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The Labour and Social Security Inspectorate has amended its criteria relating to the recording of the working day

Recent case law from the Supreme Court, which states that it is not necessary to record an ordinary working day, forces the General Directorate of the Labour and Social Security Inspectorate to amend its criteria in Order 1/2017, in addition to Order 3/2016 of 21 March on the increase of control over working hours and overtime.

The previous Order of 3/2016 from the General Directorate of the Labour and Social Security Inspectorate determined that the keeping records of the working day by a company was necessary to allow for the accounting all working hours and the subsequent certification of overtime.

In particular, Order 3/2016 established that adequate recording of the working day was the means authorised by law for the appropriate verification and proof of actual working hours, as well as this method's legality. In this respect, it stressed the essential role of records fir the regulation of working hours, with the breach of this obligation considered as a violation of regulations relating to working hours. This stance was supported by the recurrent interpretation of article 35.5 of the Spanish Worker's Statute by the Courts and in particular, the National High Court (please see Judgment of the National High Court of 4 December 2015).

Following this line, the Labour and Social Security inspectors assessed the existence of a serious infringement, punishable with fines of between EUR 626 and 6,250, from article 7.5 of the law on labour infringements and sanctions (*Ley de Infracciones y Sanciones del Orden Social* – "LISOS"), for the "violation of rules and legal or agreed limits relating to the working day, work at night, overtime, extra hours, breaks, holidays, allowances and, in general, the working time referred to in articles 12, 23 and 34 to 38 of the Workers' Statute.

The situation changed with the Supreme Court's Judgment of 27 March 2017, whose declarations were then reiterated in the Judgment of 20 April 2017 by the same Court. In these resolutions, the Supreme Court amended the National High Court's criteria and established the obligation for all employers to register working hours only if they reach overtime, without prejudice to the special provisions for part-time, mobile worker, merchant navy and railway worker contracts. The Supreme Court insisted that the Workers' Statute does not contain a general obligation for employers to record their employee's working hours, nor does the LISOS contain any infringement in this regard. Non-compliance with the documentation of hours, where applicable, could only be sanctioned as a minor offence with fines between EUR 60 and 625.

In order to comply with the criteria imposed by the Supreme Court, the General Directorate of the Labour and Social Security Inspectorate has been forced to issue Order 1/2017 which amends the previous Order 3/2016 to show members of the body of Labour and Social Security Inspectors that a lack of daily working day records by companies does not constitute an infringement of labour laws, except in the cases of part-time, mobile worker, merchant navy and railway worker contracts, or in the case of overtime.

The request for compensation due to unfair competition falls under the jurisdiction of the labour courts

A company's claim for compensation for damages caused by unfair competition filed against three employees who established private limited companies with concurrent corporate purposes falls under the jurisdiction of the labour courts.

Judgment delivered by the Supreme Court on 4 May 2017 (JUR\2017\123907)

Proper understanding of the analysed case requires the highlighting of the following circumstances: (i) during the employment relationship, three of the company's employees decided to establish two private limited companies; (ii) the corporate purpose of these companies substantially overlapped with that of their employer and the workers intended to offer the same services on the market, using the tools and knowledge arising from their employment relationship; (iii) the new companies' activity did not start until the employment relationships of the partners were terminated; (iv) one of the workers was dismissed –having signed a post contractual non-compete agreement– while the other two voluntarily resigned, and (v) the employer thus claims compensation for damages due to unfair competition.

The court at first instance upheld the claim, however on appeal the Supreme Court declared that the labour courts did not have the jurisdiction to rule on the dispute. Among other considerations, the contested judgment based its declaration of incompetence on the fact that the companies established by the employees did not commence their activities until they no longer worked for the claimant, so the possible competition did not arise from the employment contract that was already terminated. The Court also understands that, whilst the two companies established by the workers also had lawsuits filed against them, they had no employment relationship with the claimant.

However, the Supreme Court finally upheld the appeal filed by the company. On the one hand, it recalls that the labour courts shall hear litigious matters which arise between employers and workers as a result of employment contracts; and, on the other hand, that the worker has a basic duty not to compete with the company in its field of activity.

It follows that the litigious matters which arise from employment contracts and, among them, disputes relating to claims for damages between employers and workers arising from possible contractual breaches, irrespective of whether the claimant is the worker or employer, fall under the jurisdiction of the labour courts.

Thus, there is no doubt, according to the Supreme Court, that if the purpose of the company's claim was compensation for damages arising from the true fact that the workers established –while their employment relationship was still in force– two private limited companies in competition with the company, such claim represents a litigious matter which arises between employer and workers and whose basis stems from a possible and hypothetical breach of the employment contracts' intrinsic obligations.

Consequently, the Supreme Court overrules the declaration of incompetence from the judgment under appeal, with a referral of the proceedings to the Labour Chamber of the Supreme Court, which may decide on the fundamental questions raised in the appeal.

The unjustified dismissal of an employee with a reduced working day due to caring for a relative is always considered void

The Supreme Court reiterates that the unjustified dismissal of an employee benefitting from a reduced working day to care for a relative must be objectively and automatically classified as void, since such declaration falls outside of any discriminatory motive.

Judgment delivered by the Supreme Court on 18 April 2017 (JUR\2017\108209)

The debated question focused on determining whether the unjustified dismissal (since the concurrence of the alleged objective cause had not been established) of a female employee with a reduced working day due to caring for a relative should have been declared inadmissible or, on the contrary, void.

As background, it is necessary to state that the female worker, who benefitted from a reduced working day to care for a relative from 2011, requested a change of her reduced working day to an afternoon shift in February of 2013 and was dismissed for objective reasons in March of the same year, namely, for a lack of attendance as a result of various periods of temporary disability.

The objective dismissal was considered as unjustified and declared void by the judgment at first instance, based on the objective and automatic guarantee imposed by the legislation in force in this respect and which operates outside of any discriminatory motive.

The Supreme Court partially upheld the appeal filed by the company, declaring the dismissal as inadmissible considering that it was not in reality a working day reduction, but a simple shift change, and without any evidence of violation of an established constitutional right.

However, the female worker decided to file an appeal to the Supreme Court for the unification of doctrine, with said Court considering that there was a reduced working day to care for a relative and that in these cases unjustified dismissals are deemed void regardless of whether or not there is evidence of discriminatory treatment.

In effect, this declaration is considered as objective invalidity, different from invalidity due to discrimination, which prevails regardless of whether or not there is evidence of discrimination or even a motive for discrimination.

Invalidity of the dismissal of an employee undergoing *in vitro* fertilisation treatment

When the dismissed employee provides reasonable evidence of a breach of their fundamental rights, it is the employer's responsibility to prove the actual reasons for the dismissal by objectively and reasonably justifying the decision to terminate, which does not occur in this case since the unfair nature of the dismissal was recognised by the company.

Judgment delivered by the Supreme Court on 4 April 2017 (JUR\2017\96409)

The Supreme Court heard the case of an employee –a primary school teacher–, who was dismissed for economic reasons.

On the date that she was notified of the dismissal, the employee had started fertility treatment of which the company was aware. Nevertheless, it should be noted that, on the date that the dismissal took effect, the eggs fertilised "in vitro" had not yet been transferred to the uterus of the affected worker.

Regarding the economic circumstances on which the dismissal was based, it was considered proven that in the 2012 fiscal year, the primary-nursery section made a loss of EUR 96,866.31 and a loss of EUR 71,268.60 in 2013. However, the entity as a whole remained profitable throughout the two years.

In any case, the company admitted that the dismissal was unfair.

Both the judgment at first instance and the judgment at appeal found that the protection granted to pregnant women against dismissal does not cover the worker in this case as the fertilised eggs had not yet been implanted.

At this point, the Supreme Court had to decide whether to consider void the dismissal of a woman who, although not technically pregnant, underwent a medical procedure to that end.

Firstly, the Supreme Court understands that there was evidence that the dismissal decision was taken due to the fact that the worker was undergoing specific treatment for assisted reproduction, which could have led to discrimination.

In fact, the Court of Justice of the European Union's judgment of 26 February 2008 maintains that it is against EU law to dismiss an employee who is in an advanced stage of IVF treatment when it is shown that the dismissal is essentially based on the fact that the person concerned has been undergoing such treatment.

The evidence of discrimination reversed the burden of proof, obliging the company to show that the dismissal was based on real, objective, reasonable and proportionate grounds which justified it.

However, in this case, the company did not at any point attempt to justify the dismissal, but admitted that it was unfair.

Thus, the Court considered that "*it can hardly be considered that an action not consistent with the law – recognised as such by its perpetrator– constitutes a reasonable and objective justification of the questioned dismissal decision that is also proportionate to the concurrent circumstances of the employee.*", which forces the dismissal to be considered as void.

Unlawful access to an employee's email due to not having previously established usage regulations for computer equipment

Emails from an employee to their lawyer from their company computer may not be admitted to a proceeding if it is not guaranteed that the process to obtain them respected the appropriate guarantees for the secrecy of communications and privacy.

Judgment delivered by the Supreme Court on 17 March 2017 (JUR\2017\1480)

This is a proceeding for the review of final judgments. Therein, the company requested a review of the judgment issued at first instance which recognised the employee's right to reduced working hours for legal guardianship.

To secure this review, the company provided a personal email sent by the employee to her lawyer and found by the company after the notification of the judgment at first instance as evidence.

The company maintained that it had known the details of that document before adopting its defensive stance.

The employee challenged the appeal alleging a breach of the secrecy of communications and her right to professional confidentiality. Regarding the control of the use of the computer provided by the company to the worker, the following criteria, already established in case law, must be kept in mind:

1. In accordance with the requirements of good faith, the company must establish the rules of use for IT resources in advance and inform workers of the possible controls in place, as well as the necessary measures that must be adopted, where appropriate, to ensure the effective use of devices.

2. The protection of privacy is compatible with the lawful control referred to above, although telephone and email communications have additional protection arising from the constitutional guarantee of communications privacy.

3. The reciprocal balances and limitations that arise for both parties from the employment contract mean that the company's organisational powers would also be limited by the fundamental rights of the worker, with the employer being obliged to respect them. The foregoing considerations do not preclude the imposition of regulations on the use of IT tools within the company by different means such as orders, instructions, protocols or codes of good practice so that the company is not denied its powers. For this purpose, different systems may be used provided that they do not violate fundamental rights. In fact, the exercise of the power of surveillance or business control over such elements is limited by the force of fundamental rights.

4. The foregoing does not preclude the assertion that through the performance of employment, communications between the worker and other persons that may occur are covered by the right to communication privacy, whether they are by post, telegram, telephone or computer, which could result in a breach due to illegal interventions thereto by the employer or persons exercising managerial powers within the company, other workers or third parties.

In view of the foregoing, it has not been possible to prove, in the opinion of the Supreme Court, that the company has obtained the evidence in a way that does not breach the aforementioned rights, and thus cannot be considered for the purposes of the review.

Transposition of six directives and developments in the regulations on the relocation of workers

Six European Union directives are transposed within the sectors of finance, commerce, health and employee relocation.

Royal Decree Law 9/2017 of 26 May transposing European Union directives within the sectors of finance, commerce, health and employee relocation

Royal Decree Law 9/2017 of 26 May transposes six EU directives within the sectors of finance, commerce, health and employee relocation, allowing for the closure of infringement proceedings opened due to the breach of adaptation obligations to the internal order of European legislation and avoiding the imposition of economic sanctions on Spain.

Title I, which encompasses the first and second articles, contains the legislative amendments transposed by the directives related to the financial system.

Title II, which includes articles three and four, contains amendments to the actions for damages resulting from infringements of both member states and European Union competition laws.

Title III, composed of the fifth article, contains the amendments to the internal order of European Union Directives within the health sector.

Title IV, encompassing articles six and seven, contains the amendments to the internal order of a European Union directive on employee relocation. More specifically, directive 2014/67/EU establishes a common framework of necessary provisions, measures and mechanisms of control over the displacement of workers effected within the framework of providing services, including preventative and punitive measures for any abuse or circumvention of applicable legislation. This intends to guarantee that an appropriate level of protection for displaced worker's rights for the provision of cross border services is respected, in particular, that they comply with the applicable employment conditions in the member state where the service shall be provided whilst facilitating the freedom to provide services to providers and promoting a climate of fair competition with the European Union and the European economic zone.

Finally, the consolidated text of the General Law for the Protection of Consumers and Users and other additional laws are amended by the first final provision relating to the need to immediately respond to Pilot Project 8007/15/JUST open to the Kingdom of Spain as a consequence of the incorrect transposition of Directive 2011/80/UE of the European Parliament and Council of 25 October 2011 on consumer rights, fulfilling the commitments made with the European Commission.

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