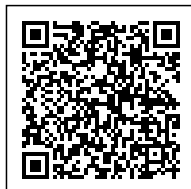


LIABILITY OF MANAGERS IN CASES OF COMPANY TAX FRAUD - ARAOZ & RUEDA

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It is not unusual to see entities investigated by public bodies in order to verify that they comply with legislation and, if appropriate, punish them for breaching it. This leads some entities to blame executives for the imposition of penalties, as was the case in Vodafone Ono, for example.

In Vodafone Ono, an inspection was conducted by the Spanish Tax Agency, due to the company's potential involvement in certain VAT fraud. As a consequence of the inspection and its results, the company decided to terminate the contracts of the CFO and the CEO. In this case – excluding the termination of the CEO as she was not an employee of the company – the High Court of Justice of Madrid considered that the dismissal of the CFO was fair.

The Court considered that the CFO had breached contractual good faith. Further, the Court argued that he lacked care and due diligence when he failed to adopt the necessary measures to find out what happened in the "international voice resale business" (the area where the tax fraud originated) and eradicate, or mitigate, the effects of the aforementioned fraud.

Contractual good faith is inherent to any employment contract. This translates to a duty of mutual fidelity between the parties. In this case, the essence of the infringement of the CFO was not so much the damage caused to the company (despite the high figure in millions of euros), but the breach of the good faith entrusted in him by the company and the loyalty that he owed it.

The nature and characteristics of this unlawful behaviour amounts to a clear and undoubted breach of the labour loyalty duty which, according to the Court, justifies the business decision of terminating the employment contract because it violates ethical principles that cannot be undermined by seniority or the job performed. Moreover, the Court even considers that this breach is of greater relevance since it is a person with high responsibility in the organisation.

These types of contractual breaches are generally more common in large entities or business corporations where internal controls are presumably higher. In many cases, as a result of being subject to a public sanctioning process, such companies initiate their own internal controls, and thus try to ascertain their own responsibilities towards third parties.

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