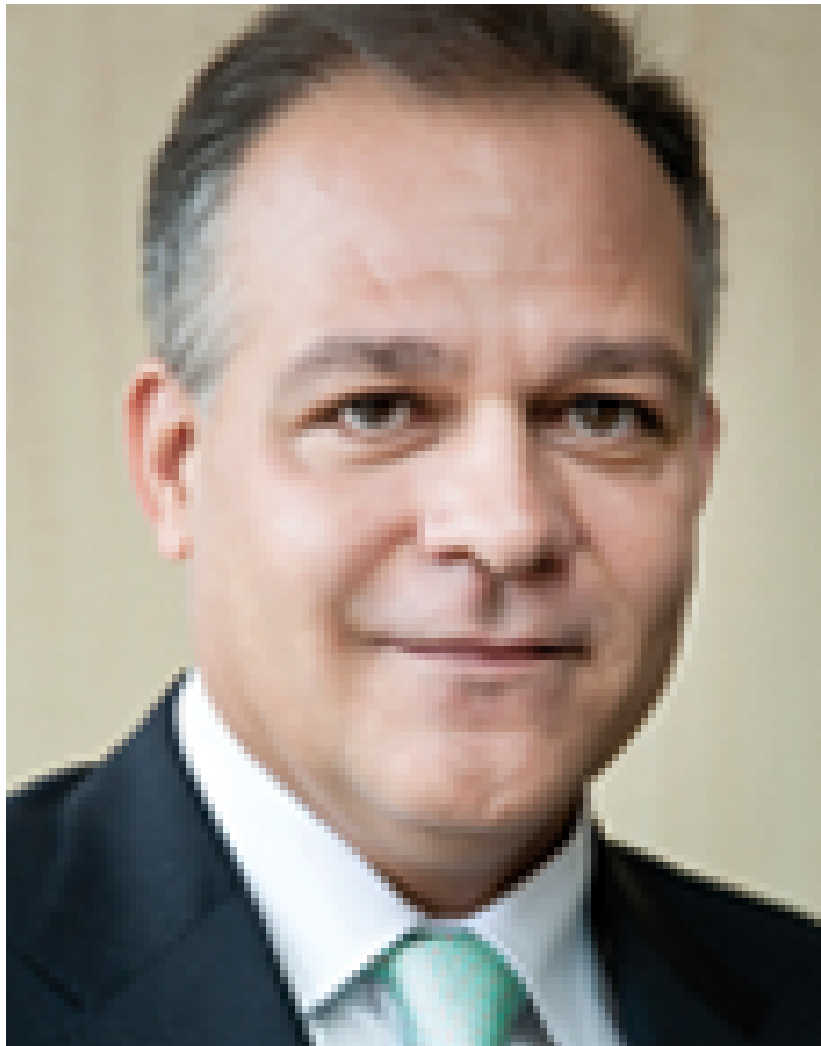


NEW RULINGS REGARDING THE NULLITY OF TERMINATIONS - DENTONS

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Two recent rulings, which declared the nullity of dismissals in certain circumstances, could potentially have a significant impact. The first one is related to the termination of an employee on long-time sickness leave, and the second focuses on the formal requirements of dismissal letters.

As a consequence of a preliminary ruling issued by Barcelona's First Instance Court, the European Union Court of Justice, on 1 December 2016 (Case C-365/15), stated that international employment

regulations (in particular, the 158 ILO Convention and the EU Directive 2000/78/CE) prohibit terminating employees on long-time sickness leave.

The European Union Court of Justice considers that these terminations are null and void for discriminatory reasons. The legal consequence arising from the declaration of nullity is that companies must reinstate the employees and pay the salaries accrued from the termination date.

This preliminary ruling contradicts Spanish case law. Case law states that sickness leave is not a legal reason for termination but that does not necessarily mean that it is discriminatory as in the case of disability. As a result, terminations must be declared as unfair. Following this logic, Catalonia's High Court declared the above-mentioned dismissal unfair, rejecting Barcelona's First Instance Court judgement.

Regarding termination of an employee by using a generic dismissal letter, a judgement of Barcelona's First Instance Court (dated 21 April 2017) declared the nullity of the termination (instead of the unfairness) stating that termination letters must include a real cause of termination, including a full description of the dismissal grounds to allow the employee to challenge the termination before the courts. Therefore, in the case that the cause was not real, the letter will infringe the 158 ILO (International Labour Organisation) Convention. As a consequence, the termination must be declared null and void.

The aforementioned theory was stated in the previous Employment Act and also followed by case law. However, the Employment Act was amended and consequently, case law modified its criteria accordingly. Today, terminations which are poorly (or not) justified are declared as unfair. In sum, it seems that Barcelona's First Instance Court is going back to the application of obsolete local legislation and case law, basing its decision on the application of international legislation. At the time being, we have no information about whether this judgement has been appealed.

Bearing in mind the above, in both cases the risk of nullity on terminations may arise if employees file dismissal nullity claims, basing them on Barcelona's First Instance Court judgements. In such hypothesis, two main consequences may arise: firstly, these judgements are based on international regulations which are applicable over local legislation such as the Employment Act and case law – therefore, certain local law provisions should be amended to match the international rules and consequently, case law should adapt accordingly; secondly, these rulings may change the way companies proceed in case of termination – thus, if there are no legal grounds, or such grounds are not serious enough, or if there is no evidence to support the termination cause especially if the employee is on sickness leave, companies may no longer provide the employee with a standard termination letter acknowledging (before the conciliation chamber) that the dismissal is unfair and pay the statutory severance compensation. Instead, a comprehensive letter with a real cause will be provided to the workers to mitigate the risk of nullity.

Taking into account the potential nullity risk highlighted above, it is advisable to assess whether the employee is on a long sickness leave and avoid terminating them in such case, and in any case, to draft a detailed termination letter stating the reason(s) for termination. In addition, from a legal perspective, it is essential to assess if the national provisions must be changed in order to match the international ones. If this modification would take place, the popular perception that "Spain has free dismissal but it is pricey" would become obsolete.

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