunta (public officials).

Moreover, the worker rendered her services at the headquarters of the Environmental Department, being transferred in July 2019, along with the rest of the staff recruited by the enterprise, to an office building located in the facilities of a body reporting to the Regional Ministry.

Due to the state of alert in March 2020, the worker began rendering her services by means of the working from home system, Amtega or the Cau providing the VPN.

Finally, the files that were assigned to the worker at that time by the general sub-directorate were entrusted to a public official of the Autonomous Government - Xunta during the period when the plaintiff was on temporary disability leave.

For all the previous reasons, the appeal was admitted and it was ratified that there had been an illegal assignment of workers, sustaining, in summary, that the worker in fact rendered her services to the Autonomous Government of Galicia - Xunta, with the material it provided and according to the instructions given by the Autonomous Government – Xunta.

What was the result of this court ruling? The right to be considered undefined temporary staff of the Regional Ministry.

Is your company using the working from home system and you have never considered that this system for rendering services could clash head on with illegal assignment and its inherent consequences? The Labour Department of RSM is specialised in the analysis and strategy of both aspects; therefore please do not hesitate to contact us if you would like an expert opinion based on an in-depth examination of your situation. ■

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

Yolanda Tejera
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>Judgement of the month

Is disciplinary dismissal deemed unfair if a preliminary hearing of the worker is not held?

Yolanda Tejera

Article 55.1 of the Spanish Labour Relations Act, which regulates the manner a disciplinary dismissal must be carried out, makes no mention about the need to set a term to hold a hearing of a worker who will be dismissed for disciplinary reasons.

Moreover, the law refers us directly to the provisions in the applicable collective bargaining agreements that, very often, among the formal requirements for disciplinary dismissal, stipulate the need to provide the workers with notification that a disciplinary procedure has been started so that they can submit any allegations that they may deem legally appropriate.

However, if the collective bargaining agreement does not stipulate such requirement or there is simply no collective bargaining agreement, can companies dismiss a worker for disciplinary reasons without holding a preliminary hearing?

The judgement of 13 February 2023 of the Court of Justice of the Balearic Islands has answered this question and ruled that, if the preliminary hearing imposed by Article 7 of Convention number 158 of the International Labour Organisation (ILO) is not held, the dismissal is unfair.

Due to this ruling, the disciplinary dismissal proceedings have been completely redefined and although this criterion must still be confirmed by the Supreme Court, it seems as though from now on, in order to be deemed as "*correctly provided*", the dismissal letter must state that the hearing procedure has been correctly held.

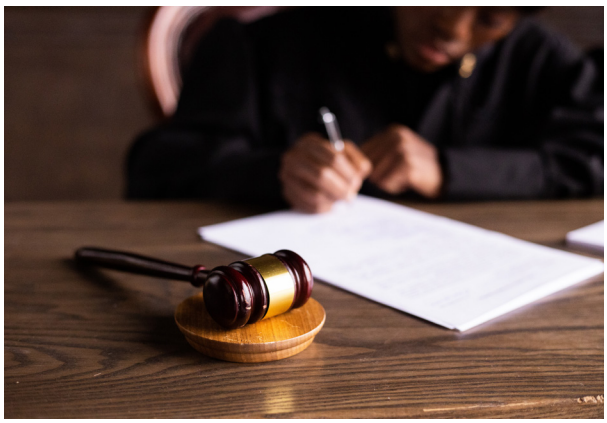
In order to understand this better, we will analyse the case in-depth:

What happened in this specific case?

In the case in question here, the plaintiff worker had been dismissed for disciplinary reasons due to having sexually harassed some students at the Foundation for Higher Education in Music and Dramatic Arts of the Balearic Islands (*Fundació per als Estudis Superiors de Música i Arts Escèniques de les Illes Balears – "FESMAE-IB"*), an instrumental public sector institution of the Autonomous Community of the Balearic Islands.

After a claim had been filed against the dismissal, the Labour Court dismissed such claim and ruled that the dismissal carried out was fair due to the worker having committed infringements of a sexual and sexist nature.

An appeal was lodged by the worker against such judgement who, among other grounds in the appeal, sustained that the disciplinary system set forth in the Basic Public Employee Statute (EBEP) was applicable to him. The High Court of Justice of the Balearic Islands, in the same way as the lower court had previously done, concluded that the system referred to in the Basic Public Employee Statute was not applicable to him and therefore there had been no violation of the disciplinary procedure provided in it.



So... what was the court's decision?

The court considered that the fact the disciplinary system set forth in the Basic Public Employee Statute was not applicable to him – which states the need to hold a preliminary hearing of the worker – did not resolve the issue and hence, resorting to the control of the convention required by constitutional doctrine, it was deemed that the provisions in Article 7 of Convention number 158 of the ILO were applicable.

After conducting an in-depth analysis of the verbatim text of Article 7 of the Convention, the Chamber pointed out that the purpose of the provision was not

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to terminate the employment of a worker for reasons related to the his/her conduct or performance before he/she "is provided an opportunity to defend him/herself against the allegations made", specifying that, unlike what occurs with other provisions, the Convention is very clear and specific regarding this aspect and therefore it is directly applicable.

In addition to this, the Chamber specified that this case, due to being a situation that exceeds the labour scope, granting a term to oppose the allegations is even more important in order to fulfil the guarantee for the workers' defence and hence, due to not having fulfilled the guarantee stipulated by an international regulation, directly and prevalently applicable over domestic law, the dismissal must be ruled unfair.

Must this "new" requirement for a Preliminary Hearing, according to Article 7 of Convention number 158 of the ILO, be observed in all cases?

Without confirmation of the criteria by the Spanish Supreme Court, the High Court of Justice of the Balearic Islands was very clear when it pointed out that Article 7 of Convention number 158 of the ILO did not raise any doubts regarding its contents being of mandatory fulfilment.

However, there are other – older – judgements of the Spanish Courts of Justice that determine the requirement to hold the "hearing" referred to in Article 7 of Convention number 158 of the ILO was deemed as having been met with the provisions in Article 55.1 of the Spanish Labour Relations Act and with the prior conciliation procedure.

Specifically, the judgement of the High Court of Justice of Cantabria of 7 February 2008 pointed out that the purpose of Article 7 is *"to guarantee the persons concerned a real possibility for defence"* but in its direct application *"it cannot be deemed that more guarantees are required than those already stipulated by the regulations currently in force according to which, before the dismissal is fully valid and after its written notification, workers are given the opportunity to oppose the company's position and maintain their own in the prior conciliation procedure in the Mediation, Arbitration and Conciliation Institute (IMAC), which takes place before the trial is held heard by the Senior Judge that presides it who rules a judgement according to the law "*.

In fact, at the moment we cannot be sure about how this new case law trend will develop but, in view of the recent judgement of the High Court of Justice of the Balearic Islands and the rulings of the Supreme Court regarding *"full application of Convention number 158 of the ILO"*, everything seems to indicate that in order for the requirement of a right to a preliminary hearing according to Article 7 of the Convention to be met, companies must provide notification to the workers, allow them to submit their allegations against it and subsequently the dismissal letter must be sent.

Another issue that this judgement has brought to the table, and it must be seen how it will be developed, is what would be the legal categorisation of a dismissal that does not meet this new requirement according to Article 7 of the Convention.

The Labour Relations Act does not stipulate that the preliminary hearing of the worker is a formality for the dismissal but, if now it is, could its infringement result in the dismissal being null and void? Will it always lead to a ruling of unfair dismissal?

All these issues must still be resolved, but the fact is that numerous claims have already been filed related to disciplinary dismissals that are pending a judgement and that perhaps will be affected by an allegation the requirements have not been met, which will need top level labour advice (i) both to request their clarification or extension or (ii) to oppose this new argument.

Therefore, please do not hesitate to contact me if you would like to obtain information about this new judgement and how the issue is developing. ■

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

Guillermo Guevara
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>Advice of the month

How can the risks of illegal assignment be avoided or reduced?

Guillermo Guevara

There is no prohibition to prevent an employer from using external recruitment of employees to work in its production activity. However, if not carried out correctly, so-called productive decentralisation could result in it being deemed there has been an illegal assignment of workers.

As shown by the latest doctrine and correctly pointed out by my colleague Alejandro Alonso in his article in this edition of **#NewsLabour**, illegal assignment consists of "providing labour without contributing any of the personal and material elements used for its business structure".

This situation could lead to various consequences, such as a worker being allowed to acquire the position of a permanent employee, if his/her contract was temporary, and to be able to choose to belong either to the assignor company or the assignee company, which means, in the case of dismissal, a worker can choose to belong to the staff of the company he/she prefers, even though the one chosen by him/her can decide on either reinstatement or severance pay or the employer could be fined an amount of between €7,501 and €225,018 by virtue of Article 40 of the Spanish Labour Offences and Penalties Act (LISOS) related to Article 8.2 of the same law.

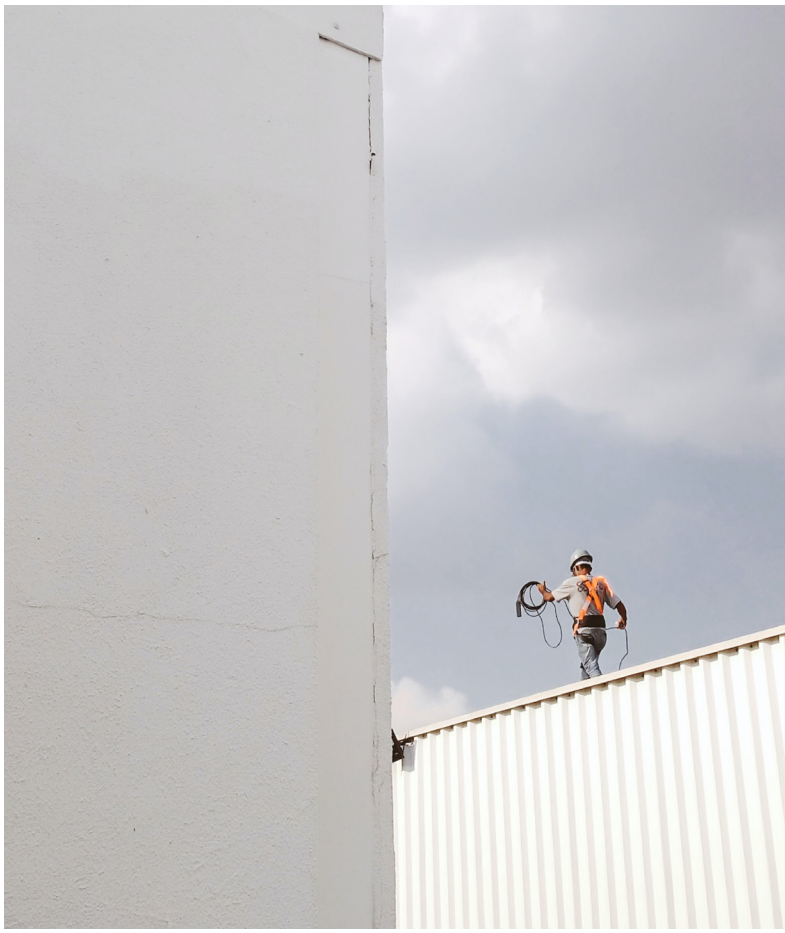
What are the indications there is illegal assignment?

As stated in Article 43 of the Spanish Labour Relations Act (ET), it is deemed there is an illegal assignment of workers in the following cases:

- If the object of the service agreements between the companies is limited to merely making the assignor company's workers available to the assignee company
- If the assignor company does not have its own stable activity or organisation.
- If the assignor company does not have the required resources to perform its activity.
- If the assignor company does not perform the duties inherent to its position as employer.

In practice, these cases can occur in different ways, some of these being the following:

- The assignee company organises the activity of the workers from the assignor company (it determines their timetable, working hours, shifts, holidays, etc.)
- The assignee company imposes sanctions on the workers from the assignor company.
- The assignor company's workers receive instructions from the assignee company's staff or perform the same work as the workers of the assignee company.
- The materials used by the workers from the assignor company belong to the assignee company.



Si quieres más información sobre alguna de estos proyectos, contacta conmigo.

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- The assignor company's workers are claimed to be workers of the assignee company to third parties or they cannot be distinguished from the assignee company's workers.

- The assignee company provides training courses to the assignor company's workers.

These are merely examples of the huge number of situations/conduct that could lead to the consideration of illegal assignment and hence the employer would undergo the consequences pointed out above.

Recommendations

For the previous reasons, there is a series of measures that could be adopted in order to reduce the risk of it being deemed there is an illegal assignment of workers, these being, among other possible examples, those explained below:

- Material resources: Regarding the previous explanations, the assignor company must provide its staff with all the material resources that could be required to render their services and to perform the work assigned to them by the assignee company and it must be avoided that such workers use the material resources of the latter.

- Differentiation between the workers: As correctly explained in the previous section, one of the indications there is illegal assignment is that the assignor company's workers cannot be distinguished from the assignee company's workers.

  There are different measures that a company can adopt in order to create and determine this required differentiation, for example the assignor company's workers using its employer's email accounts and not those of the assignee company, the assignor company's workers wearing different clothing/uniforms to those of the assignee company and when dealing with the public, they introduce themselves as the assignor company's workers, etc.

- The Coordinator: The position of a coordinator or supervisor in the assignor company is crucial in order to avoid it being deemed there is an illegal assignment of workers.

  As we have already mentioned, one of the indications there is illegal assignment is that the assignee company is the one that determines, organises and controls the activity of the assignor company's workers.

  This is why the position of coordinator is so important because this will be the person who is responsible for supervising the activity of the assignor company's workers, controlling that the workers are present, organising and distributing their work, coordinating their holidays, etc.

  If used correctly, this position is also very useful to reflect the separation between the workers of the assignor company and those of the assignee company because the coordinator of the service must be the only valid contact person with the managers of the assignee company so that any problem that could arise in the service rendered, working hours, any complaint the assignee company could have, etc., would be notified to such coordinator, creating a clear and real separation.

However, each situation is unique and the measures that must be adopted or the risks that must be taken into account could vary in each case; therefore obtaining suitable legal advice right from the start is of the utmost importance.

Are you considering carrying out production decentralisation and you are concerned about being in a situation of illegal assignment? Please do not hesitate to contact me. As pointed out, laws or judicial judgements are not always applicable to all cases in the same way and the special features of each case must be assessed in order to find the most suitable solution and, for such purpose we, at RSM, are at your entire disposal to clear up all the doubts you may have and help you avoid being involved in these kinds of situations. ■

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