Labor and Employment Newsletter

Spain

GARRIGUES

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1. Formalities of Dismissal and Prior Hearing

A recent Supreme Court ruling has created a high level of legal uncertainty regarding the prior hearing procedure in disciplinary dismissals, raising numerous legal questions.

Federico Durán López

The Supreme Court (SC), in its ruling of November 18, 2024 (1250/2024), aimed at unifying doctrine, addresses whether, under Article 7 of ILO Convention No. 158, ratified by Spain, disciplinary dismissal requires, as a formal prerequisite, a prior hearing of the employee before the employer makes the dismissal decision.

Two separate issues arise. The first concerns whether Spanish law complies with the requirement of Article 7 of ILO Convention No. 158. The second pertains to the possibility of Spanish courts directly applying this requirement if the answer to the previous question is negative. The Supreme Court's unified doctrine radically changes its previous stance. Previously, it was clear: Article 7 should be understood according to its purpose—ensuring the employee's real opportunity to defend themselves. This guarantee was considered fulfilled by the formal system established in Article 55.1 of the Workers' Statute. Consequently, the absence of a prior hearing procedure was not seen as a violation of the formal dismissal requirements or their guarantees since these were met through the system outlined in Article 55.1 of the Workers' Statute.

The SC has also held that the aforementioned Article 7 "is not directly applicable", as it requires legislative development. That article should be related to Article 1 of the Convention itself, which recognises "in general terms the non-enforceable nature of its rules, which may be applied only by way of exception and in accordance with national practice, without the regulatory mediation of domestic law". For the SC, Article 7 could not be understood as falling within this exception, as a judicial action to implement an international provision was not authorised, ignoring the various possibilities for such implementation and the broad system of exceptions, not only subjective but, above all, objective, which may be applicable in relation to the criterion of reasonableness of the company's refusal to hear the case.

Despite this clear doctrine, the SC goes on to consider that the prior hearing of the dismissed employee is something that is added to his or her possibilities of appealing the dismissal, without being "absorbed" by these. Article 7 of ILO Convention No. 158 "imposes a right to a hearing of the employee prior to the termination by disciplinary dismissal which may be adopted by the employer and this is enforceable and must be complied with". And the prior hearing cannot be understood as guaranteed, nor can it be confused with the possibility of appeal. "The hearing of the employee prior to being notified of the disciplinary dismissal and the actions that must be carried out subsequently to challenge the dismissal measure adopted by the employer are different moments". The existence of possibilities of appeal against dismissal does not eliminate the requirement of a hearing prior to its adoption. And finally, a "criterion of fairness" also requires such a prior hearing.

All this being said, it is necessary to answer the other question: if Spanish law does not guarantee compliance with the formal requirement of prior hearing of the employee in cases of disciplinary dismissal, can the courts give direct application to the mandate of Article 7 of ILO Convention No. 158? The SC states that "its direct application is appropriate as it is a provision that must be qualified as complete or automatically applicable, without the need for implementing rules to be issued by Spain, as its terms are sufficiently and duly defined".

Given that this is a radical change of criterion, it is necessary to justify it, and the judgement proceeds to do so, albeit with arguments that are certainly not very consistent.

Firstly, reference is made to the approval, after the judgments containing the preceding doctrine, of the Law on Treaties and other International Agreements (Law 25/2014, of 27 November), which proclaims, in its Article 23.3, that international treaties validly concluded become part of the Spanish legal system after their official publication. But it is not clear what this law innovates in this respect, bearing in mind that Article 96.1 of the Constitution already proclaims that "validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order". The appeal to Law 25/2014 is not sufficient to justify a change of criterion.

Secondly, reference is made to the control of conventionality, which has acquired "a charter" in the last "half a dozen years". However, while this control of conventionality may be used to carry out (debatable) operations of displacement of domestic law due to its alleged contrast with international or European standards, in no case does it seem that it can in itself become the reason or basis for a drastic change of interpretative criterion.

Thirdly, reference is made to the abolition of processing wages, which "has deprived the theories of termination of the contract only when the order terminating the employment relationship was issued". However, the termination effectiveness of the act of dismissal had already been upheld in scientific and judicial doctrine prior to the abolition of processing wages, so it does not seem that this abolition is sufficient reason for a change of doctrine either.

Fourthly, reference is made to the elimination of null and void dismissal due to formal deficiencies, which does not really seem to have any bearing on the issue.

And, finally, it is stated that "the absence of a clause of greater overall favorability of domestic regulation with respect to guarantees is now more relevant". Nor is it clear why this could be an argument for the change of doctrine.

This weakness of the reasons that could be the basis for a change of criterion would have made a more nuanced judicial decision advisable, compelling the legislator to make a regulatory modification that would ensure respect for the new interpretation of the requirements of Article 7. Going straight to the point of requiring a prior hearing in disciplinary dismissals, probably going beyond the control of conventionality (the court is stating that we are not dealing with a derogation of the internal rule, but with its mere inapplication to the specific case, which is clearly not true because it maintains the need for the new procedure for all disciplinary dismissals), generates a situation of legal uncertainty that should be addressed by a legislative intervention to review our legal regime of disciplinary dismissal.

For now, some certainties and many uncertainties:

- Prior hearings are required for disciplinary dismissals but not for objective or collective dismissals.

- The hearing only requires giving the employee "the opportunity to be heard" without further precision.

- The hearing will be on the 'facts' alleged by the employer and will not therefore extend to the legal classification of those facts or to whether they fall within the legal or contractual provisions relating to the grounds for dismissal.

- Despite the Court's statement that the requirement of a prior hearing does not require further clarification, a number of questions arise: should the employee's acceptance of the facts alleged preclude his subsequent denial of those facts in the event of a legal challenge to the dismissal; would a failure to refute the facts alleged be tantamount to acceptance of those facts; and can the employee, in the face of a legal challenge to the dismissal, rely on the fact that the facts

alleged are not disputed? May the employee plead in court circumstances other than those taken into account at the hearing, and may the facts acknowledged by the employee, even if they were obtained unlawfully, have value in court, and what value must the legal arguments put forward at the hearing have for the courts?

- And can the employer impose a precautionary suspension of employment and pay on the employee during the pendency of the proceedings?

As can be seen, a situation of great legal uncertainty has arisen, in which, in disciplinary dismissals, a prior hearing of the dismissed employee must be respected, which requires only that he be heard (except in exceptional circumstances) but which is surrounded by numerous legal questions.

2. News

The contribution order for 2025 is published

The order establishes the maximum and minimum bases and contribution rates as of 1 January 2025, which are updated in accordance with the minimum interprofessional wage for 2025. The maximum contribution base is set at 4,909.50 euros per month.

Published the minimum interprofessional salary (SMI) for 2025

The Royal Decree, effective from January 1st, increases the MIW (SMI) by 4.41%, to 1,184 euros per month.

The update of contribution bases for 2025 and other labor and social security measures have been re-approved

The law restores some of the labor and social security measures already provided for in Royal Decree-Law 9/2024 after its repeal on 22 January 2025.

Basic equality and diversity obligations at a glance

The proliferation of equality and diversity regulations has meant that companies need to remain attentive to a whole set of obligations.

With this document, we seek to offer a schematic overview of the key issues that companies need to bear in mind to properly comply with the legislation on equality and diversity.

3. On the Radar

Government Approves Draft Bill to Reduce Working Hours

On 4 February, the Council of Ministers approved the Draft Bill for the reduction of the maximum duration of the ordinary working week to 37.5 hours per week, the working day register (digital and remotely accessible) and the right to digital disconnection, under the terms agreed with the CC.OO. and UGT trade union organizations.

The law has not yet been approved; it is pending parliamentary processing.

Changes in Labor Court Procedures from April

New labor court rules will require earlier evidence submission and modify conciliation proceedings.

On 3rd April 2025, Organic Law 1/2025, of 2nd January, on measures for the efficiency of the Public Justice Service comes into force, which entails very relevant changes in social order trials, among which are the following:

- Evidence must be requested 10 working days in advance (instead of the 5 working days currently required).
- It is possible for the pre-trial conciliation to be scheduled on a different date than the trial.
- At the conciliation hearing, the legal practitioner shall reflect on the disputed aspects which prevented the settlement.
- The parties shall be required to produce the evidence they intend to produce at the trial 10 working days in advance. Only in the case of specified exceptions may documentary evidence be produced outside the above time limit.

These changes, and in particular the need to provide evidence in advance, are highly relevant for labor proceedings.

4. Court Rulings

The company's own collective agreement is not affected by a subsequent sectoral agreement

The **ruling** of the Supreme Court on January 29th, 2025, resolves the discussion regarding the latest labor reform and the priority application of company agreements and sectoral agreements. In this regard, it states that, in accordance with the general rule prohibiting concurrent agreements, if the company's collective agreement predates the sectoral collective agreement, the company agreement applies over the sectoral agreement, as derived from Article 84.1 of the Workers' Statute, regardless of its content.

Dismissal for making fraudulent returns detected by video surveillance cameras is justified

In its **ruling** of January 14th, 2025, the Supreme Court justifies the dismissal and analyzes the lawfulness of video surveillance evidence. In the case analyzed, the evidence is valid because (i) it meets the triple test: it was suitable, necessary, and proportional based on a specific suspicion, (ii) the purposes of labor control complied with data protection regulations, (iii) the cameras were visible, and the employee knew of their existence, with signs to that effect, (iv) the legal representation of employees had been informed, and (v) the cameras were used for purposes aligned with detecting internal fraud.

Delivering the objective dismissal letter to the employees' legal representatives after its notification to the employee does not affect its validity and effects

The ruling of the Supreme Court on February 5th, 2025, reiterates the doctrine that allows a copy of the dismissal letter to be delivered to the employee's legal representatives later, as long as it is done within a reasonable period that does not undermine the legal requirement or prevent the exercise of rights related to the information provided. In the case analyzed by the ruling, the company communicated the dismissal of the employee to the president of the works council on the same day it occurred, with the president present when the letter was handed over, but the copy was delivered in a communication addressed to the works council five working days later.

Disciplinary dismissal for spending time on social media during working hours is justified

The ruling of the Superior Court of Justice of Cantabria, on November 4th, 2024, declares that 411 accesses to social media (Twitter, TikTok, Snapchat, Instagram, Pinterest, Facebook, or LinkedIn) were recorded within approximately one month from a corporate device. The actions were deemed sufficiently serious, given there was an explicit company policy prohibiting the use of the internet for personal purposes and the company monitored the use of corporate devices. The employee's conduct not only violated contractual good faith but also jeopardized the company's cybersecurity.

Confirmation of suspension of employment and salary for a union delegate who made offensive comments on social media

The union delegate used both the union's and personal social media accounts to make offensive comments critical of the company. In response to these actions, the ruling of the Superior Court of Justice of the Basque Country on January 8th, 2025, states that the messages are not protected by freedom of expression, as they exceeded the limits of legitimate criticism and negatively affected the work environment and the company's reputation.

5. Garrigues Labor and Sustainable

The challenge of parity in senior management for family businesses

On 2nd August 2024, the so-called Parity Law was published in the Official State Gazette (BOE), which establishes the obligation of companies included in its scope of application to ensure that senior management has a composition that ensures the presence of at least 40% of the under-represented sex. We reflect on how this legal obligation should be addressed in family businesses.

Garrigues Sustainable Newsletter - January 2025

In this newsletter we compile the most relevant legal news on ESG matters in Spain, published by Garrigues and G-advisory.

6. In Latin America

Artificial Intelligence in the Latin American Labor Market

The adoption of technologies based on artificial intelligence (AI), also known as emerging technologies, is showing an upward trend globally, and countries like Peru and Colombia are already advancing in the creation of regulations for the use and implementation of AI. In our Latin American Labor Newsletter, we analyze this and other issues in the field of labor law that are of interest to the region.

Chile: A New Obligation for Employers Regarding Complaints of Harassment and Workplace Violence

The new law stipulates that employers must inform the respective managing body of the employee's accident insurance and professional illness insurance when they receive a complaint of sexual harassment, workplace harassment, or violence at work.

8M in Peru: These Are the Labor Rights That Protect Women in the Workplace

March 8th marks International Women's Day, a date that not only represents an opportunity to reflect on advances in gender equality but also to remind us of the labor rights that protect women in the workplace.

Mexico: INFONAVIT Law and Federal Labor Law amended to include new obligations for employers

On February 21, 2025, the reform that amends and repeals various provisions of the Law of the National Workers' Housing Fund Institute (INFONAVIT) and the Federal Labor Law was published in the Official Journal of the Federation (DOF) to include new obligations for employers in socially oriented housing.

Chile: Adjustment of the Monthly Minimum Wage Starting January 2025

On Thursday, February 6th, 2025, the Official Journal of Chile published Decree No. 3 from the Ministry of Finance, which determines the value of the Monthly Minimum Wage (IMM), setting it at $510,636, effective retroactively from January 1st, 2025.

Peru: The Ministry of Labor Implements the Mandatory Electronic Box for Administrative Act Notifications

We detail the most relevant points to consider regarding the electronic boxes implemented by the Labor Authority for administrative act notifications.

Chile: Implications and Considerations for Employers of the Recently Approved Pension Reform

The Chilean Legislative Branch approved the bill colloquially known as the Pension Reform, which includes the most significant changes to the pension system since its creation in 1981.

7. Labor and Employment Blog

The key role of good faith in the reduction and adaptation of working hours due to legal guardianship

The improvements introduced in recent years in rights of work-life balance consisting of reducing or adapting the working day have created interpretative doubts about their application and possible scope. Conflicts have arisen when, for example, the company considers that the case on which the person is relying is not accredited, or when there is no balance between the right of the person requesting the measure and the organizational needs of the company. In these cases, the courts and tribunals are giving a key role to the good faith that must exist between both parties.

The urban legend of the ‘digital nomad’

Legend has it that in Spain there are ‘digital nomads’ who can work from here for foreign companies from outside the European Union. But this legend does not explain what employment legislation is applicable and what social security system covers them. We will see below that there is no regulatory answer to these doubts because Spain has only regulated a visa and a residence permit.

‘Riders’ law’ and platform work directive: challenges ahead

On November 11, 2024, Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work was published in the Official Journal of the European Union (OJEU). Its transposition by the Member States (which deadline is December 2, 2026) will bring with it new and important obligations for digital platforms.

Vade mecum of the main paid leaves in Spain

What kind of leave can employees take? How? When? In this post we present a basic guide to the main paid leaves regulated in the Workers’ Statute. These leaves can be developed, extended or enhanced through the collective bargaining agreement applicable to each company.

8. In the Press

The Supreme Court Settles the Debate on the Hierarchy of Agreements After the 2021 Labor Reform

In this opinion piece published in *Expansión*, our partner Carlos García Barcala discusses the Supreme Court ruling that confirms the 2021 labor reform did not grant priority application to sectoral agreements over company agreements. The general rule regarding the concurrency of agreements remains the one that gives preference to the earlier agreement. The appeal to the Supreme Court was filed by a company advised by Garrigues. In the same vein, this other article has been published in *La Voz de Galicia*.

The Use of Artificial Intelligence Is Gaining Ground in Collective Agreements

Little by little, clauses related to artificial intelligence (AI) are making their way into collective agreements in Spain. As our partner Ángel Olmedo Jiménez points out in this article published in *Cinco Días*, the way AI is regulated in these agreements depends on the sector or company, although the main points are often the same.

For more information:

[Labor and Employment Department]

Folllow us:

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