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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, providing an article about a judgement that has given rise to a great deal of discussion: the judgement of the Supreme Court of 18 April 2023, which analyses the situation of a "relocation accident", an analysis you should not miss.

Neither should you miss out on our Advice of the Month regarding the risks arising by failing to set up a valid system for recording working hours in a company.

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 Villon

The judgement of the Supreme Court of 25 April 2023: Can a new awardee company dismiss workers due to subsequent incompetence?

A ruling of unfair dismissal was petitioned to the Supreme Court by a worker assigned to a job included in a public tender. After years working in the company, the worker was taken over by a new employer that decided to dismiss him when it realised he did not have the specific qualifications required for the work that he had been performing. The Chamber determined that there was no prima facie evidence that the company's conduct was abusive or fraudulent because it had attempted to keep the worker's job in spite of him not having the right qualifications for it, having proposed such possibility to the competent authorities, however it was rejected bearing in mind the stipulated technical specifications, it hence ruled the objective dismissal was fair due to subsequent incompetence. The Chamber also deemed that the worker's experience of five years was not sufficient to prove he had the required skills.

The judgement of the Supreme Court of 17 April 2023: Does filing a prior claim suspend a worker on temporary disability leave from returning to work?

In this case, the worker petitioned a ruling to revoke his disciplinary dismissal due to failure to return to work after a period of temporary disability leave. This was because the worker had challenged the medical discharge that ended his situation of disability. The court concluded that the worker must return to work if a medical discharge is issued before 365 days have elapsed even if he had challenged such discharge. Therefore, the Chamber deemed that the dismissal because of the worker's delay in returning to work was fair, providing the term of the claimed conduct had not expired. In addition, it determined that the notification about the reasons alleged by the worker for not returning to work were irrelevant, consisting of still suffering pain that prevented him from returning to work, unless they were duly proven. The dismissal was hence ruled fair.

The judgement of the Labour Court number 5 of Vigo of 19 April 2023: Is a worker's dismissal automatically null and void if he/she is on temporary disability leave?

In this case, a worker filed a claim against her employer for dismissal, arguing that there was no objective justification for her termination as a temporary employee. She therefore petitioned for the dismissal to be categorised null and void due to discrimination because it happened at the same time as when she was on temporary disability leave, invoking Act 15/2022.

The petition to rule the dismissal null and void was dismissed and it was recalled that there must be a direct link between the sick leave and the dismissal for the termination by the company to be considered null and void. However, in this case, it had been sufficiently proven that the decision to terminate her contract had been made prior to the company knowing about her sick leave and thus the dismissal was ruled fair.

The judgement of the Labour Court of Oviedo of 29 March 2023: Can a worker moving home justify a request to work from home full-time?

In this case, the plaintiff worker petitioned to be acknowledged a right to work from home full time, based on Article 34.8 of the Spanish Labour Relations Act regarding a balanced family and personal life, due to her moving home to another province. The court was clear when it determined that moving home and enrolling her daughter in a school in a new place were decisions unilaterally made by the worker and her partner, without such decisions being notified to the company. Therefore, the company was not obliged to adapt to the personal circumstances the worker had created because these aspects cannot prevail over the company's interests nor invalidate the agreements reached by collective bargaining related to a balanced working and family life. Therefore, the claim filed by the worker was dismissed. ■

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

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>Practical Law

Will the obligation to hold negotiations for an equality plan with a committee composed of the most representative trade unions and the judgement of the High Court of Malaga of 25 January 2023 bring a bottleneck to an end?

Oscar Canno

We have seen in recent years how the government and legislative powers have attempted to return the presence of trade unions in companies by agreeing on regulations that promote their actions to develop and adopt new measures such as, in this case, the negotiations and implementation of equality plans.

Article 5.3 of Royal Decree 901/2020 stipulates that, in cases when there are no workers' representatives in the negotiations for equality plans, a negotiating committee must be set up composed of, on the one hand, the company's representatives and, on the other hand, the workers' representatives, made up of the most representative trade unions and trade unions representing the sector the company belongs to and with legal standing to be members on the negotiating committee for the applicable collective bargaining agreement.

In practice, this situation has very often led us to a bottleneck situation since the most representative trade unions seem to be unable to deal with all the requests for negotiation they receive and hence, with the regulations under their arms and bearing in mind their verbatim texts, it has been impossible to comply with the legally imposed obligation to provide an equality plan.

Due to the fear of being sanctioned for the breach implied by not providing an equality plan, some companies constantly send unsuccessful e-mails or registered faxes (*burofax*) to the trade union organisations and some of these companies, on their own behalf and at their own risk, hold negotiations for an equality plan with a committee appointed by and among the workers themselves, (which we call an ad hoc committee).

In this respect, there is quite a lot of doctrine that has stated the negotiations for equality plans must take place collectively by the company with the unitary or trade union representatives of the workers authorised to negotiate collective bargaining agreements, it is hence not a feasible option to replace such representatives for an ad hoc committee.

Therefore, the judgement of the High Court of Justice of Malaga number 180/2023 of 25 January 2023 implies a breath of fresh air that opens new channels for us to escape from this dead-end street due to considering that, if the trade unions do not fulfil the companies' requests, the request need not be repeated again and setting up an ad hoc committee to replace them will be deemed valid, since the authorities cannot accept that the trade unions indefinitely block the approval of an equality plan, such judgement having based this ruling on the following grounds:

> *"(...) the requirement is for the trade unions to be allowed to take part in the negotiations for the plan, but obviously the company cannot impose such participation on them. If it were deemed otherwise this would imply accepting that fulfilling a company's obligation, (the need to draw up and apply an equality plan in companies with fifty or more workers), would mean depending on the willingness of a third party other than the person on whom the obligation is imposed or, in other words, the trade unions merely failing to reply would be sufficient to prevent the company from fulfilling its obligation."*

This is an argument that, in our opinion, is absolutely logical because otherwise a situation of immovability and suspension would be caused, which cannot be allowed to harm a company that has made every effort to fulfil its legal obligations.

We will be on the lookout for the next judgements to see if this case law doctrine is upheld. ■

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

Miguel Capel
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>Case of the month

Is an accident caused by a fall in the hotel shower when travelling to an event related to an employee's professional work considered a "relocation" accident?

Miguel Capel

In previous times, case law doctrine considered a "relocation accident" as a specific kind of occupational accident in which, due to workers travelling to perform work assigned to them by their employers, the presumption of an occupational nature, stipulated by virtue of Article 156.1 of the Spanish General Social Security Act, included accidents caused during the time the workers were relocated, considering that they were rendering their services to the company. This seemed to be subject to the company's decisions, (including their accommodation, means of transport, etc.), so that the employers' duty for safety encompassed the whole time the workers were relocated and during the time the specific services were rendered, stressing that the "place of work", for such purpose, included not only the normal place of work but also whatever place where the workers were relocated due to the work assigned to them.

However, this doctrine was defined and rectified in subsequent judgements ruled by the Supreme Court, (*see the judgement of the Supreme Court of 6 March 2007, among other important ones*), due to determining that such presumption of an occupational nature cannot be applied to cases when employees are relocated for work purposes but the accident occurs in periods when they are not rendering their services, (rest times or during personal or private activities); therefore it required there must be either a clear link between the work performed and the incident or else it must be proven that the accident occurred due to such work, (in other words, the so-called principle of "relevant occasional nature"). Similarly, it was also determined in such judgements that the party concerned must submit specific data or prima facie evidence to prove the occupational ethnology of the accident in order to be able to rule this existed.

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

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However, the judgement of 18/04/2023 of the Labour Chamber of the Supreme Court, (appeal (cassation) 3119/2020 for unification of doctrine) was recently ruled related to the ethnology of an accident caused to a worker who, following her employer's instructions, travelled to another place other than where she normally rendered her services to attend a training seminar. The accident in question took place when the worker was in her hotel where she slipped and fell in the shower (at about 7 am) while she was getting ready to attend the aforementioned seminar. Due to the fall, the worker was granted sick leave for an occupational accident by virtue of a decision adopted by the Spanish Social Security Institute (INSS).

Since the occupational accident and professional illness mutual society disagreed with such decision, it filed proceedings in the courts to determine a contingency. These proceedings ended with a judgement that ruled the professional nature of the accident she had suffered by deeming that, in the case analysed, the occasional nature was applicable because the worker, who had already travelled to the place where the seminar was being held, was taking a shower to attend such event and, even though the injury that was caused by the fall occurred in a different place other than her normal place of work, i.e. a hotel room, it was an unexpected and accidental event within the context of her work that the employee was immediately about to begin; hence the presumption of an occupational nature was applicable, according to Article 156.1 of the Spanish General Social Security Act.

Due to this unfavourable judgement, also upheld on appeal for reversal, the mutual society lodged an appeal to the Supreme Court (cassation) for unification of doctrine. The Supreme Court agreed with the thesis sustained by the plaintiff, admitted its appeal and overturned the judgement ruled by the High Court of Justice, stating that the worker's temporary disability was due to an ordinary contingency, based on the following arguments:

(i) Not all work performed due to "relocation" is covered by the presumption of an occupational nature and cases in which an accident occurs due to personal reasons must be excluded.

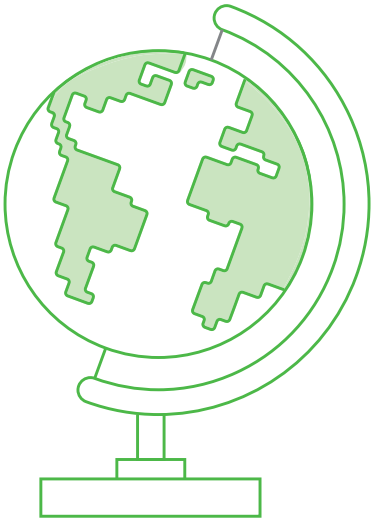
(ii) Due to the presumption of an occupational nature not being applicable, there must be a nexus causal relation between the work and the injury or it must be proven it was caused while the worker was rendering her professional services.

(iii) In the case of this judgement, the worker did not submit *any prima facie* evidence that would enable the incident to be considered to have occupational accident ethnology, since there was no indication whatsoever about any irregularity in the hotel facilities nor any other *de facto* data related to the employee's work that could prove she was affected by certain circumstances, (time changes, short rest time available, etc.), that could explain the hurry she was in when taking her shower or any other psychophysical aspect (related to her relocation) that could have been a reason for her fall.

(iv) Therefore, the injury caused during her personal and private time while she was taking a shower did not take place in working hours and the principle of "relevant occasional nature" did not play a role, which means, in the case analysed, the worker's temporary disability process was based on a common and not occupational contingency.

Nevertheless, the judgement of the Supreme Court stressed that such conclusion could not be drawn in other similar cases but only in those where the same circumstances arise as in the case analysed and, in particular, when there was no special link between the work relocation and the accident.

Please do not hesitate to contact us should you have any queries related to this issue and its implications for your company. You will probably be surprised to know that the solutions found by our courts are not always applicable in the same way to all cases and the special features of each case must be assessed in order to find the most suitable solution. ■



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

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>Judgement of the month

Judgement of the Labour Chamber of the Supreme Court of 25 April 2023, appeal number 1931/2022

Alejandro Alonso Díaz

Can an employee be objectively dismissed within the scope of staff being taken over, the assignee company being the one terminating the contract after such subrogation?

Article 52 of the Spanish Labour Relations Act, (with initials in Spanish "ET"), regulates the termination of a contract for objective reasons, specifically, its point a) categorises a worker's incompetence as a valid reason for dismissal, providing it is known or takes place after his/her effective recruitment in the company.

This new and important judgement brings us a new paradigm structured by two elements that have such a close link that, a priori, we could think there is a reason for dismissal based on a worker's permanent and not temporary incompetence due to the situation of agreed subrogation of staff.

What happened in the specific case of the judgement?

The issue to be decided by the Supreme Court was to determine whether or not the new company that had been awarded a public service could terminate a labour relationship due to the employee being incompetent, according to Article 52 a) of the Spanish Labour Relations Act, once such company had taken over the workers of the previous concessionary and then realised that a worker did not have the required qualifications for the job.

What was the judicial process in this case?

Firstly, the judgement of the Labour Court number 39 of Madrid dismissed the claim against dismissal and considered the company's actions were in accordance with the law.

However, the worker's appeal for review was admitted by virtue of the judgement of the Labour Division of the High Court of Justice of Madrid of 21 December 2021, appeal number 756/2021, which categorised the unfair termination of the labour relationship as justified in this case, deeming that there was no subsequent incompetence whatsoever because the worker had not lost the required skills to perform his work as he had been doing under similar conditions to the current ones for five years prior to the dismissal.

The company lodged an appeal to the Supreme Court to Unify Doctrine (cassation) against this judgement.

In this respect, it claimed infringement of Article 52 a) of the Spanish Labour Relations Act in order to sustain there were legal circumstances arising afterwards to allow it to terminate the labour relationship due to subsequent incompetence after taking over the staff within the scope of a contract with the public authorities, being supported by the fact that the technical specifications in such contract required that the workers must have certain professional qualifications that had not been previously required.

What were the grounds for the Supreme Court to admit the appeal and to rule that the dismissal of the worker who lacked the required qualifications was fair?

The Supreme Court deemed that a new company awarded a public service could terminate the labour relationship due to subsequent incompetence, within the scope of Article 52 a) of the Spanish Labour Relations Act, even once it had taken over the workers of the previous concessionary and realised, a posteriori, that a worker did not have the required qualifications to perform the work and all the foregoing after having unsuccessfully attempted to obtain authorisation from the city council for the worker to keep his job.

This implication for the company does not only prove there was no kind of abuse of law but also proves that the company was unaware that the worker lacked qualifications at the time it took over the staff because Article 13.1 of the applicable collective bargaining agreement, when listing the documents that the assignor company needed to provide to the assignee company, did not impose any obligation for information about the professional qualifications of each worker.

The incompetence was hence not known at the time the labour relationship began between the parties, (as an indispensable requirement to structure this reason for termination); in addition

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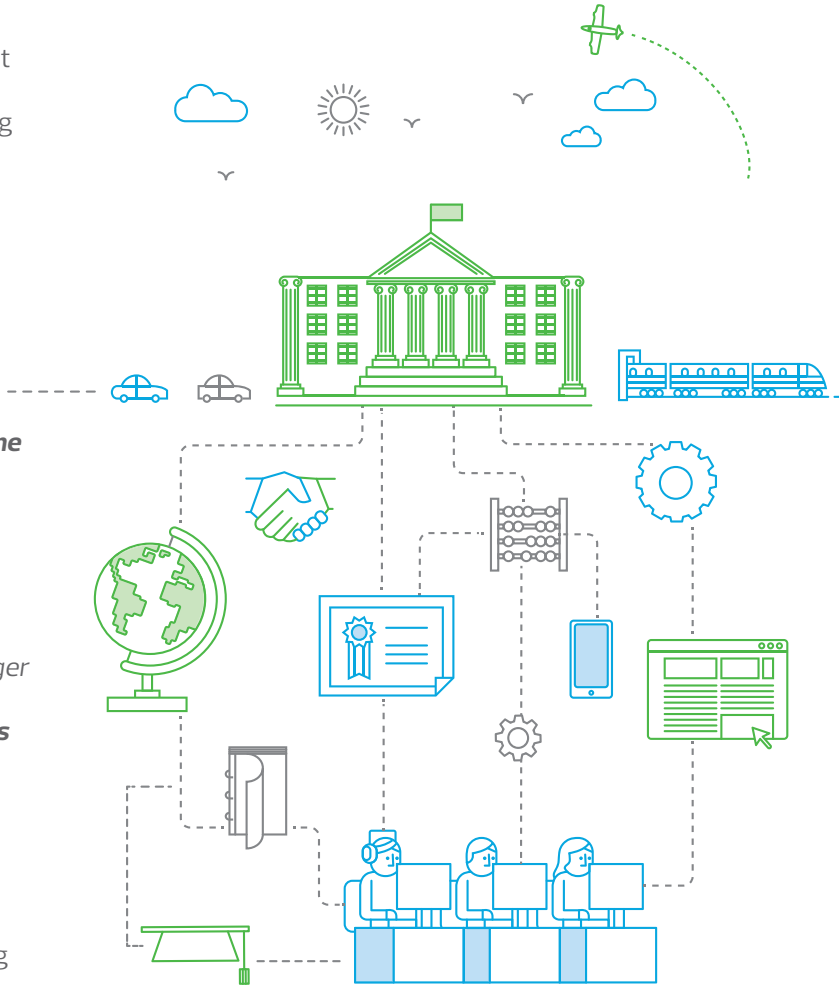
it was a subsequent circumstance because these professional qualifications were not previously required when the assignor company held the concession for the service.

Lastly, this judgement is of interest because, due to the worker's allegation there was no subsequent situation of incompetence to perform his work as claimed by the company, justified due to him having performed the same duties absolutely normally for five years without losing his skills in any way to sufficiently perform his work, the Supreme Court ruled the following:

> *"The plaintiff does not dispute the validity and effectiveness of this legal requirement for qualifications* ***but claims that his proven experience of five years in performing the work should prevail as evidence that he has the professional skills and knowledge*** *to perform the work.*
>
> *Having ruled out this definition in the terms we have already explained, it does not mean the worker has undergone any decrease in his working capacity that would imply him no longer having the skills to perform his work* ***but now the requirement for professional qualifications is a governing factor that he does not meet, which was not known by the company and previously did not exist****".*



Therefore, the requirements imposed in Article 52 a) of the Spanish Labour Relations Act are met to activate incompetence as a channel for terminating the labour relationship, with the resulting fair dismissal.

Have you found the process interesting related to this case including the grounds of the Supreme Court?

Please do not hesitate to contact me if you would like any further information about how to handle the situation of subrogation with similar cases of objective dismissal. ■

Please do not hesitate to contact us if there are part-time workers in your company and you need advice about how to correctly set up the system for recording working hours for them.

Irene Ferriols
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>Advice of the month

There is no system for recording working hours set up in my company or, if there is one, I have doubts about its validity in the case a claim is filed by a part-time worker, what risk would the company run in this respect?

Irene Ferriols

In practice, very often companies have not set up a system for recording working hours or, if they have, this is in such way that the hours actually worked by the employees cannot be verified. We have already stated on another occasion that this situation could have an impact on a possible claim for overtime; but what happens if they are part-time workers? What have the courts ruled in this respect?

Regarding this issue, the recent judgement number 651/2023 of 6 February 2023 of the High Court of Justice of Galicia ruled that if there is no system for recording working hours and it is not proven otherwise by the company, it will be presumed that the contract entered into with the plaintiff worker is full-time and hence it will need to pay such worker the relevant salary differences, if any.

Background:

In the case analysed here, the worker had entered into a part-time contract with the company for 20 hours a week, being paid her salary for such part-time hours, according to her relevant job category and professional group stipulated in the applicable collective bargaining agreement.

Article 12.4.c) 4 of the Spanish Labour Relations Act (ET) states there is an obligation to record the part-time employees' working hours on a daily basis and to provide the workers, along with their pay slip, a summary of all the ordinary hours and overtime they have worked every month, specifying that any breach of the aforementioned obligations for recording working hours will mean the contract must be presumed to be entered into on a full-time basis, unless there is evidence otherwise to prove the services were only rendered on a part-time basis.

In the case analysed here, the court deemed that the evidence submitted by the company was insufficient to prove the employee only worked part-time.

Legal grounds:

In this case, the company intended to prove that the employee only worked part-time based on the following three points:

- Some emails exchanged with the worker in which she was required to complete certain documents related to the system for recording working hours and, since the worker failed to do so, the company considered that this conduct had breached good faith and due diligence.
- The witnesses' evidence that was provided to prove the work performed by the employee was of little importance in the company.
- The employee accepting hybrid Flexi-Hours, working some of her working hours from home or remotely.

The court raised the following consideration about the evidence submitted by the company:

- Regarding the alleged **breach of good faith and due diligence** based on the emails sent to the worker requiring her to complete certain documents related to the system for recording working hours, the court dismissed this argument because **these documents did not prove that her working hours were only for 20 hours a week nor that the worker had acted in bad faith**.
- Regarding **the witnesses' evidence** with which the company aimed at proving the work performed by the employee was of little importance, according to the court, this was of no use for the purpose of review **and neither could a conclusion be reached about her exact working hours**.
- The court considered that working from home or the fact that the employee's **working hours**

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were flexible did not prove that she only worked part-time and, due to the lack of records of working hours, it was presumed she worked full-time because *"the company's intention meant excluding a legal presumption from application to a general category of workers, overlooking that the regulations do not exclude application of the presumption of completeness from any general category of workers and hence evidence otherwise must be individualised for each specific case."*

Conclusions:

Bearing in mind the context and circumstances explained above, based on the evidence submitted, the High Court of Justice of Galicia decided the conclusion could not be drawn that the employee had fewer working hours than a full-time employee and since there was no system for recording working hours it was hence concluded that the employee's working hours were full-time by applying the presumption referred to in Article 12.4.c) of the Spanish Labour Relations Act and therefore she must be paid the salary differences owed to her, the appeal lodged by the company thus being fully dismissed.

How should the system for recording working hours be set up in my company?

In order to avoid claims of this kind, it is crucial to set up a system for recording working hours, even more so in the case of part-time workers, identifying the time when the employees' working day begins and when it ends, along with any breaks and interruptions, and to take into account the constant legislative and case law updates on this matter therefore obtaining advice from professionals who are well-informed in this respect will efficiently help your company to know how to act correctly when setting up the relevant recording system.

Please do not hesitate to contact me should you have any doubts about setting up a recording system for the working hours in your company, you will probably be surprised to know that the solutions adopted by the Spanish courts are not always applicable to all the cases in the same way and the special features of each case must be assessed in order to find the most suitable solution. ■

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