

MONITORING FIXED-TERM AND PART-TIME HIRING FRAUD - SIMMONS & SIMMONS

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Madrid's Labour Inspectorate Division has recently indicated that during the coming months, fixed-term and part-time hiring will be, once more, under close watch. The inspectorate is trying to eradicate fraud in this area once and for all and is thus determined to lead a meticulous campaign on the matter.

Statistics show that, in 2016, according to the Ministry of Employment, nearly 20 million contracts were formalised in Spain, 91.43 per cent of which were temporary (18.2 million) and the remaining 8.57 per cent indefinite (1.71 million). Of these indefinite contracts, 986,858 were entered into on a full-time basis and the rest of them, on a part-time basis.

Because the registration of part-time contracts is heavily monitored in Spain, the inspectorate will be extremely vigilant in the coming months to avoid companies underpaying social security contributions.

New tool for collective bargaining

The National Advisory Committee for Collective Bargaining Agreements, "Comisión Consultiva Nacional de Convenios Colectivos (CCNCC)", has launched a new online tool enabling companies to properly identify their applicable collective bargaining agreement. This tool uses the CNAE codes (activity/sector codes) as well as other relevant information in order to be able to identify the applicable agreement.

The tool can be accessed via the following link:

https://www.empleo.gob.es/sec_trabajo/cncc/J_MNC/index.htm

The latest relevant case law: Calculation of processing salaries of employees enjoying a reduction of working hours for child care should not be based on a full working day basis (that is, 100 per cent) but instead on the real – and therefore reduced – working day basis

The High Court of Justice of the Basque Country has declared that, in the context of terminations deemed null and void, the calculation of processing salaries of employees enjoying a reduction of working hours for child care should not be based on a full working day basis (that is, 100) but instead, on the real and therefore reduced working day of the employee.

In this regard, the High Court decided not to grant processing salaries the same treatment as compensations, and therefore declared that in these particular scenarios, the Additional Nineteenth Provision foreseen in the Workers' Statute Act should not be applicable. Therefore, salaries to be taken into consideration in these cases are those the employee would have been entitled to should the relationship have endured. The High Court underlines also that only in this fair way, employees will not be entitled to receiving amounts higher than those he or she would have been eligible to receive while working.

Judicial Doctrine: 20-day severance pay for an employee under a hand-over contract

On 10 October 2017, the Social Court number three of Vitoria granted an employee under a hand-over contract (that is, a type of contract used to replace employees who retire partially) severance compensation equal to 20 days of salary per years' of service, once the contract came to an end.

The court referred to the now famous European Court of Justice (ECJ) case law which says that fixed-term employees carrying out the same functions as indefinite-term employees would be entitled to the same treatment, under the same rules. In this particular case, given that the employee carried out the same functions as the replaced employee, such European judicial doctrine is, according to the Social Court of Vitoria, applicable.

In addition to the below, the Court also concluded that by using the Spanish National laws and regulations (e.g. right to equality and article 17 of the Spanish Constitution), the result would have been the same.

Judicial Doctrine: Disciplinary dismissal declared fair after employee taking over company property outside working hours

One interesting query raised by the Spanish Supreme Court regards whether or not any given company can take disciplinary action against one of its employees outside working hours or even outside the working place. In this particular case, the employee took over a number of goods belonging to the employer, in another workplace (supermarket chain) and outside her normal working hours. Because this employee was enjoying a reduction of working hours for childcare, the courts (both a Social Court of Madrid and the High Court of the Region of Madrid at a later stage) ruled in her favour at first (based on the legal protection the employee had).

Later, the Spanish Supreme Court, in its ruling dated 21 September 2017 (Rec. 2397/2015), contradicts the precedent rulings and considers undisputed, as argued by the company, that maliciously taking over company goods constitutes improper and unethical behaviour. Although these events had taken place outside working hours and workplace, the Supreme Court believes that there was clear bad faith in the employee's actions. In its ruling, the Supreme Court refers to other similar cases where companies can take disciplinary action against their employees outside working hours and workplace, such as in the event of temporary disability or when unfair competition is taking place.

On the loop: Compulsory registration of working hours

This matter takes a step further now with a proposed law. Based on a ruling issued by the National High Court, the Labour Inspectorate published Instruction 3/2016 regarding the obligation of companies to keep detailed records of all employees' daily working hours.

However, subsequently, the Spanish Supreme Court (5/4/2017) established a new interpretation of the Workers' Statute Act and the inspectorate issued a second instruction 01/2017, this time limiting the mandatory status only to part-time workers. Despite this new interpretation, the Supreme Court itself indicated that "a legislative reform would be desirable in order to clarify the obligation to keep an hourly record". The Parliament has recently approved the reform of the Workers' Statute Act in order to incorporate the daily workday register, aimed to curb the abuse of unpaid overtime as well as to elevate this violation to the status of serious breach. Currently, this is simply a bill and more information will be released in the coming months.

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