

Employment Flash - April 2024

Case-law and legal doctrine highlights

Current situation concerning LGTBI protocols

1 – Reduced working hours and specific scheduling during the intensive working day during the non-teaching summer period. (STSJ - Basque Country of June 12, 2023)

The Supreme Court of the Basque Country has ruled on the limits of the exercise of the right to conciliation concerning the definition and duration of the reduced working day for childcare, in cases where the working day differs in duration and structure throughout the year, with an intensive/reduced working day and a significantly shorter working day during the summer period.

In this judgment the plaintiff works as a primary school teacher and enjoys a 66.67% reduction in working hours due to childcare, although, she requests to return to full working hours between June and August, to which the educational center responded that the reduced working day regime should cover the entire school year, from September to August.

The Court upholds the validity of the employer's decision, stating that the working day reduction must also be applied during periods of intensive/ reduced working hours and less activity, and concludes that to omit the reduction of the working day during the non-teaching period, when the workload is significantly reduced, amounts to an abusive exercise of the right and is not in accordance with the principle of good faith in labour relations, "*thereby seeking only to choose the periods of less activity in order to be compensated with the higher pay, without even taking into account the other interests worthy of protection, which are here those of the child and, subsidiarily, those of the company*".

2 – Compensation for post-contractual non-competition agreement set as a salary deduction and paid during the employment relationship : it is not considered adequate compensation and determines the invalidity of the restrictive clause, and its reimbursement is not enforceable in the event of subsequent breach of the clause by the employee (STS of December 14, 2023)

In the present situation, the employee received an offer letter stipulating a gross annual salary (GAS) of 50,000 euros in 12 monthly installments, with no mention of any post-contractual restrictions.

In the employment contract subsequently signed, the reference to said GAS is reiterated and a post-contractual non-competition clause is added, whereby 4.09% of the agreed salary is deducted as a monthly amount of compensation for said restriction, although said amount is qualified as "*an integral part of the salary for all purposes*".

The company seeks the reimbursement by the employee of all amounts received during the employment relationship due to its subsequent breach of the non-competition obligation after the termination of the contract (as also provided for in the aforementioned clause).

The Supreme Court confirms the decision of the High Court Chamber, considering the clause to be obscure, as it qualifies a part of the previously stipulated salary as compensation for non-competition, but maintains its salary status. Since the salary previously fixed in the offer letter (which did not provide for any post-contractual restriction) remains unchanged, it must be concluded that the subsequent non-competition clause lacks validity and lawfulness, since the economic compensation formally assigned is in fact salary and does not constitute adequate compensation for the contractual restriction.

3 – The Supreme Court clarifies that compensation for damages in the case of null and void dismissal is not always applicable. (Supreme Court decision of December 12, 2023)

Despite the nullity of a dismissal, additional compensation for damages is not always automatically justified. Recently, the Social Chamber of the Supreme Court has dealt with the case of a dismissed pregnant worker and the consequent determination of the indemnity. In this instance, the worker challenged the dismissal, pleading that it was null and void due to her pregnancy.

The court concluded that the dismissal was null and void in accordance with Article 55.5 of the Workers' Statute, which configures an objective nullity, derived directly from the pregnancy of the worker, without the need to appreciate a specific discrimination based on gender.

This case highlights the importance of distinguishing between an objective nullity and a nullity based on discrimination, as well as the need to analyze each situation of dismissal individually to determine the corresponding rights and compensation.

In its judgment of December 12, 2023, the Supreme Court reiterates the criterion on the application of the compensation for damages in a null dismissal of a pregnant worker, concluding that the mere declaration of nullity of the dismissal of a pregnant worker does not always automatically entail an additional compensation for damages. The court's decision is based on the need to provide evidence linking the dismissal decision to the employee's pregnancy, so as to establish a discriminatory situation that would allow for such specific compensation.

In the specific case analyzed, the disciplinary dismissal of a pregnant worker was examined, which, since it was not justified, became null and void due to a specific legal provision, but it was not proven that the employer's decision was motivated by discrimination due to pregnancy or any other prohibited cause. Although the dismissal was declared null and void, it was not appropriate to award additional compensation for damages due to the lack of evidence linking the dismissal to the pregnancy.

In conclusion, this judgment of the Supreme Court clarifies that the simple nullity of the dismissal of a pregnant worker does not always automatically imply compensation for damages. It is necessary to provide evidence that links the dismissal to the pregnancy in order to be able to claim such compensation.

4 – Hiring of interim personnel by the public sector in Spain (EUCJ of February 22, 2024)

The judgment of the EUCJ was delivered in response to several questions referred for a preliminary ruling by the High Court of Justice of Madrid.

The European Court examined the Spanish legislation on temporary employment and, in particular, the provision which provides for calls for selection procedures to fill posts occupied provisionally by temporary workers. The EUCJ found that the existence of such calls for applications is not sufficient to ensure the prevention of abuse of temporary employment, and that it must be ensured that the calls for applications are carried out in an effective and timely manner as a preventive measure against the abusive use of temporary contracts.

The EUCJ adds that the payment of compensation for the termination of temporary contracts is not a sufficient measure to prevent abuse arising from the successive use of temporary contracts. Finally, the EUCJ ruled on the possibility of converting temporary contracts into open-ended contracts as a measure to prevent abuse in the absence of adequate measures in national law. The European Court indicated that such conversion may be an appropriate measure in certain cases, provided that national legislation does not provide for effective measures to prevent and sanction abuses arising from the use of successive temporary contracts. This conclusion suggests that the conversion of temporary contracts into open-ended contracts could represent a viable solution to address the problem of abusive temporary contracts in the context of Spanish public administrations.

In summary, the EUCJ judgment provides comprehensive guidance on how Member States, in this case Spain, can address the issue of abuse of temporary contracts, especially in the field of public administration. It highlights the importance of implementing effective and specific measures to guarantee the job security and stability of temporary workers, as well as the need to adapt national legislation to comply with the standards set by the European Union in this area.

5 – LGTBI Protocols

Law 4/2023, approved on February 28, has the primary objective of guaranteeing the effective equality of trans and LGTBI people, with special emphasis on the labor sphere.

According to Article 15.1 of this law, companies with more than 50 employees are required to develop a detailed plan of measures and resources aimed at promoting real and effective equality of LGTBI people. This plan must contain a specific protocol to address situations of harassment or violence against the LGTBI collective. This provision came into force on March 2, 2024.

The term "LGTBI Plan" refers to the set of actions and resources designed to promote equality of LGTBI people. One of the fundamental elements of this plan is the protocol for handling situations of harassment or violence directed towards the LGTBI collective.

Article 15.1 of the law mentions that the content and scope of these measures will be detailed later in regulatory norms, which however have not been approved to date. Despite the lack of regulatory development, it is clear that the protocol to address harassment or violence against the LGTBI collective is an immediate requirement under the law.

In addition, the law contemplates a system of sanctions for those individuals or companies that violate the rights of the LGTBI collective, establishing a legal framework to guarantee equal treatment and prevent discrimination.

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