Labor and Employment Law Newsletter

GARRIGUES

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1. Remuneration register in Spain: doubts regarding the prior consultation and evaluation of job positions

Federico Durán López

The regulatory development of the remuneration register goes beyond what the legal rules would allow and generates numerous interpretative doubts.

The employer's obligation to keep a remuneration register, or rather a record of the "average values of the salaries, salary supplements and non-wage payments of its staff, broken down by sex and distributed by professional groups, professional categories or equivalent jobs or jobs of equal value", reflected in Article 28.2 of the Workers' Statute (WS), has been developed by RD 902/2020. The regulatory provision raises many interpretative doubts about its legality, which will cause innumerable practical difficulties for companies when complying with the regulatory mandate.

Firstly, in relation to the prior consultation to the preparation of the register. Article 5.6 of RD 902 provides, in this respect, that "the legal representation of the workers must be consulted, at least ten days in advance, prior to the preparation of the register". It should be noted that the preparation of the wage register, as the law calls it, or the remuneration register, as the decree calls it, is imposed on the company (in the law, on the employer), without any requirement for negotiation with the legal or union representatives of the workers. There is no duty to negotiate in relation to the pay register, as opposed to the equality plan or the situation diagnosis (Articles 5 and 6 of RD 901/2020). Moreover, Article 28 of the WS, the legal source of the figure of the register, does not contemplate the participation of the labor representatives in its preparation, nor does it confer any rights to them. It only refers to the workers' access to the (already prepared) register, through their legal representatives. On another note, Article 64.3 of the WS exclusively attributes a right to information to the already drawn up register referred to in Article 28.2 to the works council, while there is no reference to the register or its preparation in the works council's powers of consultation or issuance of a report (Article 64.5 of the WS).

In contrast to this clear legal mandate, the regulation imposes consultation, prior to the preparation of the register, with the workers' legal representatives. This requirement raises serious doubts as to its legality. Consultation prior to the preparation of the register is not contemplated in Article 28 of the WS, nor is it derived from the regulation of the works council's competences contained in Article 64 of the same legal body. As seen before, article 64.5 of the WS exclusively recognizes the workers' legal representatives' right to receive information about the already drawn up register. The fact that a regulatory text converts a legal right to mere information (a posteriori) into a right to prior consultation probably constitutes an ultra vires regulation. It is not a case of the regulation developing a legislative mandate or specifying its application: the choice of the legislator in the WS is quite clear, conferring a mere right to information a posteriori, which the regulatory rule, without the power to do so, cannot convert into a right to prior consultation. The RD is not developing or completing the law, but rather is substantially altering and modifying its mandate.

The situation with regard to job position evaluations is no less confusing. The regulations in this respect in RD 902/2020 are particularly complex and confusing. Article 4, with respect to the legal mandate, talks about "work of equal value". Not "job positions of equal value". This is a concept that does not appear in the law (other than as a possible classification technique: Article 28.2, first paragraph in fine of the WS) and is introduced by Article 9 of RD 902/2020. Furthermore, it introduces it equivocally, since it refers to "job positions of equal value under the terms established in Article 4", when this article speaks of work of equal value and not of jobs of equal value. On the other hand, in order to decide whether one job is of equal value to another, it is necessary to refer, apart from the indications of the second paragraph of Article 28.1 of the WS, to the criteria of paragraph 2 of the same Article 4 of the RD, among which there is no mention of job positions. The law speaks of the

functions or tasks, the educational, professional or training conditions required, the factors related to performance and working conditions, while the RD refers to functions, tasks, development of the activity and performance. Only in the context of the consideration of other factors relevant to performance does the RD speak of job positions (paragraph 3 of Article 4), and paragraph 4 of the same article expressly speaks of job position evaluations, but since this is a concept that does not appear in paragraphs 1 and 2, it may be thought that what it means is that, if a job evaluation system is chosen for the professional classification, such evaluation must be carried out in the terms indicated.

An analysis of article 5.2 RD, which speaks of the average and median "in each professional group, professional category, level, position or any other applicable classification system" leads to the same conclusion. Therefore, the remuneration register may include the sections of the applicable classification system (as also indicated in Article 28.2 of the WS), which may be by professional group, category, level, post or any other. For the purposes of the remuneration register, therefore, the consideration of job positions is not imposed if the classification system prevailing in the company is different.

The interpretative problem arises from Article 8.1.a) of the Royal Decree, which establishes that the diagnosis of the company's compensation situation (which is part of the compensation audit) requires "the evaluation of jobs positions", which seems to require, in contradiction not only with the law but also with other provisions of the Royal Decree, that the company's classification system be the job position evaluation system, although it states "taking into account the provisions of Article 4", which we have already seen is far from being clearly based on such a job position evaluation system. Article 6.a) of the RD also contributes to the confusion, by referring to the averages and medians of "the groupings of work of equal value in the company", but adding "in accordance with the job position evaluation described in Articles 4 and 8.1.a)", which contradicts the possibility derived from other precepts of groupings of work of equal value that are not carried out on the basis of job positions.

On the other hand, the first final provision of the RD provides for the approval of a ministerial order that will approve "a job position evaluation procedure" (the deadline for this is October 14). It should be noted that what is envisaged is the approval of a procedure, which will be indicative and not mandatory. This is also supported by paragraph 2 of the first final provision, which (confusingly: what does it mean that the order "may provide that it is complied with", is it a presumption?, an unconditional endorsement of the evaluation of job positions that follow the procedure of the order, regardless of its content?) says that if the procedure established by the order is followed, it will be understood that the formal requirements of the RD for the evaluation of job positions are complied with. It is therefore possible to proceed with a job evaluation without following the procedure established by the order, although in this case the presumption of paragraph 2 of the first final provision will not apply.

Finally, the provisions of Article 9 of the RD in relation to collective bargaining must be taken into account. The mandate of the regulation is certainly confusing: reference is made to the classification system provided for in the WS (by professional groups, although the classification by categories has been revived and reference is made to classification by levels and by job positions), and to the fact that this system must respect the principle of equal pay for work of equal value. But then it adds that the negotiating tables of the agreements "shall ensure" (what does this mean, does it have to be reflected in some way in the content of the agreement?, does it have to be registered in the minutes?, is it sufficient for the parties to state that they have ensured this?) that the concurrent factors and conditions in each of the professional groups and levels "respect the criteria of appropriateness, completeness and objectivity, and the principle of equal pay for work of equal value in the terms established in article 4". Regardless of the fact that Article 4 speaks of equal pay for work of equal value, not for job positions of equal value, it seems that, whatever the company's classification system, the jobs and their evaluation must be detailed. This lacks legal coverage, violates the

principle of freedom of enterprise and contradicts the professional classification regulations of the WS. A company that bases its classification on professional groups and levels could use this rule to state in collective bargaining that, in the assignment of pay levels associated with such classification, the principles of equal pay for work (and job positions) of equal value are respected, in accordance with the criteria set out in paragraphs 3 and 4 of Article 4 of the RD, without the need to implement a job classification system and assign each worker to a specific job.

2. Articles from the Labor and Employment Law Blog

It is possible to deduct part of a worker's salary for arriving late to work

Labor Chamber Four of the Supreme Court has ruled that companies can deduct the time a worker arrives late to work from his/her salary if it is on a regular basis. The Court considered that "if the failure to provide services is solely attributable to the worker who arrives to work late, the services provided do not coincide with the remuneration accrued". Continue reading here.

The fine red line between freedom of enterprise and religious freedom

Under debate, again is the dilemma regarding which right should prevail: that of employers to make their business a neutral space from an ideological, philosophical and religious perspective, or that of workers to make visible their convictions, also in the workplace, where they do not cease to be persons? Continue reading here.

From Jägermeister to justified dismissal: controversial conduct by workers on sick leave

Although certain sources claim that the famous German liquor Jägermeister was used during the Second World War by soldiers as an anesthetic and disinfectant, we are still unaware (at least officially) of its properties in dealing with anxiety and depression and its consumption by workers on sick leave could be questioned. Continue reading here.

An equality plan cannot be negotiated with an 'ad hoc' committee

The Supreme Court has held, in a judgment of January 26, 2021, that the equality plan negotiated with a committee of five workers appointed by the employer itself is null and void. Continue reading here.

TO READ ALL THE POSTS OF THE LABOR BLOG, YOU CAN CLICK HERE.

3. News

The Government agrees with the trade unions on an increase in the minimum interprofessional wage (SMI) in 2021

The Government has agreed with the unions on an increase in the minimum interprofessional wage of 15 euros for the year 2021, to be applied retroactively from September 1, 2021. The employers' association has not been part of the agreement as it considers that it is not the right time to carry out the increase because it could be a burden on the evolution of unemployment.

The agreement reached aims at 2023, with the objective of reaching 1,000 euros on January 1, 2022 and 1,060 euros on January 1, 2023.

The Government and the social partners resume negotiations on the extension of the ERTEs (temporary lay offs)

The ERTEs are scheduled to expire on September 30, 2021.

The trade unions have requested that they be extended until January 31, 2022, with the aim of also covering the Christmas season. The Government expects to reach an agreement for their extension with the social partners in the coming weeks.

The Charter of Digital Rights is presented with measures in the labor field

The Government presented the Charter of Digital Rights last July 14, 2021, as we reported in this alert.

The charter does not have a regulatory nature and its objective is to recognize the application and interpretation challenges that the adaptation of rights to the digital environment poses, as well as to suggest principles and policies referring to them in the aforementioned context.

The Labor Directorate General clarifies that the provisional regime of teleworking during COVID-19 remains in force as long as the health measures are maintained

The Telework Law contemplates a special transitional system that determines the inapplication of the rule to telework implemented exceptionally as a consequence of the health containment measures derived from COVID-19.

Some debate has been generated in relation to the end date of the transitional system, especially as a consequence of the loss of validity of Article 5 of Royal Decree-Law 8/2020, which established the "preference" of teleworking.

However, the Labor Directorate General has expressly stated that the transitional system remains in force "as long as the application of the health containment measures derived from the COVID-19 on the territorial scope where the work activity of a face-to-face nature must be developed" is maintained.

The Government seeks to increase the efficiency of the Labor Inspection through a new Royal Decree

Through Royal Decree 688/2021, of August 3, which amends the General Regulations on procedures for the imposition of penalties for social order infractions and for the settlement of Social Security contributions, the Government aims to improve the efficiency of the Labor and Social Security Inspection (ITSS), guaranteeing the effectiveness and dissuasive nature of the penalties.

One of the main novelties of the regulation is the possibility for the inspection to carry out an automated administrative activity in the sanctioning procedure, using massive data analysis to establish non-compliance. The Royal Decree provides that the intervention of an inspector is not necessary for the development of this automated activity.

On the other hand, the ITSS has published its strategic plan for the years 2021, 2022 and 2023, which reflects the intention to strengthen the inspection's capacity to act in all the areas where it exercises its competences.

The Government proposes to increase the length of paternity and maternity leave and to create a new universal parenting allowance

The Government has presented the main aspects of the Draft Bill on Family Diversity, which is expected to be approved by the Council of Ministers before the end of 2021. The possibility of increasing paternity and maternity leave to 6 months is being studied, as well as establishing a universal parenting allowance.

The European Commission announces a new proposal for a recommendation on individual learning accounts

The European Commission has announced the intention to submit, in the fourth quarter of 2021, a new proposal for a recommendation on individual learning accounts.

They are a means to increase accessibility in adult education and close the existing gap in access to training. They are conceived as personal accounts in which training entitlements can be accumulated and spent on quality-assured training.

4. Judgements

The Constitutional Court allows to question in an individual proceeding the cause of a collective dismissal that has ended with an agreement

The Constitutional Court, in a judgment dated July 21, 2021, has declared that it will be possible to discuss in individual dismissal proceedings the causes that gave rise to the collective dismissal, despite the fact that an agreement has been reached with the workers' representatives.

In the case under analysis, the Supreme Court's ruling had not gone into the causes of the collective dismissal that had ended with an agreement. However, the Constitutional Court points out that there is no legal provision enabling the causes to be considered as justified by the agreement (as is the case for substantial modification of working conditions) and, therefore, depriving the analysis of the causes of the collective dismissal in the individual procedure entails a violation of the fundamental right to effective judicial protection.

It is not contrary to the freedom of association for the company to meet with the workers or collaborators to inform them of its position

The National Court has analyzed a case in which the unions requested the conviction of a delivery company for violation of freedom of association, for having met with its riders to inform them of the advantages of maintaining their relationship with the company as self-employed.

The hearing declared that the right to freedom of association had not been violated because there was no rule prohibiting companies from discussing or raising labor or civil issues with their employees or collaborators, and the content of the meetings did not show that any union activity had been hindered.

The establishment of a ‘hot desk’ system does not constitute a substantial modification of working conditions

A judgment of the National Court, dated July 27, 2021, rules on the merits of the case and declares that the establishment of a job sharing system, known as Hot Desk, in which workers do not have a fixed job assigned to them does not constitute a substantial modification.

In this regard, the National Court argues that it is not one of the matters indicated in Article 41 of the Workers' Statute and, furthermore, the company's decision responds to a better use of material resources.

The company is not obliged to indicate the remuneration when delivering the basic copy of the contracts to the workers' representatives

In the case under consideration in the judgment of May 26, 2021, the Supreme Court declared that the company complies with its obligation to deliver the basic copy of the contracts to the workers' representatives, even though it does not indicate the actual salary received by the workers.

Without prejudice to the obligation to keep a salary register linked to the equality plan, the obligation to deliver the basic copy of the contracts is satisfied, even if the contracts state that the workers are paid "according to the agreement" or "according to the collective bargaining agreement".

5. Garrigues Labor and Employment in the press

A more flexible labor framework would reduce temporary hiring

Article by Sergio Santana, senior associate in the Labor Department of Garrigues in Valencia ('Economía 3').

Read here

On the new pensions

Article by Misericordia Borrás, partner of the Labor Department of Garrigues in Barcelona ('Diari de Tarragona').

Read here

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