Labor and Employment Newsletter

Spain

GARRIGUES

March 2023

Contents

1. A fresh blow to legal certainty

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The repeal of the own-initiative proceeding initiated with the labor courts and related to procedures for the characterization (or otherwise) for employment purposes of certain contractual relationships, which entailed a suspension of administrative proceedings, is a hard blow to legal certainty.

Law 3/2023 of February 28, 2023, on Employment, removes (in final provision nine) letter d) of article 148 of the Labor Jurisdiction Law (LJS), (although, under transitional provision five, the own-initiative proceeding envisaged in that letter will remain applicable in relation to claims that were admitted before the entry into force of the Employment Law, that is, before March 2, 2023). This reform has gone largely unnoticed but has important consequences.

Firstly, it reproduces a few of the ills that have recently beset the Spanish legislative process: a major reform has been included, cloaked in disguise almost, in an additional provision of a law that bears absolutely no relation to the content or purpose of the reformed provisions. This has contributed, even though the Employment Law is related to the field of labor and employment law, to the dispersion process of the legislation on employment relationships, which has experienced very important amendments included in laws with subject-matters that have little or nothing to do with those relationships (a whole host of laws could be mentioned on this subject. Recently, Organic Law 1/2023, of February 28, 2023, amending Organic Law 2/2010, on sexual and reproductive health and voluntary termination of pregnancy; Law 2/2023, of February 20, 20223, on the protection of people who report breaches of the law and on combating corruption; and Law 4/2023 of February 28, 2023 for real and actual equality of transgender people and to guarantee the rights of LGBTI people. This trend has been retained for bills under consideration, such as the preliminary bill for the Families Law and the Bill for a Sustainable Mobility Law). Extensive and confusing legislation has been the result, which is a source of legal uncertainty and prevents the existence of the necessary unified vision to undertake reforms of labor and employment law.

Plus, secondly, the amendment of the Labor Jurisdiction Law occurred without the necessary debate between government, employer and employee representatives and the formal participation of the consultative bodies (the preamble to the law makes a general reference to the fact that “the autonomous community governments, the employer organizations and the most representative union organizations were informed”). Note the use of the expression “were informed”, which clearly expresses the absence of dialog between government, employer and employee representatives, which has been replaced apparently by a “public consultation hearing and public information” period, for “affected citizens” to “participate and be heard”. The legislative process and the process for creating legislation have therefore been weakened.

And, thirdly and most importantly, the removal of the own-initiative proceeding for the labor courts to characterize as employment or otherwise certain types of contractual relationships, the termination of which is binding for both the public authorities and the judicial review courts, strengthens the powers of public authorities and very considerably reduces the legal protection of citizens. A discrepancy over the employment nature or otherwise of the relationships at issue will now have to be submitted only in the administrative jurisdiction, and subsequently, to the judicial review courts by reason of a challenge of any notices of settlement (and infringement) that may have been issued. The prior pronouncement by the labor court has been removed, a body which, by reason of its expertise and in the interests of procedural efficiency, is much more appropriate, and, definitely, much more adequate from the standpoint of legal certainty.

This last point is made more serious by the provisions of Organic Law 14/2022 of December 22, 2022 on the transposition of European directives and other provisions for adapting criminal legislation to European Union legislation, and to reform offenses against moral integrity, public disorder and arms smuggling. The new point 2 added to article 311 of the Criminal Code introduced by this law defines as a criminal offense the acts of persons who "impose illegal terms and conditions on their workers by hiring them under mechanisms other than an employment contract". Separately from the criticisms already made of this definition in our earlier newsletter, it must be taken into account that criminal censure is being used to punish the avoidance of employment contracts in relation to provisions of services. Obviously, there may be other legal instruments, aside from the employment contract, which are able to be used to enter into a specific service. The acceptability of using those legal instruments, protected by free will and freedom of contract, may be questioned by the public authorities, which, if they consider that the contracts are really employment relationships, may issue the necessary notices of settlement and infringement. The removal of the prior pronouncement as to the employment nature or otherwise of the relationship by the labor courts takes away legal certainty and opens up a dangerous field of ambiguity for criminal action, especially since article 311.2 of the Criminal Code expressly includes cases in which the legal terms and conditions (under mechanisms other than an employment contract) are "retained against an administrative request or penalty". A discrepancy over a characterization of the contractual relationship made by the public authorities, and which serves as a basis for their requests and penalties, has now been entrusted for resolution to the judicial review courts, which are far from experts in labor matters and will presumably be more inclined, therefore, towards accepting characterizations by public authorities. It is rare for coincidences to exist in these cases, and almost simultaneous reforms of the Criminal Code and the Labor Jurisdiction Law were doubtless made for the same purpose of strengthening the powers of the public authorities and limiting the legal protections of citizens, employers in this case, who are going to encounter much greater difficulty if they have a discrepancy with the public authorities and are going to run much greater risks in those discrepancies.

2. News update

Seven takeaways on pension reform

The law provides, among others, various measures for increasing social security contributions and very major changes to the retirement pension system.

These are the new pieces of labor legislation in the Employment Law, the Law for real and actual equality of transgender people and the rights of LGBTI people, and the Law on sexual and reproductive health

We analyze the three laws published on March 1 in the Official State Gazette, together with the main obligations, changes and implications they will carry for companies.

Whistleblowing: The law on people reporting infringements of the law and to combat corruption has been published

The law requires companies with 50 or more workers to have an internal whistleblowing system and sets out fines up to €1,000,000

Publication of new national minimum wage for 2023

The royal decree raises the national minimum wage by 8% and regulates its offset and absorption in cases where workers' remuneration exceeds the minimum wage when calculated over a year.

Action protocols published for the swift and effective investigation of offenses against life, health and the physical integrity of workers

An agreement has been signed by different entities aimed at setting up action protocols and cooperation mechanisms in the investigation of serious, very serious and fatal accidents, inquiries into crimes of endangerment and the enforcement of convictions.

Social security contributions order for 2023 has been published

The order determines the maximum and minimum contribution bases and rates starting on January 1, 2023. The maximum contribution base is set at €4,495.50 per month.

3. On the radar

The labor minister will bring together a joint negotiating panel to update the 1995 Occupational Risk Prevention Law

During the presentation of the 2023-2027 Spanish Occupational Health and Safety Strategy, labor minister Yolanda Díaz indicated that she will call for a joint negotiating table to update the current Occupational Risk Prevention Law. Enhancing occupational risk prevention regarding accidents and illness prevention is one of the six goals of this strategy.

The minister has stated that a negotiating process between government, employer and employee representatives will be necessary to achieve a "concept of comprehensive prevention" whereby employers will not treat health as an obligation or as a cost, but instead as a means of achieving decent work and decent lives in the face of the new risks that have arisen since the publication of the law in 1995.

Pilot projects on four-day working week

The government has set in motion a national trial period to test whether a shorter working week with the same salary is possible, through improvements in productivity, by activating a pilot program for SMEs. Order ICT/1238/2022, determining the rules on subsidies to promote an improvement in productivity at small and medium-sized industrial companies through pilot projects on shortening the working week was published,with the objective of covering the cost of a portion of the salary or other costs that SMEs may incur if they elect to participate in the pilot program on shortening the working week to four days.

Similarly, the minister heading the Department of Work and Employment in the Basque Country has submitted a proposal to create an employment innovation task force to carry out research and a practical trial on the four-day working week, opting for a joint negotiating process to explore work/life balance mechanisms.

Portugal has also joined this initiative by instating a pilot program for introducing a four-day working week, as we reported in this alert.

The labor and social security inspectors send out notifications to employers about permanent discontinuous contracts and training contracts

The labor and social security inspection authority (ITSS) is developing a shake-up plan against fraud in employment contracts, focusing especially on examining the use of permanent discontinuous contracts and training contracts.

As a result of this plan, the ITSS is sending out standard notifications to employers informing them of the workers they consider to have an excessively long temporary relationship for the type of contract used. The notification states that if these contracts are not converted into indefinite-term contracts, inspection proceedings may be initiated to verify compliance with the legislation.

Government, employer and employee representatives continue negotiations for the Interns' Statute

The government is going to bring together the employee and employer representatives to reach an agreement for approval of the Interns' Statute. Although it has now been months since negotiations started, in recent weeks various versions have been circulated. In this latest phase, the debate is focusing, among other subjects, on the inclusion of extracurricular practices.

4. Judgments

Debate over the option of imposing an additional severance to the legally determined severance for unfair dismissal

A judgment by the Catalan High Court, dated January 30, 2023, has imposed an additional severance to the legally determined severance for the dismissal of a worker on objective grounds.

The court classed the objective dismissal of a worker as unjustified and held that the alleged grounds were circumstantial rather than structural. It also stated that the stipulated statutory severance (below €1,000) was insufficient and did not have a deterrent effect for the employer, because it entailed excluding the claimant from the ERTE temporary layoff procedure initiated a few days later. In this context, the court granted an additional severance above the statutory amount, linked to the unemployment benefit that the worker would have received under the ERTE temporary layoff procedure.

The opposite conclusion has been adopted by various regional high courts of justice, in judgments stating that the statutory amount of severance fulfills the requirements set out in Convention 158 of the International Labor Organization (ILO), for which reason it is not necessary to impose any amount on top of the statutory severance for unfair dismissal, except in the cases allowed by the law.

The Supreme Court validates an agreement in the context of a collective layoff procedure that set a lower severance payment for people over 60

In a recent judgment, the Supreme Court validated the agreement in a collective layoff procedure, reached between the employer and the workers' representatives and determining a greater amount of severance for included workers under 60.

The claimant submitted that the agreement was a case of discrimination based on age. The court confirmed the validity of the agreement and stated that: (i) the judicial doctrine does not prohibit differences based on objective grounds; (ii) the agreement is the result of collective bargaining; (iii) all the severance payments are above the statutory minimum amount (including those for people over 60); and (iv) it is reasonable and proportionate because workers over 60 are close to retirement.

Lastly, the judgement also takes into account that age only had an effect on the severance payment, not on the selection criteria for the workers included.

A dismissal is considered unfair on the basis of proof obtained after opening a bag left behind by a worker

The Galicia High Court, in a judgment dated February 15, 2023, held the dismissal of a worker to be unfair, due to being supported by proof obtained after searching a bag the worker left behind at a hospitality establishment. The worker had company documents in her bag, which were discovered by two colleagues after finding the bag.

The court held that the proof was illegally obtained, because it was seen without observing the worker's right to inviolability of her private property as defined in article 18 of the Workers' Statute. The judgment did not find a breach of fundamental rights by the employer (which did not order the workers to open the bag), instead, after learning of the situation, the company decided to conduct a subsequent search fulfilling the formal requirements set out in the law.

The court thus concluded that the purpose of the dismissal decision was not to breach the worker's privacy, even if the the proof being illegally obtained prevents it from being used to sustain the ground for dismissal. Therefore, the invalidity of the proof did not affect the characterization of the dismissal which was held to be unfair and not null and void.

The Supreme Court confirms the validity of a working time recording system in which the worker enters the hours worked

In its judgment of January 18, 2023, the Supreme Court analyzed the viability of a working hours recording system in which it is the worker who has to enter the start and finish times for each working day, as well as any interruptions or breaks that take place.

The labor union that brought the claim alleged that the system was not objective, because it depended solely on a statement by the worker, which might not reflect the hours actually worked for fear of reporting a number higher than the daily working hours.

The Supreme Court held that the labor union's allegation had no legal substance and declared that the system is objective and consistent with the law, regardless of the unilateral statement by the worker stating the opposite.

The Supreme Court declares that the relationships of several odontologists are not employment relationships

In its judgment of January 17, 2023, the Supreme Court determined that the relationships of several odontologists with the clinic where they provide their services are not employment relationships, and are correctly included under the regime for self-employed workers and independent contractors.

The court held that no employment relationship exists, on account of their relationships involving self-organized professional activities, in which the odontologists assume the risks of nonpayment, and pay the clinic a sum for the use of its premises, without the franchisee or franchiser receiving a set amount of revenues or having a guaranteed client base, nor are they prohibited from operating at other clinics.

Dismissal of a worker on prolonged sick leave held to be unjustified not null and void

A case settled by the Vigo Labor Court, in a judgment dated February 15, 2023, concerned the justified nature or otherwise of a dismissal on objective grounds of a worker who had been on prolonged sick leave.

In her claim, the worker submitted two grounds for holding her dismissal null and void: (i) retaliation for the bad climate caused by the removal of her daughter who was sales director at the same company, and (ii) that it was discriminatory due to her prolonged sick leave. The court determined that although the dismissal was not in accord with the law, there are no elements enabling it to be held null and void under Law 15/2022, because it is true that the employer's administrative burden was reduced, and the employer has substantiated the reason for the dismissal.

To summarize, the dismissal was held to be unfair after finding that, although the objective ground stated in the dismissal letter was not sufficient to substantiate that it was justified, the employer evidenced the existence of that ground, which determined that the dismissal was not held null and void.

5. And also…

Peru: Regulations for the Remote Work Law approved

Supreme Decree 002-2023-TR, the Regulations for Law 31572, the Remote Work Law, was published on February 26, 2023. The regulations add further details to the regulations on providing services under remote working arrangements at public authority entities, as well as at institutions and companies in the private sector.

Mexico: New rules on registration and surveillance for providers of specialized services

A agreement published in the Official Federal Gazette on February 3, 2023 amended the general provisions on the registration of providers of specialized services or projects under article 15 of the Federal Labor Law.

6. Garrigues Labor & Employment and Sustainable

The boards of listed companies and unlisted large companies will have to have at least 40% women members

The preliminary bill for the Organic Law on Equal Representation of Women and Men on Decision-Making Bodies has completed the first stage after being approved by the Council of Ministers.

7. Labor and Employment Blog

Labor relations as an essential instrument to achieve equality between men and women

In recent months, a number of regulations have introduced new developments in the area of equality in the workplace in Spain. From the obligation to adopt measures to guarantee equal working conditions to the acknowledgement of sick leave for pregnant women from the first day of the 39th week of pregnancy. We take a look at them on the occasion of International Women's Day.

Can artificial intelligence, under human supervision, dismiss me?

The proposal for a European Directive on improving working conditions in platform work requires that, in intensely digitalized environments, there is always human control. This means that the decision regarding a job cannot be left exclusively in the hands of artificial intelligence.

Alternatives for companies against voluntary and unjustified absenteeism by a worker

Some courts are admitting notifications of worker termination in which the worker is informed of their voluntary termination due to absenteeism and, at the same time and by default, of disciplinary dismissal in the event the first option is not possible.

Should prescription glasses be provided by a company to its employees?

According to a recent judgment by the Court of Justice of the European Union, companies should only be liable for the cost of prescription glasses when, as a special corrective device, they serve to correct or prevent vision disorders that are specifically related to the job and not problems of vision or pathologies of a general nature, irrespective of the work and are not related to the working conditions.

One year on from the employment contract reform: what has changed?

2022 has come to an end. And in labor law circles we are celebrating an anniversary one year on from the much heralded labor reform published in the Official State Gazette (BOE) through Royal Decree-Law 32/2021 of December 28, 2021, on urgent measures for labor reform, ensuring stable employment and transforming the labor market.

8. In the press

The risks of abandoning objective severance in dismissals

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