Labor and Employment Newsletter

Spain

GARRIGUES

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1. Severance payments in the European context

Despite unfounded rumors, the Council of Europe has not yet ruled on the complaint filed by UGT against the compensation system in Spain. These rumors are creating enormous confusion and are based on highly questionable arguments.

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Recently, there has been a proliferation of statements of various kinds regarding the decision that the Social Rights Committee of the Council of Europe might have taken on the complaint lodged by the union UGT against the system of severance pay established in Spanish law. Interested leaks, the dissemination of inaccurate news, rumors and inventions of various kinds converge in the creation of a state of opinion that tries to establish the idea of the inevitability of a normative modification of the regulation of dismissal in Spain, as it would have been considered not to be in line with European requirements. This idea encourages government (and trade union) projects to reform the legal regime of dismissal, outside the social dialogue and with an umpteenth disregard for what was agreed in it (in the last labor reform, so praised for being the fruit of consensus, what was agreed to be modified was as important as what was agreed not to be modified and, in this sense, the tightening of temporary contracts was linked to the maintenance of the dismissal regulations).

This is a full-fledged ceremony of confusion, which calls for at least a few clarifications.

Firstly, there is no public decision by the European Committee of Social Rights (ECSR). It seems that the Committee has submitted its preliminary decision to the Committee of Ministers (of the Council of Europe, not of the European Union), which will have to carry out an initial examination at the earliest in May of this year. As a result of this review, the Committee of Ministers will be able to make a recommendation by July 2024 at the earliest. Following this recommendation, the decision of the ECSRC will be made public and may also be published four months after it has been referred to the Committee of Ministers (which would bring us to 29 July 2024).

Secondly, the European Social Charter is an international treaty which establishes commitments for the signatory states which are preferably formulated in generic terms, which constitute criteria to guide their legislative policy and which do not seek to enshrine subjective rights that can be invoked individually. Let us turn to the issue at hand: Article 24 of the Charter indicates that the right of workers not to be dismissed without valid reasons for dismissal, related to their skills or conduct, "or based on the operational requirements of the undertaking", must be guaranteed. And the right of workers dismissed without valid reason to "adequate compensation or other appropriate redress". International treaties enshrine minimum standards that should inform national laws and policies; they are not intended to provide a basis for uniform regulation for individual states or to prefigure a detailed or detailed legal regime to be imposed on them.

A minimum of good sense would require the rejection of a claim such as the one raised against Spanish law. But good sense is certainly not in fashion. And the ECSR has developed an "interpretative" work that has expanded, without mandate or power, the requirements of Article 24 of the Charter. Thus, it has been stated that national regulations, in order to comply with the precept, must provide that the judge has the power to demand the reinstatement of the worker dismissed without cause (without "valid reason"). Nothing is said about this in the Social Charter, and none of its precepts supports the alleged requirement that such reinstatement be provided for in legislation, and even that it be given preference over other remedies for dismissal without cause. And nothing is said about compensation for unjustified dismissal, only that it should be "adequate". And, let us not forget, reparation is required in cases of dismissal without a valid reason, the reason being

considered valid when it is based on the operational needs of the company. Strictly speaking, therefore, the Charter does not even require compensation for objective or collective dismissals.

The ECSRC has established the criterion that compensation must be dissuasive and that it must allow full compensation for the damage suffered by the dismissed worker. Neither one thing nor the other derives from the grammatical interpretation of the precept, and the broad interpretation neither enjoys normative coverage nor is it admissible when it is a question of standards of protection contained in international treaties. The assessment of the adequacy of compensation must in principle be left to the national legal systems, which could only be "censured" in extreme cases, from this point of view, within the framework of the interpretation of the Charter. Moreover, it should not be forgotten that the ECSRC is not a judicial body (until 1998 it was called the "Committee of Independent Experts"), nor is it made up of judges, but of experts appointed by the Parliamentary Assembly on the proposal of the signatory states of the Charter. These experts issue opinions and the Committee of Ministers, if necessary, formulates recommendations, but in no case binding decisions. (Incidentally, the magical realism of our country provides curious anecdotes: the ECSR expert proposed by the Spanish government has been recused in relation to this case by the Spanish government itself).

Therefore, we should not be sold the lie that the Spanish legal system needs to be modified to adapt it to "European requirements" or to the Social Charter. This modification must be tackled internally, through social dialogue and the relevant procedures for creating regulations. Is there a desire to change the system of compensation for unjustified dismissal from the current system of fixed compensation to compensation for actual damages suffered, or is there a desire simply to return to the compensation scale of 45 days/42 monthly payments? If this scale is reinstated, would the requirement to compensate for the damage suffered disappear? In a system of compensation for loss, would it be possible to judicially consider the non-existence of loss, for example, in cases of immediate hiring of the worker under the same or better conditions, or dismissal of workers with pension rights already matured? What is sought is a minimum compensation in any case that could be complemented by compensation for the damage suffered?

All these questions require thoughtful and debated answers within the social dialogue and regulatory production procedures. Without forgetting that everything related to dismissal is intimately linked to recruitment and job creation, and that Spain is one of the few countries in which dismissal regulations are applied without requiring a threshold of workers to exclude small companies (as is the case in Germany, where the Civil Code applies to companies with less than ten workers, This is the case in Germany, where the Civil Code applies to companies with less than ten employees, which only requires notice, of increasing duration, for the termination of the contract, or in Italy, where the threshold is set at fifteen employees and, with the provision of specific regulations, in other countries such as France, Portugal or Great Britain), and that as a general rule our severance payments are significantly higher than in the rest of the countries.

2. News

The minimum contribution bases are updated to the minimum wage for 2024

Following the approval of the minimum interprofessional wage (SMI) for 2024, Order PJC/281/2024 of 27 March has been published in the BOE, amending the Contribution Order for 2024 (Order PJC/51/2024 of 29 January), definitively setting the minimum contribution bases.

The rules for the additional solidarity contribution are developed

A modification of the general Social Security collection and contribution regulations is approved, the most important new feature of which is the development of the so-called solidarity contribution, which will come into force on 1 January 2025.

From 20 March 2024, companies will be required to appoint a lawyer within two days

In addition, from that date, the first summons of legal persons by electronic means will be valid, which will require companies to pay particular attention to the notifications they receive by electronic means.

3. On the radar

The Annual Regulatory Plan foresees almost 200 new norms by 2024

The Government has presented the Annual Regulatory Plan 2024 (PAN), which includes initiatives for organic laws, ordinary laws and royal decrees.

In the area of employment and labor relations, the following, among others, are envisaged: the so-called Interns' Statute, the law on democracy in the company, the modification of the Workers' Statute (ET) in terms of working hours (reduction of the maximum working day), control of the working day, paid leave or dismissal, the regulatory development of the training contract, the transposition of the European directive on equal pay or the regulatory development of the LGTBI law.

This newsletter contains the current status of some of these regulatory proposals.

The Council of Ministers approves the Draft Law on Families

The Council of Ministers has approved the **draft Family Law**, requesting its parliamentary processing through the urgency procedure.

Among other issues, the text foresees the modification of article 48.4 of the Workers' Statute to establish the possibility for the non-pregnant father or mother to bring forward the leave for the birth and care of a child to ten days prior to the expected date of birth.

The Ministry of Labor resumes the processing of the Interns' Statute

The Ministry of Labor and Social Economy has announced that it is taking up the Interns' Statute and will take the text on non-labor practices in the company environment, whose negotiation culminated in June 2023 with the agreement of the trade unions, but without the support of the employers, to the Congress of Deputies.

The government plans to increase the participation of workers' representatives in companies

The Ministry of Labor and Social Economy plans to promote the so-called company democracy law, which aims at a more effective participation of workers at the level of their respective companies.

Permanent incapacity shall not automatically cause the termination of the contract

The Ministry of Labor and Social Economy and the Spanish Committee of Representatives of People with Disabilities (CERMI) have signed the agreement for the protection against the termination of the employment relationship of people with permanent disability that will be reflected in a forthcoming reform of the Workers' Statute. Specifically, the current wording of article 49.1 e), which provides for the termination of the employment relationship in the event of total or absolute permanent disability of the worker, will be modified.

The proposal for a directive on improving working conditions at work on digital platforms is adopted

This European regulation seeks to improve conditions on digital platforms, establishes a presumption of an employment relationship in favour of the people who work for them and regulates their use of algorithms. The text will have to be approved by the European Parliament.

4. Judgements

Disciplinary dismissal for unjustified absences after the rejection of the request for teleworking is declared to be justified

In its judgment of 12 January 2024, the Madrid High Court of Justice dismissed the appeal brought by a worker who, after her request to work 100 % teleworking was rejected, did not return to her post.

The judgment declared the disciplinary dismissal for unjustified absences to be justified on the grounds that the company had requested the worker to return to her job and that she had failed to do so.

The refusal of a second request for an adjustment of working hours, after the employee had accepted the first request, is lawful

The judgment of the Social Division of the Madrid High Court of Justice has dismissed the appeal of a worker who was granted one of the options she had requested in her letter to the company.

The worker had included in her request for an adjustment of working hours two alternative working hours that would allow her to reconcile work and family life. The company accepted the second of the two alternatives proposed in the request. However, a few days later, the employee again requested that she be granted the first of the two proposed timetables. The company refused this second request. The court upheld the lower court's judgment, declaring the company's refusal to grant the second request to be in accordance with the law, since the company had accepted one of the timetables requested by the employee.

An employee's stroke at the workplace before clocking in does not constitute an accident at work

The Madrid High Court of Justice, in a judgement of 5 February 2024, considers that a stroke suffered by a worker shortly before the start of his working day does not constitute an accident at work, classifying the contingency as a common illness.

In this case, the accident occurred at 2:30 p.m., before the worker began his working day (scheduled for 3:00 p.m.) and, therefore, he was not in "working time" for the purposes of determining the existence of an accident at work.

Non-payment of teleworking expenses is not sufficient cause for termination of the contract with compensation

A possible breach of the employer's obligation to compensate employees for telework-related expenses is not sufficiently serious to terminate the employment relationship under Article 50 of the Workers' Statute (WS).

This was the judgement of the High Court of Justice of Catalonia, dated 12 January 2024, which dismissed the appeal lodged by a teleworker who had requested the termination of her employment relationship on the grounds that the company did not pay her all of the expenses intrinsic to teleworking. The court considered that the facts were not serious enough to justify the termination of the employment contract under Article 50.1 c) of the WS.

The rejection of an application for working time adjustment decided on the basis of a score according to personal and family circumstances is valid

According to a judgment of the High Court of Justice of Galicia of 24 January 2024, the method used by a company to assess applications for the adaptation of working hours according to the score on a scale based on personal and family circumstances is valid. Specifically, in the case analysed, the collective agreement established a system of priority and order of precedence for access to the special work-life balance systems until the limit of available vacancies established was reached, which is considered to be in accordance with the law by the ruling.

5. And also…

Portugal sets the pace for extending active retirement beyond doctors

Rui Valente, head of labour law at Garrigues' Portuguese offices, explains in this article that Portuguese legislation establishes as a general rule the possibility of accumulating old-age pensions.

Peru: Relevant aspects to take into account regarding the payment of profits to workers

Companies with more than 20 employees in Peru are obliged to distribute profits among their staff. The amount to be distributed represents a percentage of the company's profits that varies according to its activity. We review the main aspects of this benefit: who is entitled to receive it, the method of calculation and the payment deadlines.

6. Labor & Employment Blog

Occupational risk prevention, adapting to a new working environment

On the occasion of the World Day for Safety and Health at Work, we review some of the challenges posed by occupational risk prevention and its regulation, such as, for example, achieving its true integration into company management, the framework of company responsibilities, taking into account different types of companies or the preventive legal status of self-employed workers.

10 ways to attract and retain young talent in the workplace, with a legal focus

Attracting and retaining young talent is one of the main objectives for companies. Recruiting the best profiles that have just entered the labor market allows organizations to be more competitive, innovative and diverse. The implementation of policies aimed at achieving these objectives requires knowledge of the possibilities offered by labor legislation.

The use of artificial intelligence poses some challenges for labor relations

Technological developments have led to the emergence of solutions based on artificial intelligence (AI), with a myriad of possible applications in many different areas, including labour relations. The use of AI in this area raises a number of questions from a legal and human resources point of view, from the specific aspects in which these tools can be useful to the limits and requirements that their use must meet in order not to collide with workers' rights.

Family co-responsibility, key to equal opportunities for men and women in the workplace

Co-responsibility is the equal sharing of household tasks and family responsibilities between men and women. The latest legislative reforms in the field of equality in the workplace (and also the interpretation of judicial bodies) are inspired by this concept, seeking to ensure that men and women have equal access to measures related to family care. The aim: that women's careers should not be more disadvantaged than men's because of absences related to family care.

Does the overlap of the weekly rest period with a public holiday entitle the holder to an additional rest day?

The answer to this question depends on the regulation of the collective agreement and the company's practice on the scheduling of weekly breaks.

7. Press

Labor issues at the center of business strategy in 2024

In this article, Eloy Castañer, partner in charge of labor law at Garrigues, analyses the main new developments in labor law. Many of them will entail an increase in business costs that may influence companies' investment or organizational decisions.

From selection to dismissal: the legal limits of working at the command of an algorithm

Cecilia Pérez, partner at Garrigues, analyses the effects of the use of algorithms and artificial intelligence in the workplace in this Cinco Días article.

Burden of proof for overtime work

In this article by Alberto García, a senior associate in Garrigues' labor department, he discusses the obligation for companies to record workers' working hours on a daily basis.

LGTBI anti-bullying protocols risk data protection breaches

In this report, Bernardo Pérez-Navas, a partner in Garrigues' labor law department, analyses how the absence of implementing regulations makes it difficult for companies to anticipate this type of risk.

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