Employment Flash– November 2024

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1.- Organic Law 5/2024, of 2011, on the Right to Defense.

The Organic Law 5/2024, dated November 11, on the right to defence, which will come into effect on December 4, 2024, constitutes a significant advancement in the consolidation of fundamental rights within the legal sphere, specifically the right to defence and the right to legal assistance.

In the labour field, the regulation contained about the guarantee of indemnity, in Article 12 and in the third additional provision of the text, is relevant. These reinforce the legal provisions already contained in the substantive labour legislation (Art. 17 of the Workers' Statute).

Thus, Article 12.3 of the law establishes that "workers have the right to indemnity against the unfavourable consequences they may suffer for carrying out any action leading to the exercise of their defence rights. The article protects workers from being penalised for exercising their defence rights, ensuring they can claim what legally corresponds to them without fear of suffering negative consequences such as salary reductions, reprisals, or even dismissal."

For its part, the third additional provision extends the subjective scope of protection provided by this guarantee and adds that "*1. Workers have the right to indemnity against the unfavourable consequences they may suffer for carrying out any action before the company or in an administrative or judicial proceeding aimed at claiming their labour rights, whether carried out by themselves or by their legal representatives. 2. Such protection extends to the spouse, domestic partner, and relatives up to the second degree of consanguinity or affinity, who provide services in the same company, even if they had not carried out the action leading to the exercise of their rights*".

The guarantee of indemnity thus protects workers and their family members working in the company against possible abuses or reprisals by employers. The law declares all employer reprisals motivated by the aforementioned causes, such as the degradation of working conditions, discrimination, dismissal, or any other reprisal for having exercised their defence rights, to be null and void.

2.- STS 1250/2024, November 18, on Prior Hearing in Dismissals.

The Supreme Court corrects its doctrine and affirms the necessity of ensuring that the worker has the opportunity to defend themselves before being dismissed for disciplinary reasons. Specifically, it points out that according to Article 7 of the ILO Convention No. 158, ratified by Spain, dismissal based on conduct or performance must previously offer the worker the opportunity to defend themselves against the charges made, unless it cannot reasonably be asked of the employer to grant this possibility.

The Court confirms that the aforementioned provision of the international convention is directly applicable by the courts, not requiring any domestic legislative development, and establishes a guarantee measure that must be activated prior to or at the time of dismissal. This measure is fulfilled as long as the worker is given the opportunity to be heard before the final decision is made.

In the specific case, the Supreme Court recognised that, although the company acted in accordance with the previous doctrine, the new interpretation demands the fulfilment of this guarantee of defence or prior hearing before the formalization of the dismissal.

The High Court adds that the exception also contemplated in Article 7 of the ILO Convention 158 applies to the case at hand (as to those prior to the judgment itself), by following what has until now been the consolidated doctrine of the Supreme Court and the literal wording of Article 55 ET.

The practical implications of this judgment for companies are as follows:

- Companies must modify their disciplinary procedures to include a stage of prior hearing for the worker before proceeding with the dismissal. This involves properly documenting notifications and allowing the employee to present their version of the facts.

- Should this prior hearing be omitted, it should not invalidate the dismissal, but it will imply the classification of the dismissal as unfair, due to the lack of compliance with the formal requirements of the disciplinary measure, which, since the commented judgment, also includes the requirement established in Article 7 of the ILO Convention 158.

3.- STS 1302/2024, 21 November, on the non-obligation to include individual remuneration data in the salary register of art. 28.2 ET.

The Supreme Court has resolved a collective dispute initiated by the CGT and STC unions against Ericsson Spain, S.A. regarding the interpretation of article 28.2 of the Workers' Statute concerning the salary register.

In this case, the unions requested that the salary register should include not only average and median values disaggregated by gender, as current regulations demand, but also data that would allow the identification of individual remunerations. According to the unions, this information was necessary to ensure equal pay between women and men. Ericsson argued that providing individualised data would violate personal data protection regulations.

The Supreme Court upheld Ericsson's appeal, concluding that the salary register must be limited to average and median values disaggregated by gender, without including data that identifies individual remunerations. The court emphasised that current regulations, such as article 28.2 of the Workers' Statute and RD 902/2020, do not establish the obligation to disclose individualised data and that doing so could contravene upon the privacy of the workers, protected by the General Data Protection Regulation. Furthermore, the Court reaffirmed the principle of "*data minimisation*", which limits the processing of personal information to what is strictly necessary to achieve the purpose of the register: to promote pay equality between women and men. In this sense, the Court highlights that including data identifying individual remunerations is not essential for detecting pay inequalities.

4.- STSJ País Vasco 1268/2024, May 22, on the accumulation of breastfeeding leave in full days for cases of multiple births.

The judicial resolution examines the appeal for reconsideration filed by a worker regarding her claim to accumulate breastfeeding leave in full days, after having given birth to twins. The worker, basing her request on Article 33 of the Collective Agreement for Private Residences of Bizkaia and Article 37.4 of the Workers' Statute, claimed the accumulation of a total of 42 days of breastfeeding leave. The employer's refusal was based on the absence of legal or conventional provision supporting the proportional increase in the duration of the leave in situations of multiple births for the case of accumulating the hours of absence for breastfeeding, granting her only 21 days.

The High Court of Justice of País Vasco corrected the initial judge, upholding the appeal against the initial dismissal of the claim and arguing the need to adopt an interpretation of the regulations that favours the best interest of the child and promotes the reconciliation of work and family life. It was pointed out that the Supreme Court jurisprudence invoked by the instance was not applicable to the specific case, given that the applicable collective agreement allows an interpretation that permits the accumulation of breastfeeding leave for each child in situations of multiple births.

In light of the above, the High Court of Justice recognised the claimant's right to enjoy three weeks of accumulated breastfeeding leave for each of her children, which translates into a total of six weeks of leave.

5.- National Court Judgment 102/2024, September 12, 2024, on the start date of paid leave, not necessarily linked to the date of the causative event.

The Judgment resolves a collective conflict procedure regarding the interpretation of the regulation of paid leave due to serious accident or illness, hospitalization, or surgical intervention requiring home rest, as well as in situations of force majeure due to illness or accident requiring the immediate presence of the worker.

The plaintiff trade unions requested that the corporate directive, which imposed the start of such leave from the exact moment of the causative event in an uninterrupted manner, be declared contrary to law. They argued that this interpretation unjustifiably limited the care purpose inherent to these leaves. On the other hand, the corporate representation defended that the determination of the mode of enjoyment of such leaves fell within its scope of business organization, arguing that allowing workers to choose the start of the leaves could lead to scenarios of inequality, especially for those workers without family support networks for care.

The National Court concluded that the stance adopted by the company was excessively restrictive and lacked legal justification, given that neither the reference collective agreement nor the relevant legislation prescribe that the start of the leave must necessarily coincide with the date of the causative event. The judgment emphasises that the spirit of granting such leaves is to facilitate the necessary care and attention, thus allowing some flexibility in their commencement.

Additionally, the judgment underscores the need to interpret the regulations from a gender perspective, considering that the predominant use of these leaves by women and the corporate interpretation of them could contribute to the perpetuation of the gender gap in the workplace. Consequently, the National Court ruled in favour of the trade union organizations, declaring the corporate instruction as contrary to law and recognizing the staff's right to enjoy the leaves without the start of the same being conditioned by the date of the causative event.

6.- STS 1164/2024, September 24, on the failure to pass the probationary period declared as unfair dismissal due to the lack of contractual reference to its exact duration.

The judicial resolution in question addresses the situation of a worker whose employment relationship was terminated on the grounds of not having passed the established probationary period. The employment contract in question determined the existence of a probationary period "according to the agreement", without detailing the duration stipulated by said agreement for this period. The worker proceeded to challenge the decision, arguing that it constituted an unfair dismissal due to this lack of precise contractual specification regarding the exact length of the probationary period. Initially, the Social Chamber of the High Court of Justice of Madrid upheld the judgment rejecting the worker's claim, thus maintaining the validity of the contractual clause. However, the Supreme Court upheld the appeal for cassation, basing its decision on previous jurisprudence and the interpretation of Article 14 Workers' Statute as well as the relevant collective agreement.

The Supreme Court determined that the contractual clause prescribing a probationary period "according to the agreement", without explicitly detailing its duration, was invalid, creating a situation of legal uncertainty for the employee. Consequently, the termination decision could only be classified as unfair dismissal.

7.- Modification of the Workers' Statute by virtue of Final Provision 2ª of Royal Decree-Law 8/2024 of 28 November.

In addition to the package of measures approved by Royal Decree-Law 8/2024 of 28 November to facilitate the return to normality and the recovery of the areas affected by DANA, its second and final provision modifies various aspects of the Workers' Statute (ET):

- A new subsection g) is added to Article 37.3 of the ET, which establishes a leave of up to four days for workers who, as a result of mobility restrictions imposed by the competent authorities or situations of serious and imminent danger, are unable to reach their workplace or pass through the routes necessary for such access. This leave may be extended until the circumstances justifying it are resolved, regardless of the company's ability to process a furlough proceeding due to force majeure. Furthermore, consideration will be given to the adoption of remote work, provided that it is feasible and communication networks allow it, in compliance with the obligations established in Law 10/2021 on Remote Work.

- Article 47.6 ET is amended to include a specific case of temporary force majeure related to situations where, after the 4 days referred to in Article 37.3 g) ET, the impossibility of access to the workplace or the necessary transit routes persists, unless remote work is possible.

- A new subsection e) is introduced in Article 64(4), which obliges companies to inform workers of the measures to be taken in the event of an alert for disasters or adverse meteorological phenomena.

- The scope of collective agreements in Article 85.1 ET is extended to include among the subjects of collective bargaining the negotiation of action protocols establishing risk prevention measures specifically aimed at dealing with disasters and other adverse meteorological phenomena.

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