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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, with one article explaining a judgement that has caused, and will cause, a great deal of discussion: the judgement of the High Court of Justice of Catalonia of 30 January 2023, which ordered a company to pay additional severance pay to the one legally stipulated.

We also analyse the latest raise in the inter-professional minimum wage and we recall the rulings related to the possible compensation and absorption of such increase.

Neither should you miss out on our Advice of the Month that deals with the possible implications of Act 15/2022, based on the first rulings applying this law.

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 doubts about these judgements or their application in your company.

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>The courts in a nutshell

What's new on the block?

Roberto Villon

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:

The judgement of the High Court of Justice of Madrid of 25 January 2023: Resignation due to not returning to work after temporary disability leave.

Not returning to work after the end of temporary disability leave is considered resignation and not dismissal. This was ruled by the High Court of Justice, categorising the plaintiff worker's contractual termination as fair and not null and void because the worker's temporary disability leave had ended. In this respect, the company required the worker to return to work by sending two registered faxes (*burofax*) and she was withdrawn from the social security system due to no reply whatsoever being received from the worker after the second order had been sent.

The judgement of the High Court of Justice of Madrid of 16 January 2023: Internal complaints activate the guarantee of indemnity.

Internal complaints can activate the guarantee of the worker's indemnity. This was considered in the latest judgement of the High Court of Justice of Madrid by it ruling that the dismissal of a worker who had previously claimed his labour rights was null and void. In this case, the worker notified the head of Human Resources by *Whatsapp* claiming the conversion of his contract into a permanent one or acknowledgment of longer seniority, among other issues. The Court considered that the short time between the complaint and the company's reaction was sufficient to activate the worker's indemnity and uphold that the dismissal was null and void as ruled by the lower court.

The judgement of the High Court of Justice of Castilla y León of 23 January 2023: Dismissal of a worker after trade union elections is null and void

The Labour Division of the High Court of Justice of Castilla y León ruled the dismissal of a worker a few days after the trade union elections took place was null and void. He had run as a candidate in such elections and was elected as a deputy. The worker was dismissed for facts taking place before the elections, which the court did not consider were sufficiently serious and could have been sanctioned beforehand, adding to this the abstract nature of the facts alleged in the dismissal letter. Therefore, the Labour Division observed prima facia violation of the right to union freedom, ruling the dismissal null and void and ordering the company to pay compensation to the worker for moral damages.

The judgement of the National Court of 23 January 2023: Travel to the first customer is considered effective work.

The FI-CCOO and UGT-FICA trade unions filed a legal action, which was heard by the Labour Division of the National Court, claiming that the time spent by workers, who performed lift assembly and maintenance work, to travel from their homes to the first customer and from the last customer to their home, must be considered effective working time. In this respect, bearing in mind doctrine, the National Court ruled that, among others, in cases when the worker is not free to choose the location and activity, such decision being adopted by the employer, as takes place in this case, was considered as presumed working time, hence admitting the claim that had been filed. However, it is interesting to see that the National Court acknowledged the possibility for companies to implement methods to avoid workers abusing this right. ■

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

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>Practical Law

The group contract: A forgotten system

Rafa Rojas

Our labour laws include various formulae for recruiting workers, allowing companies to choose one or another depending on their corporate needs at the time or the personal or professional circumstances of the recruited employees.

Article 10 of the Spanish Labour Relations Act includes a recruitment method that is not used very much and is overlooked by many, maybe due to its practical defects or maybe because its features are not known, i.e. the group contract.

A group contract involves entering into one sole employment contract with a single labour relationship being created that affects various workers.
A group contract can be defined as a contractual system that allows an employer and a group of workers to enter into a labour relationship by means of one sole employment contract.

Once the formalities have been carried out, the group contract creates a single legal relationship between the employer and the group of workers that reciprocally implies a commitment of the employer with the group. This system is normally used when entering into employment contracts, among others, with choirs, music bands, groups in variety shows and entertainment events or groups of workers who collect fruit and vegetables.

A group contract requires a head of group must be appointed.
The first issue that must be taken into account is the way the contract must be drawn up. Group contracts, regardless of whether they are entered into permanently or for a specific term, must always be drawn up in writing, the signatories being the employer and the head of group, who will be the person that, as a member of the recruited group, is appointed by it to act as a representative and as an intermediary with the employer.

A group contract must also have minimum contents consisting of a description of the services to be rendered by the group, the term the services will be rendered, the overall remuneration, working hours and identification of the members of the group.

Certain clauses may be included when carrying out the formalities for a group contract that link the contract remaining in force to the presence of certain members in the group; an example of this could be when a music group is hired and, if the singer leaves the band, automatic termination of the employment contract takes place.

However, the only aspect that has nothing to do with the group condition, which these kinds of contracts have at any time, is related to the social security obligations because the employer must individually register each of the workers included in the group in the general system and contribute in a separate manner for each of them.

A single overall remuneration is paid that the head of group must share among the group's members.
Regarding the salary, the employer must pay all the remuneration to the head of group who will then individually share it among all the members of the group.

Termination of group contracts can be based on various reasons, such as breach of the obligations agreed by the parties or completion of the object of the contract or when it no longer exists, being possible that one or some of the members in the group continue rendering their services to the employer according to a new contractual employment system, this situation being considered a novation of their employment contract and it can be deemed that the seniority of these workers in the company will be counted from the date when the group contract was entered into.

In fact, the group contract is not used as a system very much within the current scope of labour relations but, in many cases it can be imply a good contractual formula in particular depending on the activity performed by the employer. ■

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>Advice of the month

Social Media: Allies or enemies in labour relations

Yolanda Tejera

It is obvious that labour relations are not a watertight compartment completely disconnected from the use of social media. Moreover, handling social media has become a tool used by many companies to gain visibility on an increasingly digitalised market.

Similarly, it is more and more common to see workers share information, photos, opinions and even videos on Instagram, Facebook or Twitter that have a certain connection with the scope of their work or even with the company they work for.

It is hence logical that disputes can arise between workers and employers, due to the public disclosure of content by both parties in the labour relationship, not only because of their incorrect use of IT media but also because of the content that either party could post on their social media and/or include in their personal or professional profiles.

Can companies use the content posted by their employees on social media as evidence?

According to case law, the answer to this question is YES.

Although there is still no specific regulation governing the use of social media in a labour field, there are more and more judgements that analyse cases in which, for example, disciplinary measures have been adopted due to the misuse of social media by workers or even, due to their using these media during working hours and in the workplace.

In principle, the workers' private accounts are personal and therefore they are not included in the labour relationship; however there are more and more cases in which the courts accept the content posted on workers' non-professional accounts as means of evidence.

The judgement of 29 September 2022 ruled by the High Court of Justice of Castilla y León recently upheld the dismissal of a supermarket employee who, in spite of having been on sick leave for more

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than 8 months due to lumbago, had uploaded several videos on Tik Tok where she could be seen dancing and with movements that, according to the High Court of Justice, were absolutely *"incompatible with her illness"*.

Rulings, such as the previous one, are becoming ever more frequent in a world that, as mentioned, is becoming more and more digitalised and where various types of situations can arise: There are court judgements that, due to the content posted on an Instagram profile, ruled a worker's dismissal was fair when such worker had posted nude photos, claiming that they were for the company's calendar or, the dismissal of an employee was ruled fair due to having posted images and comments on Facebook that harmed the company's image.

Can the content posted on social media also be used as evidence in other cases that are not related to justifying penalties?

The judgement of 16 November 2022 ruled by the High Court of Justice of Madrid recently went even further than merely analysing the content posted on social media to justify adopting disciplinary decisions and, due to the content posted in the professional profile of LinkedIn by a worker, it could be proven that the non-competition clause signed by the employee with the company had been infringed.

In the aforementioned ruling, the High Court of Justice analysed the appeal lodged by the worker against the judgement ruled by the Labour Court that, partially admitting the claim filed by the company against the worker, ruled that the employee had to pay €5,000 to the company for his breach of a non-competition clause.

This was because, by submitting a screenshot of the employee's LinkedIn profile as evidence, the company had proven that such employee had performed activities on the same market as his previous employer and, after his temporary contract had terminated with the plaintiff company, the employee directly competing because the new company that had recruited him had the same object as his previous company.

As mentioned above, the plaintiff had signed a non-competition clause with his employer by virtue of which he undertook *"not to poach customers or projects that the company had begun, either on his own behalf or for other competing companies"*, during the years after the termination of his labour relationship.

In this respect, after discovering that its former employee had breached the non-competition clause, the company realised from his LinkedIn profile that he was hired by his new company for *"the automatic digitalisation of receipts and invoices by using artificial intelligence"*, and this was the same object as that of his previous employer.

Finally, bearing in mind that, in spite of proving in this case that both companies were competitors and developed similar applications, it could not be proven that the employee had actually poached any customers or that he had acted in bad faith, the Court therefore decided to set the compensation payable to the company at €5,000 and not the amount of €10,000 as petitioned by the company.

In any case, the most significant feature of the aforementioned ruling is the importance of social media not only for adopting disciplinary measures but also for all other aspects involved in labour relations.

Being up to date and obtaining advice when drawing up protocols, guidelines and instructions about the use of social media can avoid a great deal of harm being caused to companies and to their workers.

For such purpose, RSM is at your entire disposal to clear up any doubts you may have related to social media, labour relations and the increasingly greater connection between them both. ■

Please contact me should you have any doubts about applying this judgement.

Guillermo Guevara
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>Judgement of the month

Severance pay higher than the one legally stipulated: a new situation?

Guillermo Guevara

Spanish labour law determines a limited compensation system in cases of dismissals being ruled unfair. In this respect, it should be recalled that at present the stipulated severance pay amounts to 45 days salary per year worked up to a maximum of 42 monthly payments for the period worked prior to the reform on 12 February 2012 and, for the period worked after such date, 33 days salary per year worked up to a maximum of 24 monthly payments.

However, over the last few years this compensation has been subject to continual debate: is such severance pay sufficient? Can the courts order payment of higher severance pay?

The first ruling by a High Court of Justice after a long debate

This debate became even more intense on 21 May 2021 when Spain ratified the European Social Charter that, in Article 24, on termination of a contract by the employer dismissing the worker, in accordance with the provisions in Convention 158 of the International Labour Organisation (ILO), stated that, in cases when a worker is dismissed without a valid reason, he/she must be entitled to **adequate compensation or other appropriate relief**.

However, this is not a new issue, as already mentioned, since various courts have ruled on this matter, considering that it is possible to order an employer to pay higher severance pay than the one legally stipulated.

Nevertheless, it was not until judgement number 469/2023 ruled by the High Court of Justice of Catalonia of 30 January 2023 that such possibility actually became a reality when an employer was ordered to pay severance pay higher than the one legally stipulated.

Overview of the judgement

The case examined by the High Court of Justice of Catalonia was related to a worker who was recruited in November 2019 and was dismissed for objective reasons related to production at the end of March 2020 due to the drastic drop in sales and cancellation of services caused by the COVID-19 crisis and so the company notified its employee of its intention to pay her the maximum legally stipulated severance pay. Five days later, the company implemented a furlough system (ERTE in Spanish) due to force majeure, effective as of 1 April 2020.

However, although the Labour Court admitted the action claiming an amount to be added to the legally stipulated severance pay for dismissal, by virtue of its judgement, it admitted that the termination measure was fair, against which the worker lodged an appeal.

In such appeal, the worker petitioned that her dismissal was ruled null and void by applying Legislative Royal Decree 9/2020 and due to alleged discrimination based on her short period of seniority and for her employer to be ordered to pay severance pay higher than the stipulated legal amount, due to the moral damages caused and her loss of earnings.

Although the High Court of Justice ruled out that the dismissal was null and void for the reasons alleged by the worker, it did rule that the dismissal was unfair because the reason alleged by the company was of a circumstantial and not structural kind, which, as such, was surprising when the High Court of Justice recalled that, regarding the refusal of the petition to rule the dismissal null and void, the aforementioned Legislative Royal Decree 9/2020 was not applicable at the time of the dismissal.

Therefore, once the dismissal had been categorised, the High Court of Justice began analysing the additional severance pay petitioned. On the one hand, it rejected the amount of €20,000 for moral damages, since such damages had not been proven, on the other hand, it admitted that a higher severance pay than the one legally stipulated must be paid due to the worker's loss of earnings. In this respect, the alleged loss of earnings consisted of the amount she would have received for the extraordinary unemployment benefits that would have been payable if she had been included in the furlough system.

Therefore, the High Court of Justice took into consideration the following when admitting such petition:

- The legal severance pay that was payable to the worker did not even reach the amount of €1,000 and hence was obviously **insignifican**t and did not compensate the damage caused by her losing her

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job neither did it have a **dissuasive effect** for the company.

– Although the dismissal was not based on a nexus causal, it was considered that the right to dismissal had been excessively exercised, when the worker could have been included in the furlough system, would have received the extraordinary benefits and would have kept her job.

Therefore, due to not knowing the period in which the furlough system implemented by the company came into force, it applied 1 April 2020, as the date it began, until 21 June 2020, the date when the state of emergency was cancelled, in order to calculate the amount of the benefits that the worker could have received and hence the amount that the company had to be ordered to pay.

The High Court of Justice thus ordered the company to pay supplementary severance pay amounting to €3,493.30.

What can we expect in the future?

This judgement has opened a Pandora's Box because, although it was not the first one that determined the legally stipulated severance pay is insufficient, it was indeed the first one to admit a petition for supplementary severance pay.

However, the most serious problem does not arise from this acknowledgement but from the grounds contained in the judgement.

Firstly because, in order to justify its decision, the High Court of Justice took into consideration facts that took place after the date the termination decision was adopted, which were not known at such time that is, to say the least, a controversial issue. What would have happened if the company had not implemented a furlough system? And what would have happened if had implemented it later?

However, in any case, returning to the crux of the matter, the grounds of the High Court of Justice to admit the petition for higher severance pay than the one legally stipulated is certainly a concerning doubt because a subjective factor comes into play that simply creates legal uncertainty: The "dissuasive nature" of the severance pay for dismissal.

If each judge/court can decide whether or not severance pay meets this requirement it will certainly mean we could be faced with completely contradictory rulings and that chance will play a role that should not be a factor in the labour jurisdiction.

Has a claim been filed against your company for supplementary/additional severance pay? Please do not hesitate to contact me in order to assess the features of the specific case and find the most suitable defence for your company. ■

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

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› Advice of the month

Dismissal of a worker when he/she is in a situation of temporary disability. Issues to be taken into account.

Lara Conde

As everyone knows very well, a great deal of caution must be taken with dismissals of workers who are in a situation of temporary disability.

Based on the *Daouidi* doctrine (the judgement of the Court of Justice of the European Union C-395/15), it has been deemed that long-term incapacity can be considered the same as disability, according to European Directive 2000/78 and hence, if the employer intends to dismiss a worker in a situation of temporary disability, it would need to objectively and reasonably justify this in order for it not to be considered discriminatory.

However, discriminatory dismissal is not automatically ruled, which would be a violation of fundamental rights, instead certain requirements must be met as explained below:

- An illness can be considered to be long-term. In other words, it may take time to cure it and therefore it is deemed to be the same as disability.
- The dismissal can be deemed to be for stigmatising reasons, for example, corporate practice to dismiss workers who are on sick leave due to temporary disability.
- The existence of pressure by the employer so that its workers do not take sick leave or when there is an atmosphere of previous prima facie warnings in this respect.

Therefore, a key requirement is that the sick leave is long-term and the direct reason for the dismissal is that the worker will remain in such situation, with no other legitimate reason to allow the employer to apply such disciplinary measure.

It was not the illness or health condition that was protected, but a situation equivalent to disability due to being a circumstance that would imply the employee not being able to work for a considerable period of time. However, based on Article 2.1 of the integral Act 15 of 12 July 2022 on equal opportunities and non-discrimination, the illness or health condition, serological status and/or genetic predisposition to suffer from pathologies and disorders is regulated, in addition to disability, as a situation that must be protected from an employer's unjustified decisions.

For such purpose, as of the date the aforementioned law came into force, it seems complicated that any situation of sick leave, regardless of the illness and length of time it lasts, is not protected from dismissal when it is impossible to justify the reason with solid grounds. It will now not be necessary for there to be prima facie evidence of fraudulent conduct but, being in any of the

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situations referred to in the law now becomes a reason to claim objective discrimination. This will imply that the simple fact of being ill or being in any of the situations protected by the law, even if the employer is unaware of the situation, could lead to the dismissal being ruled null and void.

The ruling that there is discrimination grants a right to the worker to claim compensation and also forces the employer to reinstate him/her in the situation prior to the discriminatory action; in the case of dismissal, this means reinstatement of the employee in his/her job with the same terms and conditions.

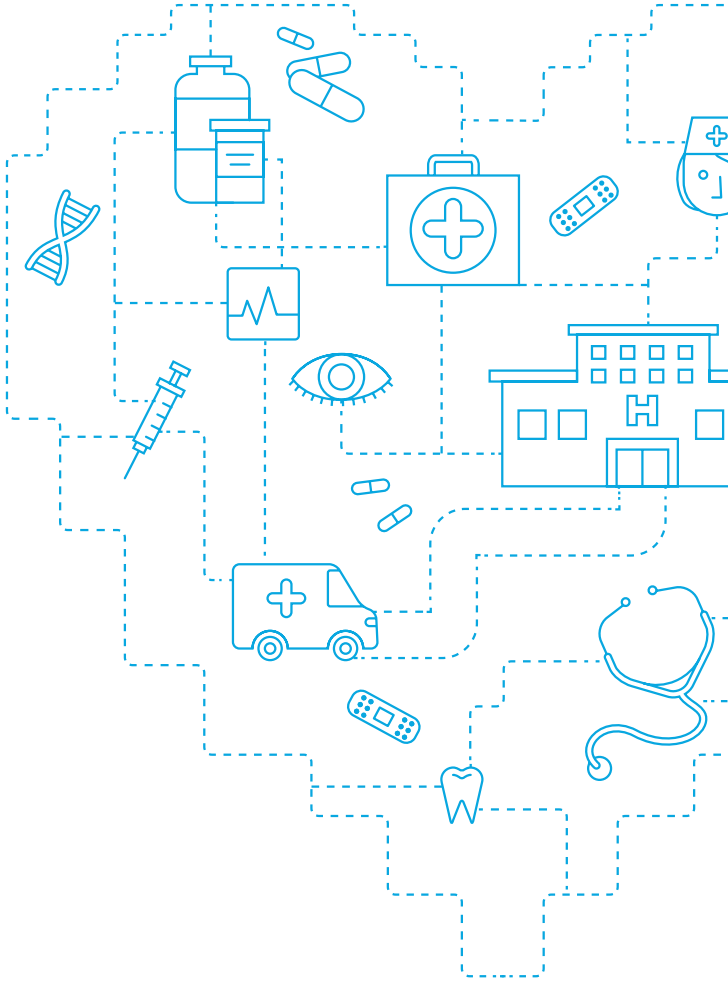
The court rulings based on Act 15/2022 are tending to rule that a dismissal is null and void when there is no reasonable and objective reason for it. Therefore, companies must be careful when they plan to dismiss a worker because, from now on, health conditions are considered a situation protected by law. However, it should be pointed out that in cases related to dismissals when employees are in a situation of temporary disability ruled after Act 15/2022 came into force, the company has had a "declared its intention" to dismiss the worker due to his/her being in such situation.

As examples, in the judgement of the Labour Court Number 1 of Gijón of 15 November 2022, the employer itself sent a message by WhatsApp in which it informed the worker that it would employ her again after her operation when she was in a position to resume her work and, in the Judgement of Labour Court Number 1 of Vigo of 13 December 2022, a worker was dismissed while he was on sick leave of 15 days due to temporary disability, being the only one who was dismissed of the four workers that had been hired for the works. Therefore, in both cases, it was deemed that the employer had committed fraudulent conduct that resulted in the dismissal by the employer being ruled null and void.

We must wait for more court rulings in this respect to fully know how this law will be applied.

In any case, it seems that companies will have serious difficulties to terminate the contracts of workers with an adverse health condition and, since this is deemed as a reason for discrimination, they will not merely be subject to severance pay for unfair dismissal.

Are you thinking of dismissing a worker in this situation and you do not know the impact this law could have on your case ? Please do not hesitate to contact me. Not all laws or judicial judgements are applicable in the same way to all cases; hence the special features of each case must be studied in order to find the most appropriate solution. ■



Please do not hesitate to contact us should you need any advice on this issue or other related matters.

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› Legislative developments

Once again the inter-professional minimum wage (SMI) is increased. We explain below the possible implications of this measure.

Irene Ferriols

The government has approved an increase in the inter-professional minimum wage (SMI). What are the implications of this increase for my company? How does the possibility work for absorbing salary items?

The measure was approved on 14 February 2023 by virtue of Royal Decree number 99 of 14 February 2023 in which the inter-professional minimum wage for 2023 was set, being structured with retroactive validity from 1 January; therefore the unpaid amounts corresponding to the start of the year must be compensated.

We mentioned in the last NewsLabour of January that it was speculated there would be an increase of between 4.6% and 8.2% in the €14,000 per year set for 2022. However, finally the government has decided to apply a raise in the higher part of the aforementioned range and has determined an increase of 8% for 2023.

Therefore, the minimum wage for any farming, industrial and services activities, with no distinction in the worker's gender or age, is set at €1,080 a month, which is a total gross amount of €15,120 a year for a full-time worker.

However, how do I know whether or not this raise is applicable to my workers? We must take into account the contents of Article 26.5 of the Redrafted Text of the Spanish Labour Relations Act, which states that *"compensation and absorption is applicable when the salaries actually paid, as a whole and on an annual basis, are more favourable for the workers than those set in the reference regulatory system or collective bargaining agreement"*, in other words, the remuneration items can be absorbed and compensated whenever the worker is paid more than the minimum reference value set in the regulations.

In other words: The adjustment of the inter-professional minimum wage does not affect either the structure or the amount of the salaries that the workers are paid if such salaries are higher, as a whole and on an annual basis, pursuant to the legal

regulations and collective bargaining agreement, arbitration decisions and individual employment contracts in force on the date the regulation comes into force.

Therefore, as a general rule, the compensation authorised by the aforementioned article in the Spanish Labour Relations Act is possible, unless any of the remuneration items paid to the worker cannot be absorbed due to their nature or based on an express provision in the legal regulations or collection bargaining agreement governing them. In this respect, the judgement of the Supreme Court of 14 April 2010, (appeal number 2721/2009), determined the following parameters:

1) Compensation and absorption can only be applied to remuneration that has the required homogeneity, which "cannot be confused with essential equality, but must be limited to that

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belonging or related to the same gender", as an example, "in the case of personal allowances being assigned due to the worker's circumstances and not the work performed". This definition has been losing its relevance so that the required similar assignment reason is limited to merely belonging to the same group between the personal conditions, work performed or situation and the company's profits and losses, or the base salary, "since a greater similarity cannot be reasonably required because such requirement would, in practice, cancel out the stipulated legal and contractual neutralising mechanism".

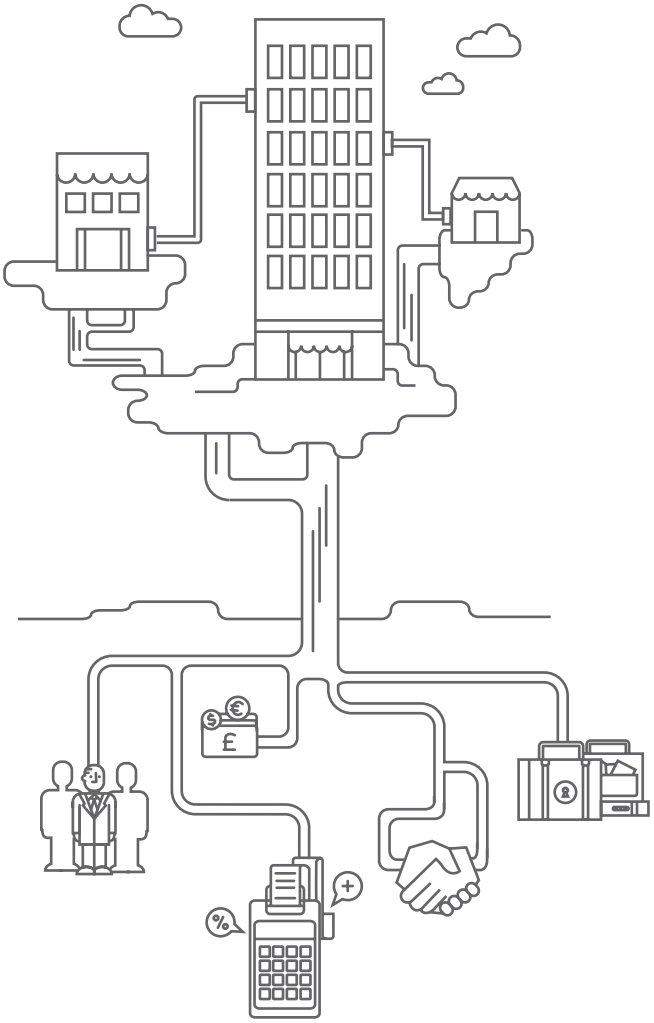
2) The possibilities for compensation and absorption must be assessed bearing in mind the circumstances of each case, always taking into account "the terms, way and scope they have been agreed" and the salary remuneration implied.

3) In principle, absorption and compensation are not governed between salary items by time unit and accruals depending on work efforts or between personal allowances that are not linked to any result or special working conditions and those that are linked to the job.

It should be added that, in spite of the possible court rulings that could determine different criteria, we should point out that, regarding the requirement for homogeneity in the items to be absorbed or compensated, the Supreme Court judgement Number 74/2022 of 26 January 2022, and, along the same lines, its judgement of 16 September 2019, supports the possibility of such increase in the inter-professional minimum wage being applied by companies to absorb the seniority allowance, pointing out that "compensation and absorption due to the heterogeneity of the salary items may only be blocked if this has been agreed in the collective bargaining agreement".

In conclusion, unless the applicable collective bargaining agreement stipulates otherwise or, if any, there is an individual or collective agreement, the remuneration items paid to workers during the year that have the required homogeneity between them or a certain heterogeneity in cases such as the seniority allowance, always bearing in mind the criteria the courts are adopting, must be added together to find out whether the minimum wage of €15,120 a year has been reached.

Please do not hesitate to contact us for any queries you may have about this matter or any other labour- and social security-related legislative news. ■



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