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THE DIGITALISATION OF EVIDENCE IN LABOUR PROCESS IN SPAIN

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THE DIGITALISATION OF EVIDENCE IN LABOUR PROCESS IN SPAIN

LA DIGITALIZACIÓN DE LA PRUEBA EN EL PROCESO LABORAL ESPAÑOL

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SUMMARY: I. THE ‘DIGITAL EVIDENCE’ AT LABOUR PROCESS. 1.1. Definition and general requirements. 1.2. Way to incorporate evidence into the process. 1.3. Probative value. II. CONCLUSIONS. III. BIBLIOGRAPHY.

ABSTRACT: The development of information and communication technology since the turn of the century has generated new technologies in a short space of time which have acquired a growing presence in companies. Currently, the influence of ICT reaches practically all organisations and business activity and it can also become a mechanism through which the sending and receiving of certain communications made by the employees in the workplace can be recorded. Besides, these tools facilitate the recording of behaviours which constitute punishable infractions on the part of the employees or the Company itself. Their evidentiary value is clear, so logically, these new tools must have a place in the legislation of the means of evidence.

RESUMEN: El desarrollo de las técnicas de la información y la comunicación desde el cambio de siglo ha generado en poco tiempo nuevas tecnologías que han adquirido una presencia creciente en las empresas. En la actualidad, la influencia de las TIC alcanza a la práctica totalidad de las organizaciones y de la actividad empresarial, pudiendo convertirse en un mecanismo a través del cual se puede registrar el envío y recepción de determinadas comunicaciones realizadas por los trabajadores en el ámbito laboral. Además, estas herramientas facilitan el registro de conductas que constituyen infracciones sancionables por parte de los empleados o de la propia empresa. Su valor probatorio es evidente, por lo que lógicamente, estas nuevas herramientas deben tener cabida en la regulación de los medios de prueba.

KEYWORDS: Labour process, evidence, new technologies, digital evidence.

PALABRAS CLAVE: Proceso laboral, medios de prueba, nuevas tecnologías, prueba digital.

I. THE ‘DIGITAL EVIDENCE’ AT LABOUR PROCESS¹

1.1. Definition and general requirements

The study of current regulations on these modern means of proof requires addressing fundamentally, the regulation contained in Spanish Law 36/2011 of 10 October, *reguladora de la Jurisdicción Social*² (LJS),³ which deals with the means of proof in Articles 90 to 96, supplemented, where appropriate, with the rules on preparatory acts and anticipation and assurance of evidence (Articles 76 to 78), the rules on their use in the trial (Article 87) and the rules concerning final proceedings (Article 88)⁴. All this, with the usual supplementary application of the regulations contained in Spanish Law 1/2000 of 7 January, *Enjuiciamiento Civil*⁵ (LEC)⁶ (Chapters V and VI, Title I, Book II, Articles 281 to 386).⁷

The first thing that is notable about the aforementioned procedural regulations is the absence of a legal definition of what should be understood by ‘digital evidence’. Actually, as doctrine has emphasised,⁸ there is no legal norm that has assumed such a task; in order to fill this gap, it is usual to resort, with more or fewer qualifications depending on the author, to the definition provided by Council Decision 2002/630/JHA July 22 2002 on police and judicial cooperation in criminal matters,⁹ which identifies it with ‘the information obtained from an electronic device or digital medium which serves to acquire conviction of the certainty of a fact’.

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1 This paper is one of many results of the National Research Project carried out by MINECO (Spain), entitled ‘New (newest) information and communication technologies and their impact on the labour market: emerging aspects at the national and international levels’ (DER2016-75376-R), led by Prof. Lourdes Mella.

2 This law regulates the Spanish Social Jurisdiction.

3 See <https://www.boe.es/buscar/act.php?id=BOE-A-2011-15936>.

4 Comments and case law on these rules in GARCÍA DE LA CALLE, J. R., “De las pruebas” at MOLINS GARCÍA-ATANCE, J. (Dir.) y VVAA *Comentarios a la Ley Reguladora de la Jurisdicción Social*, Laborum, Murcia, 2020, pp 340-366.

5 This law regulates Spanish Civil Procedure.

6 See <https://www.boe.es/buscar/act.php?id=BOE-A-2000-323>.

7 On the peculiarities of evidence in the labour process, see LOUSADA AROCHENA, J. F., ‘El acto del juicio: Fase de prueba’, in LOUSADA AROCHENA, J. F., RON LATAS, R. P., BELLIDO ASPAS, M., and RODRÍGUEZ MARTÍN-RETORTILLO, R. M., *Sistema de Derecho Procesal Laboral*. Ediciones Laborum, Murcia, 2015, pp. 181-200.

8 On the concept of digital evidence, see BUENO DE MATA, F. and BUJOSA VADELL, L. M., *Prueba electrónica y proceso 2.0*, Tirant lo Blanch, Valencia, 2014, pp. 95-105.

9 Decision 2002/630/JHA Council, July 22, 2002, relating to the police and judicial cooperation in penal matters (AGIS), Official Diary L 203, August 1, 2002.

Regarding the possible means of electronic evidence – aside from the existence of more elaborate doctrinal classifications¹⁰ - both the LJS and the LEC distinguish between two fundamental categories for the purposes of articulating their legal regime: a) a first group is composed of the means of reproducing the word, the image and the sound, that is, the so-called audio-visual media; and b) the second group comprises the means or devices for archiving and reproducing data or, rather, according to the terminology of the LEC, ‘the instruments that allow archiving and knowing or reproducing words, data, figures and mathematical operations carried out for accounting or other purposes, relevant to the process’, such as, for example, computer hard drives, memory keys, etc.

All this without representing, of course, a *numerus clausus*, an idea that translates from the mere interpretation of Article 299 of the LEC, which after citing in its first two sections the ‘traditional’ means of proof (questioning of the parties, public and private documents, expert examination, judicial recognition and cross-examination of witnesses) and the means of reproducing the word, sound and image, as well as the instruments that facilitate the archiving and knowledge or reproduction of words, data, figures and mathematical operations carried out for accounting or other purposes, relevant to the process, adds a third paragraph in the qualification which states: “When by any other means not expressly provided in the previous sections of this article, certainty could be obtained relevant facts, the Court, at the request of a party, will admit it as evidence, adopting the measures that are necessary in each case’. In other words, it clearly introduces the possibility that other, different means of proof may be admitted, which opens up the possibility of using in the process the new media and formats that the evolution of ICT can provide in the future. For example, geolocation devices¹¹ or drones, biometric control device, etc.¹², which previously did not exist, are now used as means of proof too.

On the other hand, its admission into evidence is not unconditional, so that the law requires, together with the already well-known requirements of utility and relevance in relation to the object of the process (Articles 87.1 and 90.1 of the LJS and 283 of the LEC), that the proof in question has, as it could not be otherwise, a lawful origin¹³. This is stated in Article 90.2 of the LJS, according to which ‘evidence originating or obtained, directly or indirectly, through procedures involving violation of fundamental rights or civil liberties, will not be accepted’¹⁴.

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10 Cf. BUENO DE MATA, F. y BUJOSA VADELL, L. M., *Prueba electrónica y proceso 2.0* cit., pp. 131-134.

11 For more information on geolocation devices as a means of control, see REYES HERREROS, J. ALCAIDE CABRÉ, L. “Geolocalización de trabajadores”, *Actualidad jurídica (Uría Menéndez)*, no. 52, 2019 pp. 71-76.

12 Cf. FERNÁNDEZ ORRICO, F.J., *Criterios sobre uso de dispositivos tecnológicos en el ámbito laboral*, Tirant lo Blanch, 1ª Ed, Valencia, 2021.

13 More about these requirements in TOSCANI GIMÉNEZ, D., “La validez de la prueba digital o electrónica en el proceso laboral”, at NORES TORRES L.E (coord), SALA FRANCO, T. (dir) *Problemas Actuales del Proceso Laboral: Homenaje al profesor José M.ª Goerlich Peset con ocasión de sus 25 años como Catedrático de Derecho del Trabajo y de la Seguridad Social*. Ed. Tirant lo Blanch, Valencia, 2020, pp 341-364.

14 On the collision with fundamental rights, see MELLA MÉNDEZ, L., “The digital evidence in the labour

1.2. Way to incorporate evidence into the process

From the point of view of the procedural mechanics, the request to incorporate any of this evidence into the process will follow the general rules¹⁵, that is, the appropriate moment will usually be during discovery, but it can also be requested in advance. For this, it is possible to resort to the request for preparatory acts and preliminary proceedings that are provided for in Article 76 of the LJS or, as the case may be, to the request for prior exhibition provided for in Article 77 of the LJS.

In both cases, both Article 256 of the LEC (referred to in Article 76 of the LJS) and Article 77 of the LJS expressly provides for the possibility of it being carried out using preferential recourse to copy thereof in electronic support. It should also be borne in mind that such a request may also be made by the parties during the proceedings provided they do so at least five days before the trial date (Article 77 in relation to Article 90.3, both of LJS).

In addition to the above, must also be that provided for in Section 4 of Article 90 LJS, pursuant to which: ‘When necessary for the purposes of the process, access to documents or files, in any type of medium, which may affect the personal privacy or another fundamental right, the judge or court, provided that there are no alternative means of proof, may authorise such action, by way of an order, after weighing the affected interests through a proportionality test and with the minimum sacrifice, determining the conditions of access, guarantees of conservation and contribution to the process, obtaining and delivering copies and the intervention of the parties or their representatives and experts, if applicable’.

In the workplace, at least, it is rare to resort to measures of early completion of the test or even to the insurance measures themselves (Articles 78 of the LJS and 293 to 298 of the LEC) except in the odd case in which the technological means are not in the possession of the proposing party and there exists – and it is confirmed - the risk of such devices being erased, altered or made to disappear in such a way that it would later become impossible to complete the test at the trial.

What is more common, when the parties intend to use in a judicial process, data, images, or files of various kinds that, like the contents or shared through social networks, web pages, or blogs¹⁶, usually have a temporary duration or even consist of telephone

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process and the fundamental rights of the employee”, at CARBY-HALL, J. and MELLA MÉNDEZ, L. (Eds.), *Labour Law and the Gig Economy Challenges posed by the digitalisation of labour processes*, Routledge, 2020, pp 233-246.

15 About procedural aspects, see VIDAL LÓPEZ, P., “La prueba digital en el procedimiento laboral” *Actualidad jurídica Aranzadi*, vol. 26, no. 952,2019, p. 11.

16 SELMA PENALVA, A., “Redes sociales, documentos virtuales y prueba digital en el proceso laboral del siglo XXI. Cambios sociales, avances tecnológicos e inseguridad jurídica” at GÓMEZ MANERSA, F. FERNÁNDEZ SALMERÓN, F.(coord.) *Modernización digital e innovación en la administración de justicia*. Aranzadi Thomson Reuters 2020, pp. 185-220.

conversations or message sent by SMS, email¹⁷, or WhatsApp, is that they resort, beforehand, to some means that enables them to record the content or status at a certain time. To do this, the data or files contained in the computer, phone or device in question is often printed on paper; a screenshot is printed; or a simple copy is made on CD, DVD, memory stick; or other more elaborate ways of dumping or cloning the device or disk where the data is contained, are used. In these cases, it is important to seek recourse to techniques, procedures and/or subjects that guarantee its authenticity and integrity, whether through the intervention of trusted third parties, specialist experts¹⁸ or even the intervention of a Notary.¹⁹ For this reason, the contribution to the ICT process, as will be seen, can present multiple modalities.

Thus, except in the very exceptional cases in which the anticipated practice had been agreed upon, after the trial, after the ratification of the claim (Article 85 of LJS), it passes properly to the evidentiary phase, regulated in Articles 90 and following of the LJS, which begins with the proposal by each of the litigants, which is relevant and useful. This provision states, on the one hand, that the judicial body will accept the evidence that the parties intend to use, ‘upon justification of the usefulness and relevance of the proposed proceedings’; and, on the other hand, that it may be admitted as evidence to accredit ‘the facts in dispute and the procedures for reproduction of the word, image and sound or of archiving and reproduction of data’; in addition, the evidence must be provided in ‘adequate support’ and make available to the court the necessary means for its reproduction and subsequent recording in the case file, adding that the opinions may be accompanied by reports or means of proof that it deems convenient to ensure its reliability.²⁰ It is quite common for the electronic evidence to be supplemented with another means of proof.

In particular, and in the case of instruments for archiving or reproducing words, data, figures, mathematical operations or the like, in accordance with the provisions of Article 384 of the LEC, ‘they will be examined by the court by the means provided by the proposing party or that the court decides to use, in such a way that the other parties to the proceedings may, with the same knowledge as the Court, plead and propose what is convenient for them’. In the precept, therefore, there would be room for the possibility of providing the electronic device itself in which such data is contained, or even a data archi-

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17 GONZÁLEZ GONZÁLEZ, C., Valor probatorio de los correos electrónicos. *Revista Aranzadi Doctrinal* num. 10, 2019 p. 6.

18 See Sentence of Galicia High Justice Court of November 24th, 2020 (Repertoire of jurisprudence Aranzadi no. 2021/387).

19 Cf. FERNÁNDEZ HERNÁNDEZ, C., ‘La práctica de la prueba digital’, *Diario La Ley*, no. 12, 2017, accessed at <http://diariolaley.laley.es/home/NE0001462459/20171121/La-practica-de-la-prueba-digital> [consulted May 29, 2018].

20 See Sentence of Galicia High Justice Court of March 11, 1994 (Appeal no. 248/1994).

ving instrument such as a CD, DVD or, more currently, a memory key. In these cases, if necessary, the software, application, key or decoder, etc., which enable or guarantee access to the data in question, must be provided. However, in practice, perhaps by assimilation with the documentary evidence, a copy tends to be brought to the trial and to the records, not of the instrument or electronic device, but of the data contained in the device in question, or what is the same, to print the data on paper as part of the submission of evidence, without the electronic support in the background, thus distorting the evidence and turning it all into documentary evidence²¹.

The same practice is adopted even with respect to those documents originally designed to dispense with paper support with due guarantees. This is the case with the so-called, strictly speaking, electronic documents.²² This term is used to refer to ‘information of any nature in electronic form, archived on an electronic medium according to a specific format and capable of identification and differentiated treatment’ (Article 3.5 of Law 59/2003, December the 19th, of electronic signature), whether public or private.

Another frequent assumption in which paper-based submission of evidence is used –therefore as a documentary - would be to accredit the content of conversations held on SMS, WhatsApp, or comments in forums, social networks or similar platforms in which we the image on the device’s screen through which the content is accessed is printed: the so-called ‘screenshot’²³. Now, the problem is transferred in these cases to the issue of the accreditation of its authenticity and therefore, the possibility of attributing or denying on this basis, probative value in the specific case. In this area, the Judgment of the High Court of Justice of Galicia of 28 January 2016 (Ap. no. 4577/2015),²⁴ which concerned a dismissal made by WhatsApp, states ‘... not only is it a valid means of proof, in spite of not being contemplated in the LJS, but it has already had normative implications [...]; nevertheless, it would be necessary to comply with a series of rules [...]; it would be necessary that not only the hard copy of the screen printing [...] should have been provided, but a transcription of the conversation and the verification that this corresponds to the telephone and the corresponding number’. That is to say, that the submission of the mobile phone of the party presenting the evidence and a transcription of the messages will be required, reques-

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21 . Cf. COLOMER HERNÁNDEZ, I., ‘La prueba tecnológica’, at ROMERO PRADAS, M. I., GONZÁLEZ CANO, M. I. et. al., *La prueba*, Tirant lo Blanch, Valencia 2017, pp. 579 -631

22 On the electronic document, see more widely DELGADO MARTÍN, J., ‘La prueba digital. Concepto, clases, aportación al proceso y valoración (I)’, *Diario La Ley*, no. 6, 2017, pp. 7-13.

23 About a photo uploaded to Facebook, see: Sentence of Castilla y León ,Valladolid, High Justice Court of March 15th, 2021 (Repertoire of jurisprudence Aranzadi no, 2021/155224).

24 To expand the analysis of this ruling, you can consult MORALES VÁLLEZ, C. E., ‘La validez probatoria del whatsapp y su incorporación al procedimiento’, *Sepin*, no. juny, 2016; and MUNÍN SÁNCHEZ, L. M., ‘El WhatsApp como medio de prueba en el proceso laboral. A propósito de una sentencia del Tribunal Superior de Justicia de Galicia de 28 de enero de 2016’, *Anuario de la Facultad de Derecho de la Universidad de A Coruña*, vol. XX, A Coruña, 2016, pp. 479-485.

ting that the lawyer of the administration of justice give public faith that the transcript corresponds to the messages actually received by the terminal -identifying the numbers of the communicants-; or, in any case, by means of the submission of a notarial certificate to the same end.

Given this situation and taking into account that it is unlikely that the other party will not challenge the evidence thus provided, it is most common to try to anticipate this circumstance in various ways. One way is to substitute the submission of evidence by the interested party with the provision of electronic evidence to a notary for the purpose of incorporating it into the process. For these purposes, the certificate providing its existence will normally be used, given its purpose and characteristics (Articles 199 and 200.3 of the RN²⁵), and particularly the modality of the exhibition certificate (Article 203 of the RN). For these purposes, the doctrine understands that the certificate should include, at least, certain details, such as, the address of the web page that is consulted, indicate the successive screens that lead to the one that reflects the content that is to be accredited, with their respective addresses. It also understands that the content will be reproduced in some way by means of a digital capture (screenshot), a photograph of the website, or its printing, and expressly stating on the certificate the identification of the computer or device from which the query is made.²⁶ In these cases, logically, the only thing that is submitted as evidence to the process is the certificate, as a public notarial document.

Another instrument, although endowed with fewer guarantees than the notarial intervention, is the proposal of the cross-examination or, where appropriate, testimony with the purpose of reinforcing the veracity of what is intended to be accredited with the electronic means, or seeking agreement that the printed evidence matches the original content of the device, as well as asking if a certain message or WhatsApp was received or not, or if a certain file was uploaded to a website or not, or if the documents printed are those obtained from a certain programme of the Company, etc. In these, the test must be subject to the common rules on the medium in question (cross-examination, Articles 91 of the LJS and 301 to 316 of the LEC, and witness, Articles 92 of the LJS and 360 to 381 of the LEC).

With the same purpose, an expert test can be proposed and completed (Articles 93 of the LJS and 335 to 352 of the LEC). However, when it comes to the use of a computer²⁷ or technical expert, whose aim it to try to exclude any possibility of alteration or manipula-

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25 Decree of June 2, 1944 approves the Regulation of Notary Public's organisation and rules.

26 Cf. COLOMER HERNÁNDEZ, I., 'La prueba tecnológica', at ROMERO PRADAS, M. I., GONZÁLEZ CANO, M. I. *et. al.*, cit., p. 609.

27 See, in more detail, PUIG FAURA, S., *La prueba pericial informática en el procedimiento civil*, La Ley, 2015.

tion of a device or content contained therein confirming its authorship, provenance etc, given the cost and complexity involved, their use will normally be limited to those cases in which the electronic device has a very important probative relevance and the sustained claim is also of special importance. This means that in labour procedures, computer or technical experts are rarely used. In any case, as always when an expert test is proposed and completed, the corresponding written report will be provided and the expert will also be summoned so that he may ratify the report at the hearing, and answer the questions that the parties may ask.

Exceptionally, due to its limited use, the evidence could qualify, in the labour process, for judicial recognition (Articles 359 to 359 LEC) whereby it would be verified by the judge, which would involve the direct examination by the judge of the device provided or their access to certain online content in order to directly assess the facts alleged by one of the parties.

This recognition should not be confused by the visualization that will take place at the hearing, when they intend to submit to the process, the recording and reproduction of images and sounds, captured by means of filming, recording and other similar instruments (Article 382.1 of the LEC)²⁸, which may also include voicemail messages, mobile phone application recordings, and even photographs (although in practice they are often submitted as documentary evidence). In such cases, the party may supplement the instrument of reproduction, where appropriate, with the written transcription of the words contained in the evidence in question and that are relevant (Article 382.1 of the LEC). In addition, the party may - in the same way as in the previous case - provide the opinions and instrumental means of evidence they seem appropriate for an adequate assessment of this means of proof by the judge. In this sense, when the recordings or even photographs are entrusted to a detective agency,²⁹ the evidence is usually accompanied by the submission of the corresponding report and the appearance of the detective at the hearing in support of the means of proof in question. The completion of the test consists in the reproduction of the evidence which is assessed by act of sight and by means of complete vision. However, sometimes, for the sake of the principle of procedural speed and always without objection from the other party, the reproduction of the recording could be dispensed with provided that the counterpart has received the corresponding full copy of the recording as well as its transcription.³⁰

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28 On the valid use by the company of video surveillance cameras can be consulted the Judgment of the Higher Court País Vasco (Social Chamber) nº 2469/2018 December the 11th (Repertoire of jurisprudence Aranzadi no. 2019/1085).

29 Cf. DÍAZ RODRIGUEZ, J. M., 'El informe del detective privado en el proceso laboral. Requisitos para su validez como medio de prueba', *Trabajo y derecho: nueva revista de actualidad y relaciones laborales*, no. 34, 2017, pp. 48-66.

30 See Judgment of Spanish Constitutional Court no. 212/2013, December the 16th.

1.3. Probative value

Finally, as regards its probative value³¹, it will depend on the means, or means used to submit the evidence to the process. It should thus be noted that both the interrogation of a party (Article 316 of the LEC), and the documentary evidence, public (Articles 319 to 323 of the LEC, and 1218 to 1221 of the *Código Civil*)³² and private (Articles 326 of the LEC, 1225 to 1229 of the CC, and 230 of the *Código de Comercio*),³³ are assessed within their respective scopes. In this area, there is an equalisation of all types of documents regardless of their medium, electronic or otherwise, provided that it is presented in original or with an authentic electronic certification, with its electronic signature; and, accordingly, public documents provide full proof of the fact, act or state of the parties that they verify, and of the date and of the identity of the intervenors and notary (Article 319.1 of the LEC). If the electronic document is challenged, it should be checked, which does not mean that if it does not meet the requirements for an electronic signature it cannot be assessed by the Judge, according to the criteria of legal reasoning. With respect to a private electronic document³⁴, it will be tested in the same terms that the LEC foresees, if any of the parties was not contested it (Article 326 of the LEC). In another case, it could some instrumental test could be completed (among others, a handwriting comparison), or in accordance with the aforementioned legal reasoning (Article 326.2 of the LEC)³⁵.

The rest of the means of proof must be assessed according to the legal reasoning of the judge, which, it must be borne in mind, does not imply absolute freedom for the former, because the assessment of the evidence must be substantiated, expressing in the resolution the reasons that have led the Judge to consider the facts as established or otherwise, indicating the tests carried out.³⁶ Of course, and as has already been indicated, evidence obtained unlawfully or without respect for the principle of proportionality cannot be given value³⁷.

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31 Cf. BODAS MARTÍN, R., ‘La prueba en el proceso laboral en la Ley Reguladora de la Jurisdicción Social’, *Actum Social*, no. 62, 2012.

32 Royal Decree of July 24, 1889, approves the Spanish Civil Code.

33 Royal Decree of August 22, 1885, approves the Spanish Commercial Code.

34 See Sentence of Supreme Court (Social Chamber) no. 706/2020, July the 23th, (Repertoire of jurisprudence Aranzadi no. 2020/3722).

35 On the probative value of whatsApp messages, see GOÑI IRULEGUI, A., “El valor probatorio de los mensajes de ‘WhatsApp’ en el proceso laboral” at *Nueva revista española de derecho del trabajo*, no. 233, 2020, pp. 41-76.

36 See Judgments of Spanish Constitutional Court no. 272/1994, October the 17th; no. 175/1985, February the 15th; no. 24/1990, February the 15th; and no. 37/1985, March the 8th; and of the Spanish Supreme Court May 31, 1990 (Repertoire of jurisprudence Aranzadi no. 4524), and March 21, 1990 (Repertoire of jurisprudence Aranzadi no. 2204).

37 See Sentence of Supreme Court (Social Chamber) no. 518/2021 February the 8th (Repertoire of jurisprudence Aranzadi no. 2021/672) and the Judgment of the Higher Court of Madrid (Social Chamber) no. 783/2019, July the 12th (Repertoire of jurisprudence Aranzadi no. 2019/252146).

II. CONCLUSIONS

First. The advance of technical means facilitates many aspects of the mechanics of labour relations.

Second. These advances require the adaptation of labour and procedural standards to this new phenomenon in order to provide a satisfactory answer to the questions raised by what implies at least, that the procedural rules include new technologies as evidence.

Third. However, the foregoing alone is insufficient if this process of regulatory adaptation is not accompanied by a process of innovation and momentum at the material level so as to provide the appropriate material means and techniques and tools to equip jurisdictional bodies with the necessary infrastructure to make effective the expected digitisation of the process.

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