# Andersen up to date Employment news

## REGULATION

### The European Parliament adopts the Due Diligence Directive

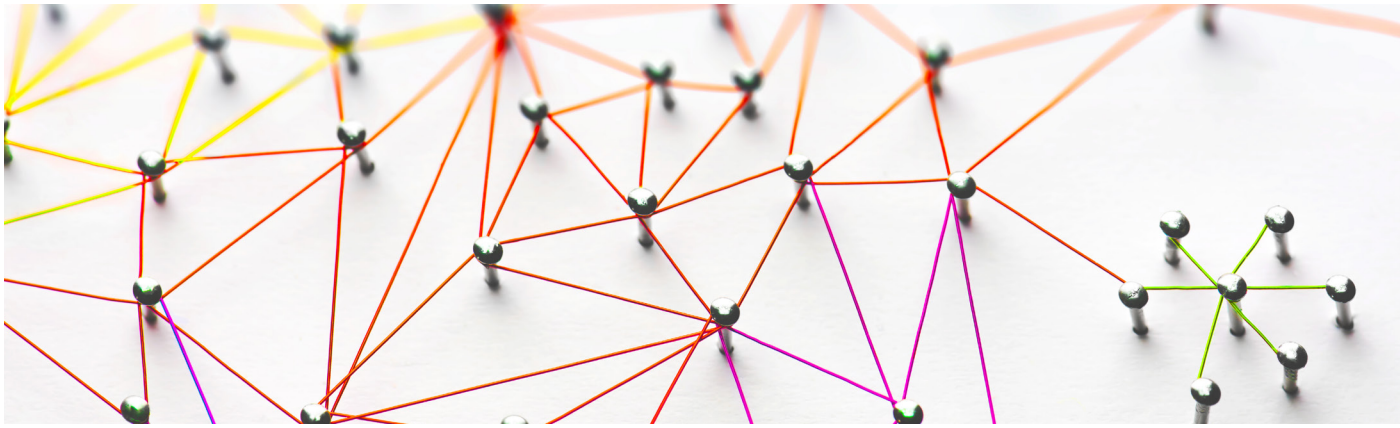
Due diligence is the process by which companies can identify, prevent, mitigate and explain how they address actual and potential adverse impacts of their activities. On 24 April 2024, the European Parliament adopted the new Due Diligence Directive, agreed with the Council, which requires companies and their partners throughout the supply chain to prevent, end or reduce their adverse impacts on human rights and the environment. These impacts include slavery, child labour, labour exploitation, loss of biodiversity, pollution and destruction of natural heritage. The Directive will apply to EU companies and parent companies with more than 1,000 employees and a worldwide turnover of more than €450 million.

### The Third State-wide Collective Bargaining Agreement for the Audiovisual Production Industry (technicians) is registered and published

It mainly applies to companies engaged in the provision of ancillary or complementary services to audiovisual production and those that have signed any kind of contract for the execution of audiovisual works or services. The collective bargaining agreement will remain in force until 31 December 2024. The salary tables for the years 2022, 2023 and 2024 are updated, with companies having a period of 3 months from the publication in the Official Bulletin to pay the corresponding wage differences, if any, with respect to the years 2022 and 2023, i.e. until 6 July 2024.

### Campaign by the Labour and Social Security Inspectorate against possible abuses in the probationary period of employment contracts

The Labour and Social Security Inspectorate is launching a campaign in which it warns that it will carry out a thorough review of employment contracts, both part-time and full-time contracts, that are terminated due to failure to successfully complete the probationary period, despite having exceeded their maximum duration. Special attention will also be paid to the termination of contracts of employee who fail to pass the probationary period, despite having been previously hired to perform the same functions.



## RELEVANT JUDGEMENTS

### Judgment of the High Court of Justice of Galicia (Social Division) no. 1158/2024, 4th March, Rec. no. 5647/2023.The risk of infringement of employees' rights to digital disconnection and privacy

In the case in question, the employee had received several e-mails outside his working hours. Although the first instance court found that there was no infringement of the right to digital disconnection, on the grounds that these emails did not require reading or immediate response, the High Court of Justice now declares that the right to digital disconnection has been infringed and establishes a compensation of 300 Euro in favour of the employee.

The reasoning of the High Court of Justice is that the right to digital disconnection implies a double aspect, as it not only implies the right of the employee not to respond to communications from the employer or third parties, but also the employer's duty to abstain from contacting the employee out of working hours.

In addition, the High Court of Justice considers that the employee's right to privacy has been violated, establishing a compensation of Euro 700 in this case, since the company transferred his data to third parties without having obtained his prior express consent for its use.

### Judgment of the High Court of Justice of Catalonia (Social Division), no. 817/2024, of 14th February, Rec. no. 6351/2023. The fine line between dismissal and resignation

The High Court of Justice dismissed the dismissal claim brought by a employee who, after two years on leave to care for a family member, informed the company of her wish not to return to work and instead requested that she be dismissed, fraudulently, as her objective was to obtain the corresponding unemployment benefit.

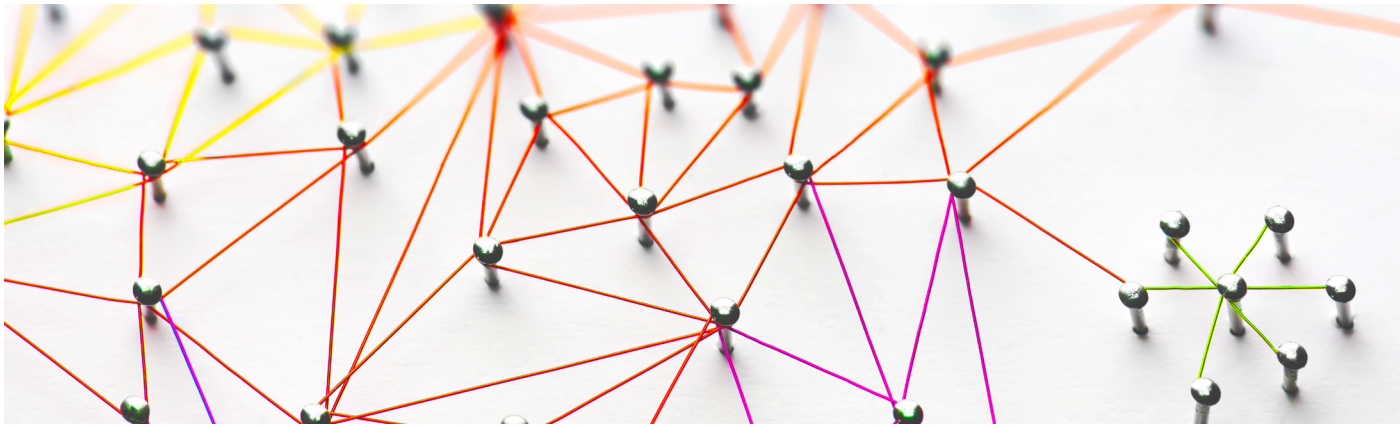
The company refused to accede to this request, informing the employee that she would either return to her job or take voluntarily leave the company. Faced with this situation, the worker did not go to work on the date set for her return to work, so the company proceeded to deregister the employee with the Social Security under the category of 'resignation/voluntary leave'.

The employee dismissal claim against the company, but both the first instance court and the High Court of Justice confirmed that the company's classification of the termination as resignation was correct, insofar as the employee fraudulent intent was demonstrated.

### Judgment of the High Court of Justice of Madrid (Social Division), no. 227/2024, 6th March, Rec. no. 1019/2023. Short-term sick leave is not considered to be a situation of sickness discrimination

In this case, the defendant company notified the employee of the termination of his employment contract on the grounds that he had not passed the probationary period. However, prior to that communication, the employee had been on sick leave (temporary disability) for a short period of time, specifically fourteen days.

Although, initially, the first instance court ruled that the dismissal of the employee was null and void for breach of the fundamental right to equality and physical integrity, the High Court of Justice upheld the company's appeal, arguing that the sick leave was of such a short duration that the employee was not a sick person, but rather a person who had a minor illness, which was not protected by the provisions of Law 15/2022, of 12th July, on equal treatment and non-discrimination. According to the High Court of Justice, the opposite would imply the existence of a protection for the employee that contrary to the will of the legislator. Thus, in this case, in the absence of discrimination, the freedom of the parties to terminate the employment contract during the trial period prevails.



## Judgment of the High Court of Justice of Madrid (Social Division), no. 240/2024, of 6th March, Rec. no. 709/2023. Not every tense situation at work constitutes moral harassment

The High Court of Justice dismisses the claim for harassment brought by an employee who had previously been on sick leave (temporary disability) for anxiety and receiving pharmacological treatment. The company had a protocol for dealing with harassment, which was activated and the appropriate proceedings were carried out, which ended with disciplinary sanction against an employee.

The main reasoning of the High Court of Justice is that not every attitude of conflict in the performance of work can merit the qualification of 'moral harassment', but that it is necessary to distinguish between conduct of real hostility, vexation and systematic persecution, from what may be a rigorous demand for certain work behaviour or an exercise of managerial power that does not seek to weaken the employee.

Therefore, the High Court of Justice recalls that moral harassment should not be confused with confrontations and misunderstandings at work that occur within the company because the parties to the employment relationship defend conflicting interests.

## Judgment of the Supreme Court (Social Division), no. 478/2024, 14th March, Rec. no. 96/2022. The minimum five days' notice in the irregular distribution of the working day is not required in shift work

The main subject matter of the dispute is whether the minimum notice period of five days, laid down in Section 34.2 of the Spanish Labour Act for the case of irregular distribution of the working day, can be extended to the change of shift.

The specific question concerns the provisions of the collective bargaining of an airline company, which establishes a minimum notice period of 48 hours for shift changes due to unforeseeable incidents. Thus, the trade unions considered that this period did not comply with the minimum notice period of five days provided for this purpose in the Labour Act.

The High Court of Justice provides a key interpretation of the law, clarifying that in shift work, it is not the length of the working day that changes, but its distribution. Consequently, the High Court of Justice concludes that the collective bargaining agreement is in line with the Labour Act, since no minimum notice period is established for shift work (regulated in Section 36 of the Labour Act).

## Judgment of the High Court of Justice of Madrid (Social Division) no. 203/2024, of 14th March, Rec. no. 824/2023. Prevalence in the assessment of the evidence of the time register

The employee claims financial compensation for allegedly having performed 302 hours of overtime. However, the work time records do not show the existence of such overtime, but the employee claims that such hours are the result of conversations held in a WhatsApp group, through which the work schedules prepared weekly by the company were sent.

The High Court of Justice held that the company's work records, which were signed by the employee, should prevail over the WhatsApp conversations, which could not alter the authenticity of those records.

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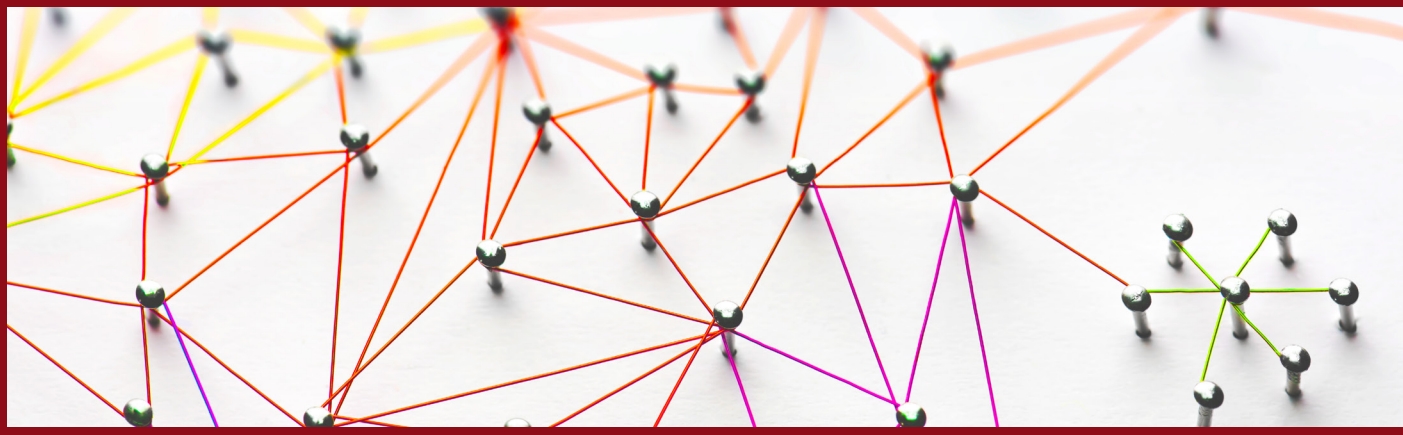


## COMMENT OF THE MONTH

# The future of severance for unfair dismissal

At the end of March, it became known that the European Committee of Social Rights (ECSR) has issued a decision against the complaint filed by UGT in March 2022 that the dismissal system in Spain does not comply with Section 24 of the European Social Charter (ESCS) ('*the right of employees dismissed without valid reason to adequate compensation or other appropriate redress*'). The main argument of the complaint was that Spanish dismissal regulations are not sufficiently remedial or proportionate to the harm caused to employees by dismissal, nor does it ensure that it is dissuasive.

The ECSRC found that the Spanish system, which provides for a fixed severance for unfair dismissal, equivalent to 33 days' salary per year of service, with a limit of 24 month's salary payments, is not in line with the ECSRC. The ECSR's decision is not public, and the ECSR has submitted a preliminary report to the Committee of Ministers of the Council of Europe, which will issue a recommendation in July 2024.

Furthermore, on 20th March, the ECSRC published its Conclusions 2023 on the articles of the ESCR relating to children, family and migrants, in which, after analysing 36 possible violations of the ESCR by Spain, it concludes, in the case of dismissal of female employees during maternity leave, that the upper limit of the compensation scales does not allow an employee to be awarded a higher compensation depending on all the circumstances, as the courts can only order compensation within the limits of the scale.

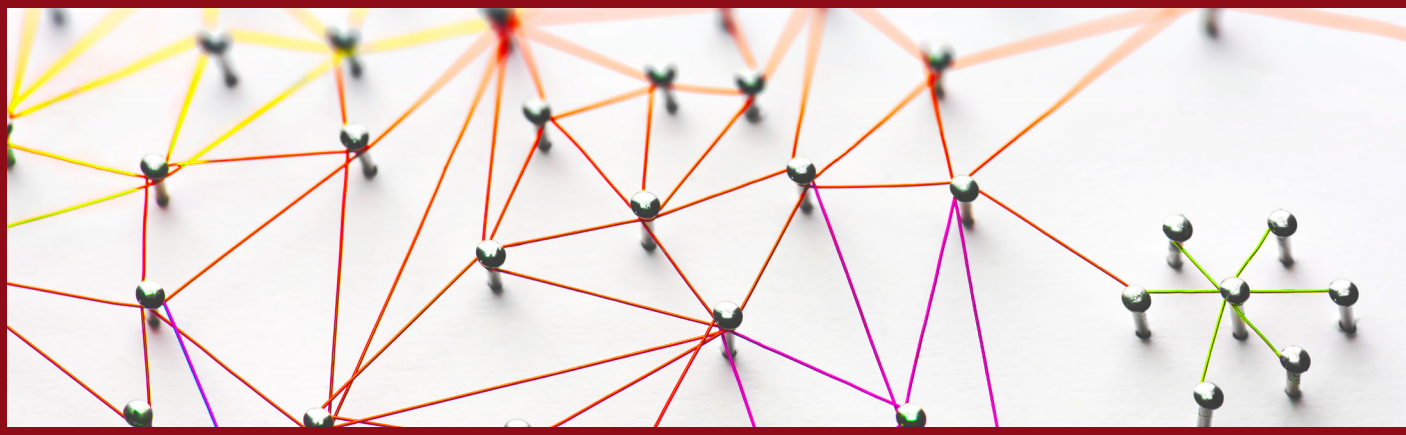
The ECSRC's position is that the system of compensation ceilings provided for in Spanish law may not guarantee adequate compensation to compensate for all the damage suffered by employees in certain situations.

And it is true that this is the case when, for example, it concerns dismissals of employees with little seniority and lower salaries, and this ignores the impact of their personal and professional circumstances on the specific damage suffered.

This issue has already been resolved in the same way in similar claims brought by trade union organisations in Finland (2016), Italy (2019) and France (2022), stating that statutory severance compensation caps or amounts set according to certain parameters could lead to inadequate compensation in relation to the damage suffered.

Although the binding or non-binding nature of the decisions of the ECSRC is debated, the fact is that, to date, these countries have not modified their legislation in this area.

One thing is clear: Spain, like the rest of the EU countries, must comply with the provisions of the ECSR, so the ECSRC decision gives a clear boost to the modification of the legislation announced by the Government in relation to the severance compensation for unfair dismissal.



Given this situation, the question arises: what system can ensure the adequacy or reparatory effect of the severance compensation or be a deterrent? Should the courts be the ones to determine the amount of severance compensation for dismissal according to the damage caused in each individual case?
There are several possibilities:

- Return to the situation prior to the 2012 labour reform, re-establishing the compensation formula (also fixed) of 45 days' salary per year of service with a cap of 42 month' salary payments, as well as the so-called "interim salary" (back pay).
- Establish a legal minimum severance compensation, for example 6 months, as in other countries.
- Give the employee the option of reinstatement or a severance compensation.

In any case, any alternative would entail a modification of the Spanish Labour Act and, for practical purposes, would foreseeably make dismissal more expensive, which could condition hiring, although, at least, it would be desirable to establish scales that would provide legal certainty.

Another alternative would be to establish an additional compensation to repair the damage caused by dismissal in each specific case, depending on:

- The conditions of the dismissed employee, such as age, family situation, ability to find work, health, etc.
- The situation in the sector.
- The actual damages suffered and proven (e.g. whether the employee is entitled to unemployment benefit or subsidy, whether he/she voluntarily left his/her previous employment relationship to join the company where he/she is dismissed shortly afterwards, etc.).

The problem is that, if certain objective parameters are not determined, it would be up the courts to establish the amounts of compensation, giving rise to a dispersion of criteria and, therefore, to greater litigiousness, even complicating the evidentiary phase of dismissal proceedings. In short, all this would contribute to creating a situation of legal uncertainty.

Faced with this uncertainty, it would be reasonable to wait for the publication of the ECSRC ruling in a few months' time and, from then on, to negotiate within the framework of the social debate with employer associations and trade unions the legal formula for calculating the severance compensation for unfair dismissal in order to comply with the provisions of the SES. All of this under the fundamental premise of respect for the principle of legal certainty, which is necessarily achieved by establishing certain parameters or objective scales.

Until then, the debate has been opened.

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