BARTOLOME & BRIONES

Legal Status

July 2023

1. Employment
2. Tax
3. Disputes

EMPLOYMENT

New rights for absence at work. Special protection in case of dismissal

JUAN CARLOS LOMBARDIA
Partner
jclombardia@bartolomebriones.com

On 30 June 2023, Royal Decree-Law 5/2023 came into force. It introduces a series of legislative changes that affect various matters, including labour matters.

Specifically, the Royal Decree-Law gives effect to the partial transposition of Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers, whose term had ended on 1 August 2022.

This transposition introduces a series of reconciliation measures that affect the current configuration of both paid leave and the right to adapt and distribute the working day. This is complemented by the protection of workers who exercise these rights both from a general point of view, with the amendment of Article 4.2.c) of the Workers' Statute (hereinafter, "ET"), and from the point of view of dismissal.

With regard to paid leave, the legislation pays special attention to the new social realities, extending the previous protection for workers and their spouses to unmarried partners. In this respect, the following amendments are made to Article 37 ET:

- 15 calendar days in the case of registered partnership.

- 2 days for the death of a spouse or common-law partner, where the law only referred to relatives up to the second degree of consanguinity or affinity.

- 5 days, as opposed to the 2 previously provided for by law, for serious accident or illness, hospitalisation or surgery without hospitalisation requiring home rest of the spouse, unmarried partner or relatives up to the second degree of consanguinity or affinity, including the family member of the unmarried partner, as well as of any other person who lives with the worker in the same home and who requires effective care of the worker.

Furthermore, a number of new aspects have been introduced that were not contemplated in the previous articles:

- Paragraph 9 is now included in Article 37 ET with a leave of 4 days per year for reasons of force majeure "when necessary for urgent family reasons related to family members or persons living with them".

- Article 48 bis ET is now included to create unpaid parental leave of no more than eight weeks to care for a child or foster child for more than one year, until the child reaches the age of eight.

Although the leave is currently unpaid, this is expected to change in August 2024, the date required by Directive 2019/1158. It will therefore be necessary to pay attention to the regulatory development in this regard.

The modification relating to the extension of the beneficiaries who can take a leave of absence of no more than 2 years to care for children or family members is also worth highlighting, which now includes unmarried partners and their blood relatives.

These subjects are also incorporated as causal subjects with regard to the right to adapt and distribute working hours regulated in Article 34.8 ET, which undergoes modifications in the following sense:

- The negotiation period is reduced from 30 to 15 days.
- The number of persons entitled to the benefit is extended, but this is subject to sufficient proof of the care needs of the persons listed below:
    - Children over 12 years of age.
    - The spouse or unmarried partner, relatives by blood up to the second degree or other cohabiting persons, and who for reasons of age, accident or illness, are dependent and unable to look after themselves.

As mentioned above, these new developments in the area of conciliation go hand in hand with the protection of those who exercise these rights. In this sense, new grounds for null dismissal (objective or disciplinary) of workers are declared:

- "those who have applied for or are on leave referred to in Article 37(3)(b), (4), (5) and (6) or who are on leave referred to in Article 37(3)(b), (4), (5) and (6)
- or have requested or are benefiting from the working time adjustments provided for in Article 34.8
- or the leave of absence provided for in Article 46(3)".

Therefore, Articles 53.4 and 55.5 ET and, in parallel, Articles 122.2 and 108.2 of the Law Regulating Social Jurisdiction are amended.

These causes extend the catalogue of those known as "objective nullity", whereby the dismissal is automatically considered null and void unless the Company objectively and justifiably accredits the dismissal decision. Therefore, as with all new regulations, it will be necessary to pay attention to the developments in case law in this regard.

July 2023

TAX

The Amazon´s Tax

ALEJANDRO PUYO
Partner
apuyo@bartolomebriones.com

The growth of e-commerce in recent years has highlighted the need to adapt traditional regulations and tax systems.

This need has been detected by the municipal government of Barcelona, which has been a pioneer in the adoption of a tax for the use of the public domain derived from the distribution to final destinations of goods purchased through e-commerce (Business to Consumer, B2C). This local tax for occupation of the public domain, produced as a result of home delivery of parcels, is colloquially known as the Amazon's Tax and the first payment must be made in June 2024.

The tax responds, mainly, to the repeated demand to the City Council of Barcelona, by various associations of merchants of the city, to adopt measures that tax this new modality of use of the public domain that replaces and competes with traditional physical establishments. In addition, the commercial activity of electronic businesses causes a revenue loss for the City Councils, since e-commerce, lacking local physical presence, is not subject to certain municipal taxes that do affect local businesses.

The Barcelona City Council requested a legal report for the articulation of this tax, aware of the difficulties that its implementation could cause. Even so, it is necessary to mention that such imposition faces some resistance. In fact, the High Court of Justice of Catalonia admitted an appeal filed by the Spanish Logistics and Transport Business Organization (UNO) against the Barcelona's tax ordinance.

The taxable event of this tax is the special use of the public domain by companies acting as postal operators distributing to the final consumer the goods purchased through e-commerce by means of vehicles occupying the public road.

The tax affects major postal operators (Amazon, DHL, UPS, etc.) with a turnover of more than one million euros per year for deliveries to final destinations indicated by consumers at home. Postal operators whose activity does not require intensive use of the public domain are therefore excluded from this levy.

One of the most controversial aspects of this tax is its method of quantification. The taxable base is constituted by the gross income invoiced in the city of Barcelona from deliveries, excluding income obtained from non-taxable deliveries.

All this can be complicated since it forces companies to differentiate between gross revenue from online sales and sales made through other channels. Without taking into account, in addition, that it must be revenue generated exclusively in the city of Barcelona.

The tax payable is set at 1.25% of the net tax base. This quantification is based on the report prepared by the Barcelona Institute of Economics, which has made an estimate of

the maximum use made by postal operators of the public domain for parking. Therefore, if finally, the total amount paid by the taxpayers exceeds the value of the utility derived from the use of the public domain, the excess will be returned in proportion to the amount paid by each taxpayer with respect to the total revenue.

The measure adopted by the Barcelona City Council has generated an intense legal debate regarding the viability of this tax, which may last for months or even years. Barcelona is the first European city to implement this measure, and this has generated considerable interest and expectation in other cities. In case of overcoming the resistance, it faces, it is likely that many Spanish and foreign municipalities will eventually adopt this measure as a model to follow.

Therefore, the response of the Courts is awaited to determine whether, despite the current controversy, this measure manages to overcome the legal challenges it poses.

July 2023

DISPUTES

Voluntary Intervention

ANTONI FAIXO
Partner
afaixo@bartolomebriones.com

Initially, the parties to the proceedings are strictly the plaintiff and the defendant, who may be one or more persons (subjective joinder). However, the Civil Litigation Law regulates certain mechanisms to enable the parties to the proceedings to be expanded, which are as follows:

- Necessary intervention.
- Necessary passive litis consortium.
- Voluntary intervention.

Briefly explained, necessary intervention is the situation that arises when the defendant asks the court to call into the proceedings another person, not initially sued, because they consider that they may have an interest in the lawsuit to act as a co-defendant; and necessary passive litis consortium is a similar mechanism, whereby the defendant claims that they cannot be sued alone but that it is mandatory to call another person as co-defendant, usually the claim is that they have joint liability. In both cases, it is the defendant who requests the incorporation of the new defendant.

Voluntary intervention, on the other hand, is the situation where a third party, neither plaintiff nor defendant, considers that they have an interest in the subject matter of the proceedings and asks to be accepted as a co-plaintiff or co-defendant (usually the latter). In this case the initiative to apply lies with the external third party, not with the defendant.

It might seem that no one would be interested in appearing in a proceeding if they were not directly sued. However, the truth is that there are circumstances when this action is indeed recommended. An usual element in this regard is the risk of repetition, i.e. that there is a risk that the defendant, if convicted, may repeat a claim against that third party because they have a contractual relationship that is linked to the claim in the lawsuit. This risk of repetition means that the third party who is not initially sued has an interest in appearing and defending themselves in this lawsuit, because the judgement that is handed down affects them indirectly given that the defendant could repeat the claim against them, depending on the outcome of the judgement.

The most obvious example would be an insurer who has not been sued initially, and then asks for voluntary intervention because it has an interest in the subject matter of the proceedings since if the insured defendant is convicted, the insured defendant can reimburse the insurer.

Another simple example would be joint and several liability. If there are two persons who are jointly and severally liable and only one of them is sued (in joint and several liability, the creditor can claim against one or against both), the other joint and several debtors can ask for voluntary intervention as they have an

interest because if the initial defendant is convicted, they can repeat the claim to share the conviction.

It should be noted that the rule regulating this mechanism is rather open and ambiguous, and that it will therefore be up to the judge to decide in each case whether they consider that the third party requesting voluntary intervention has a "*direct and legitimate interest in the outcome of the lawsuit*", which justifies their participation or otherwise.

It is also worth noting that the application for voluntary intervention does not suspend the course of the proceedings, and that the intervener, if accepted as a party to the proceedings, will only be able to participate in the remaining stages because the lawsuit does not go backwards. However, the intervener is allowed to file a defence to the claim, even if it is outside the time limit given to the defendant.

In conclusion, this mechanism is very useful and interesting when we are aware of a lawsuit in which we have not been directly sued, but which involves an indirect risk, and we want to defend our interests in order to avoid or reduce this risk.

July 2023

www.bartolomebriones.com

*This text is for information purposes only and does not constitute legal advice.