Offsetting employment claims: can a company offset them unilaterally?

A collective dispute that allows the unilateral on-payroll offsetting of wage claims by an employer does not prejudge the possible individual claim of an employee who disputes the amount owed.

LOURDES LÓPEZ CUMBRE
Professor of Employment and Social Security Law, University of Cantabria Academic Counsel, Gómez-Acebo & Pombo

1. According to Article 1195 of the Civil Code (CC), set-offs arise when two persons are mutually indebted to each other for the purpose of extinguishing both obligations. Such offsetting constitutes a power to extinguish reciprocal claims in respect of the competing amounts and is not only an arithmetic operation (equal amounts but on opposite sides are destroyed) but also a legal one. It is a power because neither party is "obliged" to offset, any debtor can pay correctly if demanded and it does not raise the defence of set-off. Set-offs shall be in full when the reciprocal amounts are identical and in part where they are not. In the case of set-offs in part, part of one of the debts will remain outstanding, constituting an exception to the indivisibility of payment under Article 1169 CC. In other situations, such as in Article 1120, the Civil Code imposes a kind of global set-off (between proceeds, to be paid by one party, and interest, to be paid by the other) without having to calculate the

respective net balance; but this procedure is exceptional and, in the case of Article 1120 CC, the case is specific to a bilateral obligation subject to a condition precedent that is ultimately fulfilled, and the global set-off is a non-technical way of affirming that the fulfilment of the condition has no retroactive effect in this case.

The application of set-offs in the employment sphere has often been denied, not so much on the basis of the synallagmatic nature of the obligation, but rather on the basis of the "supportive" nature of wages and the need to preserve their integrity. However, the law does not exactly state that support debts are not offsetable (provided that they are "overdue support"), but rather that support debts arising without consideration are not offsetable (Art. 1200 CC), and wages do not fall into this category. Furthermore, "overdue support payments" are always offsetable (Art. 151 CC).

It is understood, perhaps erroneously, that since there is an unattachable part of wages, the rest may be subject to transaction and, therefore, to set-offs. But this is a mistake because civil set-offs do not find 'unattachable limits', either in civil or employment debts. To offset, it is sufficient that two persons, on their own behalf, are mutually a creditors and a debtor to each other. Specifically, Article 1196 CC requires the following: *a*) that each debtor is the main debtor and also the main creditor of the other; *b*) that both debts consist of a sum of money or, if what is owed is fungible, it is of the same type and also of the same quality where specified; *c*) that both debts are due; *d*) that they are liquidated and payable; and *e*) that none of them are subject to any withholding or dispute instigated by third parties and duly notified to the debtor.

Unattachable limits are not intended to regulate horizontal credit and debit relationships. If someone owes one hundred euros to another person who, in turn, owes them one hundred euros, they obviously owe each other nothing, without prejudice to whether or not the one hundred euro credit may be subject to attachment when the claim is enforced at a court of law. This rule applies to any forgiveness, settlement, or novation. The debt is extinguished regardless of the intervention, where applicable, of the unattachable limit. The attachment affects enforcement proceedings, but does not determine the civil effects of the extinction of the obligation. Thus, the party that cannot enforce its claim beyond the unattachable limit may set off its counterclaim against the other party's entire debt.

Rejecting this set-off device in the employment sphere makes no sense. It is true that its application in contracts of employment requires adapting some of its elements to principles specific to employment law. Of course, it can be applied to a bilateral obligation such as that of employment, even if it requires specific adaptation. In both cases, the effect of the set-off is identical, since both employment law and civil law seek to extinguish claims and debts in competing amounts.

Strictly speaking, there is no specific set-off regime in the field of employment. If there were, express set-off scales, exclusions or inclusions could have been established in its legal regime, but in the absence of specific rules, the general rules on the matter must apply. In this regard, the requirement of homogeneity derived from Article 1166 CC applies, according to which the debtor of something cannot oblige his creditor to receive a different thing; or that of ma-

turity as a general rule established by Article 1125 of the same legal text when it states that fixed-term obligations shall only be enforceable when the day arrives and that, whenever a term is specified in the obligations, it is presumed for the benefit of the creditor and the debtor; or, at any rate, that of liquidity as the basis for the fulfilment of obligations, *ex* Article 1169(2) of the said code. There is no doubt, moreover, that set-offs are possible up to the competing amount owed, partial set-offs being accepted in this sense contrary to the principle of integrity of payment provided for in Article 1169 CC.

2. The recent Supreme Court judgment of 21 May 2025, Jur. 117133, analyses a company's unilateral offsetting through a series of deductions in the workers' pay slips. The company explains that the system for thirteenth and fourteenth month payments has been modified following the transfer of employment contracts (from being prorated monthly by the previous undertakings to being paid in full on the relevant date by the new employer) and that, due to this change, a duplication in payment has been generated. The trade unions criticise this unilateral action by the company, rejecting in their claim the possibility of directly applying the *set-off* of claims without first assessing whether or not the payments made were excessive. In this regard, they consider that the company has engaged in unlawful 'self-remedy', since, if it considered that it had a claim against employees for the amounts overpaid, it should have claimed those amounts through the appropriate legal procedure.

In principle, the trade union's objection is only partly justified. It is true that the company cannot recover payments already made through a kind of 'self-remedy'. However, here this is not the company's action, because the employer does not access its employees' accounts to deduct money unduly received; obviously, the company could never act on its own authority to recover an *undue* payment and must claim it in court. However, in this case, when the company *offsets*, it is simply applying a kind of guarantee, like a pledge of its own debt. If, in addition, the set-off occurs "automatically" (Art. 1202 CC), the power to *bring it about* can never be considered prohibited self-remedy.

It is worth highlighting the summary of the background provided by the Supreme Court in reaching its judgment against the collective dispute claim. With express reference to its own case law, which allows set-offs in the payment of wages owed provided that the legal requirements for this are met (liquidated sum that is due and payable), it concludes that, in this case, it was a case of an excess resulting from different payment methods that overlapped (thirteenth and fourteenth month payments prorated before and not prorated after), which led to an accounting adjustment. Consequently, the application of the offsetting mechanism was appropriate, so that the employer could adopt it without the need for a prior

The application of set-offs of wage claims has been denied on the basis of the "supportive" nature of wages and the need to preserve their integrity

court ruling. Limiting the dispute raised in cassation to the company's power to unilaterally offset the amounts overpaid, the Employment Division considers that the claim does not question the existence of an overpayment or an obligation to reimburse the workers, which means that there is no dispute as to the certainty of the debt. The legality of the deductions is not questioned on the basis of their amount or the remaining amount of the salary paid in a given monthly pay slip, the quantitative element being outside the terms of the dispute.

Hence, the Court establishes the need to differentiate between debt set-off and self-remedy, indicating that a set-off is an institution provided for in civil law (Arts. 1192 to 1202 CC) and perfectly legitimate in relations between private parties. On the contrary, *self-remedy* implies a privileged legal position specific to public authorities in their relations with citizens, which allows them to resolve a dispute without recourse to the courts, so that one of the parties to a legal relationship establishes the facts and applies the law, even going so far as to enforce it, all of this unilaterally, leaving the other party with the option of accepting that action or seeking the protection of the courts. The essential difference, according to the judgment, lies in two points:

a) The need or otherwise for a ruling to resolve a dispute between the parties, whether factual or legal, which is characteristic of self-remedy but not of set-offs. In set-offs, the debt must be a liquidated sum that is due and payable, which implies that it is not disputed, since, if the debt is not disputed, then the employer applying the set-off on the payroll is not exercising a power of self-remedy (i.e., resolving a dispute that should be resolved by the courts), since there is no dispute in this regard.

b) The need to carry out acts of enforcement other than the mere act of offsetting one liquidated debt against another, thereby extinguishing both in the amount of the competing debt, which is what Article 1202 CC allows as a form of extinguishing obligations.

And thus, "the legality of the set-off made by the company depends on fulfilment of the requirements established in Article 1195 CC for a debt to be offset, all of which are met in the present case [...] the company is entitled to demand the return of the amounts that the worker received in excess [...] amounts which, at the same time, are due and liquidated" (Supreme Court judgment of 25 January 2012, Ar. 2459, Point of Law 2). However, if the employee does not acknowledge the debt, this will mean that the debt will not be "a debt that is due and payable", and the set-off cannot be applied, as established by the Supreme Court judgment of 21 Oc-

If the thirteenth and fourteenth month payments were prorated and following the transfer of employment contracts in full, a duplication in payment has been generated

tober 2005, Ar. 9945, which stated that "from the concordance of the provisions contained in Articles 1156 , 1195 et seq. and 1202, all of the Civil Code - the first of which describes extinction of obligations events, and the last of which describes the effects of a set-off - it can be concluded that this is a means of extinguishing obligations between persons who are mutually creditors and debtors, without the actual performance of the obligation being necessary, since each creditor is satisfied with the debt owed to them. Both performances are homogeneous (Art. 1196 CC) and the aforementioned extinguishing effect avoids unnecessary operations, without it being necessary to claim what would have to be fulfilled. Applying these provisions, the doctrine of this Division appears in the Supreme Court Judgment of 14 December 1996, in which, having knowledge of the payroll deductions made by a company to its employees, it admits in the first instance that this may be done by way of set-offs, provided that the debts meet the requirements laid down in Article 1196 CC, since "set-offs cannot operate unless it is clear that the employee is a debtor and that his debt is a liquidated amount that is due and payable" (Point of Law 4).

Furthermore, it points out the need to analyse the specific case to determine whether there is a genuine dispute over the acceptance of the debt and its payability, so that, if the debtor's acceptance is not established or these factors are present, it is not possible to simply invoke the existence of an error in order to obtain compensation by way of offsetting for the amount allegedly owed by the employee. In the case decided by the aforementioned Supreme Court judgment of 14 December 1996, Ar. 9465, there was a clear dispute over one of the supplements paid, so the company did not commit a mere arithmetic or factual error, but rather its assessment involved the exercise of a legal assessment incompatible with the set-off made. For its part, the Supreme Court judgment of 26 January 2021, Ar. 366, will allow deductions by way of offsetting in payrolls, unless it is clearly established that the employee is a debtor and that the debt is considered a liquidated amount that is due and payable. When the debt is not disputed, there is "the possibility of offsetting to be made at the time when the company becomes, in turn, a debtor of a monetary obligation with the payment of the monthly salary, when the discount, as in this case, is not excessive and does not suggest that its percentage generates an unbearable burden or that the company has refused to settle the repayment in a more flexible manner" (Point of Law 4). Consequently, the incontestability of the debt that allows for offsetting may derive both from the clear and definitive nature of the employee's obligation, which makes it legally indisputable, and from a factual situation, i.e., that it is not disputed in fact, insofar as no dispute arises between the parties regarding it.

Several other judgments have also addressed this issue in the past. Thus, the Supreme Court judgment of 22 June 2010, Ar. 6298, determines that even if the employee has not paid the appropriate tax charges, this alone would not authorise the employer to make any deductions from the employees' pay slips unless they had given their consent or a final court ruling authorised the company to do so. This does not imply, however, that the offset cannot operate, but rather that the requirements of Article 1196 CC must be met. It is clear that the company may, where appropriate, 'withhold' amounts for the payment of tax

debts, but never offset them against its own credit, because the employer is not the tax authorities.

3. The case law discussed above is confusing about the scope of the legal institution of set-off. This is also the case in the judgment of 21 May 2025, Jur. 117133, which is the subject of this commentary, although it ultimately reaches the correct conclusion. This is because the considerations made by these judgments end up leading to a mistaken conception of set-off, almost in line with that of the trade unions in our initial judgment. Reference is made to whether or not the debtor (the employee, presumably) "acknowledges" the debt, or to whether the other party has made an arithmetic or other error, or to whether the set-off is incompatible with a value assessment, or to whether "clear evidence" of the employee's debt must be left. However, this confuses different stages of the payment by offsetting process and mixes facts and law. If the employee owes, it no longer matters whether it is clear or unclear that they owe, or whether they acknowledge it or not: the employer who practises offsetting does so correctly. However, this correction can never be determined between private parties by an ex ante judgment, but only by the court decision that finally resolves the dispute. If the employee owed, the offsetting is correct, regardless of any subjective or weighting considerations; and if he or she did not owe, the offsetting is wrongly practised, the salary is not paid and nothing counts, regardless of what the employer may have believed in good faith or how clear or confusing the initial situation may have been.

Therefore, the undoubted nature of the debt and the claim says nothing about the requirements for one party to declare the production of offsetting. For this declaration to be effective, in the absence of special provisions in the Workers' Statute Act, it is sufficient that the requirements of Articles 1195 and 1196 CC are met. A party that owes a debt may claim that it will not pay because it has the right to set-off, and therefore does not pay. If the other party does not agree, it may claim payment of what is owed, and in this process it will be determined whether the requirements for set-off are met. If they are not, the party seeking set-off did not set off correctly and is in default of performance. But that is all. There is no need for any kind of 'acknowledgability' of the set-off beforehand, nor does it matter afterwards whether or not the set-off was clear *ex ante*.

The collective dispute that allows the unilateral on-payroll offsetting of wage claims by an employer does not prejudge the individual claim of an employee

4. The mistaken criterion referred to is the stumbling block also encountered in the Supreme Court judgment of 21 May 2025, Jur. 117133, which is the subject of this analysis. But only in principle, because it then makes the fundamental and appropriate distinction between individual contractual disputes and collective disputes.

If there is a dispute about the existence of the debt and its payability, offsetting cannot be used, whereas otherwise this legal instrument would be applicable. As the judgment states: "In the present case, there is some confusion caused by the inappropriate mixing of collective and individual aspects. We are dealing with a collective dispute, which means that the ruling here establishes the general criteria applicable to all employees, but does not prejudge those cases that are entirely individual and based on their own specific factual and legal circumstances [...] in which, when the origin or value of the amount to be reimbursed by the employee may be disputed, the application of offsetting by the company could even be considered unlawful in that case. However, if a collective dispute has been brought in order to assert that the obligation is disputed, it is necessary to argue in a reasoned manner that such a dispute with collective implications exists, so that it raises reasonable doubts as to its resolution, which would prevent it from being considered a liquidated amount that is due and payable. In this case, the collective dispute claim does not put forward the slightest argument questioning the existence of excessive remuneration and the obligation to reimburse in general, so that, in the absence of such a collective dispute, the only thing that can be done is to make a ruling of the same collective scope declaring that the offsetting is lawful in general, without prejudging possible individual cases with their own specific characteristics" (Point of Law 2).

This statement puts the dispute in its true perspective. Irrespective of the civil law issue of whether the individual amounts were offsetable or not, in the case of a collective dispute, this is not the appropriate perspective, at least not in the terms raised by the appellants. What is required here is a general consideration, specific to collective disputes, of whether the unilateral conduct of the company is admissible as generalised conduct based on facts of a collective nature. And, in fact, there are two levels: on the one hand, whether the company "acted" correctly in collectively invoking offsetting under the conditions explained; but it is quite another matter whether it "offset" correctly. The latter question can only be resolved at the level of the unilateral dispute, considering each claim and each debt, because the collective dispute procedure is not the appropriate forum for discussing whether certain claims and certain debts have been extinguished, which can only be done on an individual basis. Hence the kind of permanent contradiction in this judgment, which resolves a collective dispute — on the understanding that the amount of the debt is not in question, only the unilateral nature of the company's action — and relegates the possible incorrect accounting for each worker to the ordinary procedure in individual claims.