

## Employment Update

### Starting date for paid leave: Regarding the High Court of La Rioja ruling of September 4, 2019

24<sup>th</sup> February 2020

Concerning the decision of the Court of Justice of the European Union on the interpretation of whether paid leave is to be taken on working days, both at the beginning and on all days of leave.

It is known that paid leave regulated in article 37.3 of the Workers' Statute is causal, since its purpose is to satisfy certain needs of the workers, such as, among others, hospitalization, surgery or death of a close relative, transfer of the habitual residence or the performance of union representation functions. These are needs of a personal or civic nature, some of which are linked to freedom of association or the assumption of family responsibilities.

For leave due to marriage (Article 37.3.a), the count is in calendar days, while "days" are referred to, without specifying whether they are calendar or working days, for leave due to death, accident, illness, hospitalization or surgery of close relatives (37.3.b), for transfer of the habitual residence (Article 37.3.c). Finally, leave of absence for the fulfilment of an unavoidable public and personal duty (Article 37.3.d), to carry out trade union or staff representation functions (Article 37.3.e), and for the performance of prenatal examinations, childbirth preparation techniques and attendance at sessions required for adoption, foster care or adoption (Article 37.3.f) are counted as "essential".

Furthermore, the law does not explain why marriage leave is paid in calendar days, while other leave is paid in days, or for the necessary time, nor does it specify when the leave begins. On the other hand, the Civil Code, which is applicable in a supplementary manner, establishes in its article 5.2 that the civil calculation of time periods does not exclude non-working days.

The question of the "dies a quo" for counting paid leave is not trivial. The legislator has not provided for it to occur when the reasons for it coincide in time with the weekly rest period or with holidays. The question arises: **is a delay in taking leave admissible, or must it begin on the first working day of the employee's leave?**

The Supreme Court's ruling of 13th February 2018 (RC 266/2016), interpreting the Contact Centre Sector Collective Agreement, stated that the initial day for taking leave on the grounds of marriage, birth of a child and death of a family member when the event causing the leave occurred on a public holiday should be the first working day following it. This was the interpretation of this convention, which merely stated that leave would be granted "from the time of the occurrence of the event giving rise to it", i.e. from that moment on, the High Court emphasizing the logic that its commencement would count from the first working day, since no leave would be required on a public holiday.

For its part, the Audiencia Nacional, by Order of 3 September 2018 (Día Corporate Group; orders 113/2018) referred a question to the Court of Justice of the European Union (ECJ) for a preliminary ruling, prior to the decision in the main proceedings, in order to determine whether the paid leave provided for in the applicable company agreement (with the exception of leave on account of marriage) must be taken on working days, both at the beginning and on all days of the leave.

Justification given that the Social Chamber has doubts about compliance with Articles 5 and 7 of Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working



time if workers are denied the right to take leave under Article 37.3 of the Workers' Statute and Article 46 of the collective agreement, when the state of necessity is updated to coincide with weekly rest periods and annual leave, since in those cases workers should devote those rest periods, which are intended to serve another purpose, to the situations of necessity for which paid leave is provided.

The Court of Justice has not yet given a ruling on this question.

In these circumstances, **the ruling of the Superior Court of Justice of La Rioja of 4 September 2019** (Ute Logroño Limpio; RS 133/2019) is a departure from the criterion of the previous STS of 2018. It analyzed the text of a company collective bargaining agreement which, except for leave due to marriage, was granted by calendar days. The Social Court No. 2 of Logroño handed down a ruling in the collective conflict suit filed by the Trade Union Section, stating that in cases where the event causing the leave occurred on a non-working day for the worker, it had to begin on the first following working day.

However, and here lies the interest and relevance of the resolution we are commenting on, the Territorial Court of La Rioja revoked the ruling of the Court of First Instance absolving the defendant entity. It was concluded that the leave would commence on the day of the event, if on that day the worker had not provided services due to the occurrence of the event, or, in other words, if the worker had worked on the day of the event or had been released from work for reasons unrelated to the event, the leave would commence on the following day, whether or not it was a working day, with the leave being counted as a calendar day.

The reasoning developed by the Territorial Court is certainly plausible:

1. The event causing the leave is what determines the start of the leave, so that once it has occurred, if the leave is granted on calendar days, as in this case, it is from the day of the event causing the leave, which must be recognized or enjoyed on the days immediately following, regardless of whether or not those following days are working days for the worker.
2. If the leave is taken on the first working day following the event which gave rise to it, it may be that the leave is taken in a period which is clearly not connected to the event which gave rise to the leave (such as, for example, the case, which cannot be considered unusual, where the take-up of the leave is delayed until the end of an temporary incapacity situation or the end of the annual holiday period), which does not seem logical or reasonable.
3. In any event, the leave is taken in calendar days with reference to the day of the event which determines its start, without there being any reason why, if the leave starts on the day following that of the event, it should be delayed until the first working day thereafter, without prejudice to the fact that the leave is taken in calendar days and that a delay until the next working day may clearly distort and distort the leave, which the law and the Collective Agreement do not seek to protect.
4. Although it is true that the Supreme Court Ruling of 13th February 2018 delays the start of the permit on the first working day following the event that caused it, this does not constitute case law, since it is a single ruling handed down in an ordinary appeal. Furthermore, the Supreme Court of La Rioja emphasizes that the doctrine contained therein is not a peaceful resolution in the Supreme Court itself, since in its ruling of 17th January 2008 (rec 24/2007) it does not maintain the same criterion in that it emphasizes the need for the permit to be enjoyed in order to attend to the cause that justifies it and, consequently, from the same date of the chance event or on the date immediately following it, without a delay that distorts the purpose of the permit being admissible, unless expressly agreed upon.

**By way of conclusion.** There is no consolidated jurisprudential doctrine on the matter, which will allow each case to be resolved with freedom of criteria, and the specific treaty regulations that apply must be examined in each case.

Consequently, the debate remains open and legal uncertainty in such an important matter will continue to preside over the judicial proceedings.

We must trust that in the short term the Supreme Court will again pronounce on this issue, and if it does so in the terms of 2018 it will already be creating jurisprudence. And, hope that the resolution that the Court of Justice of the European Union will dictate in its day will be in the same line as the doctrine that the Social Chamber of the Supreme Court definitively feels.

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