The regulation of wages in Spanish law

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1 - The concept of pay/wage

a) Pay as a fundamental right; the right to minimum or sufficient wage; the concept of minimum or sufficient wage

The Spanish Constitution recognizes the rights and duties of citizens, which mean that the "Workers have the right to receive a sufficient income to cover their needs and the needs of their families, without discrimination on grounds of sex" (Article 35 EC). Salary is a mean of livelihood for the worker and his family, for that reason the wage is set as a right to adequate remuneration.

The minimum wage (SMI) is an amount which is set annually, it determines the minimum amount required to hire a worker, guarantees a minimum amount to reward the delivery of services in the employment relationship (STS 13/04/1989) and it is an institution in accordance with the values of justice and equality espoused by a social and democratic state of law (STC 31/1984).

The SMI is guaranteed by Article 35 of the EC, and it is regulated in Article 27 of the Workers' Statute (WS) according to:
- Set the SMI annually by the Government, after consultation with the trade unions and business associations most representative. Currently the Royal Decree 1717/2012 of 28 December 2013 sets the SMI in 21.51 euros per day or 654.30 per month.

- The criteria to be considered are: the consumer price index, the average national productivity, increasing labour's share in national income and general economic conditions.
- There shall be a six-monthly review in the case of non-compliance with the provisions on the quoted price index.
- The amount of the SMI is indefeasible

b) Pay: a definition

The salary is the remuneration of the work; its regulation is found in Articles 26 to 33 of the WS. These provisions determine the legal concept of wages:

a) In a positive sense, Article 26.1 of WS determines that "wages include all remuneration that the worker receives, in cash or in kind, by providing professional services for others. Wages in kind may not exceed 30% of the total worker perceptions"

B) In a negative sense, paragraph 2 of Article 26 of the WS exposes that the salary is not composed by: the amounts received by the employee as compensation for expenses incurred as a result of their work (e.g. diets, transportation bonuses or costume), benefits and allowances of the Social Security and compensation for transfer, suspension or dismissal.

Doctrine and jurisprudence determined, in conjunction with Article 26, the following:

• The salary is all that the worker receives from his employer.
• The reality (not the covenants, appearances and names) must prevail when it comes to identifying the legal nature of any perceived
• The remuneration received by reason of holidays, weekly rest, leave, holidays and the like is considered wages
• The frequency with which the payment occurs does not affect the concept of pay.
• Paragraph 2 of Article 26 WS should be interpreted openly.
• The worker must bear its own obligations in tax and Social Security, avoiding covenants (individual or collective) opposed to it.
• Salary can be absorbed as "all those companies pay salary" calculated annually, regardless of the leave year and its eventual origin of individual agreements

Wage structure:

Salary is a complex institution as it is composed of miscellaneous items (salary and allowances). Thus Article 26.3 WS states that "through collective bargaining or, failing that, the individual contract, will determine the structure of wages, which shall include (...): base salary and allowances".

The base salary can be set:

a) Per unit time. It serves only the duration of the service, regardless of the amount of work done. The unit of time is usually the month, day or time, referred to the category of worker or professional group.
b) For work. Only attend to the quantity or quality of the work and work done, regardless of the time spent.
c) Mixed wages. When taking into account both; time and work.

The supplements of the salary should be agreed in the collective agreement or, failing that, in the individual contract. The criteria must be agreed to calculate its amount and its consolidated nature. The consolidated nature means that the worker can maintain the complements of the salary even if the circumstances of the work change. The WS provides that, supplements related to the job or the situation and results of the company are not consolidated, unless otherwise agreed.
Wage supplements must respond to the personal conditions of the worker, the work done or the results of the company.

Classes' complements

a) Personal. These supplements are established according to the worker's personal circumstances (age, hold qualifications or special skills, language practice).

The seniority supplement remunerates the time that the employee is working for the same company. Normally this is calculated according to the base wage every three or five years. The regulation of this supplement cannot contain discriminatory results. For example, temporary workers cannot be discriminated opposite permanent workers. Maternity periods must be taken into account too.

b) About workstation, supplements are perceived in consideration of the characteristics of the job to be performed (drudgery, toxicity, danger, shift work, night work, or time availability). Its purpose is to compensate for health damage or alterations that could be produced on personal or social life of the worker (e.g. working at night). Usually these supplements are not consolidated and therefore complement is linked to job performance
The calculation module: these bonuses are calculated on the base salary in the case of partial days would be charged accordingly.

c) About the quantity or quality of the work, it rewards a better quality or greater quantity of work (e.g. production bonuses, punctuality or attendance). The loss of the additional assistance may not occur for absences due to strike, maternity or breastfeeding.

d) Supplements that are established according to the situation of the company, such as participation in profits (commissions, incentives, pests, bonuses, or the like, such as "stock options").

Extra pays. The Article 31 of WS recognizes that the employee is entitled to two extra payments per year, one at Christmas and the other when it is determined by the collective agreement or agreement between the employer and the workers' legal representatives. They shall be set by collective agreement. It can be apportion in 12 months.

c) Payment in absence of work (parental leaves, sickness, holiday, etc.)

The work permits are authorizations for the work which is missed during the time and for the reasons set legally, with entitled or not to pay.

The permits paid, enshrined in Article 37 and 38 of the WS, are:

- Holidays: the annual holiday period cannot be replaced by monetary compensation. It will be agreed in the collective agreement. Not less than thirty days per year.
- A minimum weekly rest of a day and a half, usually on Saturday afternoon and Sunday. These breaks can be accumulated for up to fourteen days.
- leave for marriage (15 calendar days)
- Leave for birth of child (2 days)
- Leave for two days because of illness, hospitalization, accident, surgery or death of relatives to the second degree. The leave shall be four days if accurate displacement.
- Maternity, paternity, adoption, breastfeeding.
- Leave, for the required period, for performance of a public duty.
- For worker´s representatives, as long as is legally established.
- By the time required to perform studies exams.
- By the time required to perform prenatal testing and birth preparation techniques to be carried out within the working day.

Absence of the work in article 30 of the Workers' Statute

According to the article 30 of the Workers' Statute: “If the worker could not give his services once in force the contract because the businessman will be late in giving work for impediments attributable to the same one and not to the worker, the worker preserves the right to his salary, without compensate which he lost with another work realized in another time.”

Article 30 establishes a logical consequence: the worker is only required to do the committed, if for reasons beyond its control and attributable to the employer's job performance becomes impossible, he should not suffer the consequences arising without fault. The study of the precept is addressed by analyzing the four requirements set: employment contract in force, worker made available to the company, impossibility of performance and accountability to the employer.

1) Employment contract in force:

The employment contract becomes effectively from the moment that this is consolidated, however the onset of the activity can be postponed by the parties. The Article 30 of the WS cannot be applied before the establishment of the contract, neither in preliminary treatment cases, and neither in the course of pre-contract work. The defaulting employer's conduct may appear at the start of employment, or at any other time. Especially important are the situations in which after a period of suspension of employment, the employee returns to work for the employer. These are cases of suspension of the job with preferential right to reinstatement.

In relation to the requirement of the contract and Article 30 is particularly important the termination of the contract. The payment of wages by impossibility of performance attributable to the employer and procedural salaries cannot be confused, because they are different institutions. The art. 30 will be applied when, by final judgment, the dismissal is declared invalid or improper, and readmission is not produced for reasons attributable to the employer. In these cases, wages due shall be paid.

2) The failure to carry out the provision and the provision

The inability to carry out the provision of labor is the second condition required to apply the Article 30 of the WS. If the impossibility of delivery is caused by the business organization cannot be expected that the loss of activity is assumed by the employee as a result of the alienation inherent in the employment contract and the necessary assumption of the risk involved by the employer. This is precisely the case covered by Article 30 WS: the consequences of the interruption (the "periculum obligationis") are not transferred to the worker (debtor) unable to fulfill their commitment.

The STSJ of Murcia, of March 10, 1993 understood that the term "disability imputable to the employer" refers to the "Moorish in acceptance" which is when the provision of work being objectively realizable, it is not caused by a lack cooperation of the employer. Also, if the impossibility of providing the work is objective in nature, resulting from any of the elements of the company, such impairment is the employer's responsibility for its lack of attention, care or foresight.

The remuneration paid without activity has to be equivalent to the one that would have been perceived in case of working, including the complements established or the average of variables, and conserve to all the effects his wage nature. The businessman can demand the putting to constant disposition (and in the center of work) while this situation lasts or to distribute of her; precisely the jurisprudence presumes, "iuris tantum ", that the impossibility of the presentation is attributable to the businessman.

3) Accountability to the employer.

The impossibility of the benefit must belong attributable to the businessman: only the suppositions of major force can free the businessman of his obligation to pay, except that also in these cases he should do it because it have foreseen in a collective agreement.

When the absence of benefit brings his reason of events foreign to the orbit controlled by the businessman (strikes of transport or of third parties which effects could not neutralize, atmospheric accidents that concern workers or supplies, acts of sabotage, etc.). The employer has to assume the risks and supports his obligation to pay wages in spite of not receiving the labor activity, being considered to be reasonable to ask that this credit of wages should be accompanied of the subsequent development of the work. In general, the major force is formed by restrictive criteria and the opposite is done by the fortuitous act.

The legislator determines that the businessmen can suspend the labor relations according to a reason economic, technical, organizational or of production, and in suppositions of major force, regulated in the art. 47 of Workers Statute. This is why the situations of fortuitous act might solve by this route, without application of the article 30 of the Workers Statute. The suppositions of fortuitous act are cases that unleash an impossibility not wanted by the businessman. In those cases the businessman cannot do another thing.

d) Who pays? (The employer, public authorities in case of integration of wages, public authorities as employers)

Payment of wages is an obligation of the employer which is part of the work under contract. The WS determines that the settlement and payment of wages shall be made promptly and documented at the time and place agreed or according to custom. The period of time referred to the payment of periodic and regular remuneration may not exceed one month. The worker is entitled to receive, before the day appointed for payment, advance payments of the work already done.

The most common form of payment is by legal tender, although a portion, not exceeding 30%, may be paid in kind. Wages in kind create two problems about valuation and determination. The labour law does not establish rules for the valuation of wages in kind, therefore are applied the valuation rules of employment income in kind

contained in the rules of the Income Tax of Individuals (which is used the criterion of the value of the benefit in the market for general reference) .

As for the setting of wages in kind, the problem is in determining whether a particular item in very different salary money is strictly in their mode of species, or on the contrary, it is a perception that compensates a particular extra payment spending that occurs as a result of the employment relationship.

The debtor is who incurred in the debt under the employment contract and therefore which has the duty, legally enforceable, to deliver. However, sometimes there are situations in which the formal employer (who appears in the contract) is different from the debtor (who receive de facto beneficiary of the work performed). In these cases also become debtors, through accountability mechanisms, the third parties who are in the employment contract and obtain a benefit of the worker. Therefore, it must be identified as employer-debtor those get a benefit of workers directing, organizing and profiting. The WS establishes subsidiary or joint liability in certain cases (Articles 42.2, 43.2 and 44 WS). There several liabilities mean that the wage provision may be required in full and simultaneously to all and / or each.

Besides the above, there is a body in Spain, the Wage Guarantee Fund (Guarantee Fund) to ensure (in whole or in part) the worker the payment of their wages in insolvency of the employer and according to the rules established by Article 33 of the WS.

2- Mechanisms for determining pay

The salary entails a reciprocal obligation, inasmuch as it compels the employer to pay the wages and it forces the worker to perform the job. This retributive consideration must be bilateral and fixed or determinable, but it does not exhaust its legal regulation only in these unique and fundamental terms. The regulation of the salary exceeds the framework of the individual worker; therefore it requires the intervention of the government and, above all, the collective autonomy.
To understand the structure of the salary is necessary take into account the influence of the labor movement and the state intervention, either to establish the basis of wage regulation, or to regulate issues of loss (temporary or permanent) income for unemployment, sickness, disability, old age or death of workers.
The employment contract creates an obligation to pay wages, but this civilian concept does not explain all the legal regulation or its real importance. The legal structure of the wage is set by the autonomy of the parties, but it also arises in response to the confluence of statutory law, collective agreements and individual contracts.
The state rules are responsible for: the basic regulation of the obligation to pay wages, fixing the minimum wage sufficient, management of guaranteed wage and the benefits

referred to remedy its lack. However, the predominant source of wage determination by sectors is in collective bargaining. Meanwhile, the employment contract retains and enhances its ability to establish the salary.
The law ordains that the salary structure should be determined by collective bargaining or, failing that, by the terms of the individual contract. It means that the three primary sources of wage regulation in Spain are: law, collective agreement and employment contract.
Article 35.1 of the Spanish Constitution stipulates the right and duty to work and the right to a fair remuneration, sufficient to ensure a dignified existence for the worker and his/her family. Moreover, the Universal Declaration of Human Rights determines that the worker is entitled to a fair and adequate remuneration.
Therefore, law regulates the definition of salary and its structural elements (basic wage and salary supplements). It sets: a minimum wage, the obligations of payment and settlement, determination, the principle of equal pay irrespective of the sex of the worker, credit guarantees and the exclusion of the autonomy of the parties on the tax liability or worker's Social Security.
The article 26.3 of the Statute of workers determines that the salary structure should include base salary and, if appropriate, pay supplements. However, the composition of the salary will be determined by collective bargaining or, failing that, by the stipulations of the employment contract. Wage supplements will be determined by circumstances relating to personal characteristics of the worker, the work done or the situation and results of the company. It shall be calculated in accordance with the terms and conditions agreed. Wage supplements are created through collective bargaining or by the contract, and then they are added to the base salary. Consequently, the wage will be the sum of base salary and wage complements.
Otherwise, the article 27 of the Workers' Statute regulates the concept of minimum wage. The minimum wage should be set annually by the Government by Royal Decree, after consultation with the trade unions and business associations most representative. For setting the minimum wage will be taken into account: the consumer price index, the national productivity, the increasing share of national income and the general economic situation. The amount of the minimum wage shall be defined regardless of sex or age, whether they are permanent, casual or temporary workers. The minimum wage is indefeasible, and it must be respected.
On the other hand, collective autonomy and collective agreements are the most appropriate instruments for determine wages and establish a regulation adapted to each sector or company, it can be revised periodically. Collective autonomy is the preeminent source of the salary structure and it is also the best way to protect the living wage in each sector. Collective subjects are entitled to negotiate the amount and composition of wages. The collective agreements unify the structure of wages in each sector or company, especially the amount of the base salary and the determination of wage supplements.
Collective bargaining has no concessions about conceptual definition of wages, or the definition of the general concept of base salary and wage supplements, or the types of these that exist, however it has an important role in the development of these concepts. Specifically, collective bargaining defines what the base salary is. It also determines the existence of wage supplements and the legal status of each.
The collective autonomy plays a very important role in the context of setting the amount of the salary. The agreements determine what should be paid for each of the items that exist in the structure of the salary in each case. The law only sets minimum guarantees

for workers. That is why collective bargaining complements the state standard. Collective autonomy is the most appropriate instrument to ensure uniformity in each sector or company, it is also essential to ensure that the minimum wage is sufficient.
Collective agreements establish the base salary according to the unit of time, in that context supplements are calculated. However, there are collective agreements which set wage differentials. In these cases, the new workers receive lower wages than older workers.
In some cases, collective bargaining contributes to strengthening the corporate powers, which becomes an important element in personnel management policies.
The employment contract plays an important role in the process of wage determination too. The employment contract is a manifestation of the autonomy of the parties (worker and employer). The Workers' Statute provides that, in the absence of a collective agreement, the salary structure will be determined by the contract. The contract can´t be less favorable than the provisions of the law or collective agreements, but it may be higher or different and it can be adapted to the needs and peculiarities of each case. The contract may set the salary if it is greater than the salary determined by collective bargaining. This improvement can be express or implied and the employer is not entitled to remove such improvement, unless this is made through: a) the mechanisms of compensation or absorption, b) the application of Article 41 of the WS c) novation of the contract. An individualized salary, established by contract, refers to a specific worker, so it can´t be extend to other workers in the same category. However, the individual autonomy must not entail any discrimination.
In conclusion, law regulates the salary, it protects the wage credit as a guarantee, and it sets the minimum wage (SMI). Collective agreements determine the amount of the salary, set the salary structure and articulate different levels of negotiation. Finally, the contract improves the worker's wages, it also determines the salary structure if there is no regulation of the case by the collective agreement.
Nonetheless, the sources of the salary are very dynamic, thereby; the higher sources project their effects on the lower sources. For example, the collective agreement establishes a certain rate of pay, then it is improved by the individual autonomy and finally this amount is again increased by a conventional wage increase. In this context appears the mechanism of compensation and absorption. This mechanism acts when the wages are more favorable to workers than the wages established by law or agreement. If the base salary or the supplements are higher than the minimum required by law or agreement, they can be absorbed and compensated as a whole. If applicable, the employer must make the necessary calculations to determine the most favorable wage for the worker. The mechanism can´t be applied if the law doesn´t change. On this basis, the improvement made by law may increase the employee's salary or it may be absorbed or compensated. The new quantity should be compared to the amount of the contract, both are calculated as a whole (the total amount that the worker receives in a year).So, the legal improvements are absorbed by the improvements of the contract, not added. The employer can waive the mechanism of absorption and compensation.

3- The principle of equal treatment in terms of pay

The specific amount of the salary of each worker refers to the provisions of collective bargaining or employment contract. Nevertheless, in the legal regulation is established certain type of general principles, which determine qualitatively the determination of the wage. Apart of the quantitative limitation derivative of the fixation of the minimum wage, some general principles are valid too, it creates limits between that stands out: the principle of proportionality, major effort or dedication and prohibition of discrimination.
The article 28 of the Workers Statute establishes the following: "The businessman is enforced to pay for the presentation of a work of equal value the same remuneration, satisfied direct or indirectly, and anyone that is the nature of the same one, wage or extrasalarial, without one could produce some discrimination because of sex or in none of the elements or conditions of that one."
The mentioned rule constitutes a specialty of the generic rule contained in the articles 14 Spanish Constitution and 17 Workers Statute. It is a consequence of the special attention that legal Spanish system has given and is giving to the fight against the "discrimination because of kind ".
Given this specialty, are necessary some succinct references of the principle of equality. According to the article 28 of the WS, there are two questions which are very relevant at the moment of proceeding to the interpretation and application of them. The first question is about the development in the context of discrimination and indirect discrimination; it expresses the same criteria that determine the value of the work to determine if there is wage discrimination. The second issue concerns the concept of pay in this particular field.

1. Principle of equality and remuneration

The article 14 of the Spanish Constitution and the labor regulation do not impose an absolute equality of treatment, differences are admitted not only between suppositions of different facts, but also between equal situations providing that should base in reasonable and proportionate criteria. In addition, the principle of equality is not applied with the same intensity to the deprived relations, that is to say, to the relations between individuals. In this type of relations, the principle of equality is limited by the collective autonomy and by the contractual freedom, this implies that this principle is applied with a different intensity among individuals and public administrations.
The principle of equality in the field of labor relations is confined mainly to the exclusion of any unequal treatment based on discriminatory grounds, in this case about sex, or business decisions that are based solely on sex.

Public administration, as an employer, is not governed by the principle of autonomy, but is fully subject to the law (Article 103.1 EC), which implies the explicit prohibition of any arbitrariness (art. 9.3 EC) and its relationship with the principle of equality in front of law. The Administration does not enjoy as much freedom as the employer to establish wage differentials between workers.

In reference to conventional standards of wages, under Article 37 EC, the agreement is incorporated into the legal system. It is an essential source of labor system, so that, like other standards, is subordinated to the demands of higher laws and to the provisions of the EC and WS.

But, the collective bargaining is also a manifestation of the private autonomy, therefore the application of Article 14 EC to the collective agreement cannot have the same scope here than in other contexts.
The Constitutional Court, in STC 2/1998, says that "the collective agreement, but must comply with the requirements of the right to equality and non-discrimination, it cannot have the same scope as in other contexts, as in the field of private relations, in which the collective agreement is incardinated, fundamental rights including equality must be applied subtly, making it compatible with other values that are rooted in the principle of autonomy. "This agreement establishes collective differences in working conditions "but they must be reasonable in accordance with the values and interests that must be considered in this area of social life, which include the type of work performed, its performance, the economic capacity of the company, the contract or bargaining strength of the parties, cost of living, etc.. The differential treatment is not a sign of discrimination must meet objective and sufficiently justified. "(STS 22.7.1997)

Article 14 EC determines the prohibition of discrimination, which is especially relevant for private relations. While the principle of equality binds the government and the collective agreement, the prohibition of discrimination (on the special intensity of protection) is projected into the sphere of private relations. "(STS 11.11.2008).

1.1 The double wage scales

The establishment in the collective agreements of remunerative differences between workers of the same company depending on the date of revenue in the same one is known as "double pay scale ". It is a question therefore of a pejorative remunerative treatment motivated in the date of revenue in the company, since the realized work is the same that the realized one for other workers. But this wage differentiation in date of revenue is not a problem of wage discrimination, since the motive of the difference is not the sex or another prohibited factor, but the application of the principle of equality. In such all that, the unequal treatment must obey an objective and reasonable justification and the principle of proportionality must be observed between the difference of treatment, the motive that justifies it and the result of the measure.
The objective and reasonable justification that legitimizes the remunerative differences motivated in the date of revenue in the company can be the creation of employment, that is to say, measures for the effective increase of the insole. The temporary duration of the measure must be valued since it affects in the principle of proportionality. Definitively, the double pay scales will not damage the principle of equality depending on his causality and duration.
It is necessary to mention the existence the conventional procedure that claims a progressive remuneration subject to criteria of antiquity. Respect of this rule, the Supreme Court understands that it does not damage the principle of equality and not discrimination, since the antiquity is an objective and reasonable reason that justifies the remunerative treatment (STS on October 13, 2004). Nevertheless, when the double pay scale has his origin in the temporary / indefinite duration of the contract, the

jurisprudence of cassation understands that objective reason does not meet to justify the differentiated treatment since the temporality of the labor link does not legitimize the unequal treatment (STS on September 27, 2004).

1.2 Wage discrimination. The predominance of the indirect discrimination

Article 28 of WS concerns the scope of work and the lack of pay discrimination. The discrimination is characterized by the utilization of a certain feature or social condition of the person, in that case the sex, as criterion that determines the attribution of a differentiated treatment, prohibited for supposing a prejudice or injury of the rights of the historically victimized group.

The article 28 WS refers to the labor area and to the antidiscriminatory guardianship in remunerative matter. The businessman is forced to give the same remuneration not for equal works, but for presentations of "equal value ". The guardianship against the wage discrimination because of sex understands "those suppositions in which there takes place an unequal valuation of not strictly equal but equivalent works or of equal value from the point of view of the nature and conditions of presentation, in whose unequal valuation is the determinant element the sex or factors linked to the same one." (STC 145/1991).

The antidiscrimination protection of Article 28 includes direct discrimination (adverse treatment against other comparable situation on grounds of sex) and indirect (the one situation where a provision, criterion or practice that creates a disadvantage on grounds of sex, unless that provision , criterion or practice is objectively justified in response to a legitimate aim and the means of achieving that aim are appropriate and necessary). Wage discrimination by gender usually implies, most of the time, indirect discrimination.

Following the jurisprudence of the Court of Justice of the European Union, the proof of the existence of indirect discrimination must be built on the basis of the following jurisprudential concept. While direct discrimination is caused by differential treatment based on sex, indirect discrimination does not have to be caused by a discriminatory motive, but will produce discriminatory effects.
The Constitutional Spanish Court follows the doctrine of the Court of Justice of European Union, in relation to the indirect discrimination, establishing a series of subsequent steps at the moment of determining the existence of this modality of discrimination:

1. The existence of unfavorable effects
2. Collective, serious or persistent effect
3. Differentiated treatment lacking in a well-taken reason

Therefore, the basic elements of the prosecution are:
There must be a difference in treatment between groups or categories of persons, the objective situations should be homogeneous or comparable, ergo, the comparison cannot be arbitrary or capricious. In addition there must be an objective and reasonable justification.

> According to art. 14 of the Spanish Constitution, the TC is usually focused on the prosecution of an objective and reasonable cause to justify the hypothetical

existence of indirect discrimination. For example, the STC 145/1991, the case reflects the doctrine through the following four claims:

1. The indirect discrimination comes constituted for " the formally not discriminatory treatments which produce , for the real differences that take place between workers of diverse sex, unequal damaging consequences for the differentiated and unfavorable impact that formally equal treatments or reasonably unequal treatments have on the workers of one and of another sex because of the difference of sex ".
2. "The constitutional principle of not discrimination in wage includes all the suppositions in which there takes place an unequal valuation of equivalent works or of works with equal value from the point of view of the nature and conditions of the presentation because of sex. "
3. The criteria of physical effort as rationale. "Physical capacity of workers cannot be defined only in response to the values of one sex" "because the only endpoint corresponds to a male worker's standard."
4. Concern of arranged in the collective agreements, the Constitutional Court understands that " the right to the collective bargaining dedicated in the art. 37.1 Spanish Constitution, it does not involve, in any way, that the collective agreements are not subject to the rules of normative hierarchy so that they have to yield, necessarily, before the fundamental right dedicated in the art. 14 Spanish Constitution. "

1.3 The determination of the work of "equal value "

The legislation does not provide a definition of 'work of equal value'; only the Article 28 WS states that the same amount should be paid for work of equal value, but the Constitutional Court has discussed how 'work of equal value' should be understood. In Decision 145/1991 the Constitutional Court analyzed a case in which the professional category of 'cleaner' at a hospital, a category which was only fulfilled by women, earned between 33 % and 35 % less than the category of 'laborers and warehouse workers' occupied by men. In this decision the Constitutional Court stated that 'work of equal value' means that: a) The work must not be strictly equivalent, b) 'Equal value' is understood from the point of view of the nature of the work and the conditions of service. That is, its nature and conditions should be equivalent; c) In the assessment of work any criteria linked to the sex of the workers cannot be used, and in particular criteria linked to womanhood, because they reflect social or economic underestimations of women's work. Also Case 58/1994 from the Constitutional Court (in the case analyzed basic salaries were the same, but the quantity and quality supplements were higher for categories occupied by men) indicated that the evaluation criteria used to assess the work must be neutrally based on the attributions of both genders which are equally predicable.

To fix the various salary levels, according to job classification, must be avoided male differentiation criteria and must be replaced by neutral criteria of gender.

The employer must prove that the wage differentials between different sexes respond to different value jobs. This difference in valuation must be based on neutral criteria. The employer must prove that the salary does not harm the underrated category, revealing

the criteria of: "major remuneration to the privileged sector", which is required to prove that the remunerative system is transparent.
The Constitutional Court in the STC 250/2000 has indicated that the utilization of the physical effort like criterion of determination of the professional classification and remuneration has to be rejected by general character, for not considering it to be a neutral element from the point of view of the sex, though it is possible to admit with exceptional character that it is a question of an essential factor in the task to realizing.

2. Positive actions and protective Measures

The recognition of equal payment between men and women express in the articles 14 and 35 of the EC, and in the art. 28 of the WS, implies the adoption of positive actions that make effective equal pay. On 22 March 2007 entered into force the Law 3/2007 (LOI) which First Title is entitled "The principle of equality and protection against discrimination" and it defines the basic legal concepts and categories related to equality and the principle of equal treatment and opportunities for men and women, the direct and indirect discrimination, sexual harassment and harassment based on sex, and positive actions. Article 11 regulates the positive actions as follows: "In order to give effect to the constitutional right of equality, governments take specific measures in favor of women to correct situations of inequality in fact patents on men . These measures, which shall apply if such situations persist, must be reasonable and proportionate to the objective in each case. Also private individuals and legal entities may adopt such measures in the terms set out in this Act ".

The application of positive action generates much social controversy. These actions are considered discriminatory situations intended to rebalancing measures aims to equate the situation among women, socially disadvantaged, and men. Since these measures are designed to accelerate the achievement of equality in a particular area there is a risk of creating a new discrimination of gender against women as beneficiaries of these positive actions.
Prior to the entry into force of the LOI, isolated measures considered "positive actions" coexisted with other "protector" measures whose purpose and effect was questionable because it preserved the social roles attributed to women. The most controversial cases were those relating to night work, to complement female daycare staff and transport plus night.
For matters related to protecting women's night work, the constitutional jurisprudence considers in STC 81/1982, of 21 December that the equalization overhead of the men with the women bases in that not " the equality must be established obtaining to the feminine personnel of the benefits that the past had acquired, but granting the same ones to the masculine personnel that realizes work identical and professional activity, without prejudice that in the future the legislator could establish a regime different from the current one, providing that he respects the equality of the workers. "
As for the called complement of day-care center of the feminine personnel extended also to the men widowers, the Constitutional Court in the STC 128/1987, of July 16 thinks that being the women those who have to make compatible the familiar obligations with the labor ones, cannot understand discriminatory the measures destined to avoid a social practice directed to removing the woman of the labor market.

The National Audience in judgment of February 7, 1996, in the same line that the constitutional jurisprudence, he argues that " they do not break on the principle of equality the measures to relieve the situation of certain social groups as the women who are placed in position of undeniable disadvantage in the labor area ".
In the STC 28/1992, of March 9, in Constitutional Court, as for the bonus of night transport granted to the women, he understands that " on the conventional norm having connected with the eventual dangerousness of the transport in the night, it splits of a distinguishing notion of the woman the one that is supposed holds to a few risks that never threaten the male, and by it itself it has to be qualified like of a protective norm of the woman ".

4- Flexible pay systems.

1. Salary Related to company's results.

The new wage politics are looking for a link between the worker´s pay and the result of the company, so there are new forms of payments whose juridical nature is becoming a problem by the difficulty of its determination; it´s also difficult to concrete the juridical consequences of these new payments.
The payment participation has been developed in the framework of the payment politics designed by the huge commercial companies in order to link the compensation of their board of directors with the interests of the shareholders. These forms of participation have also been revealed as effective instruments in order to attract to good professionals, to keep the best employees/office workers and increase the productivity of the job.
The main reasons to introduce this type of payments have been:
- Giving an answer to the main economic efficiency requirements for the companies.
- Getting to maximize the profit of the shareholders.
- Compensating suitably the effort of the board of directors and the office workers in the company.

A. Within the formulas of the payment participation of the workers in the company we can identify two groups according to the participation, either in the profit or in the ownership.

A .1 The participation in the profit was already regulated in 1948 as a wage complement; the High Court has explained that "the payments of participation in the profit must be assimilated to the extraordinary gratifications". The participation in the profit is a genuine form of wage; moreover it is compatible with the demands of the contract as long as the worker has guaranteed at least a minimum pay which makes him/her to be immune from the risks of the company.

A.2 The participation in the share capital. This system is nowadays found in companies belonging to specific sectors, such as new technologies - Internet, telecommunications, computer science-. Within the participations in the capital, we can find several systems:

- Distribution of actions.
- Delivery of obligations changed into actions.
- Options on/over actions.

These different pay systems reach a high complexity because they are connected both to labour law and financial law. Even the juridical/legal classification of these pay systems is difficult (being wage or extra wage). In any case, if we recognize its wage nature, they should be included in the collective agreements.

The current tendency is considering the pay of the worker as a strategic tool for human resources instead of a labour cost. The objective is to encourage the motivation and increase the productivity of the workers and the competitiveness in the companies.

2. Salary Related to the performance of the individual employee or of the team.

The most usual way of quantifying salary is by means of using a time unit (salary-per-time), in which the salary is related to the amount of working time. Time unit comprises a period of time longer than a day and shorter than a year, but it has always to be paid monthly. However, this kind of salary considers other factors such as diligence within a normal working session, that is, the usual salary for a normal performance.
In case of part-time jobs, its remuneration will be proportional to the working time.

Salary and performance.

This kind of salary depends on the organised productive system and remuneration will vary according to production and the required excellence within a particular period of time agreed by both employer and employee.
The set of rules for this pay system is complex and it is generally adapted to the particular industrial or commercial process. It takes into account the participation or revision of the organisation systems, task control, incentive payment and so on (arts. 64.1.3., d y e, WS Y 10,3 ,3º LOLS). The key point in this kind of salary is to establish the minimum required level so as to allow that a worker can earn a higher salary if his/her performance is superior to the stipulated minimum required level.

In general trade unions are reluctance to salary related to performance unless they are controlled in order to avoid abuses in the work setting or in its economic quantification by collective agreements. This method has its real reason in enabling a higher income in the balancing of retribution in time. When it is required a higher performance to established wage for full-time, the result should also enable a higher income.

Mixed wages tend to be frequent and they are set within the freedom of configuration of the wage that allows the art. 26.1 WS.

5- Variation of pay in time of crisis.

Individual remuneration (contract amendment)

Spain is passing through a moment of economic crisis, which also causes secondary consequences in the private economy. One of those is the economic performance of companies, especially when the subject is the payment of the employees.
In cases of economic crisis which affects a company, we ask ourselves if the individual remuneration could be changed by a contract amendment. Well, according to the new labour law reform of 2012, which made changes on a several number of articles that presents mechanisms that reduces the salary of the employees.
One of those mechanisms is the article 41.d of the WS which authorizes the employer to make unilateral changes in the contract. Article 41 WS allows contractual amendments which are substantial and on certain matters, including the remuneration system and the quantity of the salary.
Article 41 of the WS regulates the following aspects:
- Sets out what is meant by substantial changes: Those conditions are the ones that, once changed, there is a transformation of the basic aspects in the labour relation, in other words, those are substantial changes.
- Establishing causes of justification that allow these modifications
- Regulates the types of modifications - dividing between individual and collective
- Establishes the procedures and controls over the changing business decision - individual or collective.

The employer can-not make substantial modifications without a justification. Justifications are all legally listed in the legislation (article 41.1 of the WS):

- Proved economic reasons
- Technical reasons
- Organization reasons or
- Production reasons

In other words, the employer cannot make any substantial changes, except under any of these causes.

Furthermore, the employer or the company should prove that is passing through economic difficulties, competitiveness problems or low production.
The substantial modifications, in that case, the changing of the remuneration system or the quantity of the salary, can be individual referred to the conditions of work, either given to the worker because of a personal merit or agreed in the employment contract

(individual) or recognized to the workers by a collective agreement. Changing working conditions recognized in a collective agreement negotiated under Title III of the WS can only be made through the procedure provided in Article 82.3 WS. This procedure is a mechanism for exemptions of agreements negotiated under Title III of the WS.
The difference between the individual and collective modifications is basically the number of employees that are affected with them.

- Collective

a) If on a period of 90 days, affect at least 10 employees in a company that has less than 100 employees.
b) 10% of employees in a company with 100-300 employees.
c) +30% in a company that has more than 300 employees.

- Individual

If on a period of 90 days, does not affect the numbers written above. (article 41.2 WS).

The procedures

- Individual

If the employer believes that there is cause ("proved economical reasons") for justification may unilaterally modify any substantial condition of the contract (except if the condition has its origins in a collective agreement signed as title III WS).

The management of the company must notify the employee and the worker´s representatives about the salary reduction or other change of the working conditions at least 15 days in advance before the change takes place (article 41.3 of the WS).

The unilateral decision of the entrepreneur does not need to attempt to deal with the representation of workers and is immediately executed.

- Collective

If changes are collective the company will open a consultation period "not exceeding 15 days," with the employee representatives. The consultation period will analyze the causes for the business decision and action to take. The purpose of consultation is to reach an agreement between employer and employee representatives. When on the consultation period arise discrepancies, you can go to mediators or arbitrators to help resolve the conflict. If after the consultation period no agreement is reached, the employer may unilaterally change working conditions, in this case the rate of payment.

Contractual Resignation

Is important to say that, if the employee doesn´t like the diminution of the salary or the changes of the labour conditions, can request the dismissal of the company, with a 20 days per working year compensation, with a maximum of 9 months.

Changing collective agreements remuneration (collective agreement and its impact on the contract).

Collective agreements negotiated under Title III of WS have effectively "erga omnes", ie apply to all employers and workers within its territorial and on a sector level (example collective agreement of Education-sector-of- Andalucía-territory -), whether insured or not the unions or business associations that have negotiated and signed the collective agreement. This rule has two major exceptions. The first is a mechanism derogating from agreements negotiated under title III of WS applicable only when an economic crisis. The second is the possibility of negotiating a collective agreement and that "move" to a sector partially collective agreement applicable to that company.

The mechanism of non-application of a collective agreement has the following regulation on the WS Article 82.3: a) the agreement may be a company agreement or a sector one; b) requires that the company is in "a negative economic situation", that means the existence of losses current or planned, or persistent decrease in the level of income or sales, considering the decline as persistent, if it occurs in two consecutive quarters, compared to the same quarter of the previous year; c) matters that are subject to derogation only are set forth in Article 82.3 WS, among which is the pay system and the amount of wages; to proceed to the derogation the agreement is necessary to open a negotiation period of 15 days with representatives of workers, d) if during that period an agreement is not reached on the new working conditions applicable to the company, they must go on to the Joint Commission from the collective agreement, to non-jurisdictional procedures (mediation or arbitration) or the National Advisory Commission on Collective Agreements.

The second mechanism is the ability to negotiate at any time and without the concurrence of any cause (economic or other) a collective enterprise or group of enterprises agreement although there is a sector collective agreement applicable to that company or group of companies. This mechanism, known as "applicative priority of the enterprise agreement" is an exception to the general rule that, if there is an agreement in force and applicable to a sector is not possible to negotiate other agreements for the same area. WS Article 84.2 regulates the "priority of applicative enterprise agreement" and was incorporated into the WS with the labour reform of 2012 in order to allow changes in companies and adapt to the crisis. The possibility of negotiating a collective agreement at company level through this procedure is limited only to a limited number of conditions, among which is included the amount of the base salary and wage supplements.

6. Consequences of non-payment of wages by the employer/enforcement of pay

The debt position that the employer takes as a subject of the employment contract involves, among others, the obligation to pay, which is an obligation assets. The performance of the duties of the employer is guaranteed by the order, which imposes compensatory and administrative responsibilities.

The salary, as a consideration of the employer, is functionally dependent on the worker's basic benefit. The full compliance of the salary, as the object of the obligation of the employer, required to be paid at the appropriate time and place and be documented in a certain way.

The liquidation of the wage, the time, the place, the means of payment and, even, the consequences of the non-payment or delay in the payment are regulated in the articles 26, 29 and 50 Worker Statute.

The article 4.2 of the Worker Statute establishes the rights of the worker, the paragraph f) specifies as right of the worker the punctual perception of the remuneration. The article 29.1 of the Worker Statute establishes the obligation of punctual payment of the salary; the breach of this creates default, with independence of any relation with the managerial fault. The WS signals an interest tied to one year in accordance with Article 29.3 which provides that "the interest for late payment of wages shall be 10% of the debt." The legislature chooses a penalty assessed and referenced to a time period. The concept of "best interests" of the article is legally equivalent to the compensation for the delay in payment. This will be determined in proportion to the delay.

The arrears is required only when appears a delay in the payment of wages and it will be affected in proportion to elapsed delay time, up to 10%. Any other method of calculation would benefit the person who is late fulfilling its obligations.

To apply the default of the employer for lateness in the payment of wages must be appreciated three conditions: a) must be wage debts, overdue receivables and liquid, b) the interest of the rule is not a charge independent of the duration of the delay (is an interest that is related to the duration of the infringement, the ten percent in annual calculation) and c) to determine whether an employer is in default of its obligations must be weighed the circumstances of each case, even the subjective.

Not appropriate to order the payment of interest for late payment of wages judicially recognized when there is controversy about the amounts due or when the judgment is not supported by the defendant in its entirety. The late payment penalty is also applicable to general government.

The default starts from the moment that the wages stopped him paying, not from the requiring a preliminary examination or judicial claim, having his dies ad quo in the date in which such a debt should have satisfied punctually and totally, and his dies ad quem in the date of the judgment that declares the positive existence of such a principal debt.

1. Remedies before court

One of the consequences of non-payment of wages is the possibility of claiming the amount due. The procedure for performing this action can be performed by procedure (Article 101 of the LRJS) or through a regular process (Articles 80 et seq.). The procedure is agile and fast, it does not require the presence of counsel or solicitor. The procedure requires the following:

- The claim is attributed only to the worker

- The defendant employer must not be declared bankrupt;

- The amounts have to be determined, due and payable and not exceeding 6000 Euros.

- Claims for payment are limited

- The edictal communication is excluded

The Law excludes expressly the claims of collective character that could present the representation of the workers and the claims against managing entities and collaborators of the National Health Service. This judgment serves to help the worker when, under the term of the contract of employment, he / she does not receive the corresponding monthly wages. When the worker suffers delay in the payment of his wage, he can claim the amount due. If the amount due exceeds 6000 Euros or the company is insolvent, the claim must be exercised by ordinary process. Under Article 63 of the LRJS, is necessary try to conciliate with the company. If the company, duly summoned, fails to appear, the conciliation is considered tried without effects, ex art. 66.3 LRJS. Thus begins the regular process, which shall be made in accordance with Articles 80 and following of the Act.

A novelty of the Law Regulating the Social Jurisdiction is the ability to add dismissal and claiming payment due until the date of termination of the employment contract ex art. 49. 2 WS, however, if in the opinion of the judge, the complexity of the concepts may delay sentencing, the claim of the amount will be processed separately, ex art. LRJS 3.26. The action of the extinction of labor, requested by the employee for unpaid wages, and the action for recovery of wages due (including amounts that accrue after the filing of the complaint) are cumulative .art. 26.3, paragraph 1.

2. Valid reasons for nonpayment (strike)

For the application of Article 30 WS is necessary to distinguish between cases where non-striking workers cannot work because of the strike, and cases in which workers cannot return to the job, because productive activities cannot be resumed after the strike. The non-strikers have no right to charge unless there is the possibility of imputing that fact to the company, like in cases in which there is a defect in the direction, and the circumstances wrought by strike situation could and should be provided (STSJ Andalusia November 25, 1994). In respect of cases in which workers cannot be incorporated into their jobs after the strike, it should be noted that no one is entitled to a total compensation according to art. 30 WS, but the Court has understood that the working hours invested in the strike are deducted from the salary (STSJ May 22, 1996).

3. Constructive dismissal

The late payment legitimizes the worker to enforce the obligation to pay the salary arrears charges and to request the termination of the employment contract, based on

business failure, but does not require a specific defaulting, and gives to the worker the entitled to receive compensation for unfair dismissal.

The article 50.1.b) of the Workers Statute contemplates as extinctive reason, to instance of the worker, the breach for the businessman of his remunerative obligation. Mentioned article is in correspondence with above. 4.2.f) of Workers Statute, in which there is gathered one of the basic rights from the worker " the punctual perception of the agreed remuneration or legally established ". The worker does not have to prove the managerial breach, is enough that it invokes the delay in the credit of the wages, corresponding to the businessman to demonstrate his effective payment.

Not all non-payment or delay in payment extinguishes the indemnified; certain assumptions must attend. First, the pay debt must be unchallenged. For the exercise of the action is required the collectability of the debt, so extinction cannot prosper if assists dispute over the reality or the amount of the debt. Second, the debt has to be of a salary. The non-payment or delay should occur in the salary, under the terms of Article 26.1, including base salary and wage supplements, but not other fringe perceptions, as the payment of temporary disability even if the employer is bound to payment. The non-payment of the amounts can cause a resolutive action based on Article 50.1.c) WS.

Non-payment of wages cannot be a mere sporadic delay, but it has to be a continued and persistent behavior, a continuing duty to pay wages due.

The severity of the behavior shapes in each case the concurrence of business failure, but it is not strictly necessary to exercise the adjudicative cause. Guilt is required to generate it, and it is immaterial whether the continued non-payment of wages or its delay can be determined by the poor state of the company.

Article 50.1.b) WS presents a clear similarity to the constructive dismissal of English law, and this is because, in both laws: 1) the salary is an essential contractual condition whose breach by the employer entitles the employee to take serious and drastic actions against the employer, 2) the conduct of the employer must affect the parties' rights, and 3) small breaches may become relevant when assessed as a whole.

As mentioned, there are wage delays that cannot be applied to the indemnified termination of the contract. This happens in a case in which the worker suffered, since January 2010, delays in paying wages that are caused by the economic situation of the defendant. Following a meeting between the company and the workers, it was agreed that salaries and arrears would be paid when the company earn revenue. At the time of the trial were satisfied regular wages, except for the last month as well as a number of differences of agreement. Based on wage arrears, the actor demanded the termination of his contract with compensation for unfair dismissal.

The first instance held that the delay responded to their economic situation and had been taken over by workers, so the application was dismissed. After supplication appeal, the High Court dismissed the application because he understood that this assumption is not subsumed in the legal concept of breach of contract. A dissenting against the majority opinion of the Social Chamber of the Supreme Court was made, he understood that the

fault of the company is not required, because is necessary to take into account the financial need of the employee.

The criterion followed by the particular vote represents the doctrine of the Supreme Court, which understands that is necessary to omit the valuation of the reasons and the willfulness of the conduct of the company to grant to the worker the extinction indemnified with foundation in the delay in the payment of the wages.

But here we are before a special circumstance that consists of the fact that existed an agreement between the workers, his representatives and the company of paying of by installments form and in conformity with the income. Provided that it was a question of a resignation that it was concerning only the punctuality in the payment of the wages, it affects directly on the reason of the paragraph b) of the number 1 of the art. 50 Worker Statute.

Regardless of the application for termination of contract by the worker, Article 8.1 of LISOS qualifies as a serious offense "default and repeated delays in the payment of wages.