Labor and Employment Newsletter

Spain

GARRIGUES

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Contents

1. The internal whistleblowing channel and its impact on labor relations (I)

Federico Durán López

2. On the radar

3. Judgements

4. Garrigues Labor and Employment - Sustainable

5. Labor and Employment Blog

6. Press

7. Latin America

1. The internal whistleblowing channel and its impact on labor relations (I)

In this first installment on the recently introduced whistleblower protection law, the author raises questions about the requirements to be met by the complaints channel or the possibility of sharing the system and the resources allocated to its management with other companies.

Federico Durán López

The transposition of Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law, carried out by Law 2/2023 of 20 February, regulating the protection of persons who report regulatory breaches and the fight against corruption, will have a very significant impact on companies and labor relations. In addition to the institutional role assigned to the Independent Whistleblower Protection Authority and the regulation of external channels, including autonomous regional ones, which tighten the bureaucratic spider's web that imprisons civil society, the obligation for companies to establish an "internal reporting system", i.e. an internal whistleblowing channel, will impose new and significant business burdens and generate new conflicts, fuelled by a complex, imprecise and in some aspects redundant regulation.

The first thing that is striking is the Spanish law's extension of the material scope of application of the directive. While the latter (Article 2) covers infringements of European Union law in certain areas listed in its annex, those affecting its financial interests and those relating to the internal market, the Spanish law (Article 2) adds acts or omissions that may constitute a serious or very serious criminal or administrative offence (including in any case those involving financial losses for the Treasury and for the Social Security). What the European rule limits to the law and interests of the Union, the Spanish legislator extends to all serious or very serious criminal or administrative offences. It is true that the extension is protected by the directive itself, which allows (Article 2.2) the Member States to extend protection to other areas or acts not provided for in the directive. But this is yet another manifestation of the Spanish legislator's long-standing habit of not merely transposing Community law but adding new requirements or new content. This is worth reflecting on: it would seem that European regulations (which are becoming ever more prolix and interventionist) are always insufficient for us and that we should go further, without taking into account the impact on the competitiveness of our companies or the growing weight of the regulatory burdens they have to bear. It would be interesting to analyse which obscure collective complexes encourage this tendency.

But the important thing is that the extension of the scope may lead to a collision with existing labor procedures, whether internal to companies or not (inspection procedures, penalties, and settlement of social security obligations). Administrative and criminal offences are mentioned without further ado, and only the area of health and safety at work is saved, with an imprecise formula (Article 2.3), subject (in what sense? with what scope?) to its specific regulations. There is a lack of nuances and specifics, and this is a source of legal uncertainty. The repeated appeal in the Preamble of the law to the fact that the general interest is at stake (that it is damaged, affected, or undermined) is not reflected in the text of its precepts. It is not clear, therefore, whether it can be required that the reported offence affects the general interest, although what the law does exclude is "information linked to claims about interpersonal conflicts or affecting only the informant and the persons to whom the communication or disclosure refers" (Article 35.2.b). This seems to leave out complaints about actions affecting the informant (the different types of harassment or discrimination) and which are imputed to a specific person, or to a group of specific persons, but here again we cannot be fully certain about how the interpretation and application of the law will occur.

In relation to this, the question also arises as to whether the internal whistleblowing channel can coexist with others that may already be established in the company (e.g. equality plans or harassment protocols) or whether it should/can integrate or absorb them. In favour of this integration operates the mandate of Article 5.2.d) of the law, according to which the internal management system shall "integrate the different internal information channels that may be established within the entity". Similarly, Article 7.1 provides that all internal information channels shall be integrated into the internal system regulated by the law. But does integration mean unification, and can different channels be maintained, even if they are integrated into the internal system? This, in any case, must be seen in connection with the provision of the first transitory provision regarding the possibility that existing systems and channels in companies can be used to comply with the provisions of the law, as long as they "comply with the requirements" established therein. The regulation speaks of "internal communication systems and their corresponding channels" but does not require their integration or the configuration of a single channel, which raises the question of whether, despite what is provided by the aforementioned Articles 5 and 7, the provisions of the law can be complied with through different systems and channels already in place. In any case, companies adapting pre-existing channels will have to ensure that it is clear that they comply with the requirements of the law, as required by the first transitional provision.

Companies with 50 or more employees are obliged to have an internal information system in accordance with the terms of the law (Article 10). This is in line with the provisions of Article 8.3 of the Directive, but there is no doubt that the economic and bureaucratic burden for small companies may be excessive. For this reason, both the European legislator (Article 8.6 of the Directive) and the Spanish legislator (Article 12 of the law) provide for a kind of shared internal system, a "pooled" system, whereby companies with between fifty and two hundred and forty-nine employees may share the system and the resources allocated to its management, which may correspond to any of the pooled companies or they may opt to outsource it (an option that is open to all companies: Article 6 of the law). In any case, each company is obliged to maintain the confidentiality of complaints, to respond to the complainant and to deal with the infringement reported (Article 8.6 of the Directive). This joint management, for which the law does not contain any further specifications (such as the requirement of any criteria to justify it, such as geographical proximity, belonging to the same production sector or integration in a cluster) can be, if well designed, a very interesting way for medium-sized companies to comply with their legal obligations.

Finally, it should be noted that there are specific provisions for groups of companies (Article 11 of the law), in which the controlling company must approve a general policy regarding the internal information system and ensure the application of its principles in all the companies that make up the group, notwithstanding the autonomy and independence of each of them. The internal information system may be one for the whole group and the person responsible for it may also be the same, although the requirements of Article 8.6 of the Directive must also be considered applicable in the case of the group, in the sense that each company must guarantee confidentiality, the response to the whistleblower and the treatment of the reported infringement.

In a future publication we will discuss the channel manager, anonymous whistleblowing, and sanctions.

2. On the radar

New employment incentive scheme in force

On 1 September, Royal Decree-Law 1/2023, of 10 January of urgent measures on incentives for labour recruitment and improvement of the social protection of artists, came into force, introducing the requirements and conditions for bonuses and incentives for hiring, among other issues.

The purpose of the law is to regulate incentives aimed at promoting employment contracts, as well as other programmes or measures to promote and maintain stable and quality employment, as we mentioned in this publication.

The UGT union calls for a 35-hour working week and an increase in the minimum wage

The secretary general of UGT has announced the priorities of this union for the current legislature, among which are the reduction of working hours and the increase in the minimum wage and severance pay.

The union proposes that the working week should be reduced to 35 hours a week, as a first step towards the final target of 32 hours a week. In addition, according to the union's internal calculations, the minimum wage should be increased to 1,200 euros this year, an amount representing 60% of the average wage, as set out in the European Social Charter.

The UGT also calls for the severance pay to be made more expensive for companies, taking into account the personal circumstances of the dismissed worker when calculating it.

EU labour ministers make progress on regulating telework and digital disconnection

Last July, the 27 member states of the European Union met in an informal council where, according to the Spanish Minister of Labour and Social Economy, Yolanda Díaz, steps were taken towards the development of the directives on telework, digital disconnection and work on digital platforms.

The negotiation of a legally binding agreement on telework and the right to disconnect is one of the objectives of the 2022-2024 agenda signed in June 2022 by the European Trade Union Confederation (ETUC), BusinessEurope, SGI Europe and SMEunited. The directive would highlight the key role of social dialogue in making labour markets more productive, competitive and resilient.

The Spanish government proposes to the European Parliament to extend the ratification of ILO Convention No. 190 to the whole of the EU

On 7 September 2023, the Minister of Labour proposed to the European Parliament the ratification of the International Labour Organisation (ILO) Convention No. 190 on Violence and Harassment by the 27 Member States, as well as to recover the agreements with social dialogue throughout the European Union (EU).

Spain has already ratified ILO Convention No. 190 in 2022, so now the extension to the whole EU is being promoted within the framework of the Spanish Presidency of the Council of the EU. The ratification of Convention 190 implies the implementation of laws and measures to prevent and address violence and harassment at work.

The State Office for Combating Discrimination in the Labour Inspectorate is set up

The Official State Gazette has published Order TES/867/2023, of 22 July, which creates the State Office for Combating Discrimination in the State Agency for Labour and Social Security Inspection, in accordance with the Strategic Plan of the Labor and Social Security Inspection 2021-2023.

The new office will be responsible for the coordination of all actions carried out by the Labour and Social Security Inspectorate in the field of equal treatment and equal opportunities and will also ensure that discrimination in access to employment, vocational training, career advancement and working conditions is avoided.

Among other functions, the Office for Combating Discrimination in the Inspectorate will be responsible for: (i) coordinating campaigns and inspection actions related to discrimination, (ii) analysing infringing behaviours and conducts in terms of equal treatment and opportunities and non-discrimination at work or in access to employment, in order to establish the most efficient mechanisms and initiatives in the fight against inequalities and (iii) facilitating coordination with other bodies of the Ministry of Labour and Social Economy and with other Administrations with competences in terms of equal treatment and opportunities and non-discrimination at work or in access to employment.

The Trainee Statute and the transposition of the Directive on transparent working conditions remain on the legislative agenda

Two of the regulations announced during the last legislature are still pending approval and publication: the so-called Trainee Statute (despite the announcement that an agreement to this effect had been signed between the Ministry of Labour and the trade unions UGT and CC.OO.) and the transposition of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

3. Judgements

It is not necessary to communicate the objective dismissal to the workers' legal representatives on the same day as to the employee concerned

In a recent judgement of the Supreme Court dated 5 July 2023, it is stated that the communication of the letter of objective dismissal four days after the effective date does not violate the right to information of the representatives, nor the rights of the dismissed employee.

The High Court points out that the intention of the law is that copy of the letter of dismissal that has been given to the employee should be delivered, which implies that such delivery can in no case be prior to the delivery of the letter to the employee. For this reason, a communication after the effective date is possible, provided that it is made within a reasonable period of time.

In the case analysed by the judgement, the communication four days after the effective date of the dismissal does not infringe any of the rights of the workers' legal representatives or of the employee herself, insofar as it is understood to have been made within a reasonable period of time and allows the exercise of all the actions linked to the right of the representatives to be informed of the dismissal.

This resolution has been analysed in more detail in our Labor Blog.

The objective dismissal of an employee who was unable to use the computer software necessary for her job is declared justified on the grounds of supervening ineptitude

The High Court of Justice of Madrid, in its judgement of 28 June 2023, upheld the validity of the objective dismissal due to the employee's lack of aptitude to use the management software (registration, payments, organisation of sports activities, etc.). The software was essential for the post, the employee had received training and other colleagues with the same seniority were using it without incident.

The court considers that the dismissal is fair, insofar as the employee is not suitable for her job, given that she is not capable of using the management tool essential for the performance of her duties, even generating incidents, and pending work for the rest of her colleagues.

The High Court of Justice of Madrid reiterates that the right to family reconciliation does not grant an absolute right to demand teleworking by employees

The High Court of Justice of Madrid, in its judgment of 30 June 2023, dismissed the appeal for judicial review lodged by a employee who requested to work under a teleworking regime until her child reached the age of 12. In the case analysed by the court, the defendant company had temporarily authorised teleworking for all its employees due to the exceptional situation caused by COVID-19. During that period, the employee changed her place of residence.

After requesting several extensions, the employee demanded that she be granted the right to provide services on a 100 % teleworking basis in order to reconcile family life under Articles 13 and 34.8 of the Workers' Statute. After carrying out the legally required negotiations, although the company offered the employee the possibility of teleworking two days a week, it refused the 100% teleworking she requested.

The Court considers this decision to be in accordance with the law, given that: (i) the first concession was due to an exceptional situation and not to the will of the company, (ii) the company accredited the need to attend on-site for the job in question and (iii) the employee's request did not truly respond to a need to improve the reconciliation of work and family life, but to the employee's interest in providing services from the home to which she moved during the period in which teleworking services were exceptionally authorised, a home which was located in a different locality to that of the workplace.

The High Court of Justice of Madrid declares the company's review of WhatsApp conversations between its employee and clients through the mobile phone that the employer provided her with to carry out work activity lawful

In its judgment of 8 June 2023, the High Court of Justice of Madrid has established that there was no violation of fundamental rights in a dismissal in which the company accessed the Whatsapp conversations between an employee and a client, as the right to secrecy of communications was not violated, since the conversations were not strictly private, but were carried out in the work environment.

In the first instance, the court considered that the conversations between employee and client were carried out in the workplace, but were of a private nature, considering that the employee's right to privacy had been violated. Combining this with the absence of criteria for the company's use of the digital devices, the court declared the employee's disciplinary dismissal null and void.

In contrast, the High Court of Justice of Madrid considers that the control carried out by the company refers to the work tools made available to the plaintiff and within the communications made by her with clients, without considering strictly private conversations. Therefore, although it recognises that the obligatory communication to the employee of the specific rules of use did not take place, nor an express total or partial prohibition of the private use of the aforementioned work tools, there is a contractual clause between the parties which establishes that the company has the right to control and supervise the activity of the employee by telematic and computerised means, in order to carry out the control of the computer tools made available to her.

Consequently, the High Court of Justice of Madrid found that there had been no breach of the plaintiff's right to privacy, nor had her privacy or intimacy been compromised, establishing the unfairness of the dismissal and rejecting the claim for annulment.

The Supreme Court declares that the use of a common valuation algorithm between the main company and the subcontractor may be an indication of illegal assignment

The Supreme Court, in its judgment of 23 May 2023, dismisses the appeal of the co-defendants and declares the existence of an illegal assignment. In reaching this conclusion, it relies on the usual characteristics of illegal assignment, such as the fact that the subcontractor did not use its organisation or the use of the main company's tools.

Furthermore, the judgement adds that there is a system/algorithm for measuring the quality of calls and assessing the attention provided by the managers that is common to the employees of the subcontractor and those of the main company. Thus, the judgement includes among the evidence revealing the existence of an alleged illegal assignment the use of algorithms or computer systems by the main company to control the services provided by the subcontracted employees.

4. Garrigues Labor and Employment - Sustainable

Eighth anniversary of the adoption of the SDGs: UN launches rescue plan for people and planet

On the eighth anniversary of the adoption of the 2030 Agenda and the 17 Sustainable Development Goals (SDGs), the 2023 SDG Summit in New York on 18-19 September launched a new phase of accelerated progress towards their achievement with the launch of a rescue plan for people and planet.

The European Commission approves first set of standards for sustainability reporting by companies

In compliance with the mandate of the Corporate Sustainability Reporting Directive (CSRD), the European Commission has adopted the delegated act adopting the first set of reporting standards.

5. Labor and Employment Blog

The EU equates cross-border teleworking to the EU posted employees

In the event of dismissals for objective reasons, at what point the worker's legal representatives must be provided with a copy of the letter?

6. Press

Six months' prior notice to close a workplace: the latest labor law surprise from the legislature

Article by Eloy Castañer, Garrigues Labor and Employment Department partner, in Cinco Días.

Freelance professionals or false self-employed workers? In these cases there is an employment relationship

Article published in *The Objective* with the opinion of Cecilia Pérez, Garrigues Labor and Employment Department partner.

The seams of indefinite-term contracts for seasonal work: a year and a half after coming into vogue, the OECD and economists cast doubt on their efficacy

Article in *Business Insider* with the opinion of Clara Herreros, Garrigues Labor and Employment Department partner.

Spain's six-month notice period for some mass layoffs unclear, legally questionable

Article by Eloy Castañer, Garrigues Labor and Employment Department partner, in the publication *International Employment Lawyer*.

7. Latin America

Peru: Keys to Indecopi's recent decision declaring that the ban on outsourcing nuclear activities is a bureaucratic barrier

Colombia: Law 2306 of 2023 extends breastfeeding period

For more information:

Labor and Employment Department

Follow us:

GARRIGUES

Hermosilla, 3

28001 Madrid, Spain.

T +34 91 514 52 00 **F** +34 91 399 24 08

garrigues.com