

The obligation of the employer to proceed with the call of discontinuous permanent workers when at the beginning of the campaign is in a situation of temporary disability

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Resumen

La finalidad de este trabajo es el análisis detallado de la jurisprudencia española sobre el deber o no de las empresas de efectuar el llamamiento a los trabajadores fijos discontinuos y por ello darles de alta y efectuar el pago delegado de las prestaciones, si en el momento del llamamiento se encuentran en situación de incapacidad temporal.

Abstract

The purpose of this work is the detailed analysis of the Spanish jurisprudence on the duty or not of the companies to make the appeal to discontinuous permanent workers and therefore to register them and make the delegated payment of the benefits, if at the time of the appeal are in a situation of temporary disability.

Palabras clave

Deber, llamamiento, prestaciones, incapacidad, temporal.

Key Words

Duty, appeal, benefits, disability, temporary.

Abreviaturas

TSJ- Tribunal Superior de Justicia

TS-Tribunal Supremo

AN-Audiencia Nacional

AP-Audiencia Provincial

TRLET- Estatuto de los Trabajadores

STC- Sentencia

STSJ- Sentencia del Tribunal Superior de Justicia

DEFINITION OF DISCONTINUOUS FIXED CONTRACT.

Before that we have to know what a discontinuous fixed worker is and what is meant by appeal:

The discontinuous fixed is that which is given by reason of the discontinuity of its activity, which does not require the provision of services every day or hours within the normal and permanent nature of the business activity, that is, in companies of continuous cycle, which they have excess of work in seasonal periods, when these are repeated, or when it comes to hiring in companies that do not work permanently, but in a discontinuous, cyclical or intermittent way, whether or not seasonal. According to art 15.8 TRLET will be arranged to carry out works that have a fixed discontinuous character and are not repeated on certain dates, within the normal activity volume of the company. In cases of discontinuous work that are repeated on certain dates, the regulation of the part-time contract concluded for an indefinite period shall apply.

Fixed discontinuous workers shall be called in the order and manner determined in the respective collective agreements, the worker may, in the event of non-compliance, claim a dismissal procedure before the competent jurisdiction, beginning the term for it from the moment in which I had knowledge of the lack of convocation. This contract must be formalized in writing on the model established, and must include an indication of the estimated duration of the activity, as well as the form and order of appeal established by the applicable collective agreement, also stating, of orientative way, the estimated working day and its hourly distribution.

DEFINITION OF CALL.

The appeal appears as the main procedural institution in the individual determination of the period of activity of discontinuous permanent workers and, therefore, as a central aspect of the contractual type itself and its main peculiarity. So much so that the main legal reference acts to its legal regime is to the appeal and the consequences of its defect.

It is a central institution in the configuration of the legal regime of the discontinuous fixed contract. It is the main formal element for the individual determination of the period of activity of the same. This specifies the initiation of work and, therefore, compliance with the employer's first obligation-to give work-with respect to discontinuous fixed workers.

ANALYSIS OF THE DIVIDED JURISPRUDENCE IN SECTIONS.

We proceed to analyze from two contrary legal arguments:

1) Legal argumentation in which the worker is called and when he responds that he is in a situation of temporary incapacity, the company keeps him and calls the next one until the recovery of the same having started to give the delegated payment of the benefits.

2) Legal argumentation in which the appeal must be made, but is not incorporated to the worker until it is recovered.

Beginning with the first legal argument we can find a series of examples among the Spanish jurisprudence that opts to use more this as the following judgments of various courts such as:

- ✓ TSJ COMUNIDAD VALENCIANA 4024/2006, 19-12
- ✓ STC T N°3 MURCIA SOCIAL, 07-07-2008
- ✓ STS SALA 4ª 29-03-2001, rec 2093/2000
- ✓ Sentencia TSJ MURCIA 405/2003-en referencia a la sentencia dictada por la sala de lo

- social del juzgado de Murcia nº3 el 3-12-2002.
- ✓ STC TSJ ANDALUCIA 27/02/1991 JUNTO CON RECURSO DE CASACIÓN Y UNIFICACIÓN DE LA DOCTRINA:1016/1991 DEL TS FALLIDO POR PARTE DE LA EMPRESA
 - ✓ STSJ MURCIA 9/07/2002, rec 707/2002

While the second legal argumentation tries to solve is that during the periods of inactivity between campaign and campaign, even in the situation assimilated to the discharge, however, to find the contract suspended until the call the discontinuous fixed worker can not access Temporary disability benefit for not being in a situation of discharge or assimilated to discharge with the specific activity that is resumed and not with the validity of the contract:

STS SALA 4ª 26-05-2003, rec 2724/2002, en favor de STSJ MURCIA 9-10-1998.
TSJ CATALUÑA 8914/2007, 14-12

We can find in all these examples the two antagonistic principles that may or may not determine whether the discontinuous worker in a situation of temporary incapacity will be able to register them and make the delegated payment of the benefits, for which I will now detail the content of both points in order to show my opinion about it in the conclusion of it.

SENTENCES AND COMMENTS ON THE FIRST LEGAL ARGUMENT.

From the first legal argument the discontinuous fixed employment contract is not extinguished at the end of the campaign, but is suspended, so that the obligation to work and remunerate work ceases (article 45.2 of the ET), being legal situation of unemployment for the worker, being able to request unemployment benefits if he meets the qualification requirements (articles 207 and 208.4 of Legislative RD 1/1994, of June 20, which approves the Consolidated Text of the General Law of Social Security).

Said the previous thing, if the contract has not been extinguished, only suspended, when the campaign begins again, if the worker in situation of medical leave is included among the employees that have to be appealed, the company has to request the discharge in the General Social Security Scheme, prior to the date scheduled for reincorporation, initiating the obligation of contribution by this to the General Social Security Scheme (articles 29, 30 and 32 of RD 84/1996, of 26 January -BOE of February 27, which approves the General Regulation of Registration of Companies, Affiliation, Registration and Discharge in Social Security, in relation to articles 12 to 14 of RD 2064/1995, of December 22 -BOE of 25 January-, which approves the General Regulation for Social Security Contribution).

This is the solution to which, in its day, the Resolution of the General Directorate of the Social Security Economic Regime of February 12, 1979, which was confirmed by the Resolution of the former Directorate General of Legal Regulation and Collaborating Entities of Social Security of November 2, 1992, and which the Subdirectorate for Ordination and Challenges of the General Treasury of the Social Security, dated December 2, 2002 (Dec. 1020/2002), has taken up. We can find in any of the sentences exposed in a favorable way to the worker the same situation: The worker is in a situation of temporary disability in an inter-campaign period and the company proceeds to the appeal of the same, when he communicates that situation the company begins with the process of registering him in the social security so that he can access the disability benefit until you can rejoin the work activity within the campaign

In any of the sentences exposed within each legal argument (not all) we can find a link in the argument:

STC TSJ ANDALUCIA 27/02/1991 : 1016/1991 TS :

the situation in which the worker of Hoteles Mallorquinos Unidos S.A. she was in a situation of temporary disability when she was called to start the new campaign, she notified them of the situation and they neither reincorporated him when she was still in the season nor gave her the appropriate benefits, so by this sentence and later with the dismissal of the appeal by HMU SA he is forced to reincorporate it and give him to receive the opportune social security benefits.

Legal comment of the student:

After examining the factual background, the legal basis and the ruling my opinion is joint to the court so the worker is entitled to obtain temporary disability benefits during the inter-campaign period until the appeal of the next by of the company at the time of carrying out its task during that time, being able likewise to incorporate itself as worker when it is recovered, reason why the dismissal is annulled and it must be reincorporated to the company and to maintain it until it can reincorporate to be able to realize thus his opportune tasks.

STS 2629/2001 with STSJ ANDALUCIA 21/01/2000

Here is the same situation: Ms. Irene is a discontinuous fixed worker who for a long period of time is on temporary leave until she applies for permanent leave, and until then the appeal is made by her company, claiming that she can not work for Being in temporary disability, the company not only would not reincorporate it, nor would it give it the opportune benefits, but it also dismisses it. Therefore, through the appeal of cassation 2093/2000 the company JUMARI SL is condemned to compensate the worker and also to give her to receive the respective benefits for the days she has been out of social security in a proportion of 45 days of salary per year worked, prorating the lower periods by months, thus paying the salaries not received from the date of dismissal until the notification of the sentence or being able to choose to be readmitted.

Legal comment of the student: After examining the factual background, the legal basis and the ruling my opinion is joint to the court so the worker is entitled to obtain temporary disability benefits during the inter-campaign period until the appeal of the next by of the company at the time of carrying out its task during that time, being able likewise to incorporate itself as a worker when it is recovered, reason why the dismissal is annulled and it is due to him to reincorporate to the company and to maintain it until it can reincorporate itself to be able to realize thus his opportune tasks.

STSJ MURCIA 9/07/2002

A worker of the agri-food industry is in a situation of temporary disability during the inter-campaign period receives the call of the company Hermanos Pasqual SL to which he notifies, the company tells him that when he joins will be given the appropriate benefits, When it does not occur, it is not considered that you can agree to register or give benefits.

Legal comment of the student:

After examining the factual background, the legal basis and the ruling my opinion is joint to the court so the worker is entitled to obtain temporary disability benefits during the inter-campaign period until the appeal of the next by of the company at the time of carrying out its task during that time, being able like this also to be incorporated as worker when it is recovered.

STSJ MURCIA 327/2002, rec 78/2002

A worker of the company Mensajero Alimentación S.L. is in a situation of temporary disability from the end of the campaign and goes until the call of the next so the company decides to postpone incorporation until it recovers without giving it the timely provision of temporary disability, so after this situation decides to file a claim alleging that being on temporary leave is in his right to obtain the appropriate benefit, which the court considers in accordance with the provisions of the law and dictates that this benefit be granted in addition to its subsequent incorporation after his recovery.

Legal comment of the student:

After examining the factual background, the legal basis and the ruling, my opinion is joint to that of the court, so the worker is entitled to obtain temporary disability benefits during the inter-campaign period until the next appeal by the party. of the company at the time of carrying out its task during that time, being able likewise to be incorporated as a worker when it is.

TSJ MURCIA 405/2003-in reference Murcia nº3 3-12-2002.

For which the worker obtains the monetary amount required to be in a situation of temporary disability during the inter-campaign period by which after the respective business call you are informed that you will be reinstated to work and that you may receive the disability benefit.

Legal comment of the student:

After examining the factual background, the legal grounds and the ruling, my opinion is joint to that of the court, so the worker is entitled to obtain temporary disability benefits during the inter-campaign period, prelude to the appeal by the company at the time of carrying out its task during that time, being able likewise to be incorporated as a worker when it is recovered.

Stc TSJ Comunidad Valenciana 4024/2006, 19-12:

What is being explained here is that the worker is on the contract, is suspended, so he must give the benefit to temporary disability and when he is recovered reincorporate him to his job.

Legal comment of the student: After examining the factual background, the legal basis and the ruling, my opinion is joint to that of the court, so the worker is entitled to obtain temporary disability benefits during the period that covers the end of a previous campaign. appeal of the following by the company at the time of carrying out its task during that time, thus being able to also be incorporated as a worker when it is recovered, or as also can be seen in the sentence, request permanent disability since it can not perform their respective tasks.

STSJ MURCIA 17-11-2008

A worker who at the beginning of the agricultural activity in his company as a discontinuous fixed worker does not call him when he notifies them that he is in a situation of temporary disability, so that he will not be reinstated in that campaign and will not be given the opportune benefits, Therefore, this ruling resolves the situation in which the company must take charge of the reinstatement and payment of benefits.

Legal comment of the student:

After examining the factual background, the legal basis and the ruling my opinion is joint to the court so the worker is entitled to obtain temporary disability benefits during the inter-campaign period until

the appeal of the next by of the company at the time of carrying out its task during that time, being able like this also to be incorporated as worker when it is recovered.

JUDGMENT SENTENCES AND COMMENTS OF THE SECOND LEGAL ARGUMENT.

Well as we have already seen there are many courts that are in favor of using this point of view through timely legislation, but there is another point of view which we have to take into account since there are other courts that have alluded to it in order to be able to Be based on your decisions:

STS SALA 4ª 26-05-2003, rec 2724/2002, in favor of STSJ MURCIA 9-10-1998.

Sentence of the TS by which upon finding the contract suspended until the call the discontinuous fixed worker can not access the temporary disability benefit, since it is not in a situation of discharge or assimilated to the discharge with the concrete activity that is resumed and not with the validity of the contract.

It is the situation in which an agricultural worker who was in a situation of temporary disability that the call by the company alludes to temporary disability and wants to receive unemployment benefits directly until the end of the campaign when incorporated since it will not be able to be incorporated in all of it.

While the company argued that the employment relationship is latent, so that the obligations of the company indicated above disappear.

Legal comment of the student:

After examining the factual background, the legal basis and the ruling, my opinion is not joint to that of the court, because the worker is entitled to obtain temporary disability benefits during the inter-campaign period until the appeal of the following on the part of the company at the time of carrying out its task during that time, being able likewise to be incorporated as worker when it is recovered, something that does not happen in that date, but that is in the following campaign.

STSJ CATALUÑA 8914/2007

This situation is completely different to the ones we mentioned earlier, since what it comes to saying is that during the time when it ceases to be in temporary disability will be incorporated, but not being recovered for the entire campaign is not incorporated nor is the timely provision given, so this ruling gives the reason to the company according to their understanding according to law, since not being able to be active can not be incorporated, therefore it would be postponed to recovery .

Legal comment of the student:

After examining the factual background, the legal grounds and the ruling, my opinion is not joint with the court, so the worker is entitled to obtain temporary disability benefits during the inter-campaign period until the appeal of the following by part of the company at the time of carrying out its task during that time, being able likewise to be incorporated as worker when it is recovered, something that does not happen until the following season.

But in this case there is nothing that the worker can do apart from making the corresponding appeal of cassation and unification of the doctrine to the TS in order to obtain what is in itself her right to receive temporary disability benefit.

PERSONAL OPINION-FINAL CONCLUSION ON THE OBJECT OF THE WORK: THE ENTREPRENEUR'S OBLIGATION TO THE APPEAL OF THE DISCONTINUOUS FIXED

WORKER AT THE BEGINNING OF THE CAMPAIGN IN A SITUATION OF TEMPORARY DISABILITY

My opinion on this subject is simple and simple: the worker, although he is not doing a task within the company, if he has the right that when the call is made, he will be admitted to the company in temporary supervening situation, give him the opportune economic benefits of social security and even the improvements envisaged in the Collective Agreement of application, since I think and believe with the regulatory regulations in hand that the work contract is suspended, and for that reason it continues to be fully valid.

All the employees of this special contracting system that are still in force throughout the national territory, if not, would then be in a situation of helplessness and social injustice if they were temporarily incapacitated, so they would not have access to the benefit of the Social security and even companies would not call them for the next campaign. In addition to not having an adequate legal coverage could lose their jobs so I am in favor of the judgments of the first point of view of the analysis of this work, for which the worker would be protected with the incorporation after his recovery to the company and also the one of perceiving the benefits and even the improvements within the collective agreement to be able to subsist to those moments in which they can not work to be able to earn a living, apart from the loss of contributions such as retirement, disability, etc.

If the second legal argument favorable to companies were used, they could, in any situation of temporary incapacity, use the same reference as these judgments, since they would consider that the employment relationship ended at the end of the campaign, for example, from the moment of the appeal and they have not joined the job, so they are not in a situation of discharge or assimilated to the discharge and thus could not or would not have the right to request benefits for temporary disability during all that time and would have to wait for the next campaign to so we can work in that company.

So in my opinion is closed the debate on whether to incorporate the worker into the company, not to start the payment of the benefit delegated in addition to possible improvements in the collective agreement applicable.

By way of conclusion and as a personal opinion I consider or believe that in this social and democratic state in which we live this inequality between workers can not be produced as if the temporary or fixed hired this condition does not harm them why a fixed worker of a discontinuous nature the situation of having a disease or a non-work accident can not give it a worse right than to other groups previously described in this work.

sentence's biography

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