

COMPARATIVE LABOR LAW DOSSIER DISMISSAL DUE TO BUSINESS REASONS IN SPAIN

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Introduction

Redundancies and dismissals due to business reasons in the Spanish legal system have increased exponentially after the 2012 labor reform. The Royal Decree 3/2012, February 10, and Law 3/2012, July 6, on urgent measures to reform the labor market (2012 labor reform, hereinafter) introduced major changes in, among others, the legal regulation of redundancies and dismissals due to business reasons. Specifically, as is well known, the elimination of the administrative authorization prior to a collective dismissal and the redefinition of the economic, technical, organizational and productive reasons that allow a dismissal. The aim of the legislator, according to the preamble of the RD 3/2012 and Law 3/2012, was to facilitate dismissals –eliminating the employer's pressure to reach an agreement with the worker's representatives so as to obtain the administrative authorization– and restrict the judicial review in regard to the concurrence of the above business causes.

Notwithstanding the above, as a result of these changes introduced in the legal regime of collective redundancies, there has been a multiplication of judicial decisions regarding the interpretation of the new definition of economic causes, the proportionality principle, the scope of corporate liability in case of holdings or business groups, the definition of good faith in the context of the consultation period with workers' representatives, the formal requirements of the consultation period, the designation of affected workers, etc.

In this context, the aim of this article is to briefly explain the legal regulation of redundancies and dismissals due to business reasons in the Spanish legal system, as well as present some of the recent judicial and doctrinal debates regarding this issue.

1. How does the legislation or the judicial bodies define the causes that allow for a dismissal due to business reasons?

The Spanish legal system allows dismissals due to business reasons, distinguishing between economic causes and TOP causes (technical, organizational or productive). As mentioned, the definition and regulation of these causes has, in recent years (specially as a result of the 2012 labor reform), evolved so as to facilitate the concurrence of these causes.

Article 51.1 of the Worker's Statute (ET, hereinafter) defines these causes as follows:

- **Economic causes:** It is understood that economic causes concur when the results of the company derive a negative economic situation, in cases such as the existence of present or expected losses, or the persistent decline in the level of ordinary revenues or sales. In any case, the decrease is considered persistent if for three consecutive quarters the level of revenues or sales each quarter is lower than in the same quarter of the previous year. Therefore, due to this definition, a company with benefits but with expected losses or a decline in revenues or sales during three consecutive quarters can legally proceed to a dismissal for business reasons.
- **TOP causes:** It is understood that exist technical causes when changes occur, among others, in the field of the means or instruments of production; organizational reasons exists when changes occur, among others, in the field of systems and working methods or the organization of production; and productive causes exist when changes occur, among others, on the demand for the products or services the company intends to place on the market. According to these definitions, it is clear that, nowadays, in Spain it is not difficult for a company to allege TOP causes so as to proceed with a dismissal.

In spite of the legislators aim to reduce judicial control in regard to the concurrence of the business cases, recent judicial decisions of multiple Spanish Courts have stated that for a collective dismissal to be legal, the mere concurrence of causes is not enough, requiring the existence of proportionality between the company's economic situation and the entity of the collective dismissal and a functionality relation between the alleged cause and the workers selected to be affected by the dismissal. Specifically, for the redundancy to be legal there must concur three requirements: (i) existence of cause, (ii) proportionality between the alleged cause and the number of dismissals and (iii) functionality relation between the cause and the selected workers (decision of the Spanish Supreme Court of March 26, 2014).

2. Do the business reasons that justifying the dismissal must concur in the whole company or can they only concur in the workplace where dismissal occurs?

In the Spanish legal system, according to the Supreme Court's doctrine, when the cause alleged by the company is an economic cause, it is required that this cause affect the entire company and not just the work center where the dismissal occurs. On the contrary, if the alleged causes are TOP, the rule is more flexible and it allows the technical, organizational or productive mismatch to affect only the workplace where it is needed to perform the dismissal, without requiring that cause to concur in the rest of the company.

The explanation is simple: it is understood that the dismissal due to economic reasons seeks a reduction in labor costs (reactive dismissal), while the dismissal due to TOP cause is understood as a preventive dismissal (defensive dismissal) that tries to avoid arriving at a negative economic situation, allowing the company to readjust its workforce before these TOP imbalances generate economic problems. Therefore, if it is easy for economic causes to concur in a company, it is even easier for TOP reasons.

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in relation to the number of workers affected?

In the Spanish legal system, the procedure in cases of dismissal due to business reasons varies significantly depending on whether the dismissal is qualified as collective or not.

- Collective redundancies

In regard to the definition of a collective dismissal, in the Spanish legislation it is easier to fulfill the collective dismissal criteria than in relation to the criteria established in Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, as it qualifies as a collective redundancy that which in the 90-day period affects at least (article 51.1 ET):

- Ten workers in companies with less than 100 workers.
- 10% of workers in companies with between 100 and 300 workers.
- 30 workers in companies employing more than 300 workers.

In these cases, when the dismissal is qualified as collective, the company must substantiate a period of consultation/negotiation with the workers' representatives (for a maximum of 15 or 30 days, depending on the size of the company) with the aim to negotiate measures so as to avoid or reduce the redundancy and mitigate the consequences for affected workers with social measures, such as relocation or training measures so as to increase these workers' employability. It is especially relevant (as explained in the Q.7) that the company fulfills with the formal legal requirements of this consultation period and that negotiations between the company and the workers' representatives must be developed in good faith.

One of the most controversial issues nowadays in the Spanish legal system in regard to collective redundancies is that the negotiation must be performed in a single negotiation body, without allowing the existence of different negotiating committees for each work center. In fact, when not all work centers are affected by the dismissal, the negotiating committee will only be composed by workers' representatives of those work centers affected (article 51.2 ET). Such negotiating committee will be integrated by a maximum of thirteen members for each party.

The company's communication regarding the initiation of a consultation period must be done in writing and send to the workers' representatives and the labor authority. In such letter, the company must include information regarding: a) the specification of the reasons for the dismissal, b) the number and job classification of employees affected by the dismissal, c) the number and job classification of workers normally employed in the last year, d) the period for carrying out the dismissals, e) criteria used for the designation of workers affected by the dismissal, f) copy of the communication addressed to the workers' representatives in regard to the company's decision to initiate the procedure for a collective redundancy and g) indication of the workers' representatives that will integrate the negotiating committee or indication of the lack of constitution of the negotiating committee. Furthermore, the notification must be accompanied by a report explaining the reasons for the redundancies, records and accounting and tax documents and other technical reports established in articles 3, 4 and 5 of the RD 1483/2012, October 29, Regulation of collective redundancy procedure and reductions of the labor contract.

After the development of the consultation period, the employer must notify the labor authority of the result of the negotiation. If the company and workers' representatives have reached an agreement, the employer must also transfer a full copy of the agreement to the labor authority. In absence of an agreement, the employer must inform the workers'

representatives and the labor authority of its final decision regarding the redundancies and its conditions.

Finally, indicate that since the 2012 labor reform, it is no longer necessary the authorization of the labor authority to proceed with collective redundancies. Nowadays, the labor authority has a monitoring role so as to ensure the effectiveness of the consultation period, and may refer warnings and recommendations to the parties and intervene, when requested by both parties, as a mediation so as to seek solutions to the problems posed by the collective dismissal.

- No collective redundancies

A dismissal is not considered collective when, even though it can affect multiple workers, it doesn't reach the threshold of number of affected workers established in article 51.1 ET for collective redundancies.

In these cases, the norm only requires three formal requirements (article 53.1 ET):

- a) Written notice to the employee affected by the dismissal, establishing the cause that justifies the dismissal.
- b) Make available to the worker, simultaneously with the delivery of the written communication, an economic compensation equivalent to 20 days of salary per year of service, with maximum of 12 monthly payments.
- c) Notice period of 15 days, computed from the delivery of the written communication of the dismissal to the workers' representatives.

4. In the Spanish legal system, are there groups of workers who have retention priority in a dismissal for business reasons and/or exist criteria for determining the workers affected by such a redundancy?

The Spanish regulation of dismissals or redundancies due to business reasons does not include criteria for the selection of employees affected by the dismissal. As a general rule, therefore, the employer can determine which employees are affected by the dismissal, respecting, obviously, the principle non-discrimination and other fundamental rights and freedoms.

There exist, nonetheless, two types of retention priorities for different groups of workers: one explicit and one implicit.

- Explicit retention priority

Article 51.5 ET states that workers' representatives have retention priority –that is priority to remain in the company– in cases of dismissal for business reasons.

This article also establishes that collective bargaining agreements or the agreement reached during the consultation period can establish retention priorities for other groups of workers, such as workers with family responsibilities, over a certain age or disability. Therefore, unless the collective bargaining agreement states otherwise, the Spanish regulation does not, at least explicitly, include a retention priority for these workers.

- Implicit retention priority

In spite of the absence of a specific legal regulation, some recent court rulings, however, have recognized a retention priority in the context of a collective redundancy of a pregnant workers and workers who have reduced their working time so as to take care of a child or dependent family member (decision of the High Court of Catalonia of November 29, 2013).

This implicit retention priority is based on article 53.4 ET that states that will be considered null (see Q.7) those dismissals that have as motive a discrimination cause prohibited by the Spanish Constitution or by law or are done with violation of the workers' fundamental rights and civil liberties. Furthermore, they will also have the consideration of null the following dismissals:

- Workers on maternity leave, leave due to risk during pregnancy or breast-feeding, diseases caused by pregnancy, childbirth or breastfeeding or paternity leave.
- Workers after their return to work after maternity or paternity leave, within the following 9 months of the date of birth or adoption of the child.
- Pregnant workers from the date of the beginning of pregnancy until the start of the period for maternity leave.
- Workers who have enjoyed or applied for a license for breastfeeding or birth of premature baby or reduction of working hours for the care of a child under 12, with a disability or dependent family member (sections 4, 4a and 5 of article 37 ET) or are on leave for care of child or dependent family member (article 46.3 ET).
- Women victims of gender violence as a result of exercising their rights in regard to adaptation or reduction of working time, geographic mobility, change of workplace or suspension of the employment contract.

The dismissal of these workers will be considered null, unless the company can prove objective reasons, not related with the pregnancy or the use of licenses and leaves of absence, that justify the dismissal.

5. Does the dismissal for business reasons that is declared correct/legal generate the worker's right to obtain an economic compensation?

In the Spanish legal system, dismissals due to business reasons declared fair –that is, according to the law–, give rise to the right of the worker to obtain an economic compensation equivalent of 20 days of salary per year of service with a maximum of 12 monthly payments. In the Spanish legal system there doesn't exist any peculiarity in relation to the amount of the economic compensation to which the worker is entitled in relation to the size of the company.

In this context, it is interesting to note that in Spanish law wage and compensation claims are protected against cases of corporate insolvency. In this regard, the Wage Guarantee Fund (*Fondo de Garantía Salarial*), autonomous body dependent of the Ministry of Employment and Social Security, will pay the compensation for dismissal due to business reasons in case of corporate insolvency, to a maximum of one year's salary and without daily salary, basis of calculation, exceeding twice the value corresponding to the minimum wage (article 33 ET).

6. In addition to, when applicable, the worker's right to an economic compensation, what other company obligations derive from a dismissal due to business reasons?

In the Spanish legal system, the company has additional obligations, in addition to the payment of the economic compensation to the workers affected by the dismissal, only in the context of a collective dismissal. Specifically, the company has two additional obligations:

First, companies carrying out collective redundancies affecting more than fifty workers must provide an outplacement or relocation plan through an authorized outplacement firm (article 51.10 ET). This relocation plan must be designed for a minimum period of 6 months, include measures of professional training and occupational guidance, personal attention and active employment seeking. The cost of developing and implementing the plan can not be borne by the workers affected by the dismissal. This does not apply to companies that have gone through a bankruptcy proceeding.

Second, companies carrying out collective dismissals for business reasons which affect workers that are 50 year olds or older, must make a financial contribution to the Treasury (additional provision number sixteen of Law 27/2011, August 1st, of adaptation and modernization of Social Security).

7. What are the consequences that arise from breach or non-compliance with the legal procedure regarding redundancies due to business reasons?

In the Spanish legal system, the consequences of non-compliance with the procedure for redundancies due to business reasons depend, again, on whether or not the dismissal is considered a collective redundancy.

- Collective redundancies: according to article 124 of the Law 36/2011, October 10, regulatory of the social jurisdiction (LJS, hereinafter), collective redundancies will be declared:
 - Unfair/wrongful when the employer has not proven the concurrence of the business cause alleged in the written communication sent to the workers' representatives. In this case, the company may choose between reinstating the affected workers to their job post or paying them the economic compensation for unfair dismissal, equivalent to 33 day's pay per year of service with a maximum of 24 monthly payments.
 - Null when the company has proceeded to a redundancy without complying with the legal obligation to develop a consultation period with the workers' representatives or given them the legally required documentation, as well as when the dismissals is discriminatory or violates workers' fundamental rights and public freedoms. It is important to note that the company's default on its obligation to negotiate in good faith during the consultation period with the workers' representatives is considered cause for annulment, because the consultation period not has been carried out effectively with the objective of achieving an agreement. In this case, the worker has the right to be reinstated in his/her workplace and the right to unpaid wages.

The majority of court decisions during 2013 and 2014 that have declared the nullity of collective dismissals have been based on the absence of good faith during the consultation period usually derived from the company's default of providing all the legally required documentation. It is interesting to note, however, that recent court rulings have clarified this legal provision and have stated that not any lack in the

documentation submitted to the workers' representatives leads to the nullity of the dismissal, but only those essential to ensure the effectiveness the consultation period.

Finally, it is also important to mention that two recent court rulings of the Spanish Supreme Court have also declared the nullity of the dismissals in cases of fraud. That is, when the company carries out a collective dismissal so as to avoid de labor consequences derived from the application of article 44 ET regarding transfer of companies (decisions of the Spanish Supreme Court of February 17 and 18, 2014).

- No collective redundancies. The individual or not collective dismissal due to business reasons will be declared (article 123 LJS):
 - Unfair/wrongful when the company has not complied with the formal requirements established in article 53.1 ET (written communication, provision of compensation and notice). However, the lack of notice or an excusable error in the calculation of compensation does not lead to an unfair dismissal, notwithstanding the employer's obligation to pay the wages corresponding to the days of unfulfilled notice or payment of the economic compensation in its correct amount.
 - Null/void when:
 - a) The dismissal is discriminatory or violates workers' fundamental rights and public freedoms.
 - b) The dismissal is fraudulent as it has tried to avoid the rule established in article 51.1 ET for collective redundancies. In this sense, this article establishes that when the company carries out redundancies in successive periods of 90 days without exceeding the thresholds for collective dismissals and without the occurrence of new business causes, the dismissals must be considered fraudulent.
 - c) The dismissal affects workers that are exercising their right to licences and leaves of absence due to maternity, paternity or to take care of child or dependent family members or victims of gener violence in the terms established in sections c), d) and e) of article 123 LJS.

8. Are there specialties in the dismissal due to business reasons for microcompanies and/or small and medium enterprises?

In the Spanish legal system there are no specialties in the definition, criteria or procedure of the dismissal due to business reasons in relation to the size of the company. That is, there

are no specialties for microcompanies or for small and medium enterprises. There is only one residual peculiarity regarding the maximum duration of the consultation period with workers' representatives in the procedure for collective redundancies: when the company has fewer than fifty employees the maximum duration of the consultation period is reduced from 30 to 15 days.

9. What consequences exist regarding the legal regime of dismissal due to business reasons when the dismissal takes place within the framework of a company that is part of a holding or a business group?

In the Spanish legal system, the only specialty that exists in relation to the legal regime of dismissal due to business reasons when the dismissal occurs within a company that is part of a holding or business group is in relation to the documentation the company must deliver to the workers' representatives in the consultation period in the context of collective redundancies.

In this sense, according to article 4.5 of the Regulation of collective dismissals,

- When the company that initiates the procedure is part of a holding or business group with the obligation to prepare consolidated financial statements and when the controlling company is established in Spain, the documentation must include the annual accounts and consolidated management report of the controlling company of the group, duly audited (when legally required), when there are debit or credit balances with the company that has initiated the redundancy procedure.
- If there is no requirement to prepare consolidated accounts, in addition to the legally required financial documents of the company that initiated the redundancy procedure, the company must give the workers' representatives the financial documentation of the other companies part of the holding, duly audited (when legally required), when these companies have their headquarters in Spain, have similar activity or belong to the same economic sector and have debit or credit balances with the company that has initiated the redundancy procedure.

In this context, it is interesting to note that the case law has raised a debate about the scope of the business causes when the redundancy takes place in a company that is part of a holding or business group: company vs. holding or business group. However, the majority of the court decisions have stated that, notwithstanding the above mentioned obligation of

financial documentation, the scope of the economic cause or the TOP causes must be assessed in the company that initiated the redundancy procedure and not in the whole holding or business group.

10. Is it possible to conduct a dismissal due to business reasons in a public administration? In this case, what specialties exist in regard to the definition of the business causes?

In the Spanish legal system, it is possible to conduct a dismissal due to business reasons in a public administration body, according to additional provision 20th of the Worker's Statute. The dismissal due to business reasons in the different agencies and entities that are part of the public sector will be developed according to the provisions established in articles 51 and 52.c) ET.

Regarding the definition of the business reasons, the additional provision 20th of the Worker's Statute states that it is understood that economic causas concur when there is a persistent and supervened situation of budget shortfall for funding the public service; in any case, the shortfall will be considered persistent if it occurs for three consecutive quarters. Technical reasons exist when changes occur, among others, in the field of the means or instruments of provision of the public service and organizational reasons when changes occur, among others, the field of systems and methods of work of the workers assigned to public service.