Employment Update

# Modification of the worker's ordinary working day without reduction due to conciliation of personal, family and working life.

30th September 2019

Regarding ECJ 18 of September 2019 (interpretation art. 34.8 WS before its modification by RDL 6/2019)

The Court of Justice of the European Union ("ECJ") has ruled in its judgment of 18 September on the question referred for a preliminary ruling by Madrid Employment Division No 33, in a dispute between Mr Jesús Manuel Ortiz Moreno and the UTE Luz Madrid Centro, concerning the conformity of Article 37.6 WS to Union provisions - in particular Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ("Directive 2006/54") and Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave ("Directive 2010/18").

Given the evident update that this pronouncement could represent with respect to the modifications introduced by RD-Law 6/2019, in the basic labour standards of the labour-juridical order, in relation to measures for conciliation of work, personal and family life, below is a brief and practical analysis of its main considerations. These are its keys:

**a.- The lawsuit brought before the Employment Division 33 of Madrid: application for assignment to the morning shift under article 34.8 WS**

The origin of the question referred to the ECJ lies in the refusal of a request for a specific time for reasons of conciliation, the worker being interested in the **modification of his ordinary working day** consisting of morning, afternoon and evening rotating shifts and his exclusive assignment to the morning shift for the care of his two children**, maintaining his schedule and remuneration unchanged**.

As a first conclusion, it is significant to specify that the request for adaptation of the working day occurs prior to the entry into force of RD-Law 6/2019, that is to say, with the previous wording of article 34.8 of the ET, which stated: "The worker shall have the right to adapt the duration and distribution of the working day in order to make effective his right to the conciliation of personal, family and working life **in the terms established in collective bargaining or in the agreement reached with the employer, respecting, where applicable**, the provisions of the former".

That is why, in the absence of any provision in the applicable Collective Bargaining Agreement, as well as the absence of an agreement between the interested parties, the Court brings the controversy back to the right to reduction of working hours provided for in article 37.6 WS, since, in the absence of the previous budgets, it considers inapplicable the right to adaptation of working hours without reduction provided for in article 34.8 WS.

**b.- The question referred to the Court of Justice of the European Union for a preliminary ruling**

As a consequence of the foregoing, Social No. 33 of Madrid raises before the ECJ whether Article 37.6 WS would have to be considered contrary to European Union law -Directive 2006/54 and Directive 2010/18- **by requiring the worker, in order to make effective his right of conciliation to attend to the direct care of minors or dependent family members, to reduce his ordinary working day and proportional salary**, without, consequently, being able to take advantage of a

fixed schedule when his ordinary working day regime corresponds to rotating shifts- as well as the possible existence of a discriminatory action contrary to the provisions of the Union, since it is the female gender that habitually takes advantage of such measures.

**c.- The decision of the Court of Justice of the European Union**

Following the analysis of the issue raised, the ECJ reaches two main conclusions:

**(i). - With regard to Directive 2006/54:** it declares inadmissible a pronouncement in this respect, inasmuch as, without prejudice to the fact that conciliation rights are mainly exercised by women, no specific consequence, disadvantage or discriminatory result specifies the national judicial body which allows the ECJ to assess the case in question.

**(ii)- With regard to Directive 2010/18:** the European Court declares the question referred for a preliminary ruling inadmissible, inasmuch as the directive in question does not regulate any provision requiring Member States to grant a worker the right to perform his services during fixed hours when his normal working hours are based on rotating shifts.

The ECJ also stresses that the provisions of Directive 2010/18 constitute a minimum legal framework which is open to complement and development by the legislation of the Member States which, in the case of Spanish law, translates into the provisions of Articles 34.8 and 37.6 of the WS which, moreover, are susceptible to improvement by virtue of collective or individual agreements.

**d.- Considerations of interest after the new wording of article 34.8 ET -after the entry into force of RD Law 6/2019-.**

As stated in its explanatory memorandum, RD-Law 6/2019 mainly seeks to establish measures that promote the real effectiveness of the rights to reconcile family life and work, as well as the exercise of co-responsibility in the assumption and distribution of family burdens.

Indeed, among the measures introduced by the Royal Decree, the wording of article 34.8 WS is modified in order to contribute to the exercise of the right to specific working hours, without reduction of working hours, to meet family reconciliation needs.

Thus, regardless of the permits included in article 37 of the labour law, this provision allows the right of workers to adapt the duration and distribution of the working day -both in terms of working time and the form of their benefit-, provided that they are proportionate to the personal needs of the worker on the one hand, and, on the other, **to the organisational and productive needs of the company.**

In order to give effect to the deserved right, the RD-Law calls for collective bargaining or, failing that, for an agreement with the employer through the development of a negotiation process of a maximum duration of 30 days, which may end with one of the following options: (i) Acceptance of the employee's proposal (ii) Offer of an alternative proposal (iii) Refusal with allusion to the objective reasons on which the decision is based.

Therefore, despite the fact that the right to adapt the working day had already been provided for previously in the WS, its configuration indicated a greater degree of indetermination, since it was subject to "the terms established in the collective bargaining or in the agreement reached with the employer", without any precision as to what the content and development of the bargaining should be, in its collective or individual aspect. Now, the current article 34.8 WS requires the development of an individual negotiation procedure between the interested parties and, in addition, establishes specific guidelines regarding its duration, development and completion.

Finally, it should be noted that, while a current tendency towards guarantees and protectionism prevailing in the judicial panorama must be recognized on the occasion of the legislative reform, it is appropriate to qualify article 34.8 WS does not constitute a right in absolute terms, but it enables a right of workers to request the hourly concretion that to their needs of conciliation interest and to the opening of a negotiating procedure with the conditions demanded ex lege, hence, the importance that companies carry out the legal mandate and meticulously complete the negotiating procedure, analysing and accrediting the organizational reasons that make impossible the assumption of the concretion requested by the employee, as well as the possible alternatives that allow to balance the interests of both parties.

It may also be concluded that, without prejudice to the amendment made to the aforementioned Article 34.8 ET, the decision of the ECJ, which is the subject of this commentary, would be fully valid, insofar as Directive 2010/18 does not apply to national legislation providing for the right of workers to reduce their ordinary working hours in order to attend to the direct care of minors and family members, with a proportional reduction in salary, without being able to take advantage, when their work regime is shifts, of a fixed morning schedule.

You can read the complete sentence for more information.

For more information please contact:

José Antonio Sanfulgencio

jose.sanfulgencio@AndersenTaxLegal.es