COMPARATIVE LABOR LAW DOSSIER
DISMISSAL DUE TO BUSINESS REASONS

Coordinated by Juan Peña Moncho (student of the Master´s Degree in Labour Law, ESADE Law School) and Andrés Camargo Rodríguez (PhD candidate, Pompeu Fabra University).

Abstract

The Comparative Labor Law Dossier (CLLD) in this issue 1/2018 of *IUSLabor* is dedicated to dismissal due to business reasons. We have had the collaboration of internationally renowned academics and professionals from Belgium, France, Germany, Greece, Italy, Portugal, Spain, Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Uruguay and Canada.

El Comparative Labor Law Dossier (CLLD) de este número 1/2018 de IUSLabor está dedicado los despidos por causas empresariales. Se ha contado con la participación de académicos y profesionales de prestigio de Alemania, Bélgica, España, Francia, Italia, Grecia, Portugal, Argentina, Brasil, Chile, Colombia, Costa Rica, República Dominicana, Uruguay y Canadá.

Título: Comparative Labor Law Dossier. Dismissal due to business reasons.

Keywords: collective dismissal, redundancies, business reasons, severance pay, retention priority, relocation right.
Palabras clave: despido colectivo, causas empresariales, indemnización, liquidación, prioridad de permanencia, derecho de recolocación.

IUSLabor 1/2018, ISSN 1699-2938, p. 4-167.

Summary

DISMISSAL DUE TO BUSINESS REASONS IN BELGIUM

Pieter Pecinovsky
PhD Researcher, Institute for Labour Law, Leuven University

Introduction

Dismissals due to business reasons are mostly connected to collective redundancies. In 2017, 62 companies started the information and consultation procedure (with an announcement) which is obliged in case of collective redundancies, 3829 employees were involved (916 in Brussels, 2193 in Flanders and 720 in Wallonia). Compared to the record years of 2012-2013, we see a decrease of 77% in the number of redundancies announced (2012 - 16707 redundancies) and almost 50% fewer procedures (2013 - 132 procedures). The metal production industry was affected the most, with collective redundancies relating to 1147 employees (the same sector was affected most in 2013). 67 companies ended the information and consultation procedure in 2017, resulting in 6790 dismissed employees (1862 in Brussels, 2190 in Flanders and 2853 in Wallonia), while at the start of the procedure 8124 jobs were threatened. The procedure thus might have saved 1334 jobs. In the metal production sector, 2079 employees lost their employment in 2017, leaving the other sectors far behind mostly thanks to the closing of the Caterpillar Factory in Charleroi. This also resulted in the fact that men were more affected than women by collective redundancies. The Financial sector was second with 1156 redundancies caused by the closing of bank offices by ING Bank. (Statistics of Federal Government Service of Work Labour and Social Dialogue / FOD WASO, www.werk.belgie.be/defaultTab.aspx?id=30532)

1. How are the causes that justify a redundancy or a dismissal due to business reasons defined?

The Belgian legal system does not differentiate specific causes for a dismissal. The main distinction is between a normal dismissal with compensation (period of notice or termination fee) and a dismissal with urgent cause (without period of notice or termination fee). A dismissal because of business reasons will fall under the normal dismissal with compensation because "urgent cause" demands that the employee himself gave urgent cause to his dismissal.

However the Belgian legal system knows the notion of "economical and technical reasons" as a valid cause to dismiss protected employees (like worker's representatives) and is also important in case of collective redundancies and at the closure of (a branch of) an enterprise. The laws ruling these subjects do not contain any definition for

"economic and technical reasons". Nonetheless, in the preparatory works of The Act of 19 March 1991 ruling the special dismissal procedure for protected (candidate-) worker's representatives states that these reasons are restricted to the closure of an enterprise, the closure of a branch of an enterprise and the a taking out of service of a specific group of personnel (Report of 4 March 1991 of the Commission for Social Matters, by Mr. Ansom and Mr. Santkin, 4).

Article 2 of Collective agreement number 24 (regarding the to be followed procedure in case of collective redundancies) states that collective redundancies cannot be due to reasons which are related to the person of the employee(s). According to the commentary of this article this means that the reason for the collective redundancies have to relate to the company itself, i.e. economic and technical reasons, defined in a broad way.

The Collective agreement number 109 about the motivation of a dismissal defines in its article 8 a manifestly unreasonable dismissal as a dismissal of a worker, who was hired for an indefinite term, which is based on reasons which are not related to his capability/suitability or the behavior of the employee or which is not related to the necessities caused by the functioning of the company, an which would never have been taken by a normal and reasonable employer. These necessities caused by the functioning of the company of course can also relate to (economic) business reasons.

2. The business reasons that justifying the dismissal, must they concur in the entire company or only concur in the workplace where dismissal occurs?

As long as the reason is not manifestly unreasonable, the employer can dismiss the employee (see question 11). The employer has a relative wide margin of appreciation to determine the organization of his company, since the "business reason" would have to be "manifestly" unreasonable, which is very hard to prove for the employee. Thus, both options seem fine. In the case of a dismissal of protected employees, the legislation does not specify whether the reason has to relate to the whole company or the specific workplace. In case of collective redundancies, the regulation collective agreements (number 10 and number 24) look at a company as a "technical business unit", in conformity with article 14 of the Act of 20 September 1948 (which regulates the works council). A technical business unit does not equal the legal unit but any business unit that has autonomy and independence based on economic and social criteria, with the social criteria taking precedence. A legal business unit can contain several technical business units. For the procedures of collective redundancies to be applicable a certain amount of employees need to be affected (see question 4).

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in cases of redundancies (that is, when there is a collective dismissal)?

There are three different options.

3.1. Non-protected employees

First, in the case of an individual non-protected employee, there is no special dismissal procedure (see question 11). General periods of notice and termination fees apply.

3.2. Protected employees

a) Worker's representatives

The Act of 19 March 1991 regulating the special dismissal procedure for protected (candidate-) worker's representatives installed a special procedure. There are only two valid causes to dismiss a worker's representative: with urgent cause (for example. the behavior/conduct of the employee makes it impossible to continue his contract) or due to economic or technical reasons. The procedure for a dismissal due to economic or technical reasons is laid down in article 3, §1: the employer has to put the dismissal case on the agenda of the competent joint labour committee (a committee of employer and worker's representatives which can for example. conclude collective agreements for a specific sector: 'Comité Paritaire') by a registered letter. If the company does not fall under the competence of a joint labour committee (or if it is not functional) he has to send it to the National Labour Council (Nationale Arbeidsraad/Conseil National du Travail). The joint labour committee (or the National Labour Council) will then decide if the reasons of the employer indeed can be qualified as economic or technical. The deadline for this decision is maximum two months after the request of the employer. If they fail to take a decision in those two months, the employer can dismiss in case the company is closing down or in case of a dismissal of a specific group of employees. This means he can't dismiss in case of a closure of a branch of the company.

Unless the economic and technical reasons are related to the closure of a company or a branch of the company, there is a second step in the procedure which has to be followed. In this case, the employer has to file his case before the president of the labour tribunal. Before the employer can dismiss the representative, the president of the labour tribunal has to recognize the existence of the economic and technical reasons. The President of the tribunal will state his/her decision in a judgment, against which the protected employees can appeal at the labour court. The dismissal can take place

starting of three days after the deadline for appeal has passed. The technical rules of the procedure before the president of the labour tribunal are fixed by article 8, 10 and 11.

The employer thus has to prove that the dismissal is related to economical or technical reasons and has nothing to do with the fact that the employee is a (candidate-)worker representative (article 3, 2 and 3).

b) Other protected employees

Other against dismissal protected employees are by example pregnant women, employees who have a right on maternity or paternity leave, employees who are sick or prevention advisors. Their protection system does not specifically mention business reasons as a valid cause for a dismissal, but also in those cases these reasons seem to be allowed. A general rule is that the reason for the dismissal of protected employees cannot be related to the reason of their special protection. By example, a pregnant woman can only be dismissed because of reasons which are not related to her pregnancy (article 40 Labour Act). A dismissed pregnant employee can ask her employer to give her the motivation of the dismissal (in writing, but which form of writing is not stated). The employer will have to prove that he only had other reasons (for example. business reasons) for the dismissal and any hesitation will work in favor of the dismissed employee.

3.3. Collective redundancies

a) Collective redundancies without a closure of an enterprise

In case of collective redundancies, the employer has to follow a special and complex procedure, laid down in the Act of 13 February 1989 (“Renault Act”), Collective agreement number 24 of 2 October 1975 and others (including the EU directive 75/129/EEG of 17 February 1975).
If the dismissals qualify as collective redundancies (see question 4) the procedure goes as follows:

The employer needs to inform the worker’s representatives, as soon as he has the intention of proceeding to collective redundancies. He has to do this in written form, with all relevant information included. These include:
- The reason for the collective redundancy.
- The number of the to be dismissed employees.
- The number of employees who work for the company.
- The period in which the collective redundancy will take place.

- The criteria used to decide which employees will be dismissed.
- The calculation method of the (extra) compensations which are not obliged by law or collective agreement.

The employer also has to send this information to the director of the local employment service and to the Federal Government Service of Work, Labour and Social Dialogue (FOD WASO).

Next, the employer has to organize a meeting with the worker's representatives to explain the written information so they are able to fully understand the details and study the impact.

Following this information session, the next step for the employer is to consult the worker's representatives on possibilities to prevent or diminish the collective redundancy and to reduce the negative consequenses of the dismissals for the employees. The worker's representatives can ask questions and give remarks or do proposals. The employer has to study the questions, remarks and proposals and has to answer them.

Next, after the consultation procedure has finished, the employer can formally give notice of the collective redundancy to the local employment service and to the Federal Government Service of Work, Labour and Social Dialogue in the form of a registered letter. This letter has to contain the same information as in the first notice and additional information on how the employer followed the correct procedure of information and consultation.

On the same day as the employer has sent this notice, he has to make a copy of this document and make it visible (post it on the wall) in the company building, send it to the worker's representatives (who can send their remarks to the local employment service) and send it with registered letter to the employees which are affected by the collective redundancy and who's employment contract was already ended on the day of the posting of the notice in the company building.

During 30 days (in some cases this period can be made shorter or be prolonged) after the announcement (the datum of the registered letter, given by the post office), worker's representatives can make objections to the employer regarding the procedure. During these 30 days the employer cannot end the contracts of the employees who meet the criteria to be dismissed. After these 30 days the employer can end the employment contracts, unless the worker's representatives made justified objections, in which case the employer did not follow the correct procedure. In that case he has to send a new

notice, after he made the necessary acts to fulfill the requirements of the procedure, and a new waiting period of 30 days will begin.

Collective agreement number 10 of 8 May 1973 also stipulates a special compensation for the dismissed employees in case of collective redundancies. This collective agreement is only applicable if 10% of the employees of the technical business unit are dismissed (or at least 6 when the technical business unit counts between 20 and 59 workers). See question 6 for more on this.

b) Collective redundancies in case of a closure of an enterprise

In case the collective redundancies are due to the closure of the company, the procedure of the collective redundancies and the procedure of the closure of the company have to be followed simultaneously.

The procedure of the closure of the company is laid down in the Act of 26 June 2002, the Royal Decree (Koninklijk besluit) of 23 March 2007 and Collective agreement number 9 of 9 March 1972. The Act allows the competent joint labour committees to install a procedure of information and consultation in a collective agreement (so the procedure can vary from sector to sector). If the joint labour committee does not (or if there is none), the procedure laid down in the Royal Decree has to be followed.

In this case, the employer has to notify his decision to proceed to a closure immediately to:
- The employees, by posting an announcement on a visible place in the company.
- The works council.
- The government: Federal Government Service of Work Labour and Social Dialogue, the Minister of Employment and the Minister of Economy.

This notice needs to contain the following information:
- Name and address of the company.
- Nature of the company activity.
- The presumed date of the end of company activities.
- The full list of employees that are employed by the company on the day of the notice.

According to article 11 Collective agreement number 9, the works council has to be informed an consulted before any announcement.

Also, these affected employees will be entitled to a special compensation (see question 6).

4. How is the number of affected workers calculated in order to determine the individual or collective nature of the dismissal?

For the information a consultation period: to be qualified as a collective redundancy under Collective agreement number 24, the dismissals, taking place in a period of 60 days, need to affect:

- 10 employees in a company with more than 20 and less than 100 employees in the year before the dismissal;
- 10% of the employees in a company with more than 100 and less than 300 employees in the year before the dismissal;
- 30 employees in a company with at least 300 employees in the year before the dismissal.

For the special compensation for dismissed employees (see question 6), due to a collective redundancy, according to Collective agreement number 10, the dismissals, taking place in a period of 60 days, need to affect:

- 10% of the employees in a company with more than 60 employees in the year before the dismissal;
- 6 employees in a company with more than 20 and less than 60 employees in the year before the dismissal.

Number of employees in unit	Information (CAO no. 24)	Compensation (CAO no. 10)
20-59	10	6
59-99	10	10%
100-299	10%	10%
+300	30	10%

5. Are there groups of workers who have priority in a dismissal for business reasons? Particularly, do workers' representatives have priority? And pregnant workers? Elder workers? Workers with family responsibilities?

The criteria to determine the workers who will be affected in case of a collective redundancy are not laid down by law but can be determined by the employer. However, as seen above, the worker's representatives have to be consulted. Of course, the discrimination acts of 10 May 2007, based on the relevant EU directives, forbid these criteria to be based on any discriminatory grounds.

The Belgian law does not provide any retention priority for certain groups of employees. Also protected employees can be dismissed due to business reasons. In practice however it will be easier for the employer to let go non-protected employees, as

the protected ones could object that they are actually dismissed because of their special situation and because the procedure to dismiss (candidate) worker's representatives is quite complex and tricky.

6. Are workers affected by a dismissal due to business reasons entitled to an economic compensation?

In case of an individual dismissal, only the normal compensation is provided. However, in the case of collective redundancies and the closure of a company, there is a special extra compensation.

6.1. Compensation due to collective redundancy

The Compensation due to collective redundancy is regulated by Collective agreement number 10 of 8 May 1973. Strangely, this collective agreement has a different understanding of a collective redundancy than Collective agreement number 24. As seen under question 4, the conditions for Collective agreement number 10 to apply are less strict.

The dismissed employees will have a right on an extra compensation, paid by the employer, which can be combined with the regular unemployment benefits. This extra compensation is granted to persons who are entitled to unemployment benefits. However certain groups are equated with them:

- Unemployed employees who are not entitled to unemployment benefits due to a reason which is not related to their person.
- Employees who found a new job, but who earn a lower wage than they did before.
- Employees who are following a professional education (for adults) and receive a lower compensation than they did before.

The amount of the compensation is equal to the half of the difference between the net reference wage and the unemployment benefits they are entitled to. For the equated persons the amount is equal to the difference between the net reference wage and, respectively:

- The unemployment benefits they would have received if they were entitled to.
- The total net income obtained from the new job.
- The total net income obtained from the professional education.

The net reference wage is equal to the brut monthly wage (wage and extra benefits) minus the social security contributions and the fiscal deductions. The net wage is also restricted to a certain maximum.

The reference month (to which the net reference wage refers) is laid down in an agreement between the employer and the worker's representatives, or, if no agreement was reached, it is the last month before the collective redundancy.

The dismissed employees who are entitled will receive the compensation due to collective dismissal for a period of four months after the dismissal, or after the period of notice (or the period that is equated to the termination fee) has ended. However, persons who are entitled to a termination fee or a period of notice of seven months or longer will not be entitled to the compensation due to collective dismissal.

This compensation is not to be cumulated with compensation due to a closure of an enterprise. If the collective redundancy is a consequence of the closure of the company, only the compensation due to the closure of an enterprise can be paid.

6.2. Compensation due to closure of an enterprise

The Act of 26 June 2002 (articles 18-26) entitles employees to a closure compensation when the company closes (which means the main activity of the company has ended and at least 75% of employees are dismissed), but also in a situation which is equated to a closure:

- The relocation of the operational headquarters or the fusion of the company.
- Restructuring of the company with an amount of dismissals which is at least two times as high as needed for the applicability of the rules for collective redundancies.

The closure compensation is not paid by the closing company (as it is often in a state of bankruptcy), but by a Closure of Businesses Fund (FSO: Fonds tot vergoeding van de in geval van Sluiting van Ondernemingen ontslagen werknemers/ FFE: Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprises) of the Federal Government (RVA/ONEM). The fund is mostly funded by employers' social security contributions and the state.

To be entitled to the closure compensation, affected employees will have to:

- Have at least one year of seniority in the company.
- Be bound by an employment contract of indefinite term.
- The employment contract has to be terminated, without urgent cause by the employer or with urgent cause (related to the employer) by the employee (in a period before the closure of twelve months for blue-collar workers, or eighteen months for white-collar workers).

Some employees are excluded, including:

- If the employee is transferred to another company by the employer, while retaining his wage and seniority on the condition he will not be fired in the next six months.
- If the employee refuses a written proposal to such a transfer.
- If he reaches the age of 65.

The yearly indexated amount of the closure compensation is determined in function of the age and seniority of the employee. For each year of seniority in the company the compensation will be 160,02 euro (amount as of 06/2017), with a maximum of 3200,40 euro (amount as of 06/2017). The maximum amount equals 20 times the fixed yearly amount. For every year the age of the employee reaches above 45, there will be an addition of 160,02 euro (amount as of 06/2017), with a maximum of 19 times (until the age of 65). Bringing the total maximum amount (as of 06/2017) on 6240,78 euro.

The closure compensation can be cumulated with the termination fee, unemployment benefits and the special compensation for the dismissal of (candidate) worker's representatives. But as seen above, not with the compensation due to the collective redundancy (in which case only the closure compensation remains).

7. What obligations does the company that carries out a dismissal due to business reasons have? In particular, is there the obligation to relocate affected workers within the company or the group of companies?

Although not legally obliged, in consequence of the information and consutation procedure, the employer will often (almost always) make a social plan to deal with the consequences of the collective redundancies or the closure of the company. The social plan will be more enforceable and thus stronger if it is an agreement with the worker's representatives and laid down in a collective agreement. The social plan often contains measures which are a surplus on the legal obligations, including the payment of:

- The wage and benefits until the last day of employment.
- The termination fee (or the period of notice).
- The vacation bonus.
- The pro rate end of the year bonus.
- The closure compensation or compensation due to collective redundancy.
- Specific compensations (provided by the sector or the company itself).

The social plan is a way to please the employees and worker's representatives, so a clean closure of the company is possible and collective redundancies will not lead to massive collective actions.

Collective agreement number 82 of 10 July 2002 entitles employees of 45 years old or older to outplacement counseling. For younger employees, outplacement counseling is not an obligation for the employer, however, Collective agreement number 52 of 10 February 1992 regulates a facultative outplacement counseling which the employer can opt for. Outplacement counseling is a combination of accompanying services and advices which, commissioned by the employer, are granted to the employee, as to enable him to find a new employment as soon as possible or to start as an independent worker. In case of a 45-year-old or older employee, the employer who dismisses him has to do an outplacement proposal in fifteen days after the termination of the employment contract. The employee is entitled to 60 hours of counseling; spread over three phases (maximum twelve months).

Also, Royal Decree of 9 March 2006 regarding the activation policy in case of restructurings entails some obligations for the employer. Most importantly, he is obliged to set up an Employment Cell, which is a sort of cooperative between the employer, social partners and the employment service to accompany and guide the dismissed employees in their search for a new employment.

8. What are the consequences that arise from breach or non-compliance with the legal procedure regarding dissmisals due to business reasons? In which cases is the dismissal considered null (that is, that implies the worker´s readmission)?

This part will focus on the breach of the procedures of the dismissal of protected (candidate) worker's representatives, of collective redundancies and of the closure of an enterprise.

8.1. Protected (candidate) worker's representatives

In case the procedure is not followed, the sanctions of article 14 to 19 of the Act of 19 March 1991 apply.

The employee or his workers' organisation (trade union) can ask his reintegration in the company under the same conditions as before. He has to ask this reintegration by registered letter, within a period of 30 days after the notification of the termination of the contract or after the day on which the candidacies for the elections of worker's representatives are made public in case this date is later than the notification date of the termination. If the employer accepts the reintegration, he has to pay the lost wages and the social security contributions of the period during which the employment contract was terminated.

If the worker's representative does not ask the reintegration, the employer has to pay a compensation equal to his current wage of:

- Two years, in case of less than ten years of seniority in the company.
- Three years, in case of more than ten but less than twenty years of seniority in the company.
- Four years, in case of twenty or more years of seniority in the company.

The employee is not entitled to this compensation if his contract was terminated before the submission of the candidacies for the election of worker's representatives. This compensation can be cumulated with other compensations.

If the employer refuses the reintegration, he has to pay the aforementioned compensation and the wages of the employee, until the end of the term during which the employee could or would have served as an elected worker's representative. Naturally, this is a very costly price to pay for the employer.

8.2. Collective redundancies

The procedure of information and consultation is laid down in the generally binding Collective agreement number 24, the breaching of its rules can be criminally persecuted or result in an administrative fine as article 193 of the Social Criminal Code foresees a sanction of level 2. Next, the non-notification of collective dismissals to the relevant government services is punished by article 197 of the Social Criminal Code which prescribes a sanction of level 1: an administrative fine.

However more interesting are the special sanctions of the Renault Act (article 68 and 69). There is a collective and an individual procedure to dispute the correctness of the followed information and consultation procedure, which are too detailed to discuss in this contribution.

When the correctness of the information and consultation procedure is contested, the sanction will depend on the question if the period of notice is still running or not. If the period of notice did not end yet, it will be suspended until the employer can prove that he followed the procedure correctly. During the suspension, which can take up to 60 days (after the correct notification of the collective redundancy to the local employment service), the employer has to pay wages and supply labour for the affected employees. If he ends their contracts during the suspension, they have the right to be reintegrated.

If the period of notice has ended, and thus the employment contract is terminated, and the contestation of the correctness of the followed procedure is grounded, the employer has to reintegrate the affected employee (and pay his lost wages and social security contributions). If he refuses the reintegration (in a term of 30 days), the employer has to

pay a compensation which is equal to the current wage during a period of 60 days (which starts after the notification to the local employment service). This compensation can be cumulated with any other compensation.

A special sanction is the obligation to pay back state support. Article 70 of the federal Act of 13 February 1998 made this possible, but the article had no real impact on reality and was later deleted. On the regional level the sanction was regulated by several government decisions and decrees in Flanders (Wallonia and Brussels will probably have similar rules). If the correct procedure of Collective agreement number 24 is not followed, the Flemish government can demand the restitution given state support. Practice has proven that the Flemish government is not afraid to do so (by example at the closure of Opel in Antwerp and Ford Motors Company in Genk).

8.3. Closure of an enterprise

Article 74 of the Act of 26 June 2002 states that breaches of the procedure of information and consultation will be persecuted and punished according to the Social Criminal Code. Article 194 of this code foresees a sanction of level 2 (penal or administrative fine) in case the emlpoyer:

- Did not inform the employees by displaying a dated and signed message at a prominent place in the company's premises of its decision to close an undertaking or a branch of an undertaking.
- Did not include in that notice the obliged references.

Article 198 of the Social Criminal Code also prescribes a sanction of level 1 (administrative fine) in case the employer did not comply with the notification procedure to the relevant government service.

Article 48 of the Act of 8 April 2003 sets a special fine on the breach of article 11 of Collective agreement number 9 regulating the information and consultation of the works council in case of company restructurings. The employer has to pay the fine to the Social Security Service.

In case of a closure of an enterprise, there will be collective redundancies. The relevant procedures and its sanctions will apply simultaneously. Reintegration of a dismissed employee in the company will however be rather difficult or even impossible.

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

As seen the special procedures for collective dismissals and company closures are only applicable to companies with 20 or more employees. Employees of microcompanies and SME's with less than 20 employees will not enjoy the mentioned "special protection" of the procedures. They can only call on Collective agreement number 109 on the motiviation of dismissals (see question 11). Also, in companies with less than 50 employees there is no obligation to have a Committee for Health and Safety at Work, nor for a works council (only obliged for companies with 100+ employees), thus also no protected workers' representatives. In general employers of SME's will thus face less difficulties (with a lower burden of proof) to dismiss their employees because of business reasons.

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

Workers in the public administration are in principal statutory functionaries (see for example Royal Decree of 2 October 1937 regarding the statutes of public servants / Rijksambetnarenstatuut). They do not have an employment contract but a fixed statute. It is hard to dismiss these functionaries and the employer (the government) has no real power of dismissal. Dismissal is only allowed in case of disciplinary actions, the absence of the functionary, the loss of his capacity as statutory functionary and professional incompetence (after two negative evaluations). Although most public servants are still statutory functionaries, the public administration makes more and more use of contractual employees. In principle the use of contractual employees is restricted to certain exceptional cases (article 4 of the Act of 22 July 1993 for federal public servants and article 2 of the Royal Decree of 22 December 2000 for public servants of the Communities and Regions), but in practice the restrictions are not applied in a strict way. For contractual employees, the employer (the public administration/government) has the power to dismiss (as seen above).

Moreover, it is possible to transform a statutory functionary into a contractual employee to dismiss him. In that case the administration has to inscribe the worker into the social security system as an employee and retroactively pay all the social security contributions. Of course, this is a very costly solution, but this would allow the public administration to dismiss (ex-) statutory functionairies because of business reasons. It is self-evident that in case of budgetary shortcomings, the contractual employees are the first who will be sacrificed.

If public functionairies are dismissed as a disciplinary sanction, the government has the duty to hear the functionairy before taking the decision and has to motivate its decision (General Principles of Decent Government). Recent case law of the Constitutional Court made clear that also contractual workers in the public sector should be heared before they can be dismissed (cases of 22 February 2018, number 22/2018 and 6 July 2017, number 86/2017).

Finally, the legislation relating to collective redundancies and the closure of an enterprise is not applicable for the public administration. Special regulations or procedures are not provided.

11. Other relevant aspects regarding dismissals due to business reasons

In Belgium the employer has the power or the right to dismiss his employees. As long as he is willing to pay the price (the compensation / termination fee) he can dismiss an individual employee (which is employed for an indefinite term). Before 2014 the employer did not have to give a reason for the dismissal. Only in the case of the dismissal of protected workers like pregnant women or (candidate) worker's representatives and in the case of a collective dismissal he had to give a valid reason as a condition for the dismissal to be allowed (which can be a business reason). Furthermore, it was naturally forbidden to dismiss someone on discriminatory grounds. In 2014 however, the new Collective agreement number 109 (which is declared generally binding) made it obligatory for the employer to give the employee the concrete reasons for the dismissal if the employee asks for it. The reasons can never be manifestly unreasonable, but a dismissal because of business reasons will normally always be accepted. Of course, also before Collective agreement number 109, a manifestly unreasonable dismissal was not really allowed, but it was a lot harder to prove it. Especially for white-collar workers. The given concrete reason is thus not (in general) a condition for the dismissal to be allowed, but a way to prove that the dismissal is not manifestly ill-founded.

However, Collective agreement number 109 does not apply to collective redundancies.

DISMISSAL DUE TO BUSINESS REASONS IN FRANCE

Francis Kessler
Prof. Sorbonne Law School, University Paris 1
Attorney, Senior counsel, Gide Loyrette Nouel, Paris

Introduction

Employment relationships in France are highly regulated, in particular with regard to termination of employment. Employment at will does not exist in France. However, unless a collective bargaining agreement or the employment contract provides otherwise, an employment contract can be terminated without any restrictions during the probationary period.

After the probationary period, an employment contract can only be terminated in certain circumstances.

Beyond traditional dismissals and resignations, French Law n°2008-596 of 25 June 2008 created the "contractual termination". Such a termination enables the employer and one employee to mutually agree about the termination of the employment contract, under the control of the Labor Administration[1]. This flexible mechanism is solely applicable to individual termination.

However, Ordinance n°2017-1387 of 22 September 2017 created "the Contractual Collective Termination" which enables to terminate employment contracts through a negotiated collective bargaining agreement[2]. The content of the voluntary departures plan is determined by the collective bargaining agreement, which is submitted to the administration for validation. These voluntary departures plans are autonomous from social plans: the departures are decided on a voluntary basis and exclude any layoffs.

Regarding indefinite-term employment contracts, an employer can terminate the contract at any time, but he must be able to justify from a real and serious ground of termination[3], and it must comply with the applicable dismissal procedure which varies depending on the type of dismissal.

Real and serious cause means that the dismissal has to be exact, specific, objective and of a sufficiently serious nature to justify the dismissal. This requirement applies to any

[1] Labour Code, article 1237-11 et seq
[2] Labour Code, article L. 1237-17 et seq
[3] Labour Code, article L. 1233-2, par. 2,

type of dismissal regardless the employee's age/position/length of service and the headcount of the company.

The employer proves the reality and the seriousness of the grounds for dismissal. In the event of litigation, if the employer fails to adduce such evidence, the dismissal of the employee will be held to be unfair. If the court considers that there is a doubt in this regard, the issue is resolved in favor of the employee.

In France, there are two major categories of dismissals:
- Dismissals based on the employee's behavior, such as a poor performance, the employee's negligence or inability to work;
- Dismissals based on economic grounds, which can be either individual or collective. Between October 2014 and Septembre 2015, 3% of the registration at the institution of unemployment ("*Pôle emploi*") concerned employees which dismissal was based on economic reasons[4].

1. How are the causes that justify a redundancy or a dismissal due to business reasons defined?

The French legal system allows dismissals due to business reasons in different situations.

Law number 2016-1088 of 8 August 2016 specified the criteria that shall characterise the economic difficulties that may be invoked by the employer to lawfully dismiss an employee[5]. This new definition of the "economic" reason for the dismissal came into force on 1 December 2016.

Before this amendment, the dismissal for economic reasons was defined as the dismissal justified by causes not related to the person of the employee, arising from the removal or the transformation of a job, or from the modification, refused by the employee, of an essential element of the employment contract, stemming from events such as economic difficulties or technological change.

This definition was less specific than the new one, which indicates criteria to assess economic difficulties. Now, the Labour Code defines 'economic grounds' as those which are not inherent to the employee, resulting from the suppression or transformation of

[4] DARES / Pôle emploi, Inscriptions à Pôle emploi en catégories ABC, selon le motif, entre octobre 2014 et septembre 2015

[5] Law n°2016-1088 of 8 August 2016, article 67

employment or a change, which has been refused by the employee, in an essential element of the employment contract[6].

The article L. 1233-3 states that four legal reasons can justify economic dismissal:

- Economic difficulties, characterised as either significant evolution of at least one economic indicator such as a decrease in orders or turnover, operating losses or a deterioration in cash or gross operating profit or by any other element likely to justify these difficulties. A significant reduction in orders or turnover is established when the duration of this decrease is, in comparison with the same period of the previous year, at least equal to: (i) one quarter for a company with fewer than 11 employees; (ii) two consecutive quarters for a company employing between 11 and 49 employees; (iii) three consecutive quarters for a company employing between 50 and 299 employees; and (iv) four consecutive quarters for a company employing 300 or more employees.
- Technological change.
- The reorganization of the company necessary to safeguard its competitiveness.
- The cessation of activity of the company.

The reasons related to the cessation of activity and the reorganization of the company to safeguard its competitiveness are not new. They were already recognised by the French Court of Cassation[7].

This list is not exhaustive, which implies that other reasons may justify an economic dismissal. The judge is able to adopt other criteria than those indicated in the law to justify dismissal for economic reasons.

2. The business reasons that justifying the dismissal, must they concur in the entire company or only concur in the workplace where dismissal occurs?

Article L. 1233-3 of the French labour Code states that the materiality, the transformation of the employment or the modification of an essential element of the employment contract are assessed at the level of the company.

Since Ordinance n°2017-1387 of 22 September 2017, this article specifies that the economic difficulties, the technological changes or the reorganization of the company in

[6] Labour Code, article L. 1233-3, par. 1

[7] Labour Division (Chambre sociale) of the Court of cassation, 5 April 1995, n° 93-42.690
Labour Division (Chambre sociale) of the Court of cassation 16 January 2001, n°98-44.647

order to safeguard its competitiveness are assessed at the level of the company if it does not belong to a group.

If the company belongs to a group, these economic grounds are assessed at the level of the common business sector of this company and the companies of the group to which it belongs, established on the national territory. In other words, the scope of assessment of economic grounds within a group is now limited to the companies of the group located in France which belong to the same sector of activity.

The French labor code now refers to the implementation of a group committee: when the headquarters of the dominant company are located in France, the group is composed of the dominant company and of all the companies under its control. If the dominant company's headquarters are not located in France, then the group is composed of all the companies located in France.

To assess the validity of the economic grounds, the sector of activity is defined, notably, by "*the nature of the products, goods or services delivered, the targeted customers, the networks and distribution methods which are related to the same market*."

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in cases of redundancies (that is, when there is a collective dismissal)?

In France, the procedure to follow in case of dismissal for business reasons varies depending on the number of employees concerned, the size of the company and the presence of staff representative bodies[8].

The greater the number of employees involved, the more burdensome the procedure becomes for the employer.

3.1. Dismissal for business reasons of a single employee

Pursuant article L. 1233-11 of the French labour Code, the employer must convoke the employee to a preliminary interview. This convocation is carried out by a registered letter or by a letter delivered by hand. This letter indicates the object of the convocation. The preliminary interview occus at least five working days after the receipt of the convocation.

[8] A. LYON-CAEN., "La procédure au cœur du droit du licenciement économique", Droit ouvier, 161

During the preliminary interview, the employer indicates the reasons of the dismissal and the employee can provide his explanations[9]. The employee can benefit from the assistance of the person of his choice belonging to the staff of the company[10].

The dismissal is notified at least seven working days after the date of the preliminary interview or fifteen days when the employee concerned is an executive[11].

The letter of dismissal indicates the economic reasons justifying the dismissal and specifies their consequences on the dismissed employee's employment contract[12]. Otherwise, the dismissal is considered without real and serious grouds[13]. The letter must also mention the existence of the priority of reemployment provided by article L. 1233-45 of the French labour Code.

Since Ordinance n°2017-1387 of 22 September 2017, the employer can use a template for the notification of the dismissal[14].

Finally, the employer informs the administrative authority of the dismissal[15] within the time limit of eight days after the letter of dismissal[16].

3.2. Dismissal of two to nine employees during 30 days

Pursuant article L. 1233-8 of the French labour Code, the employer who considers to dismiss less than 10 employees during the same period of 30 days must consult the Social and Economic Committee on this project. The Social and Economic Committee transmits its opnion within the time limit of one month after the date of the first meeting during which the Committee was consulted. Failing that, the Social and Economic Committee is presumed to be consulted.

In the absence of such a consultation, the employer is guilty of offence of obstruction[17].

[9] Labour Code, article L. 1233-12
[10] Labour Code, article L. 1233-13
[11] Labour Code, article L. 1233-15
[12] Labour Code, article L. 1233-16
[13] Labour Division (Chambre sociale) of the Court of cassation, 16 March 2004, n°02-40.633; Labour Division (Chambre sociale) of the Court of cassation, 28 February 2006, n°03-47.888
[14] Decree n°2017-1820, 29 December 2017
[15] Labour Code, article L. 1233-19
[16] Labour Code, article D. 1233-3
[17] Criminal Division (Chambre criminelle) of the Court of cassation, 11 May 1989, n°87-81.710

If the company does not have a Social and Economic Committee, the employer consults the staff representative[18].

The employer transmits to the personnel representative the useful information on the project of dismissal such as the economic reasons, the number of dismissals, the professional categories concerned and the criteria for the order of dismissals[19].

The provisions explained above concerning the convocation of the employee to a preliminary interview, the notification of the dismissal and the information of the administrative authority are applicable. The employer transmits to the administrative authority the minutes of the meeting of the Social and Economic Committee consultation on the project of dismissal.

3.3. Dismissal of at least 10 employees during 30 days

a) Companies with more than 50 employees.

In this situation, the employer has to implement a Redundancy Plan in order to avoid dismissals or limit the number of dismissals[20]. It can be implemented by a collective bargaining agreement[21] or by a unilateral document settled by the employer[22].

The collective bargaining agreement is signed by one or several representative trade unions which collected at least 50% of the votes cast in favor of representative trade unions during the first round of the last professional elections, regardless the number of voters[23].

The collective bargaining agreement defines at least the content of the Redundancy Plan. It cannot derogate from[24] :

- The obligation of redeployment (please refer to section 7);
- The provisions on the information and consultation of the Social and Economic Committee;
- The obligation to suggest to the employees the professional securing contract or the reclassification leave;

[18] Labour Divison (Chambre sociale) of the Court of cassation, 29 May 2013, n°12-12.952
[19] Labour Code, article L. 1233-10
[20] Labour Code, article L. 1233-61
[21] Labour Code, article L. 1233-24-1
[22] Labour Code, article L. 1233-24-4
[23] Labour Code, article L. 1233-24-1
[24] Labour Code, article L. 1233-24-3

- The provisions on the communication of specific and written information to the Social and Economic Committee before the first meeting.

In the absence of a collective bargaining agreement, the employer implements, after the last meeting of the staff representative, a unilateral document which determines the content of the Redundancy Plan. It must establish[25] :

- The modalities of information and consultation of the Social and Economic Committee;
- The scope of application of the criteria concerning the order of dismissals;
- The dismissals' calendar;
- The number of removal of employment and the professional categories concerned;
- The modalities of implementation of the obligation of redeployment.

The monitoring and the implementation of the Redundancy Plan is made by a a regular and detailed consultation of the Social and Economic Committee[26].

The employer consults the Social and Economic Committee on[27] :

- The restructuring project;
- The project of collective redundancy.

There are at least two meetings of the Social and Economic Committee, separated by at least 15 days. The Social and Economic Committee transmits its opinion within a time limit which depends on the number of dismissals.

The regional director of companies, competition, consumption, work and employment ("*Direccte*") controls the respect of the information and consultation procedure.

When the dismissal is null and void (by lack or insufficiency of a social plan), the employee is entitled to minimum damages of six months (instead of 12 months before 24 September 2017)[28].

b) Companies with less than 50 employees.

The employer consults the Social and Economic Committee or the personnel representative and informs them of the economic reasons, the number of dismissals and

[25] Labour Code, article L. 1233-24-4 ; Labour Code, article L. 1233-24-2 1° to 5°
[26] Labour Code, article L. 1233-63, par. 2
[27] Labour Code, article L. 1233-30
[28] Labour Code, article L. 1235-11

the professional categories and the criteria concerning the order of dismissals[29]. The employer also informs them of the measures which are contemplated in order to avoid dismissals or to limit their number and to ease the redeployment[30].

There are at least two meetings of the staff representatives, separated by a time limit of 14 days[31].

Information transmitted to the staff representative is simultaneously transmitted to the Direccte.

4. How is the number of affected workers calculated in order to determine the individual or collective nature of the dismissal?

The procedure that the company must follow to conduct a dismissal for business reasons depends on the number of dismissals.

The number of dismissals is assessed at the moment when the procedure of dismissal takes place[32], at the level of the company or the establishment concerned by the dismissals[33]. This case law is consistent with the decision of the Court of Justice of the European Union[34] which considered that taking exclusively the company as a reference was contrary to the Directive 98/59/CE which specifically refers to the establishment.

To assess the number of dismissals, the contemplated number of dismissals for business reasons must be taken into account and not the final number of dismissals[35].

All modalities of termination are taken into account, including early retirements[36] and conventional terminations in the context of a staff reduction process[37]. Article L. 1233-3 of the French labour Code which states that the employee's refusal of the modification of an essential element of his employment contract constitutes a dismissal based on economic reasons is consistent with the case law of the Court of Justice of the European

[29] Labour Code, article L. 1233-31
[30] Labour Code, article L. 1233-32
[31] Labour Code, article L. 1233-29
[32] Labour Divison (Chambre sociale) of the Court of cassation, 12 July 2010, n°09-14.192 ; Labour Divison (Chambre sociale) of the Court of cassation, 13 July 2010, n°09-65.182
[33] Labour Divison (Chambre sociale) of the Court of cassation, 16 January 2008, n°06-46.313
[34] CJEU, 13 May 2015, C-392/13
[35] Labour Divison (Chambre sociale) of the Court of cassation, 26 January 1994, n°92-41.512
[36] Labour Divison (Chambre sociale) of the Court of cassation, 1 February 2011, n°09-70.121
[37] Labour Divison (Chambre sociale) of the Court of cassation, 9 March 2011, n°10-11.581

Union[38]. Indeed, it considered that the modification of an essential element of the employment contract based on a reason which is not related to the employee is a dismissal.

In order to determinate the applicable procedure, the number of dismissals must be assessed on a period of 30 days from the date of the first meeting of the staff representative on the dismissal project. In the absence of staff representative or if the consultation is not mandatory, the period of 30 days is counted from the first preliminary interview of several employees for the same economic reason[39].

Some provisions prevent the employer from organizing little and repeated dismissals to avoid the procedure of large dismissals. Indeed, when a company with at least 50 employees dismissed during three consecutive months more than 10 dismissals without reaching 10 dismissals on the same period of 30 days, every new contemplated dismissals during the next three months is subject to the provisions related to the dismissal of at least 10 employees during 30 days[40].

Furthermore, the company with at least 50 employees which dismisses for economic reasons more than 18 employees during a year without the implementation of a Redundancy Plan must establish one for all new contemplated dismissal for economic reason during the first three months of the next year[41].

5. Are there groups of workers who have priority in a dismissal for business reasons? Particularly, do workers' representatives have priority? And pregnant workers? Elder workers? Workers with family responsibilities?

French law on dismissals for business reasons includes criteria for selection of employees affected by the dismissal.

From now on the scope of the criteria to be applied to choose the employees to be made redundant is set by collective bargaining agreement.

In the absence of provisions in the collective bargaining agreement, the employer settles the criteria unilaterally after the consultation of the Social and Economic Committee[42]. These criteria take into account:

[38] CJEU, 11 November 2015, C-422/14
[39] Circular letter, DE/DRT 46 of 1st October 1989
[40] Labour Code, article L. 1233-26
[41] Labour Code, article L. 1233-27
[42] Labour Code, article L. 1233-5

- The number of dependents, in particular for single parents;
- The employee's length of service;
- The employee's situation, which would make finding new employment particularly difficult, notably for disabled and old employees;
- The employee's skills assessed in light of his professional category. The professional categories include the employees with similar functions and a common vocational training[43].

The employer can favor some criteria if he takes into account all the other legal criteria.

The perimeter of application of the criteria of order of dismissals is settled by a collective bargaining agreement or unilaterally by the employer but it cannot be less than the employment area in which are located one or several establishments of the company concerned by the dismissals[44].

Discriminatory criteria are prohibited, such as the assment of the family responsibilities according to the employees' origin[45] or differences between full-time employees and part-time employees[46] even if the dismissal concerns a part-time job[47].

Where the employer fails to respect the order of redundancies or provide the employees with information regarding the criteria selected for the order of redundancies, employees may obtain damages for the loss incurred.

6. Are workers affected by a dismissal due to business reasons entitled to an economic compensation?

Dismissed employees are entitled to the following indemnities:

6.1. Severance pay

Since Ordinance n°2017-1387 of 22 September 2017, the employee has to justify eight months of seniority to benefit from the severance pay provided by the law[48]. The amount of the severance pays cannot be less than[49] :

- Before ten years of seniority: 1/4 month of salary per year of seniority;

[43] Labour Divison (Chambre sociale) of the Court of cassation, 28 September 2010, n°09-65.118
[44] Labour Code, article L. 1233-5
[45] Labour Divison (Chambre sociale) of the Court of cassation, 8 April 1992, n°90-41.276
[46] Labour Divison (Chambre sociale) of the Court of cassation, 23 November 2011, n°10-30.768
[47] Labour Divison (Chambre sociale) of the Court of cassation, 4 July 2012, n°11-12.045
[48] Labour Code, article L. 1234-9
[49] Labour Code, article R. 1234-2

- From ten years of seniority: 1/3 month of salary per year of seniority.

The reference pay to take into account is[50] :
- The monthly average of the last twelve months before the redundancy, or when the employee has not been in the company for twelve months, the monthly average of the salary before the redundancy;
- Or 1/3 of the last three months.

The employee receives statutory severance pay where severance pay provided for by the relevant collective bargaining agreement is lower than statutory severance pay.

6.2. Indemnity in lieu of notice

If the employer decides to release the employee from work during the notice period, it must pay the employee an indemnity in lieu of notice, which corresponds to the salary he would have received if he had worked during the relevant period.

According to article L. 1234-1 of the French labour Code, in principle every employee dismissed is entitled:
- To a giving notice determined by a collective bargaining agreement or by the use in the locality and occupation, if he has been employed by the same employer during a continuous period of service of less than six months.
- To a giving notice of one month, if he has been employed by the same employer during a continuous period of service between six months and less than two years.
- To a giving notice of two months, if he has been employed by the same employer during a continuous period of service of at least two years.

These minimum periods of notice are applicable only if the law, the collective bargaining agreement, the employment contract or the occupational uses do not foresee a giving notice or a length of service's condition more favorable for the employee.

6.3. Indemnity in lieu of paid holiday

Pursuant article L. 3141-28 of the French labour Code, the employee is entitled to receive an indemnity in lieu of paid holiday corresponding to the days accrued but untaken at the time of the employment contract is terminated.

In the French legal system there are no peculiarities in relation to the amount of such economic compensation depending on the size of the company.

[50] Labour Code, article R. 1234-4

Generally, collective agreements or employment contracts provide for severance pay above the legal minimum.

7. What obligations does the company that carries out a dismissal due to business reasons have? In particular, is there the obligation to relocate affected workers within the company or the group of companies?

As seen above, there are three types of redundancy procedure, based on the number of the redundancies implemented and the number of employees within the company (please refer to section 6):

- The redundancy of a single employee: it does not require a collective redundancy plan or a consultation of the Social and Economic Committee, except for consultation on the selection criteria for the order of redundancies.
- The redundancy of fewer than 10 employees: the Social and Economic Committee must be consulted and no collective redundancy plan is required.
- The redundancy of 10 employees or more within a company employing at least 50 people, thus requiring the consultation of the Social and Economic Committee and the implementation of a collective redundancy plan.

The dismissed employee benefits from a rehiring priority during one year from the date of the dismissal if he claims it during this delay. The employer informs the employee of available jobs which are consistent with his qualifications[51].

Pursuant article L. 1233-4 of the French labour Code, the dismissal based on economic reasons can be pronounced only if all the vocational training and adjustments were made and that the redeployment of the employee cannot happen on available jobs, located on the national territory of the company or the other companies of the group to which the company belongs and whose organization, activities, and operating place ensure the permutation of all or part of the staff. In practice, employees are longer entitled to request redeployment offers abroad. The obligation to offer redeployment positions abroad upon request from the employee no longer exists.

Indeed, since 24 September 2017, article L. 1233-4-1 of the French labour Code related to the redeployment abroad is null and void. The redeployment is now limited to France.

The redeployment targets a job in the same category as the one occupied by the employee or an equivalent job with an equivalent remuneration. The employee can consent to his redeployment on an employment of a lower category.

[51] Labour Code, article L. 1233-45

Individualised redeployment offers had to be made in writing and be sufficiently detailed. Since Decree n°2017-1725 of 21 December 2017, the employer has now the choice between transmitting the redeployment offers in a personnalised way or by a list transmitted to all employees[52].

If the employer does not respect the obligation of redeployment, the dismissal is considered without real and serious ground[53].

8. What are the consequences that arise from breach or non-compliance with the legal procedure regarding dissmisals due to business reasons? In which cases is the dismissal considered null (that is, that implies the worker´s readmission)?

Pursuant article L. 1233-2 of the French labour Code, a dismissal based on economic reason must rely on a real and serious ground. In the absence of such a real and serious ground, the employee is entitled to a compensation. According to article L. 1235-3, "*the judge awards the employee an allowance payable by the company*". This article settles a minimal and a maximal allowance according to the employee's seniority and varies depending on the fact that the company has less or more than 11 employees.

If the employer does not respect the procedures of consultation of the staff representative or information of the administrative authority, the judge awards the employee an allowance paid by the company depending on his harm[54].

In case of disrespect of the rehiring priority, the employee is entitled to an allowance paid by the company which cannot be lower than one month of wage (instead of two months before 24 September 2017)[55].

In companies with more than 50 employees, when the project of dismissal concerns at least 10 employees in a period of 30 days, dismissals prounounced in the absence of validation or approval of the Redundancy Plan or in case of refusal are null and void[56].

If the decision of validation or approval of the Redundancy Plan is null and void because of an absence or failure of the Redundancy Plan, dismissals are null and void[57].

[52] Labour Code, article D. 1233-2-1
[53] Labour Divison (Chambre sociale) of the Court of cassation, 8 July 2014, n°13-14.609
[54] Labour Code, article L. 1235-12
[55] Labour Code, article L. 1235-13
[56] Labour Code, article L. 1235-10, par. 1
[57] Labour Code, article L. 1235-10, par. 2

When the procedure of dismissal is null and void, the judge can prounounce the reinstatement of the employee. When the employee does not claim the reinstatement or that it is impossible, the judge awards him an allowance paid by the company of at least six months of wage[58].

If the decision of validation or approval of the Redundancy Plan is null and void because of another reason than the absence or failure of the Redundancy Plan, the dismissals are not null and void but the parties can decide the reinstatement of the employee. In the absence of reinstatement, the employee has the right to an allowance paid by the company of at least six months of wage[59].

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

Within companies with fewer than 1.000 employees, such as microcompanies or small or medium companies, the employer must suggest to the employee a professional securing contract[60] in case of dismissal due to business reasons.

This contract is implemented by the French unemployment institution ("*Pôle emploi*") which provides psychological assistance, professional counseling and coaching, professional abilities evaluation and training in order to facilitate the employee's redeployment after his dismissal.

The employee has 21 days to accept or refuse the professional securing contract. If the employee accepts it, the employment contract is considered as terminated by mutual agreement between the parties as from the expiration date of 21-day period.

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

The French labour Code is only applicable to private sector employers and their employees[61]. Public sector employees benefit from a specific protection from dismissal under public law. If an established civil servant is dismissed, the cases of dismissals depend on his occupation:

[58] Labour Code, article L. 1235-11
[59] Labour Code, article L. 1235-16
[60] Labour Code, article L. 1233-65 to L. 1233-70
[61] Labour Code, article L. 1111-1

State civil service:

- Dismissal based on the civil servant's professional inadequacy[62];
- Dismissal based on the refusal, without any valid reason related to his health, of position(s) proposed after a maternity leave, long term sick leave or a long-term leave;
- Dismissal based on the permanent physical inability to carry out his function.

Territorial civil service[63]:

- Same cases of dismissals as a civil servant working for State civil service;
- Dismissal when there is no vacant position corresponding to his grade after the secondment on a management position;
- Dismissal in case of refusal of two job offers when his position was removed following to a service delegation and that he refused to be seconded to the beneficiary of this delegation;
- Dismissal in case of refusal of three job offers for another reason.

Hospital civil service[64]

- Dismissal based on the civil servant's professional inadequacy;
- Dismissal based on three successive refusals of positions corresponding to its rank after the civil servant's availability;
- Dismissal in case of refusal of three job offers when his job was removed.

Thus, dismissals due to business reasons do not exist in the French public sector.

[62] **Law** n° 84-16 of 11 January 1984 related to statutory provisions applicable to State civil service, article 70

[63] Law n° 84-53 of 26 January 1984 related to statutory provisions applicable to territorial civil service

[64] Law n° 86-33 of 9 January 1986 related to statutory provisions applicable to hospital civil service

DISMISSAL DUE TO BUSINESS REASONS IN GERMANY

Alexander Stöhr
Assistant Professor for Labor and Business Law at the European Academy of Labor, Goethe-Universiy Frankfurt am Main, Germany

Introduction

In Germany, dismissals due to business reasons (betriebsbedingte Kündigungen) are a dominant issue in the labor courts. In 2016 there were 11.688 cases, representing 24,7 percent of all trials.[65] In view of the good economic situation, the number of dismissals due to business reasons has been constant in the last years. Business reasons may be regarded as the most honorable ground of dismissal for the affected employees since they do not stem from their sphere. Dismissals due to business reasons contravene the principle that emplyees do not bear the entrepreneurial risk, because they lose their job if the conditions are satisfied under which the dismissal is valid.

1. How are the causes that justify a redundancy or a dismissal due to business reasons defined?

In Germany, general protection against dismissal is only applicable if the employment relationship lasted longer than six months (personal scope, § 1 Employment Protection Legislation) and if more than ten employees are employed in the undertaking in question (establishment -related scope). If the general protection against dismissal is applicable, the dismissal has to be socially justified in order to be valid. The employment protection legislation recognizes three grounds for dismissal: personal capability, conduct and business reasons. According to § 1 (1) Employment Protection Legislation, the dismissal is socially unjustified if it does not depend on urgent requirements of the establishment which stand in the way of further employment. The German Federal Court of Labor thus derived two requirements for the effectiveness of the dismissal.

The first requirement is a measure whose transposition eliminates the employment opportunity at the latest on expiry of the period of notice. The elimination of the employment opportunity has to be assessed on the basis of a prognosis. The relevant time for the prognosis is the receipt of the dismissal. The courts are not entitled to examine the the business decision with regard to its necessity or its usefulness. This

[65] Statistics provided by the DGB Rechtsschutz, which can be downloaded at https://www.dgbrechtsschutz.de/fileadmin/media/0_2015_Media_Neu/Wir_Unternehmen/Publikationen/Statistiken/Statistiken_2016/DGBR-Arbeitsrecht-2016.pdf, accessed on 13 Marsh 2018.

would encroach upon the right to entrepreneurial freedom (National level: Article 12, 14 Grundgesetz, European level: Article 20 Charter of Fundamental Rights of the European Union). The court has only to examine whether the dismissal is apparently unobjective, irrational or arbitrary (control of abuses).[66] The courts shall assume that the business decision was made on objective grounds and is not arbitrary.[67]

The second requirement is the proportionality of the dismissal (principle of last resort). Operation requirements are only urgent if the employer cannot achieve his decision by means other than the dismissal. Milder means are, for example, a notice of dismissal with the option of reemployment on altered conditions (Änderungskündigung)[68] or the introduction of short-time work.[69] The dismissal is socially unjustified if the employee could be transferred to a free position in the same undertaking or company, as expressly laid down in § 1 (2) Employment Protection Legislation.

Furthermore, according to § 1 (3) Employment Protection Legislation, the employer has to conduct a proper selection based on social factors (Sozialauswahl). This selection procedure will be described in detail below under question 5.

2. The business reasons that justifying the dismissal, must they concur in the entire company or only concur in the workplace where dismissal occurs?

In the German employment protection legislation, business reasons as grounds for dismissal only consists of a measure whose transposition eliminates the employment opportunity at the latest on expiry of the period of notice. Such measure can relate to the workplace where dismissal occurs, but the entire company as well. Hence, this distinction is not relevant in the German legal system.

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in cases of redundancies (that is, when there is a collective dismissal)?

As with any dismissal, according to § 102 German Works Constitution Act, the employer has to consult the works council. The council must be informed about the reasons for dismissal. Otherwise the dismissal is invalid.

[66] German Federal Labour Court, decision of 10 July 2008 – 2 AZR 1111/06, NZA 2009, 312 point 24.
[67] German Federal Labour Court, decision of 18 June 2015 – 2 AZR 480/14, NZA 2015, 1315 point 35.
[68] German Federal Labour Court, decision of 3 April 2008 – 2 AZR 500/06, NZA 2008, 812 point 12, 13.
[69] German Federal Labour Court, decision of 23. February 2012 – 2 AZR 548/10, NZA 2012, 852 point 22.

If the dismissal is qualified as a collective as defined in § 17 (1) Employment Protection Legislation, the employer has to notify the Agency for Employment within 30 calendar days prior to dismissing

- More than 5 employees in establishments with regular more than 20 and fewer than 60 employees.
- 10 per cent of the regularly employed employees or more than 25 employees in establishments with at least 60 and fewer than 500 employees.
- At least 30 employees in establishments with regularly at least 500 employees.

§ 17 (2) Employment Protection Legislation states that where an employer intends to make dismissals which are notifiable pursuant to paragraph. (1), he must inform the works council in writing and in a timely manner of, in particular:

- The reasons for the planned dismissals.
- The number and occupational group of the employees to be dismissed.
- The number and occupational group of the employees regularly employed.
- The period of time over which these dismissals are to take place.
- The intended criteria for the selection of the employees to be dismissed.
- The criteria for calculating any severance payments.

According to § 17 (3) Employment Protection Legislation, the employer must, at the same time, send the Agency for Employment a copy of the notification to the works council; this notification must at least contain the information set forth in paragraph. 2 nos. 1 – 5 above. The notification pursuant to paragraph. (1) must be in writing and include the works council's comments regarding the dismissals. Where the works council has not given its comments, the notification shall be effective if the employer can demonstrate that he informed the works council at least two weeks prior to submitting the notification pursuant to paragraph. (2) and describes the Status of the discussion. The notification shall give the employer's name, the seat and nature of the establishment, the reasons for the planned dismissals, the number and occupational group of employees to be dismissed and of those regularly employed, the period of time over which the dismissals are to take place and the intended criteria for the selection of the employees to be dismissed. Further, in agreement with the works council, for the use of the Agency for Employment, the notification should give the sex, age, occupation and nationality of the employees to be dismissed. The employer shall send a copy of the notification to the works council. The works council may submit further comments to the Agency for Employment. It shall send the employer a copy of such comments.

However, according to § 22 Employment Protection Legislation, these requirements do not apply to seasonal and project-orientated establishments in the case of dismissals made necessary by the special nature of such establishments.

4. How is the number of affected workers calculated in order to determine the individual or collective nature of the dismissal?

As already mentioned in question 3 above, the relevant thresholds are defined in § 17 (1) Employment Protection Legislation: The dismissal is qualified as a collective if the employer employs more than 5 employees in establishments with regular more than 20 and fewer than 60 employees, 10 per cent of the regularly employed employees or more than 25 employees in establishments with at least 60 and fewer than 500 employees or at least 30 employees in establishments with regularly at least 500 employees. The criterion "establishment" has to be interpreted in accordance with the Directive 98/59/CE. As the European Court of Justice held, establishment is the economic unit which the affected employees belong to.[70]

5. Are there groups of workers who have priority in a dismissal for business reasons? Particularly, do workers' representatives have priority? And pregnant workers? Elder workers? Workers with family responsibilities?

As already mentioned, the employer has to conduct a selection based on social factors (Sozialauswahl). According to this requirement, the dismissal is socially unjustified if the employer did not take sufficient account of the social aspects in the selection of the employee. If the employer has the possibility to choose from several employees, he has to choose the employee or employees which would best cope with the dismissal in social terms. If this selection is not done lawfully, the dismissal is invalid. In summary, the business reasons create the menace of a dismissal, which is concretized by the selection based on social factors. The selection has to be carried out in three steps.

As a first step it has to be asked which employees have to be included in the selection. The selection only includes employees which are working in the same establishment[71] (establishment-related selection) and which are interchangeable because they are obliged to conduct activities which are in principle equivalent. The interchangeability has to be determined with regard to the work-place: The comparison of the employees takes place only on the same level within the establishment hierarchy (horizontal comparability). The employee who is affected by the dismissal cannot argue that he could do the work of a less skilled employee (vertical comparability): It would contradict the purpose of the selection if it would have to be borne by less qualified employees.[72]

[70] European Court of Justice, decision of 7 December 1995 – C-449(93, ECR I-5291.
[71] German Federal Labour Court, decision of 2 June 2005 – 2 AZR 158/04, NZA 2005, 1175.
[72] German Federal Labour Court, decision of 29 Marsh 1990 – 2 AZR 369/89, BAGE 65, 61, 77.

In the second step, the selection decision has to be made. The relevant social aspects are listed in § 1 (3) Employment Protection Legislation: Length of service with the company, age, maintenance obligations and severe disability. According to the case law rulings of German labor courts, it does not depend on an error-free selection process, but on an error-free selection outcome: Selection errors that cannot affect the result with regard to the employee concerned are not relevant.[73]

In the third step it is evaluated whether certain employees have to be excluded from the selection. According to in § 1 (3) Employment Protection Legislation, employees whose ongoing employment is of a legitimate and operational interest to the company, have to be excluded. Relevant for the legitimate and operational interest to the company are the knowledge, skills and performances of the employees, but also the security of a well-balanced personnel structure. This regulation shall ensure the exclusion of top performers from the selection.

6. Are workers affected by a dismissal due to business reasons entitled to an economic compensation?

In general, the German protection against dismissal aims at the continued existence of the employment relationship. If the dismissal is not socially justified, it is invalid and the employment relationship persists. If the dismissal is socially justified, the employment relationship terminates after expiry of the period of notice. The employees shall on principle not be entitled to an economic compensation. This also applies to the dismissal due to business reasons. Claims to an economic compensation exist only on the basis of collective agreements, in the case of an operational chance (§ 111 Works Constitution Act), on the basis of a social plan (§ 112 Works Constitution Act) or compensation for disadvantages (§ 113 Works Constitution Act) or – as with any dismissal – under the provisions of §§ 9, 10 Employment Protection Legislation.

However, § 1a Employment Protection Legislation contains a special provision for the dismissal due to business reasons: If the employer dismisses an employee due to business reasons and the employee does not petition the Labor Court to find that the employment relationship has not been dissolved due to the termination by the expiration of the period set forth in § 4 Employment Protection Legislation, the employee shall have a claim to an economic compensation upon expiration of the notice period for dismissal. The claim is subject to the condition that the employer has stated in its declaration of dismissal that the dismissal is based on business reasons and the employee may claim the economic compensation once he has allowed the period in which it may petition the court to elapse. According to § 1a (2) Employment Protection

[73] German Federal Labour Court, decision of 9 November 2006 – 2 AZR 812/05, NZA 2007, 549.

Legislation, the economic compensation shall amount to 0.5 monthly remuneration for each year the employment relationship existed. In the calculation the duration of the employment relationship, a period of more than six month shall be rounded up to a full year.

7. What obligations does the company that carries out a dismissal due to business reasons have? In particular, is there the obligation to relocate affected workers within the company or the group of companies?

The German legal system pursues exactly the other way: According to the aforementioned principle of last resort, the dismissal is invalid if the employee could be transferred within the company. Vacant jobs in other companies of the same group can remain out of consideration, since the German protection against dismissal is not group related.

8. What are the consequences that arise from breach or non-compliance with the legal procedure regarding dismissals due to business reasons? In which cases is the dismissal considered null (that is, that implies the worker´s readmission)?

As already mentioned, the dismissal is invalid and the employment relationship continues if the dismissal violates legal procedure regarding dismissals due to business reasons. However, according to § 4 Employment Protection Legislation, where an employee wishes to assert a claim that his dismissal is socially unjustified or legally invalid on other grounds, he must petition the Labor Court within three weeks after receiving the written termination notice to find that the employment relationship has not been dissolved due to the termination. Where the invalidity of a dismissal is not asserted in a timely manner, § 7 Employment Protection Legislation states that the dismissal is held to be legally effective from the outset (fiction of legal validity).

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

According to § 23 Employment Protection Legislation, the protection against dismissal is only applicable in establishments with more than ten employees. Below this threshold, the German Federal Constitutional Court demands a degree of social consideration if the employer has to choose from a number of employees (selection based on social factors "light").[74] The Federal Labor Court realizes this through an alleviated protection based on §§ 138, 242 Bürgerliches Gesetzbuch (unethically and

[74] German Federal Constitutional Court, decision of 27 January 1998 – 1 BvL 15/87, BVerfGE 97, 169 (178).

good faith). The protection is restricted to arbitrary and extraneous considerations of the employer.[75] The Federal Labor Court emphasizes that a dismissal is not arbitrary if a "somehow good reason" exists. The selection decision is only considered arbitrary if the employer chooses an employee who is obviously worthier of protection than others.[76]

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

In the German legal system, it is possible to conduct a dismissal due to business reasons. However, business reasons in the proper meaning of the word cannot exist in the public sector, since the public authorities are in principle not permitted to carry out economic activities. A measure whose transposition eliminates the employment opportunity at the latest on expiry of the period of notice can be the affixing of a so-called kw-note (kw = posts to be cancelled in the future) in the budget plan or the change of a plan of staffing requirements.[77]

[75] German Federal Labor Court, descision of 21 February 2001 – 2 AZR 15/00, BAGE 97, 92 (100 f.).
[76] German Federal Labor Court, decision of 6 February 2003 – 2 AZR 672/01, NZA 2003, 717 (719).
[77] German Federal Labor Court, decision of 6 July 2006 – 2 AZR 442/05, NZA 2007, 139.

DISMISSAL DUE TO BUSINESS REASONS IN GREECE

Evangelos Angelopoulos
Attorney-at-Law, LL.M, PhD Cand.

Introduction

Under severe circumstances of economic and financial crisis, undertakings operating in Greece have widely adopted measures of restructuring leading to redundancies due to business reasons. While specific official statistics are not available, a major portion of the skyrocketed unemployment in Greece (a record 27.8% in the first trimester of 2014, and according to the last available data 20.8% in December 2017) should logically be appointed to redundancies due to business reasons.

1. How are the causes that justify a redundancy or a dismissal due to business reasons defined?

There is no authentic/ex lege definition of the causes justifying a redundancy/dismissal due to business reasons in Greece. Altogether, the issue at hand is primarily a judge-made law. The Greek Supreme Court ("Areios Pagos") steadily holds that "*as far as dismissals due to economic and technical reasons, such as among others restructuring of the departments or services of the undertaking and the reduction of workforce for reasons of economy that are forced by specific conditions faced by the undertaking, the decision of the employer to deal with the apparent economic crisis of the undertaking is not subject to judicial review*".

2. The business reasons that justifying the dismissal, must they concur inthe entirecompany or only concur in the workplace where dismissal occurs?

In the Greek legal system, there is not a specific rule or provision to set the issue at hand. Moreover, as far as this specific issue is concerned, there is not even settled case law. Thus, every case will be decided in concreto and on a case by case basis, taking into account the goals and general principles of labour law, such as the protection of the employee as the weaker party etc.

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in cases of redundancies (that is, when there is a collective dismissal)?

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

3.1. Collective redundancies

In regard to the definition of collective redundancies, the limits beyond which a dismissal is considered collective are:

- More than six (6) dismissals per month in undertakings normally employing more than 20 and less than 150 workers.
- 5% of workers but not exceeding 30 workers per month in undertakings normaly employing over 150 workers.

In these cases, when the dismissal is qualified as collective, the undertaking must conduct a period of prior consultation/negotiation with the workers' representatives 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 the worker's employability. The limitation period for the consultation procedure is thirty (30) days, starting from the relevant invitation of the employer addressed to the workers' representatives.

This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in Article 2, and particularly the reasons for the redundancies, the number and category of workers to be made redundant, the number and category of workers normally employed, the period over which the redundancies are to be effected, the criteria for the selection of the workers to be made redundant. These obligations are applicable even if the decision for the redundancies is taken from an undertaking that controls the direct employer (for example parent company). Copies of these documents are filed by the employer to the Supreme Work Council.

In the context of consultation, the employer can propose to the workers' representatives a social scheme including measures to mitigate the impact of the redundancies.

The result of the consultation procedure is formulated in a written document (minutes) and it is forwarded by the employer to the Supreme Work Council. On the other hand,

the workers' representatives have the right to submit a memorandum regarding the consultation. If there is agreement between the parties, the collective redundancies take place according to the agreement and are in effect ten (10) days since the date of submission of the consultation minutes.

If no agreement is reached, the Supreme Work Council, decides within ten (10) days if the obligations of the employer regarding information and consultation have been respected and whether the notification of the relevant documents took place. If the Supreme Work Council holds that the obligations of the employer have been fulfilled, the redundancies are in effect twenty (20) days after the relevant decision. On the contrary, the Supreme Work Council extends the consultation or sets a limitation period to the employer, in order for him to take the necessary measures to fulfill his obligations. If the Supreme Work Council with a new decision reaches the conclusion that the obligations have been fulfilled, the collective redundancies are in effect twenty (20) days after that decision. In any case, the collective redundancies are in effect sixty (60) days after the notification of the consultation minutes. This process is not applicable for collective redundancies arising from termination of the establishment's activities where this is the result of a judicial decision.

3.2. No collective redundancies

The dismissal is not considered collective even though it can affect multiple workers, if it doesn't reach the threshold established in article 1 of Law 1387/1983 relating to collective redundancies.

In these cases, there are three formal requirements and one substantive:

a) Written form of the dismissal delivered to the affected employee.
b) Simultaneously with the delivery of the written notice, the employee must receive the severance pay according to the rules set by the applicable statutes (namely Law 2190/1920 and Royal Decree of 16.071920).
c) The affected employee was registered and insured by the employer at the relevant Social Security Fund.
d) The dismissal ought not to be abusive, according to the limits set by article 281 of the Greek Civil Code (abusive exercise of right).

4. How is the number of affected workers calculated in order to determine the individual or collective nature of the dismissal?

In Greek labour law, it is considered as collective redundancies the dismissals that affects the entire workforce of the company (if the workforce is higher than 20 employees) or the dismissal that, in a 30-day period, affects at least:

- More than six (6) dismissals per month in undertakings normally employing more than 20 and less than 150 workers.
- 5% of workers but not exceeding 30 workers per month in undertakings normally employing over 150 workers.

Regarding the unit of measurement article 1 of the applicable Law 1387/1983 specifically refers to both the undertaking and the establishment.

Regarding to the terminations of the employment contract that have to be counted to determine the individual or collective nature of the measure, article 1 paragraph. 3 of Law 1387/1983 indicates that, in addition to the dismissals due to business reasons, "*any other dismissals produced in the reference period at the initiative of the employer by virtue of other reasons irrelevant to the employee shall be taken into account, provided that they are, at least, five*".

Finally, it should be noted that the protection of the Law does not apply to collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts.

5. Are there groups of workers who have priority in a dismissal for business reasons? Particularly, do workers' representatives have priority? And pregnant workers? Elder workers? Workers with family responsibilities?

The Greek legislation on dismissals does not include selection criteria for employees affected specifically by dismissals due to business reasons. Nevertheless, the judge-made law is ample and settled and requires that the selection should be made by objective criteria as required by the good faith principle and business ethics. Specifically, the employer when selecting among employees that belong to the same category and specialty and share the same level of dexterity, skills and work performance, should take into account and co-assess the socio-economic criteria of seniority (only the years served in the undertaking involved), age, family status, and the capability of finding another job. Hence, the dismissal is abusive, and thus null and void, when the employer omits to take into account the aforementioned criteria.

It should be noted that if an employee is protected due to other features by other legal provisions or case law (such as maternity, disability, workers' representatives) the protection is preserved and co-assessed for the selection of the employees to be laid off or its judicial review.

6. Are workers affected by a dismissal due to business reasons entitled to an economic compensation?

In the Greek legal system, a lawful dismissal due to business reasons implies the recognition of workers affected by such dismissal of an economic compensation (severance pay), with the condition that they have provided their work for a minimum period of one year at the respective undertaking. The calculation of the compensation depends on whether the dismissal took place with or without prior notice:

1) In case the dismissal took place without prior notice (this is the vast majority of the cases), then the dismissed employee receives a minimum compensation equivalent to two (2) monthly wages with a maximum compensation equivalent to twelve (12) monthly wages. The wages are calculated on the basis of the last monthly payment before the dismissal. In case the dismissed employee has completed at 12/11/2012 a period of seventeen (17) years or more of service in the undertaking, she is entitled to one (1) additional monthly wages for each additional year of service, up to twelve (12) additional monthly wages for dismissed workers that have completed twenty-eight (28) years of service. It is important to note that in the case of senior workers who have completed at 12/11/2012 seventeen (17) or more years of service, there is a statutory plafond for the calculation of the additional compensation. In particular, as a maximum basis for the calculation of the compensation is set the monthly sum of two thousand (2,000) euros.

2) In case the dismissal took place with a prior notice (a quite rare phenomenon): The notice should take place at least one (1) month before the dismissal and with a maximum of four (4) months depending on the seniority of the employee. The employee is entitled to fifty percent (50%) of the compensation that she would have received in the case of dismissal without notice.

In the Greek legal system there are no special provisions/exemptions in relation to the amount of such economic compensation depending on the size of the company.

7. What obligations does the company that carries out a dismissal due to business reasons have? In particular, is there the obligation to relocate affected workers within the company or the group of companies?

In the absence of relevant legislation, it is the judge-made law that imposes obligations to the employer arising out of dismissals due to business reasons. According to the well-settled relevant jurisprudence of the Supreme Court, the judicial review is based on the principle of ultima ratio. Thus, the dismissals should be the ultimum refugium of the employer, if and only if he is unable to avoid them whatsoever. Hence, a dismissal due to business reasons is considered abusive and illegal if the court finds that the employer's interests could have been served by more lenient than the dismissal measures, such as transfer to another position, job rotation, reduction of wages, part-time employment etc. Indeed, the softer measure is the relocation of the affected employee to a different job post.

8. What are the consequences that arise from breach or non-compliance with the legal procedure regarding dismissals due to business reasons? In which cases is the dismissal considered null (that is, that implies the worker´s readmission)?

In Greek labour law the employer should respect the prerequisites of the law (either enacted by the legislature or judge-made) as far as the dismissals due to business reasons are concerned, otherwise he faces the following consequences:

Within the collective redundancies framework, article 6 paragraph. 1 of Law 1387/1983 provides that "*Collective redundancies that take place in breach of the provisions of this Law are null and void*". The same applies for dismissals due to business reasons that are judicially reviewed and found abusive according to article 281 of the Greek Civil Code relating to abusive exercise of a legal right (for example, dismissals that could have been avoided by transferring the affected employees to another establishment of the undertaking, or dismissals that failed to take into account the selection criteria of the employees to be made redundant). In any case, the dismissal is considered null and void, and thus the employment contract is regarded as still valid and functioning, hence the employer owes default wages, until he readmits the employee.

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

The Greek labour legislation lacks any special provision(s) regarding the dismissal due to business reasons in relation to the size of the undertakings (for example for small and medium enterprises). The only relevant provision is that of article 1 paragraph. 1 of Law

1387/1983 (that transposed the relevant Directives to national law) relating to collective redundancies that sets the definition and scope of the statute.

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?

First of all, it should be noted that in Greece there is no definition of the causes for a dismissal due to business reasons in a public administration body/entity. According to article 154 of the Code of Public/Civil Servants, the servant is dismissed if her position of service is abolished. If the eradication affects only some of the positions of the same branch, the servants with the less substantial skills are to be laid off, following a decision of the respective departmental board. The decision can be disputed before the Supreme Administrative Court. The same rules apply also to abolition of working positions following a merger of branches or services. The servants to be dismissed are entitled, subject to application, to move to a vacant position of another public service or public entity. Finally, the servant has a re-appointment right if the same or a similar position is reinstituted within a year of the dismissal. Pursuant to article 101 of the same Code, the servant that her position is abolished is placed ex lege on suspension, as far as she has not been transferred to a vacant position according to article 154 paragraph. 4. The suspension lasts for eight months, and subsequently the servant is dismissed. During the suspension, the servant receives the 75% of her wages.

11. Other relevant aspects regarding dismissals due to business reasons

According to article 10 of Law 3198/1955, the undertakings that experience a reduction of economic activity, instead of proceeding to redundancies, can alternatively place their workforce on suspension after prior consultation with the workers' representatives. The suspension cannot exceed a three (3) month period annually and has to be notified in written form. During the suspension period the employee receives half (50%) of her average full-time wages during the last two (2) months before the suspension. After the three-month suspension period, in order for the same employee to be placed on suspension again, at least three (3) months should pass.

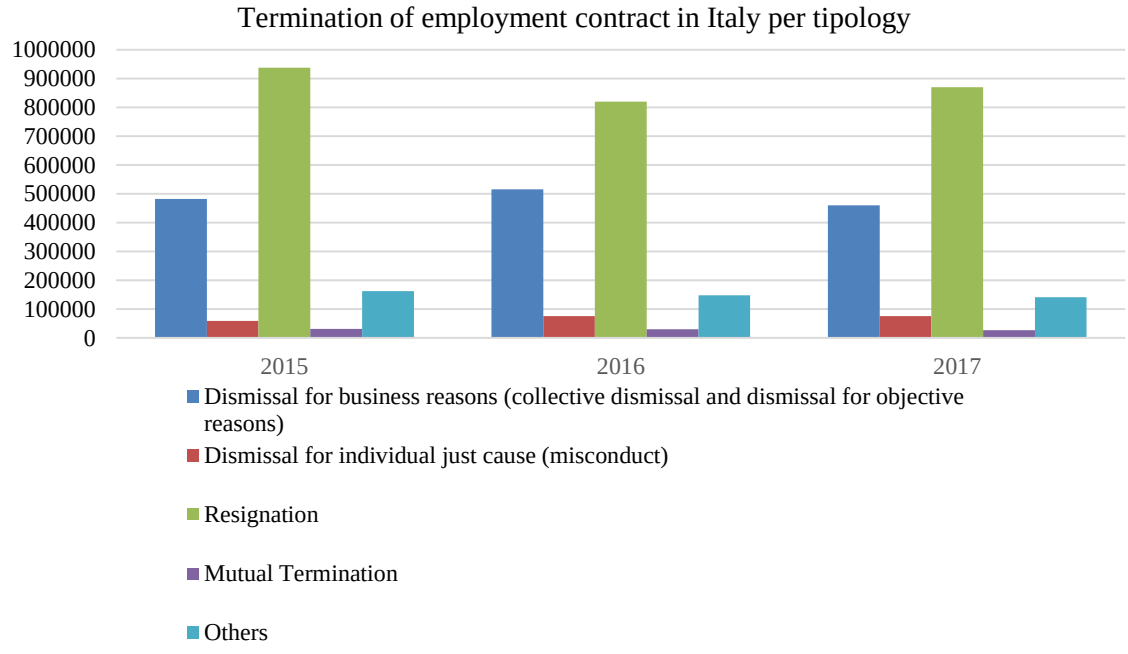
DISMISSAL DUE TO BUSINESS REASONS IN ITALY

Michele Tiraboschi
Full Professor of Labour Law at the University of Modena and Reggio Emilia.
Scientific Coordinator of ADAPT

Diogo Silva
PhD Candidate, University of Bergamo - ADAPT

Introduction

Considering the latest statistics of the year of 2017 provided by INPS, dismissals for business reasons is the second most frequent type of termination of the employment contract in the Italian labour market, following the termination by will of the employee. It is worth mentioning that this type of dismissal has decreased since its peak in 2012. According to data provided by SISCO, in 2012 collective dismissals amounted to 96369 and the dismissals for objective reasons amounted to 830027. In 2017, they totalled 460530 (see the graph below).



Source: INPS, Osservatorio sul Precariato, Dati sui nuovi rapporti di lavoro, Report mensile Gennaio-Dicembre, 2017

A reflection on dismissals due to business reasons is not only important for its relevance in the labour market, but also because the Italian legislator has recently made some

important reforms on the legal framework for this kind of dismissal. To build a comprehensive framework of the dismissal due to business reasons in Italy, it is important to bear in mind two of the major labour market reforms in the Italian legal system, the first produced by Law number 92 of 28 June 2012 and the second by a series of legislative decrees promulgated during the year 2015 (so-called Jobs Act reform). Both these reforms redefined the sanctionatory framework for unlawful dismissals through a progressive reduction of workers' reinstament and substitution for compensation schemes: currently the two different regimes coexist as the latter only applies to dismissals of workers hired after March 7th 2015. Moreover, the above-mentioned reforms had an impact on other aspects of the regulation of dismissals due to business reasons.

1. How are the causes that justify a redundancy or a dismissal due to business reasons defined?

In the Italian legal system, "economic" dismissal refers to the dismissal for justified objective reasons, due to "*reasons inherent to the productive activity, the organization of work and the regular functioning of it*" (Article 3 of Law number 604, of 15 July 1966).

Therefore, the "economic" reasons do not refer to a misconduct by the worker, but to specific business reasons so that a certain job position is no longer needed. Two of the conditions required for this purpose are: a) the effectiveness of the business needs referred to in the motivation for dismissal; b) a causal nexus between these needs and the dismissal.

It must be specified, however, that the entrepreneurial management choices are not questioned by the judge, which must be limited to pronounce only on their realization consistency, by virtue of the principle of freedom of the private economic initiative laid down in article 41 of the Constitution. Furthermore, in the presence of general clauses, among which they are expressly understood also the rules on dismissal, "*judicial control is limited exclusively, in compliance with the general principles of the legal system, the establishment of the assumption of legitimacy and can not be extended to the merit side on evaluation, techniques, organizational and productive activities that belong to the employer*" (according to article 30, paragraph 1 of the Law number 183/2010). Law number 92/2012 also specified that failure to comply with the relevant provisions to the merit "*constitutes a ground of appeal for violation of the rules of right*" (article 1, paragraph 43).

On the other hand, it is possible to verify in Court the consistency of the dismissal with an organizational change in light of the technical rules of good organization: a dismissal would therefore be unjustified if, according to these 'rules', does not appear as an indefectible consequence of the unquestionable, technical-organizational choices or if it is not linked to the latter by a close causal link (for example dismissal of a worker not involved in a reorganization process).

2. The business reasons that justifying the dismissal, must they concur in the entire company or only concur in the workplace where dismissal occurs?

When the employer decides to order a dismissal for economic reasons, the technical, organizational and productive reason must affect the whole company and not only the workplace, where the dismissal occurs. The dismissal must be configured as an *extrema ratio* and, according to a consolidated jurisprudential orientation, the employer must demonstrate the non-existence of alternative positions not only in the employer's premises where the worker was used, but in all the offices of the company (also known as obligation of *repechage*, that will later on be explained in detail).

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in cases of redundancies (that is, when there is a collective dismissal)?

The procedure to be followed is first and foremost different depending on whether the dismissal is individual or collective.

3.1. Individual dismissal

The dismissal must be communicated in writing indicating at the same time the reasons that determined it.

If the employer falls within the dimensional requirements of article 18 of the Statuto dei Lavoratori (Law number 300/1970), following the Reform of 2012, a further obligation of a procedural nature was established in the experiment of an attempt of conciliation before the administrative headquarters of the Territorial Labor Inspectorates (*Ispettorati Territoriali del Lavoro*, henceforth ITL). The employer must make a communication in which he declares his intention to proceed to the dismissal indicating the reasons, as well as any assistance measures for relocation of the interested employee.
The procedure is aimed at examining the existence of alternative solutions to the dismissal and must be completed within twenty days of the transmission of the

convocation by the ITL, unless the parties, of common notice, do not consider the reaching of an agreement.

For specific provision of the Legislative Decree number 23/2015 (article 3 paragraph 3), the above-mentioned procedure is not applied to the workers who fall under the application of the same regulation (in general, those hired after March 7th, 2015).

3.2. Collective dismissal

In the Italian legal system, there are two different kind of collective dismissal: collective dismissal resulting after a period of Extraordinary Wages Guarantee Fund (CIGS) (article 4, paragraph 1 of the Law number 223/1991) and collective dismissal due to a staff reduction (article 24 of the Law number 223/1991). As we will see in the next section, they have different requirements: however, they share the same collective dismissal procedure established by article 4, paragraph 2 and following.

Article 4, paragraph 2 and paragraph 3 of the Law number 223/1991 states that the procedure begins with the communication of the intention of the dismissal to the Unitary Workplace Union Structure (RSU) and to the associations belonging to the more representative confederations, the technical and organizational reasons that determine the need to reduce staff; the number, the company location and the professional profiles of the excess staff, as well as of the personnel normally employed; the implementation time of the staff reduction; any measures planned to deal with the consequences on the social plan of the implementation of the program: the method of calculation of all attributions other than those already provided for by current legislation and by contract.

The procedure, introduced by the first communication, can be divided into two phases: one, occasional and preliminary, and the other subject to the negative result of the first.

The first phase, so-called union phase, can take place at the initiative of the union within 7 days from the date of receipt of the communication and must, however, take place in a time frame not exceeding 45 days. This phase consists of a joint discussion between the employer and the union aimed at seeking an agreement that resolves in whole or in part the problem of surpluses (article 4, paragraph 5, Law number 223/1991). When this phase is over, two possible situations are set up: an agreement has been reached or the procedure was unsuccessful; in this second case the law provides for the opening of a further conciliation phase in the administrative area.

Once the whole procedure has been completed, which on the whole can not last longer than 75 days, if there is still a need to intimate all or only some of the redundancies initially provided for in the communication, the employer has the right to identify in concrete, the workers affected by the dismissal provision.

4. How is the number of affected workers calculated in order to determine the individual or collective nature of the dismissal?

In order to delimit individual dismissals due to objective reasons from the collective dismissal, the Italian legal system establishes a dimensional requisite for the collective dismissal (in harmony with article 1 of the Directive 98/59/EC of 20 July 1998). According to article 24, paragraph 1 of Law number 223/1991, for a collective dismissal due to a staff reduction there must be the intention to dismiss at least 5 workers in a timeframe of 120 days on a production unit or on distinct production units within the same province, as long as the enterprise has more than 15 employees. The cause of the dismissal must be unitary and due to a reduction or transformation of business activity (to be intended as the working and production factors used to fulfill business goals) or of the workload. This definition has a generally all-encompassing scope, so it must be considered to include also hypotheses in which the enterprise only reduces the workforce employed due to technological upgrades, without fulfilling a contraction of structures or activity (so-called technological dismissal), even just to reduce costs business.

However, if the dismissal results after the employer had access to Extraordinary Wages Guarantee Fund (CIGS), then article 4, paragraph 1 of Law number 223/1991 is applicable and the dimensional requirement no longer takes place: if the employer dismiss even only one employee, the dismissal is still qualified as a collective dismissal.

5. Are there groups of workers who have priority in a dismissal for business reasons? Particularly, do workers' representatives have priority? And pregnant workers? Elder workers? Workers with family responsibilities?

5.1. Individual dismissal

Regarding the individual dismissal, there is no specific group of workers with protection against the dismissal. Nonetheless, the employer must respect the general rules regarding the principle of equal treatment, non-discrimination and other fundamental rights of workers in a protection period, such as pregnant workers, workers on paid leave, whether maternity leave, paternity leave, parental leave, marriage leave or sick leave.

5.2. Collective dismissal

In collective dismissal, the identification of workers to be fired must take place according to technical, productive and organizational requirements in compliance with the criteria set by collective agreements, according to article 5 of Law number 223/1991.

In lack of the latter, the choice must be made in compliance with the following concurring legal criteria: family loads; seniority; organizational and technical-productive needs. These criteria are not set in order of prevalence and they must be jointly evaluated with reference to each employee. With reference to the "family responsibilities" criterion, employees with family engagements should be given priority at the time of deciding whom should be kept in employment; in relation to seniority, priority to keep the job is given to employees who have higher seniority, but the nature of the criterion is still debated among scholars and courts.

The criteria covered by the collective agreement can be totally different from the purely supplementary ones identified by the law, but they must be equipped with the character of abstractness and cannot be, of course, discriminatory or violate some particular provisions dictated by law as mandatory (for example, the number of disabled persons' subject to compulsory placement regulations cannot be less than percentages provided for by the Law number 68/1999).

The dismissal of a working mother is only possible in the case of termination of the activity of the enterprise, according to article 54 of the Legislative Decree number 151/2001. The company cannot also dismiss a percentage of female labor above the percentage of female labor occupied with regard to the tasks taken into consideration.

6. Are workers affected by a dismissal due to business reasons entitled to an economic compensation?

In Italy in any case of legitimate termination of the employment relationship is recognized an indemnity called termination treatment (*Trattamento Fine Rapporto* or TFR), calculated by dividing by 13,5 of everything what the worker has received during the year on a non-occasional basis and with exclusion of the amount paid as reimbursement of expenses.

The amount obtained must be re-evaluated with the application of an annual increase composed of a fixed rate of 1.5% and more than 75% of the increase in the price index to the consumption recognized by the ISTAT (National Institute of Statistics). The

assumptions and the modalities for the payment of severance pay, before the termination of the relationship, are determined from the same article 2120 Civil Code and from Law number 53/2000. In some cases of insolvency or default, the employer is replaced in the payment of the TFR by a guarantee fund.

The worker will also be able to benefit from the unemployment benefits in order to ensure a gradual transition from the old to the new job position.

7. What obligations does the company that carries out a dismissal due to business reasons have? In particular, is there the obligation to relocate affected workers within the company or the group of companies?

As mentioned in the question 2, before proceeding to the dismissal the employer has to abide by the principle of *extrema ratio* of the dismissal, that is the employer must verify if the worker can be reallocated to an alternative position in the establishment where the worker was used, but in all the company premises.

Notwithstanding, a recent law change has brought a new relevance to this point, more concretely article 3 of the Legislative Decree number 81/2015 that modified the article 2013 of the Italian Civil Code. Under this new regulation, the employer can modify even if in a pejorative sense (in terms of category) the duties of the worker respecting certain conditions, something that is denominated as the *ius variandi in peius*. Following this modification, a doctrinal section question if the new provision entails an enlargement of the obligation of *repechage*, coherently to the enlargement of the power to change the tasks performed by the employee. Some interpreted the *ratio* of the Legislator with this attenuation of the principle of conservation of the workers' professionality the intention of enlarging the principle of *extrema ratio* of the dismissal.

This discussion is far from over in the Italian doctrine and the jurisprudence will prove to be essential on the corroboration of this interpretation.

Obviously, in case the worker refuses the transfer to a different location, the obligation can be considered as respected, with consequent legitimacy of dismissal.

Whenever there occurs a termination of the employment contract not due to the worker, the employer has the obligation to pay a contribution to the social security that is defined yearly with the State Budget. As such, any employer that wants to dismiss either for objective reasons or collective dismissal has to pay the contribution. There is a possibility of aggravation in the case of collective dismissal when the employer

proceeds to the dismissal without an agreement with the trade union (mentioned in the question 3): in this case the contribution will be multiplied by three.

8. What are the consequences that arise from breach or non-compliance with the legal procedure regarding dismissals due to business reasons? In which cases is the dismissal considered null (that is, that implies the worker´s readmission)?

8.1. Individual dismissal

As previously said, different regimes are applied depending on the date of hiring of the employee and on the size of the enterprise.

a) Employees hired before the 7th of March 2015:

- Independently of the size of the enterprise, the reinstatement is applied in the event that the objective dismissal is intimated in oral form and not in writing or if the dismissal is considered discriminatory or void for violation of other specific provisions (for example, those covering physical disability and dismissals in case of marriage). In these cases, the employee is also entitled to an economic compensation and can also decide to decline the reinstatement, which is substituted by the payment of 15 wages.
- If the employer has more than 15 employees in the productive unit or, in any case, more than 60 employees in the organization as a whole, if the reason behind the dismissal is deemed unjustified, the reinstatement protection is applied only if there is a "*manifest non-existence of the fact placed on the basis of dismissal for justified objective reason*" of the justification given by the employer for the dismissal due to business reasons. In these cases, the employee is also entitled to an economic compensation (lower than the one provided in the previous case) and can also decide to decline the reinstatement, which is substituted by the payment of 15 wages. In all the other cases of non-compliance with the regulation, the employee is only entitled to an economic compensation which varies according to type of violation.
- If the employer does not reach the threshold mentioned in the previous paragraph, according to article 8 of the Law 604/1966, when the dismissal due to business reasons is deemed unjustified, the employer can decide to re-hire *ex novo* the employee or to pay an economic compensation between 2,5 and 6 wages.

b) Employees hired after the 7th of March 2015:

- Independently of the size of the enterprise, the reinstatement is applied in the event that the objective dismissal is intimated in oral form and not in writing or if the

dismissal is considered discriminatory or void for violation of other specific provisions (such as, for example, those covering physical disability and dismissal in case of marriage). In these cases, the employee is also entitled to an economic compensation and can also decide to decline the reinstatement, which is substituted by the payment of 15 wages.

- If the employer has more than 15 employees in the productive unit or, in any case, more than 60 employees in the organization as a whole, when the dismissal due to business reasons is deemed unjustified, the employee is only entitled to an economic compensation that is determined according to the seniority of the employee (to the maximum of 24 wages). In all the other cases of non-compliance with the regulation, the employee is only entitled to an economic compensation which varies according to type of violation and the seniority.
- If the employer does not reach the threshold mentioned in the previous paragraph, when the dismissal due to business reasons is deemed unjustified, the employee is only entitled to an economic compensation that is determined according to the seniority of the employee (to the maximum of 6 wages).

8.2. Collective dismissal

a) Employees hired before the 7th of March 2015:

The sanctions for non-compliance of the regulation are those provided by article 18 of the Law number 300/1970, according to the provisions of the article 5 of the Law number 223/1991.

The employee is entitled to reinstatement if there was a violation of the criteria established by law or collective agreement for the individuation of the employees to be dismissed and if the dismissal has not been communicated in writing. The employee is also entitled to an economic compensation that is higher in the latter case.

If there was a procedural violation, the employee is only entitled to an economic compensation.

b) Employee hired after the 7th of March 2015:

The sanctions for non-compliance of the regulation are provided by article 10 of the Legislative Decree number 23/2015.

The employee is entitled to reinstatement only if the dismissal has not been notified in writing. In both the case of violation of the criteria established by law or collective

agreement for the individuation of the employees to be dismissed and of procedural violation, the employee is entitled to an indemnity determined according to the seniority of the employee (to the maximum of 24 wages).

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

9.1. Individual dismissal

As explained responding to the previous question, different (that is, less onerous) regimes are applied for the non-compliance with the regulation of dismissal if the employer does not meet a certain threshold.

9.2. Collective dismissal

According to article 24, paragraph 1 of the Law number 223/1991, the collective dismissal can only be applied in enterprises with 15 or more employees, thus microcompanies and small enterprises that do not fulfill this requirement fall out of the scope of this dismissal.

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?

It is possible to have the dismissal of the public employee due to business reasons. However, unlike what happens in private sector, the needs the employer's organizational arrangements give rise to the institution of the surplus of personnel and of the placement in availability. Consequently, the justified objective reason in the public employment refers exclusively to circumstances inherent to the worker himself: the interdiction from public offices, which may derive from a criminal conviction sentence; the physical incapacity, provided that it is not possible to frame the worker in equivalent levels or even lower ones.

Contrary to the private sector, in the public administration the judge can verify the merit of the dismissal and the criteria utilized, as they constitute administrative acts, being contestable for incompetency, violation of the law or misuse of power.

11. Other relevant aspects regarding dismissals due to business reasons

On the category of dismissal due to business reasons, there is an ongoing debate caused by a recent jurisprudence trend on the definition of its nature, that is the dismissal based on objective grounds does not limit itself to factual prerequisite like situations of crisis on the enterprise, thus not supporting a literal interpretation of article 3 of Law number 604/1966. In the decision number 25201 of December 2016 of the *Cassazione*, the Court stated that foundations related to greater managerial or productive efficiency (or even grounds of intended increase in company's profitability) may be considered to justify the dismissal, that determine an effective change in the organizational structure by deleting an identified working position, thus putting aside the thesis of the negative economic performance of the company as *sine qua non* condition for the dismissal.

The Court revolved around article 41 of the Italian Constitution, regarding the free economic initiative of the employer, concluding that the employer has the choice of the best combination of the productive unit functioning in order to increase production and the choise of setting the dimension of the occupational dimension of the enterprise, choices that cannot be questioned by third parties, like a judge. As such, the Court affirmed that the role of the judiciary will be limited to the control of the concrete consistency of the motive given by the employer.

The decision has raised different voices by the scholars and it is not possible to say if this interpretation will consolidate in Court in the future.

DISMISSAL DUE TO BUSINESS REASONS IN PORTUGAL

Catarina de Oliveira Carvalho
Universidade Católica Portuguesa, CEID-CRCFL – Católica Research Centre for the Future of Law, Faculdade de Direito – Escola do Porto

Introduction

In Portugal, the main principles concerning the termination of the employment contract are embodied in the Constitution. According to article 53 of the Portuguese Constitution (Job security), "Workers are guaranteed job security, and dismissal without fair cause or for political or ideological reasons is prohibited". Hence, a termination of the contract by the employer, namely a dismissal, always requires a cause, which might be either subjective or objective. The objective cause concerns mainly business reasons.

The Labor Code contemplates three different situations of termination of the employment contract that can be based on business reasons: *i)* collective redundancy; *ii)* dismissal by extinction of the work post (*despedimento por extinção do posto de trabalho*); *iii)* expiry (*caducidade*) of the employment contract due to the total and final closing of the company.

The 2003 Labor Code expanded the expiry of the labor contract substantially and, at the same time, facilitated collective redundancies significantly, an option that the 2009 Labor Code has not altered.

As a matter of fact, the present Portuguese labor law system is something of a paradox, since it provides a rather strong protection of the employee against disciplinary dismissals but has much less demanding requirements when collective redundancies are at stake – it is therefore rather easy to get rid of an unwanted employee, simply by including them in a collective dismissal. Simultaneously, it is generally considered easier and safer for the employer to go for a collective redundancy rather than a dismissal by extinction of the work post.

The economic and financial crisis led the Portuguese State to request financial assistance from the European Commission, the European Central Bank and the International Monetary Fund (the so called "Troika"), which was granted on May 2011 under the terms of the European Financial Stabilization Mechanism. In exchange, this required a commitment to a three-year austerity plan laid out in the Memorandum of Understanding on Specific Economic Policy Conditionality (MoU). The MoU prescribed several labor market reforms in a broad group of areas, including

employment protection legislation. As a consequence, in 2012, a new revision of the 2009 Portuguese Labor Code took place, introducing additional flexibility to the legal framework on lawful dismissal. Since the Portuguese Constitution grants strong protection against unfair dismissal (namely the disciplinary one) and collective dismissal was already very flexible, legal adjustments were addressed to the individual dismissal linked to the extinction of the work post and to the general reduction of the severance payment. Yet, some of the measures implemented were later reversed by the Constitutional Court, as it will be mentioned.

During the crisis, the number of companies involved in collective redundancies went up, rising 118% in 2011 compared to the previous year, reaching its peak in 2012 with a 203% increase compared to 2010. This trend reversed in 2013 as these numbers dropped and continued to decline until the last data available (2017).

The number of companies involved in collective redundancies rose to 785 in 2011, peaked to 1269 in 2012 and started declining to 990 in 2013, 664 in 2014, 537 in 2015, 421 in 2016 and 396 in 2017. The number of workers dismissed was, on average, 9 workers per company: 6.526 in 2011, 10.488 in 2012, 9262 in 2013, 6.216 in 2014, 5.236 in 2015, 4.712 in 2016 and 3.478 in 2017. In all situations, the number of workers dismissed was inferior to the number of employees included at the start of the procedure, which could indicate that some thousands of jobs might have been saved by the procedure itself. However, the reality is that many of the employees affected accepted ending their employment contracts by mutual consent, partly justifying the reduction of the final number of dismissals. (Cf. DGERT, *Evolução anual dos despedimentos, 2005-2017; Livro verde sobre as relações laborais 2016*, Gabinete de Estratégia e Planeamento do Ministério do Trabalho, Solidariedade e Segurança Social, Lisboa, 2016, pages 291-292).

In relation to the dismissal by extinction of the work post, since 2009, the number of workers affected ranged from just over forty-one thousand to a maximum of near fifty thousand in 2012. From 2013 to 2015, there was a drastic reduction in these numbers as the workers dismissed by extinction of the work post were just over fifteen thousand in 2015 (Cf. *Livro verde sobre as relações laborais 2016*, Gabinete de Estratégia e Planeamento do Ministério do Trabalho, Solidariedade e Segurança Social, Lisboa, 2016, page 293).

1. How are the causes that justify a redundancy or a dismissal due to business reasons defined?

The Portuguese legal system allows dismissals due to business reasons, which can be motivated by the closing of one or various sectors or equivalent structures of the company or a reduction of employees due to market, structural or technological reasons.

According to the definition of article 359(2) of the Labor Code: *(i)* market reasons are understood as a reduction of the enterprise's activity due to the foreseeable reduction of demand of goods or services or subsequent practical or legal impossibility of placing such goods or services on the market; *(ii)* structural reasons refer to an economic-financial unbalance, change of activity, restructuring of the organization or replacement of main products; *(iii)* technological reasons are related to a modification in manufacturing techniques or processes, automation of production instruments or of control or movement of cargo instruments, as well as computerization of services and automation of means of communication.

After the entry into force of the 2003 Labor Code, the existence of an imminent crisis or losses is no longer required for a collective redundancy. The motives may very well consist in a restructuring of the enterprise in order to increase the profits of the company even when it is already profitable.

When the employer uses the dismissal by extinction of the work post, some additional requirements related to the causes of the dismissal are defined in article 368 of the Labor Code: *i)* the motives cannot be due to the employee's or to the employers' fault; *ii)* the survival of the employment relationships must be practically impossible (see explanation in question 7); *iii)* and there can be no term contracts for the tasks corresponding to the position being extinguished. According to some legal literature, these requisites, as well as the selection criteria (explained in question 5), confirm that the legislator is more demanding in this case than in the collective dismissal. Nevertheless, other doctrine defends that these requirements are also applicable to collective redundancies, although the employer does not need to expressly address them in the written procedure.

The total and final closing of the undertaking determines the expiry (*caducidade*) of the employment contracts (article 346 of the Labor Code). Still, in order to fully implement Council Directive 98/59/EC of 20 July on the approximation of the laws of the Member States relating to collective redundancies (see European Court of Justice Case C-55/2002, Commission of the European Communities v. Portuguese Republic), the closing of the company must be preceded by the same procedure established for

collective redundancies (described in question 2) with the exception of the micro enterprises (as explained in question 9).

2. The business reasons that justifying the dismissal, must they concur in the entire company or only concur in the workplace where dismissal occurs?

In the Portuguese legal system, when the cause alleged by the company is an economic-financial unbalance, it is required to affect the entire company and not just the workplace where the dismissal will occur. On the contrary, if other causes are alleged, the rule is rather flexible, as these causes can affect only the workplace where the dismissal needs to be carried out.

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in cases of redundancies (that is, when there is a collective dismissal)?

The Portuguese legal system allows the employer to conduct a dismissal for business reasons unilaterally. The procedure to follow varies depending on whether the dismissal is qualified as collective or not.

3.1. Collective redundancies

According to Directive 98/59/EC, when the dismissal is qualified as collective (as explained in question 4), the protection given to employees is of a procedural nature, although it may be questioned whether some aspects of the Directive are really met.

The employer who wishes to promote a collective redundancy must notify in writing the works council (article 360(1)). If there is no works council, the inter-union committee or the union committee representing the workers affected must be notified. In the absence of these employees' representatives, the employer must notify the employees in writing. The employees who may be affected can, within a period of five business days from the notification, elect a representative committee with a maximum of three to five workers depending on whether the redundancy affects up to five or more employees. In this case, all the negotiation procedure will take place with this ad hoc committee.

The employer's written notification of the intent to carry out a collective redundancy shall include information regarding: a) the reasons for the dismissal; b) the map of the company's personnel detailed and described by organizational sectors of the company; c) the criteria followed for the selection of the employees who are to be made redundant; d) the number and job classification of the employees affected; e) the period

for carrying out the dismissals; f) the method followed to estimate the compensation granted to the employees who are to be redundant. Nevertheless, it is not clear if this information must be sent to the employees themselves if they do not constitute an ad hoc committee.

The copy of the notification must also be sent to the governmental department responsible for labor issues (article 360(5)). Still, it must be stressed that the administrative intervention in this procedure is very modest: the labor authority will only participate in the negotiation "with the purpose of ensuring the regularity of the substantive and procedural aspects and promoting the conciliation of the parties' interests". In case some irregularity is identified, the labor authority can only refer warnings and recommendations to the employer and mention that in the negotiation records (article 362).

In the five days following the notification to the employee's representatives or to the ad hoc committee, an information and negotiation phase will take place with the purpose of obtaining an agreement as to the scale and effects of the measures being adopted and also regarding other measures that might reduce the number of employees being made redundant (article 361). It should be stressed that, in spite of its name, this is mostly a consultation process and normally there is no real negotiation, since frequently the employer's decision is already taken. Still, a number of alternative measures may be proposed such as suspension of the employment contract, reduction of the work periods, professional re-conversion and reclassification, early retirements or the anticipation of retirement. The proposed suspension of the employment contract or reduction of the work do not require the consent of the individual employees, unlike what happens with the other measures. The law foresees that both the employer and the worker's representatives may use the services of experts in the negotiation procedure. A record of the negotiation meetings must be made containing both the points of agreement as well as the conflicting positions of the parties, with the opinions, suggestions and proposals made by each one.

If there are no employees' representatives (which is the case in most Portuguese companies) and employees do not constitute an ad hoc committee to represent them within a period of five business days from the notification (which happens very frequently), the information and negotiation might not take place, according to the majority of Portuguese case-law and legal literature. In these cases, the employer can go straight to the communication of the final decision.

After the consultation period, having reached an agreement or in the absence of an agreement 15 days after the initial notification, the employer shall notify each of the

affected employees in writing with specific reference to the reasons and the date of the termination of the contract, the amount of severance payment, and the manner and the place of its payment (article 363). Consequently, in the absence of an agreement, the employer can communicate the final decision within a very short period since he/she has only to wait 15 days from the initial notification, which leaves – particularly if there is the need of an ad hoc committee – an extremely short period for the employees' representatives (and the employees themselves) to analyze the reasons presented and for the negotiation procedure itself.

On the same date on which the final decision is notified to the employees, the employer must send the record of the negotiation meetings to both the employees' representatives and the labor authority, together with a list containing the name of each employee, residence, date of birth and of admission in the company, social security situation, profession, job classification, salary, the individual measure applied, and the date for its implementation.

3.2. Non-collective redundancies (so-called dismissals by extinction of the work post)

A dismissal which is not considered collective is that kind of dismissal that, even though it can affect multiple employees, does not reach the threshold established in article 359 for collective redundancies (as explained in question 4).

In these situations, the procedure is similar to the one applicable in case of collective redundancies, although there are a few differences, as follows.

The employer shall notify in writing the works council (or, in the absence thereof, the inter-union committee or the union committee), the employee(s) affected by the dismissal and, in case they are union representatives, also the respective union, of the following elements (article 369): a) the need to eliminate the work post, identifying the motives and the section or equivalent unit to which it respects; b) the need to dismiss the employee(s) affected to the work post and their job qualification; and c) the criteria used for the selection of the employees affected by the dismissal (article 369).

In the 10 days following this notification, those entities (including the employee affected) can issue a grounded opinion stating their reasons to oppose the dismissal (article 370).

Finally, five days subsequent to the 10-day period previously mentioned, the employer can issue the grounded decision in writing, mentioning: a) the reasons for the extinction of the work post; b) confirmation of the requirements established in article 368(1); c)

proof of the priority criteria, in the event opposition regarding this aspect was raised; d) amount of severance payment, as well as the manner and place of payment; and e) date of termination of the contract (article 371).

This decision must be notified not only to the employee, but also to the employees' representatives and to the labor authority.

4. How is the number of affected workers calculated in order to determine the individual or collective nature of the dismissal?

The Portuguese definition of a collective dismissal is more comprehensive than the one established in Council Directive 98/59/EC, since it qualifies as a collective redundancy that which, simultaneously or over a three-month period, affects at least two or five employees, depending on whether it is a micro/small enterprise or a medium/large enterprise, respectively (article 359 of the Labor Code). For this purpose, article 100 of the Labor Code defines what shall be considered as a "micro" (with less than 10 employees), "small" (between 10 and 49 employees), "medium" (between 50 and 249 employees) and "large" (250 or more employees) enterprise.

Dismissal by extinction of the work post (article 367 of the Labor Code) shall take place only in cases where there is no room for collective redundancies as a result of the insufficient number of employees affected (article 368(1)(d)). For instance, in a company with 60 employees, if the employer decides to shut down a section with four employees, the collective dismissal is not applicable, but rather the dismissal by extinction of the work post.

Regarding the unit of measurement (company or establishment), article 359 specifically refers to the company, and article 16(2) of the Labor Procedure Code determines that when the collective redundancy includes employees from different establishments, the court of the place where the establishment with the largest number of dismissed employees is located shall be competent. Therefore, the previously mentioned thresholds have to be complied with within the company as a whole in order to determine the collective nature of the dismissal. Nevertheless, some legal literature considers that in the case of multinational companies, only the employees occupied in the Portuguese branch should be considered.

In this context, the decision of the European Court of Justice in the Rabal Cañas' Case (C-392/13) – declaring that taking exclusively the company as a reference was contrary to Directive 98/59/CE, which specifically refers to the establishment – has also had an

obvious impact in Portugal. Still, the problem has not been raised by Portuguese case-law until the present moment.

Regarding employment contract terminations, which have to be counted to determine the individual or collective nature of the dismissal, articles 359 and 367 of the Labor Code only consider dismissals due to business reasons. However, some case-law and certain legal literature include the situation of termination of the employment contract by mutual agreement when the motives that led to this agreement are identical to the ones that justify the dismissal due to business reasons (*v.g.*, Tribunal da Relação de Lisboa, 24.06.2009, proceeding 108/09.7TTFUN-A.L1-4). In this situation, the Pujante Rivera' jurisprudence of the European Court of Justice (Case C-422/14) had also no impact in the Portuguese regime for the time being.

In these circumstances, the compliance of the Portuguese regime of collective dismissal with European law is debatable. One disputable argument invoked by the legal literature that advocates such conformity regards the small number of employees necessary under Portuguese law to qualify the dismissal as collective (two or five, as explained above).

5. Are there groups of workers who have priority in a dismissal for business reasons? Particularly, do workers' representatives have priority? And pregnant workers? Elder workers? Workers with family responsibilities?

The Portuguese regulation on collective redundancies does not include criteria for the selection of employees to be made redundant, although they can be set by collective agreement. As a general rule, the employer can choose those criteria, which must be mentioned in the first notification to the workers' representatives (described in question 3), as long as they obviously respect the principle of equality and non-discrimination and other fundamental rights and freedoms.

Nonetheless, in the dismissal by extinction of the work post there are legally binding criteria (article 368(2) of the Labor Code) whenever several equivalent positions are to be eliminated, which must respect the following order: *i)* worst performance assessment (in accordance with parameters known in advance by the employee); *ii)* lower academic and professional qualifications; *iii)* higher cost of maintenance of employment for the company; *iv)* less experience on the job; *v)* less seniority in the company.

The Labor Code originally established other legally binding criteria: *i)* least seniority in the work position; *ii)* least seniority in the professional classification; *iii)* job classification of lower rank; and *iv)* least seniority in the company. However, the reform of the Labor Code operated by Law No. 23/2012 – which implemented most of the

labor market reforms imposed by the MoU – eliminated those criteria, stating that the employer could choose other ones, as long as they were relevant and non-discriminatory. Yet, the Constitutional Court ruled such amendment unconstitutional (decision 602/2013), because the new criteria were considered too vague and imprecise to permit an effective judicial control of the employer's choice, allowing arbitrary and judicially uncontrollable dismissals. Hence, there was a violation of the constitutional prohibition on dismissal without just cause (Article 53 of the Portuguese Constitution). As a consequence, Law 27/2014 amended article 368 of the Labor Code once more, defining a new order of criteria (mentioned in the above paragraph) which still remains in force.

Regarding protected workers, in Portuguese law no retention priority is given to workers' representatives (such protection existed in the previous Decree-Law 64-A/89 but disappeared in the 2003 Labor Code) or other groups of "disadvantaged" workers.

Nonetheless, there is some additional protection given to pregnant, puerperal and breast-feeding employees, as to any employee enjoying a parental leave (fathers as well) in any case of dismissal. Article 63 of the Labor Code requires an additional phase in the procedure which the company must follow to carry out a dismissal (including for business reasons): after the negotiation (collective redundancies) or the consultation (dismissals by extinction of the work post) of the employees' representatives, the employer must require the prior written opinion of the entity responsible for promoting equal opportunities among men and women (*Comissão para a Igualdade no Trabalho e no Emprego*). Regarding the *modus operandi*, the employer must send a copy of the termination procedure to this entity, whose opinion must be notified to both parties within 30 days. If this entity does not issue its opinion on time, it is considered favorable to the termination of the contract and the procedure follows its regular terms. If the opinion is unfavorable to the termination of the contract, the employer can only dismiss the employee if there is a court decision recognizing the existence of a justifying reason. The employer must put forward the lawsuit within 30 days after being notified of the written opinion. The dismissal is null and void if such opinion has not been requested (article 381(d) of the Labor Code).

6. Are workers affected by a dismissal due to business reasons entitled to an economic compensation?

In the Portuguese legal system, a dismissal due to business reasons declared fair – that is, according to the law – implies the recognition of the employees' right to a severance payment equivalent to 12 days of base salary and seniority payments per full year of service (articles 366 and 372). In cases of year fractions, the worker will be entitled to

the respective proportion. There are no minimum limits and an upper double cap is fixed by law: *i)* the value of the base salary and seniority payments cannot exceed 20 times the minimum monthly wage (EUR 580 since January 2018); and *ii)* the overall amount of severance payment cannot exceed 12 times the monthly base salary and seniority payments, with a limit of 240 times the value of the minimum monthly wage.

The same applies to the expiry of the contract in case of total and final closing of the undertaking, for which the assets of the company are liable (article 345(5)).

There are no peculiarities in relation to the amount of such severance payment that depend on the size of the company.

The present legal regime of severance payment was the result of the enactment of the measures prescribed by the MoU (see Introduction), which were implemented progressively. Before 2011, employees were entitled to a severance payment equal to one month of base salary and seniority payments per year of service or fraction, with a minimum of three months of salary and with no maximum cap. This severance payment was firstly reduced to 20 days of base salary and seniority payments per full year of seniority, the minimum limit was eliminated, and the maximum cap was introduced (Law No. 53/2011 and Law number 23/2012). The subsequent reform of the Labor Code, operated by Law No. 69/2013, further reduced severance payments to 12 days of base salary and seniority payments per full year of tenure. A complex transitional regime was established in order to safeguard acquired rights related to previous contractual periods.

If the worker accepts the severance payment, it is assumed that they accept the dismissal, making it very difficult for them to judicially challenge the dismissal. This is a very controversial solution, since it implicates a basic injustice which consists in forcing the employee who intends to challenge the dismissal to refuse something that they would always be entitled to, even if they did not win in court.

7. What are the obligations of a company that carries out a dismissal due to business reasons? In particular, is there an obligation to relocate affected workers within the company or the group of companies?

Workers affected by a collective dismissal or by an extinction of the work post have a number of rights besides the severance payment (explained in question 6), which are the same in both cases (articles 363-366 and 372 of the Labor Code):

a) The decision of dismissal must be notified in writing to each employee with a prior notice in relation to the anticipated date of termination of the contract which depends on the seniority of the employee concerned: 15 days for an employee with a seniority inferior to one year, 30 days if the seniority is equal or superior to one year but less than five years, 60 days for employees with a seniority equal to or greater than five years but inferior to 10 years, and 75 days for employees with a seniority equal to or greater than 10 years. Nevertheless, if a married couple (or one in a de facto relationship) is included in the collective dismissal, each member of the couple will be entitled to the prior notice immediately above the one that would apply to them if considered alone (article 363).

Yet, if the prior notice is either not given or only partially given, the collective dismissal is not unlawful: it simply happens that the employer will have to pay the salary corresponding to the prior notice period lacking (article 363(4)).

b) During the prior notice period, employees are entitled to a time credit of two days per week without reduction of salary, in order to look for a new job (article 364).

c) During this prior notice period, employees may also terminate the contract without losing their right to severance payment with a very short warning (three days in advance).

d) The dismissed employees are entitled to unemployment benefits.

Regarding the company's obligation to relocate workers affected by the dismissal, as stated above (see question 1), when the employer resorts to the dismissal by extinction of the work post, article 368(1)(b) requires that the survival of the employment relationships be practically impossible. Subsequently, article 368(4) explains that this happens as long as, after extinguishing the work position, the employer does not have another position to offer which is compatible with the employees' job classification. This means that, in order to pursue the dismissal, a vacant work position compatible with the job classification of the redundant worker must be unavailable in the company. The employer has to confirm this, but they do not have to create any new jobs nor is there any obligation of vocational (re)training.

This employers' duty to offer the employee an available and suitable position, whenever possible, as an alternative to the dismissal was removed in the 2012 reform of the Labor Code (Law number 23/2012), which implemented the MoU. Nevertheless, the Constitutional Court ruled such amendment unconstitutional (decision 602/2013), considering that there would be a disproportional restriction of the constitutional right to

job security. Subsequently, Law 27/2014 amended article 368, reinstating the employer's duty to propose an alternative work position whenever possible.

Some legal literature and case-law consider that such requirement must also be fulfilled in case of collective redundancy, despite the absence of identical legal norm. They invoke the Portuguese Constitution, which entails the *ultima ratio* principle in relation to dismissals. So, whenever there are work positions available that match the qualifications of the workers, dismissals should be always avoided.

8. What are the consequences that arise from breach or non-compliance with the legal procedure regarding dismissals due to business reasons? In which cases is the dismissal considered null (that is, that implies the worker´s readmission)?

Both dismissals for business reasons are considered unlawful whenever: a) the dismissal has not been preceded by the respective procedure; b) the dismissal is based on political, ideological, ethnic or religious reasons even when a different motive has been invoked; c) the grounds invoked to justify the dismissal are found non-existent or insufficient; d) the employee is pregnant, puerperal, breast-feeding or enjoying a parental leave and the prior written opinion of the entity responsible for promoting equal opportunities among men and women was not requested (article 381 of the Labor Code, which is applicable to all kinds of dismissals).

In addition, collective dismissal is also unlawful when the employer: a) has failed to perform the notifications and promote the negotiations; b) has failed to observe the 15-day dilatory deadline to decide the redundancy; c) has not made available to the employee, until the end of the notice period, the severance payment as well as the credits that have matured or become due as a result of the termination of the employment contract (article 383 of the Labor Code).

And dismissal by extinction of the work post is also unlawful when: a) the motives are due to the employee's or to the employers' fault; b) the survival of the employment relationships is not practically impossible (see explanation in question 7); c) there are term contracts for the tasks corresponding to the position being extinguished; d) the regime foreseen for collective redundancy is applicable; e) the criteria to select employees to dismiss are not respected; f) the employer has failed to notify the employees; g) has not made available to the employee, until the end of the notice period, the severance payment as well as the credits that have matured or become due as a result of the termination of the employment contract (article 384 of the Labor Code).

In all these cases, the employee will be entitled to two remedies: *i)* the reinstatement at the same workplace without prejudice to their job classification or seniority; *ii)* and an indemnity for all the damages caused by the dismissal (article 389 of the Labor Code). The choice of reinstatement belongs in any case to the employee, who can choose an indemnity instead. It will be for the court to establish the exact amount of this indemnity within a legal frame of 15 to 45 days of basic salary and seniority awards for each full year or fraction of service, with a minimum of three months of salary.

In cases of total and final closing of the company without following the collective redundancy procedure, there are further consequences, such as obligations to lodge financial guarantees, prohibition of practicing acts that can aggravate the company solvency, and annulment of some transactions (article 315 of the Labor Code).

9. Are there specialties in the dismissal due to business reasons for micro companies and/or small and medium enterprises?

In the Portuguese legal system, there are some specialties in the dismissal due to business reasons depending on the size of the company.

Firstly, there is an important particularity when the contract expires due to the closing of the company. In these cases, and as explained above (see question 1), as a rule, the employer must follow the same procedure established for collective redundancies. However, there is an exception for micro-companies (companies with less than 10 employees, according to article 100 of the Labor Code), which do not need to follow any procedure for the closing. They just have to give the employees the advance notice applicable in case of collective dismissal (article 346(4) of the Labor Code).

Secondly, the Labor Code allows the micro-employer to oppose the reinstatement of the employee if they show that such reinstatement would be highly detrimental and upsetting to the activity of the company (article 392 of the Labor Code). Still, the final decision concerning the reinstatement belongs to the court, which will evaluate the reasons presented by the employer. It must be stressed, however, that the faculty of opposition to the reinstatement does not exist if the dismissal is unlawful for being based on political, ideological, ethnic or religious reasons, even if a different motive was invoked, as well as in those cases where the court considers that the reason for opposing the reinstatement was created by faulty actions of the employer. If the employer successfully opposes reinstatement, the employee will be entitled to a higher indemnity fixed by the court between 30 and 60 days of basic salary and seniority payments for each full year of service or fraction of service, with a minimum of six months.

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 Portuguese legal system, it was possible to conduct a dismissal due to business reasons in a public administration body but only due to reorganization of services or rationalization of staff (articles 311-313 of Law 35/2014). However, this regime was recently revoked by Law 25/2017, of 30th May. Consequently, in the present moment, a dismissal due to business reasons is not possible in public administration.

11. Other relevant aspects regarding dismissals due to business reasons

The legal regulation of the termination of the employment contract is normally totally mandatory. According to article 339(1) of the Labor Code, the legal regime of the termination of the contract cannot be altered or excluded neither by a collective agreement nor by an employment contract, unless otherwise is established in the law itself.

Also, according to article 339(2), the criteria for determining the compensation to be paid, as well as the procedural deadlines and prior notice periods, may be altered by collective agreement. Therefore, they cannot be modified in the individual labor contract (article 3(5) of the Labor Code). Even the scope of modification by the collective agreement remains dubious in some cases, as article 339(3) states that "*the compensation values may be regulated by a collective labor regulation instrument within the limits established in this Code*".

DISMISSAL DUE TO BUSINESS REASONS IN SPAIN

Juan Peña Moncho
Graduate in Law and Student of the Master´s Degree in Labour Law,
ESADE Law School

Introduction

The Spanish labour legislation on redundancies and dismissals due to business reasons is characterized by the wide power it concedes to companies in adopting these measures. In 2012, the Spanish legislator adopted an important labor reform (adopted by Royal Decree 3/2012, February 10, and Law 3/2012, July 6, on urgent measures to reform the labor market), which aim was to increase flexibility of companies, both internally and externally. Analyzing redundancies in Spain, it is clear that companies did not hesitate to use the faculties recognized by the regulation after the labor reform of 2012. In this sense, between 2012 and 2014, 189.102 workers were fired. However, the tendency today is that less workers are being affected by collective redundancies: 24.572 workers were affected in 2015, 24.348 in 2016 and 20.813 in 2017.[78]

One of the tools that has facilitated dismissals due to business reasons is the general definition of the causes that enable the use of redundancies due to business reasons. According to the current definitions of business causes included in the Worker's Statute, as will be analyzed in this paper, it is relatively easy for any of them to concur. Therefore, the reaction of unions and workers has been to challenge the legality of redundancies adopted by companies, specially attending to the formal requirements. For example, attending to the lack of negotiation in good faith during the consultation period, the illegal use of alternative proceedings to conduct a collective dismissal, the designation of affected workers or the lack of the necessary documentation to prove the existence of the alleged business cause. At the same time, courts have also determined the scope of business causes by requiring the existence of proportionality between the alleged cause and the measures adopted by the company.

Furthermore, the European Court of Justice has played a primary role in the delimitation of the Spanish regulation on dismissals due to business reasons. Some of its rulings have obliged Spanish courts to change its traditional positions on relevant matters, such as the reference that must be taken into account to determine the collective or individual nature of the dismissal (company vs. establishment) and the interpretation of the concept of assimilated terminations of the employment contract

[78] Statistics of the Spanish Ministry of Employment and Social Security (available at: http://www.empleo.gob.es/estadisticas/reg/welcome.htm).

In this context, the aim of this article is to analyze the legal regulation of redundancies and dismissals due to business reasons in the Spanish legal system, along with recent case law regarding this matter.

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 technical, organizational or productive causes. The definition and regulation of these causes has, in recent years, evolved to facilitate their concurrence and, hence, favor redundancies.

Article 51.1 of the Spanish Worker's Statute defines these causes as follows:

- Economic causes are defined as the situation where the results of the company show a negative economic situation, 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 persistent if for three consecutive quarters the level of ordinary revenues or sales each quarter is lower than in last year's same quarter. Therefore, due to this definition, a company with profits but with expected losses or a persistent decline in income can legally proceed to a dismissal for business reasons.
- Technical causes are defined as changes, among others, in the field of the means or instruments of production. Nowadays it is not the main cause of restructuration alleged by companies because it tends to be complementary to the other causes, but it is foreseeable that it will gain importance as new technologies are introduced in companies.
- Organizational causes are defined as changes, among others, in the field of systems and working methods of the staff or the organization of production. Consequently, they will be applicable when "*working methods and distribution of the workload are affected*" (decision of the Spanish Supreme Court of March 3, 2016, [number 361/2016]).
- Productive causes are defined as changes, among others, on the demand for the products or services that the company intends to place on the market. Therefore, if a productive cause is alleged, the company must prove "*that a mismatch within the activity of the company has been produced, such as the lack of orders or the progressive fall of production or activity within the company, and that it obliges the company to modify or decrease the production, making obsolete one or several jobs, since in case not to eliminate such jobs, an imbalance would be produced to the company undertakings*" (decision of the Spanish Supreme Court of January 31, 2018 [number 78/2018]).

It is important to mention that the concurrence of a cause does not imply the impossibility to invoke another cause. On the contrary, most of times, companies argue the existence of two different causes generated by the same phenomenon. For instance, the existence of losses in the company could imply the concurrence of economic and productive causes at the same time.

As mentioned previously, the Spanish legislator facilitated the concurrence of any of these causes through the 2012 labor reform. Nevertheless, the Spanish Supreme Court responded (decision of the Spanish Supreme Court of July 12, 2017 [number 624/2017]) by requiring companies to accredit, not only the cause alleged by the employer, but also the existence of proportionality and functionality between the accredited cause and the dismissal. The tribunals will appreciate then if the alleged causes are sufficient to justify the dismissals.

In summary, for a redundancy to be legal three requirements must concur: (i) the existence of an economic, technical, organizational or productive cause, (ii) proportionality between the alleged cause and the number of dismissals and (iii) functionality between the cause and the selected workers. For example, if a company dismisses workers invoking a cause but then contracts workers through a Temporary Employment Agency to render similar jobs and overtimes increase within the company, those dismissals will be considered wrongful (decision of the Spanish Supreme Court of February 28th, 2018, [number 229/2018]). Another example is found in the decision of the Spanish Supreme Court of April 20, 2016 (number 304/2016) where the court establishes that the dismissal is proportionate because the percentage of workers dismissed (25%) is inferior to the percentage of losses of the company (38%).

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

The answer to this question depends on the cause alleged. The Spanish legal system, in its article 51 of the Workers´ Statute, sets out a relevant distinction between economic, on one hand, and technical, organizational or productive causes, on the other.

When economic causes are implied, they must affect to the entire company and, therefore, the company cannot allege them when only a specific workplace or establishment of the company is affected.

However, regarding technical, organizational or productive causes, the rule is more flexible. The Spanish Supreme Court has recently reminded (decision of the Spanish

Supreme Court of February 28, 2018 [number 893/2018]) that the unit of measurement of technical, organizational or productive causes may be the company, the workplace or a sector of the workplace. This last option will occur when mismatches "*are produced and localized in concrete sites of the company, and they do not reach the entity globally considered but an exclusive space in which the pathology is manifested. The remedy to this unusual situation must apply where the unbalance of the convergent elements is detected.*"

The explanation is simple. The dismissal due to economic reasons seeks a reduction in labor costs (reactive dismissal). However, the dismissal due to technical, organizational or productive causes is understood as a preventive or defensive dismissal that tries to avoid reaching a negative economic situation. The dismissal due to technical, organizational or productive causes allows the company to readjust its workforce given these imbalances before they generate in economic problems. Therefore, if it is easy for economic causes to concur in a company, it is even easier for technical, organizational or productive cause given their definition and unit of measurement.

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 to follow in cases of dismissal for business reasons varies significantly depending on whether the dismissal is qualified as collective or not.

3.1. Collective redundancies

Article 51.1 of the Spanish Worker's Statute qualifies as a collective redundancy that which affects the entire workforce of a company (as long as more than five workers are affected) or that which, in a 90-day period affects, at least:

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

The Spanish definition of a collective dismissal is broader, as can be seen, than 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 uses a 90-day reference period instead of 30-day.

It is necessary to specify two issues relating to the numerical and temporal thresholds:

- If the dismissals carried out by the company does not surpass the numerical thresholds abovementioned, those dismissal could not be effectuated through a collective redundancy proceeding but through an individual dismissal proceeding (decision of the Spanish Supreme Court of October 10, 2017 [number 771/2017]).
- Regarding the 90-day period, the Spanish Supreme Court has recently decided that, the last day counted is the day of the dismissal. This means that if a worker is dismissed April 30, 2018, a backwards count of 90 days since that date will be effectuated. Therefore, the dismissals taken into account will be those between January 30, 2018 and April 30, 2018 (decision of the Spanish Supreme Court of January 11, 2017 [number 21/2017]).

When the dismissal is qualified as collective, the company must substantiate a consultation period with workers' representatives for a maximum of 15 or 30 days, depending on the size of the company. The aim of this consultation period is to negotiate measures to avoid or reduce the redundancy and mitigate the consequences for affected workers with social measures, such as relocation or training measures to increase theses worker's employability. It is especially relevant (as explained in the question 7) that the negotiations between the company and workers' representatives must be developed in good faith.

It is important to highlight that negotiations must be performed in a single negotiation body. The Spanish regulation specifically precludes the possibility 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 affected work centers. Such negotiating committee will be integrated by a maximum of thirteen members for each party.

The company must inform workers' representatives about its intention to carry out a redundancy and, hence, initiate a consultation period. Workers' representatives will have seven days to constitute the negotiation committee. However, if the measure affects a workplace with no workers' representatives, the negotiating committee will have fifteen days to be constituted. After this period, the company is entitled to formally communicate to workers' representatives and the labor authority the initiation of the consultation period regardless of the successful constitution of the negotiation committee.

The company's communication regarding the initiation of a consultation period must be done in writing and send to workers' representatives and the labor authority. In such communication, the company must include the following information:

a) Specification of the reasons for the dismissal.

b) Number and job classification of affected employees.
c) Number and job classification of workers normally employed in the last year.
d) 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 workers' representatives in regard to the company's decision to initiate the procedure for a collective redundancy.
g) 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 redundancy, records and accounting and tax documents and other technical reports stablished in articles 3, 4 and 5 of the Royal Decree 1483/2012, October 29, which adopts the Regulations of the procedures for collective dismissal and suspension of contracts and reduction of working hours. The consultation period must last no more than 30 days (of 15 days in companies that employ less than 50 workers). Exceeded this period, the proceeding expires and it will have to be reinitiated.

After 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. In case of lack of agreement, the employer must inform workers' representatives and the labor authority of the final decision regarding the redundancies and its conditions. Hence, even in absence of agreement between the company and worker's representatives, the employer can proceed with the redundancy.

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 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 mediator to seek solutions to the problems posed by the collective dismissal.

3.2. Individual or plural dismissals.

Individual or plural dismissals are those dismissals that, even though they can affect multiple workers, do not reach the numerical threshold established in article 51.1 of the Worker's Statute for collective redundancies.

In these cases, the norm only requires three formal requirements (article 53.1 of the Worker's Statute):

a) Written notice to workers affected by the dismissal, stablishing 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' pay 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. How are calculated the number of workers affected in order to determine the collective nature of the redundancy?

In the Spanish labor system, as mentioned before, it is considered as redundancy the dismissal that affects the entire workforce of the company (if the workforce is higher than five workers) or the dismissal that, in a 90-day period, affects at least:

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

However, there are two issues that must be taken into consideration when calculating the number of affects workers to determine the collective nature of a redundancy: a) the unit of measurement (company or establishment/work center) and b) the terminations of the employment contract that must be taken into account.

a) Unit of measurement: company vs. establishment/work center.

Regarding the unit of measurement (company or establishment/work center), article 51 of the Spanish Worker's Statute specifically refers to the company. Therefore, the Spanish Supreme Court's traditional position was to understand that the previous numerical thresholds had to be complied within the company as a whole.

The Spanish Supreme Court knew that there was a divergence between the Worker´s Statute and the Directive 98/59/CE, however, it used two arguments to justify this difference:

- The Spanish regulation introduced a procedure rule more protective to workers because it required to the company, in addition to the justification of the alleged cause of extinction and a prior administrative authorization to proceed with the collective dismissal (decision of the Spanish Supreme Court March 18, 2009, [appeal number 1878/2008]). However, this prior administrative authorization requirement was derogated by the labor reform of 2012.
- The Spanish regulation also includes in article 51.1 that in order to quantify the quantitative requirement of a collective dismissal, those "*contract extinctions*

effected by an employer for one or more reasons not related to the individual workers concerned". Therefore, "*both regulations reach the same result in califying the collective redundancy*" (decision of the Spanish Supreme Court July 8, 2012 [number 5663/2012], previous to the labor reform of 2012).

However, the decision of the European Court of Justice of May 13, 2015 (C-392/13, case Rabal Cañas) declared that taking exclusively the company as a reference was contrary to the Directive 98/59/CE, which specifically refers to the establishment.

Consequently, the current Spanish Supreme Court's position is to understand that, in order to determine the collective or individual nature of the dismissal, a twofold count is required: first, article 51's numerical threshold must be applied to the company as a whole. Second, in case the dismissal is not considered collective, the same thresholds must be applied to the specific work center or establishment in which the dismissal takes place, as long as it employs at least 20 workers (decision of the Spanish Supreme Court October 17, 2016 [number 36/2016]).

For example, a company has a workforce of 260 employees distributed in two workplaces: Barcelona (150) and Valencia (110). The company dismisses 12 employees from the workplace in Valencia. According to the traditional position (company as unit of measurement) it would not be considered a collective redundancy as the number of dismissals do not exceed the minimum threshold of 10% in the company (in this case, the dismissal only affects 12 out of 260 employees, while the minimum would be 26 employees). However, after the decision of the European Court of Justice May 13, 2015 (C-392/13, case Rabal Cañas) and the Spanish Supreme Court's doctrine to carry out a twofold count, the dismissals would be considered a collective redundancy as it exceeds the minimum threshold of 10% in the workplace (the dismissal affects 12 employees in Valencia, which exceeds the minimum of 11 employees).

b) Dismissals vs terminations of the employment contract.

Regarding the terminations of the employment contract that must be taken into account to determine the individual or collective nature of the dismissal, article 51.1 of the Worker's Statute, similar to article 1.1 of the Directive 98/59/CE, establishes that, in addition to the dismissals due to business reasons, "*any other dismissals produced in the reference period at the initiative of the company by virtue of other reasons not inherent to the worker different from the ones provided in art 49.1.c) of this Act shall be taken into account, provided that they are, at least, five*".

The scope of this provision was determined by the decision of the European Court of Justice of November 11, 2015 (C-422/14, case Pujante Rivera). This decision concluded that "*the fact that an employer — unilaterally and to the detriment of the employee — makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within the definition of 'redundancy' for the purpose of the first subparagraph of Article 1(1)(a) of the directive*". As a result, terminations of the contracted derived from a substantial change on workers conditions in detriment of the employee unilaterally imposed by the employer fall within the definition of "redundancy" and not "assimilated terminations". The decisions of the European Court of Justice of September 21, 2017 (C-429/16, case Ciupa and C-149/16, case Socha) further analyze the scope of this provision and conclude that terminations of the employment contract derived from (a) non-significant modifications on essential working conditions and (b) significant modifications on non-essential working conditions, both unilaterally imposed by the employer and to the detriment of the employee, must be considered "assimilated termination".

In application of these rulings to the Spanish regulation, terminations of the employment contract because of a substantial modification of working conditions of article 41 of the Worker's Statue when unilaterally imposed by the employer must be considered a "redundancy". Similarly, also the terminations derived from the employer's unilateral modification of the workers workplace that implies a change in residence *ex* article 40 of the Worker's Statue. The question that arises, however, is wheter those terminations derived from the substantial modification of working conditions adopted by the employer as a result of an agreement reached with workers' representatives must be included in the concept of "redundancy" or "assimilated termination". In my opinion, they should be included in the concept of "assimilated termination".

Nevertheless, in my opinion, terminations of the labor contract due to substantial modification of working conditions *ex* articles 40 and 41 of the Worker's Statute should not be considered "redundancies" *stricto sensu* because the employee, not the employer, triggers them.

Finally, extinctions derived from the foreseen termination of fixed-term contracts are not considered to this effect. Although, terminations of fraudulent fixed-term contracts will be taken into account. Furthermore, workers with fixed-term contracts do count in determining the number of workers "normally" rendering services in a specific workplace or establishment.

In summary, and regarding the Spanish regulation, fall within the concept of "redundancy" dismissals due to business reasons, unfair dismissals and terminations of the contract derived from a substantial modification of working conditions *ex* articles 40 and 41 of the Worker's Statue unilaterally imposed by the worker and in detriment of the employee. In addition, must be considered as "assimilated terminations" those derived from a substantial modification of working conditions *ex* articles 40 and 41 of the Worker's Statute adopted by the employer because of an agreement with worker's representatives, terminations due to an employer's breach of contract (article 50 of the Worker's Statue) and terminations of fraudulent fixed-term contracts.

Finally, it is important to note that there is another contradiction between article 51 of the Spanish Worker's Statue and article 1.1 of the Directive 98/59/CE. Despite being possible in light of the Directive, article 51 of the Worker's Statue does not require a minimum number of dismissals. Nevertheless, on the contrary of the Directive, it does require a minimum number of assimilated extinctions.

5. Are there groups of workers who have priority in a dismissal for business reasons? Particularly, do the worker´s representatives have a priority? And pregnant workers? Elder workers? Workers with family responsibilities?

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

There exist, nonetheless, the retention priority of worker's representatives. Article 51.5 of the Worker's Statute establishes that workers' representatives shall have retention priority within the company in case of redundancy due to business reasons. Furthermore, such article states that the collective bargaining agreement or the agreement reached during the consultation period between the employer and workers' representatives can include additional priorities in favor of other workers, such as workers with family responsibilities, elder workers, disabled workers, etc.

Specifically, regarding pregnant workers and worker with family responsibilities, no article of the Spanish regulation mentions a special protection to these workers. However, article 55.5 of the Worker's Statute foresees that if the dismissal of an employee is motivated by any of the grounds of cause of discrimination prohibited by the Spanish Constitution or by law (as well as any other dismissal which implies vulneration of the worker´s fundamental rights) the dismissal will be void. More

specifically, following Directive 92/85, in sections a), b) and c) of this same article 55.5 of the Worker's Statute the following dismissals with be considered void: (i) the dismissal of workers on maternity or paternity leave, on leave for risk during pregnancy or natural breastfeeding; (ii) the dismissal of pregnant workers; and (iii) the dismissal of worker that are exercising work-life balance rights.

Despite the former, the last paragraph of this article 55.5 of the Worker's Statute admits the possibility to dismiss pregnant workers and workers that exercise work-life balance measure when the decision is fair based on grounds not related with the pregnancy or the exercise of work-life balance measures. As a result, it is possible to include a pregnant worker or a worker with family responsibilities in a redundancy or dismissal due to business reasons.

This regulation was object of a recent decision of the European Court of Justice (C-103/16, case Porras Guisado), in which the European Court of Justice held that a dismissal due to business reasons falls "*within the exceptional cases not related to the condition of pregnant workers within the meaning of Article 10(1) of Directive 92/85*". Therefore, it is possible to dismiss a pregnant worker in the context of a dismissal due to business reasons if the decision is unconnected to the pregnancy.

Nevertheless, note that the European Court of Justice also considered that the Spanish legislation does not fully comply with the Directive because the protection of these vulnerable workers is based essentially on the protection by way of reparation and not by way of prevention. In other words, according to the European Court of Justice, the Spanish legislation does not restrain enough to the employers the possibility to dismiss pregnant workers and ex post measures (nullity of the dismissal and compensation for damages) "*cannot replace protection by way of prevention*".

Finally, regarding elder workers, there is also no regulation that offers special protection to these workers. Hence, elder workers are eligible to be selected in a dismissal due to business reasons. Furthermore, the decision of the Spanish Constitutional Tribunal June 16, 2015 (number 66/2015) declared that setting a 55-year age as one of the criteria for the selection of workers affected by a collective redundancy is not discriminatory because of age, as long as the company adopts effective measures to avoid or minimise the damages that may arise from the extinction of the working relationship.

6. Are workers affected by a dismissal due to business reasons entitled to an economic compensation?

In the Spanish legal system, a dismissal due to business reasons declared fair –that is, according to the law–, gives rise to the right of the affected worker to obtain an economic compensation equivalent of 20 days' pay per year of service with a maximum of 12 monthly payments. It is worth to mention, however, that during the consultation period between the employer and workers' representatives, the parties may agree to a higher compensation than the legally recognized. Generally, this is the most controversial point of the negotiation and, usually, the success of the negotiation will depend on this issue.

It is also necessary to highlight that there are no peculiarities in relation to the amount of the economic compensation depending on the size of the company. The compensation legally recognized will apply to all companies regardless of their size.

Apart from the severance pay borne by the employer, dismissed workers would be recognized an unemployment benefit by the State. Workers will be entitled to this benefit if they have contributed (worked) to the Social Security at least 1 year in a reference period of 6 years. The amount will be of the 70% of the average of contributions during this 6-year period for the first 180 days, and of the 50% of the same average until the end. The duration of the unemployment benefit varies from 4 months to 2 years, depending on the time the worker has contributed to the Social Security.

7. 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 particular, is there the obligation to relocate affected workers within the company or the group of companies?

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

First, companies carrying out a collective redundancy affecting more than fifty workers must provide an external outplacement or relocation plan through an authorized outplacement firm (article 51.10 of the Worker's Statue). This external 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 cannot borne by the worker. This does not apply, however, to companies that have gone through a bankruptcy proceeding.

Second, companies carrying out a collective dismissal for business reasons which affect workers that are 50-year or more 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).

In addition to these two legal obligations, the Spanish legal system does not impose the company's obligation to relocate workers affected by the dismissal in other sections or departments of the company or, when the case, in other companies within the group of companies. The Spanish Supreme Court has reasserted this position in its decision of January 31, 2018 (number 78/2018).

8. What are the consequences that arise from breach or non-compliance with the legal procedure regarding redundancies due to business reasons? In which cases is the dismissal considered null (that is, that implies the worker´s readmission)?

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.

8.1. 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 allege in the written communication sent to the workers' representatives. In this case, the company may choose between reinstating workers in their previous 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/void 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. In this case, the worker has the right to be reinstated in his/her workplace. It is interesting, however, to note that recent court rulings have clarified this legal provision and have determined that not any lack in the documentation submitted to

workers' representatives leads to the nullity of the dismissal, but only those essential to ensure effectiveness the consultation period (decision of the Spanish Supreme Court December 20, 2016 [number 128/2016]). It is also interesting to note that the company's default on its obligation to negotiate in good faith during the consultation period with workers' representatives is also considered cause for annulment of the collective redundancy, because the consultation period not has been carried out effectively with the objective of achieving an agreement.

8.2. Individual or plural dismissals.

Individual or plural dismissal due to business reasons will be declared (article 123 LJS):

- Unfair/wrongful when the company did not comply with the formal requirements established in article 53.1 of the Worker's Statute (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 correct economic compensation.

- Null/void when:
  a) The dismissal is discriminatory or violates workers' fundamental rights or public freedoms.
  b) The dismissal is fraudulent, as the employer has tried to avoid the rule established in article 51.1 of the Worker's Statute 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.

9. 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 regulation of 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 50 employees, the maximum duration of the consultation period is reduced from 30 to 15 days.

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?

According to article 1.2.b) Directive 98/59/CE, the Directive shall not be applicable to the "*workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies).*"

However, the Spanish Worker's Statute provides in its sixteenth additional provision that the dismissal due to business reasons in the different agencies and entities that are part of the public sector will be developed according to articles 51 and 52.c) of the Worker's Statute. Therefore, it is possible to realize a redundancy or a dismissal due to business reasons in a public administration body.

Regarding the definition of the business reasons, the twentieth additional provision of the Worker's Statute states that it is understood that economic causes 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, in the field of systems and methods of work of the workers assigned to the public service.

11. Other relevant aspects regarding dismissals due to business reasons

In September 21, 2017, the European Court of Justice issued two decisions: case Ciupa (C-429/16) and case Socha (C-149/16). Both decisions continue with the reasoning followed in its decision of November 11, 2015 (C-422/14, case Pujante Rivera) and both rulings could have a significance according to the Spanish labour regulation.

Trying to reduce the complexity of the decisions to the maximum, basically, what they state is that when a company decides to initiate a procedure to substantially modify working conditions unilaterally by the employer and in detriment to the worker, must "*reasonably expect that a number of employees would not accept the amendment of their working conditions, and that their contracts would be terminated as a result*". As a result, the employer is required to carry out the consultations provided for in article 2 of the Directive 98/59/CE when conditions laid down in article 1 of the directive are satisfied. Otherwise, the purpose of the obligation of consultation laid down in article 2

of the Directive, namely to avoid terminations of employment contracts, or to reduce their number, and to mitigate the consequences, would be eluded.

According to the Spanish labour regulation, the proceeding for collective substantial modifications of labor conditions also implies a consultation period with worker's representatives similar to the one established for collective redundancies. The question is whether collective substantial modifications of working conditions can be implemented following its specific procedure regulated in article 41 of the Worker's Statue, which, as mentioned, includes a consultation period. Alternatively, if they should be processed according to the procedure for collective redundancies of article 51 of the Worker's Statute. At the moment, no internal relevant Tribunal has issued a decision on this matter yet.

DESPIDO POR CAUSAS EMPRESARIALES EN ARGENTINA

Vanesa Beatriz Lamam
Profesora
Universidad Nacional de José C. Paz - Universidad de Buenos Aires

Introducción

El despido por causas económicas ha sido incorporado en la legislación argentina en el año 1945, siendo objeto de múltiples reformas en armonía con la política vigente en materia de relaciones de trabajo. Sin embargo, la jurisprudencia ha sido pacífica en imprimir un carácter restrictivo a los requisitos de su configuración, en las distintas modalidades, circunstancia que ha disminuido las posibilidades de su utilización fraudulenta.

1. ¿Cómo se definen las causas que justifican un despido por causas empresariales?

El despido por causas económicas en nuestra legislación se encuadra dentro de los supuestos que configuran una justa causa de extinción del vínculo contractual. Los motivos que configuran las causas de índole económica se encuentran regulados en; la Ley de Contrato de Trabajo (Nº 20.744) en donde se prevé el despido "por fuerza mayor" o "falta o disminución de trabajo", en la Ley Nacional de Empleo (Nº 24.013) mediante la cual se incorpora el "despido por causas tecnológicas", y en la ley de PYMES (Nº 24.467) que reconoce la potestad de despido por "razones organizativas y de mercado"

El artículo 247 de la Ley 20.744 establece que; ***"****En los casos en que el despido fuese dispuesto por causa de fuerza mayor o por falta o disminución de trabajo no imputable al empleador fehacientemente justificada, el trabajador tendrá derecho a percibir una indemnización equivalente a la mitad de la prevista en el artículo 245 de esta ley. En tales casos el despido deberá comenzar por el personal menos antiguo dentro de cada especialidad. Respecto del personal ingresado en un mismo semestre, deberá comenzarse por el que tuviere menos cargas de familia, aunque con ello se alterara el orden de antigüedad".*

La norma determina las causas objetivas, que podemos denominar "clásicas", que configuran el despido por motivos económicos: "fuerza mayor, o falta o disminución de trabajo". La doctrina acepta pacíficamente que la falta de trabajo no imputable al empleador, debe ser un hecho ajeno, que, sin provocar una imposibilidad absoluta de ocupar al trabajador, ocasiona mayor dificultad u onerosidad sobreviniente, en cambio

en el supuesto de fuerza mayor ocurre una imposibilidad de dar ocupación. La configuración del supuesto de falta o disminución de trabajo encuentra su fundamento en el instituto regulado en el artículo 1091 del Código Civil y Comercial, según el cual: *"Si en un contrato conmutativo de ejecución diferida o permanente, la prestación a cargo de las partes se tornare excesivamente onerosa, por una alteración extraordinaria de las circunstancia existentes al tiempo de su celebración, sobrevenida por causas ajenas a las partes y al riesgo asumido por la que es afectada, esta tiene derecho a plantear extrajudicialmente, o pedir ante un juez, por acción o como excepción, la resolución total o parcial del contrato o su adecuación (...)"* En cambio, en el supuesto de fuerza mayor nos encontramos ante un hecho que no ha podido ser evitado (artículo 1730 CCyC). La fuerza mayor supone la imposibilidad del empleador de dar ocupación efectiva a los trabajadores.

Por su parte, el "despido por causas tecnológicas" incorporado en nuestra legislación en el año 1991, ha abierto un debate doctrinario que intento descifrar si se trataba de una nueva causa de despido o si la misma resultaba una manifestación del supuesto de "fuerza mayor o falta o disminución de trabajo". Tratándose de una causa autónoma de despido, su configuración se aleja de los requisitos de "ajenidad" e "inevitabilidad" que resultan mucho más restrictivos que las secuelas inevitables que un proceso de modernización puede producir en la empresa, es decir, en esta interpretación la causal se aleja del nexo entre la crisis económica y sus consecuencias en la empresa, y la posibilidad de resolver la misma mediante la modificación de los vínculos entre los trabajadores y la empresa. Este sector de la doctrina concluye que la norma alteró definitivamente los requisitos tradicionales del despido por causas económicas, exceptuándolo de las instituciones equivalentes del Código Civil.

2. ¿Las causas empresariales que justifican el despido han de concurrir a nivel de toda la empresa o pueden hacerlo sólo en el centro de trabajo donde se produce el despido?

La legislación ha utilizado el concepto de empresa regulado en el artículo N° 5 de la Ley 20.744, entendiéndose por tal a "*la organización instrumental de medios personales, materiales e inmateriales, ordenados bajo una dirección para el logro de fines económicos o benéficos*", y diferenciándose del concepto de establecimiento contenido en el artículo N°6. En este sentido, la norma ha determinado expresamente que tanto las causas económicas deben concurrir a nivel empresa.

3. ¿Cuál es el procedimiento que la empresa debe seguir para proceder a un despido por causas empresariales? ¿Existen especialidades en el procedimiento de despido por causas empresariales cuando el despido tiene naturaleza colectiva?

La Ley 24.013 ha diseñado un procedimiento administrativo de carácter previo y obligatorio, a la comunicación de despidos o suspensiones por causas empresariales denominado "Procedimiento Preventivo de Crisis", para aquellos casos en que las medidas (despidos o suspensiones) afectasen a un 15% del personal dependiente en empresas de menos de 400 trabajadores, a un 10% en empresas de entre 400 y 1000 trabajadores y a un 5% en empresas de más de 1000 trabajadores.

El "Procedimiento Preventivo de Crisis se encuentra regulado entre los artículos 98 y 105 de la Ley Nacional de Empleo (N° 24.013), y otorga legitimación tanto al empleador como a las asociaciones sindicales de los trabajadores, para iniciar el procedimiento de crisis ante el Ministerio de Trabajo y Seguridad Social. Para ello deben realizar una presentación debidamente fundada, solicitando la apertura del procedimiento y ofreciendo todos los elementos probatorios que se consideren pertinentes.

Si el procedimiento es iniciado por el empleador de una empresa de más de cincuenta trabajadores, al solicitar la apertura del procedimiento de crisis, deberá acompañar a su presentación una propuesta en las siguientes materias: efectos de la crisis sobre el empleo y en su caso, propuestas para su mantenimiento, movilidad funcional, horaria o salarial, inversiones, innovación tecnológica, reconversión productiva y cambio organizacional, recalificación y formación profesional de la mano de obra empleada por la empresa, recolocación interna o externa de los trabajadores excedentes y régimen de ayudas a la recolocación, reformulación de modalidades operativas, conceptos y estructura remuneratorias y contenido de puestos y funciones, aportes convenidos al Sistema Integral de Jubilaciones y Pensiones y ayudas para la creación, por parte de los trabajadores excedentes, de emprendimientos productivos. En el caso de que la propuesta para superar la crisis incluya la reducción de la planta de personal, deberá indicar el número y categoría de los trabajadores que se propone despedir y cuantificar la oferta indemnizatoria dirigida a cada uno de los trabajadores afectados (conf. artículo 1 del Decreto 2072/94). Asimismo, deberá dar cumplimiento a los requisitos del artículo 1 del Decreto 265/2002.

Dentro de las 48 horas de la presentación, el Ministerio de Trabajo y Seguridad Social, notificará a la otra parte, entendiéndose por "parte" a las asociaciones sindicales y/o al empleador, de la solicitud del inicio del procedimiento preventivo de crisis citándolos a una primera audiencia dentro de los próximos cinco días.

Cabe aclarar que, durante la sustanciación del procedimiento preventivo de crisis, el empleador no podrá tomar las medidas objeto del procedimiento ni los trabajadores realizar ningún tipo de huelga u otras medidas de acción sindical.

En caso de no existir acuerdo en la audiencia prevista, se abrirá un período de negociación entre el empleador y la asociación sindical, el que tendrá una duración máxima de 10 días. Vencido el plazo, si no se hubiese producido acuerdo entre el empleador y la asociación sindical, se da por concluido el procedimiento, pudiendo el empleador y la asociación de trabajadores, tomar las medidas que consideren necesarias.

Desde el inicio y hasta la finalización del procedimiento, el Ministerio de Trabajo y Seguridad Social, posee las facultades ordenatorias, instructorias y sancionatorias, pudiendo de oficio o a petición de parte; recabar informes aclaratorios o ampliatorios acerca de los fundamentos de la petición, realizar investigaciones, pedir dictámenes y asesoramiento, y/o cualquiera otra medida de mejor proveer. En caso de existir un acuerdo entre las partes podrá homologarlo con la misma eficacia que un convenio colectivo o rechazarlo mediante resolución fundada.

Si la cantidad de trabajadores afectados por los despidos o suspensiones fuese inferior a los porcentajes establecidos en el artículo 98 de la Ley 24.013, el empleador deberá seguir el procedimiento establecido en el Decreto 328/88, que lo obliga a comunicar al Ministerio de Trabajo y Seguridad Social, con una anticipación no menor de 10 días de la efectivización de las medidas, la siguiente información: causas que justifiquen la adopción de las medidas informando; si las mismas afectan a toda la empresa o solo a alguna de sus secciones, si se presumen de efecto transitorio o definitivo, informando los datos personales, laborales y filiatorios de los trabajadores afectados por las medidas. Las medidas pueden consistir en; suspensiones, reducciones de jornada laboral, o de la totalidad o parte de su personal. Con la misma anticipación deberá el empleador, entregar a la asociación sindical "con personería gremial" que represente a los trabajadores afectados por la medida una copia de la presentación efectuada ante el Ministerio de Trabajo y Seguridad Social.

El Decreto 265/2000 ha otorgado facultades al Ministerio de Trabajo y Seguridad Social, para iniciar de oficio el procedimiento preventivo, cuando la crisis implique la posibilidad de despido en contravención a lo dispuesto en el artículo 98 de la Ley 24.013.

4. ¿Cómo se calcula el número de trabajadores afectados para determinar si el despido tiene naturaleza colectiva?

A los fines de determinar la cantidad de trabajadores afectados y con ello el procedimiento aplicable, se deberá en primer lugar considerar que "las medidas" que el empleador tiene posibilidad de adoptar pueden consistir en despidos y/o suspensiones, y deben ser analizadas conjuntamente para determinar el porcentaje de trabajadores afectados. Luego se debe considerar que el cálculo de los porcentajes deberá realizarse respecto de los trabajadores "de la empresa", en los términos del artículo 5° de la LCT, entendida como aquella "*organización instrumental de medios personales, materiales e inmateriales, ordenados bajo una dirección para el logro de fines económicos o benéficos*."

5. ¿Existen trabajadores que gozan de prioridad de permanencia ante un despido por causas empresariales? En particular, ¿tienen los representantes de los trabajadores prioridad de permanencia? ¿Las trabajadoras embarazadas? ¿Los trabajadores de mayor edad? ¿Los trabajadores con responsabilidades familiares?

El artículo 247 de la Ley de Contrato de Trabajo, determina que en los casos de despido dispuesto por causa de fuerza mayor o falta o disminución de trabajo se deberá comenzar por el personal menos antiguo de cada especialidad, y respecto del personal ingresado en un mismo semestre, deberá comenzarse por el que tuviere menos cargas de familia, aunque con ello se altere el orden de antigüedad.

Esta norma debe analizarse en armonía con la legislación vigente. Por ello, el orden de prelación establecido en la norma cede frente a la existencia de vínculos laborales protegidos con estabilidad propia. En lo que refiere a los representantes de los trabajadores, el artículo 51 de la Ley 23.552, establece expresamente que cuando no se produjese el supuesto de suspensión general de tareas, los trabajadores amparados por la estabilidad (propia) instituida en dicha norma, no podrán ser objeto de despido o suspensión.

Sin perjuicio de no encontrarse expresamente contemplada otra excepción a lo dispuesto en el artículo 247, existen supuestos específicos de protección otorgado a la mujer en el periodo de siete meses y medio, anteriores y posteriores al parto (artículo 178) y, a las y los trabajadores/as que han contraído matrimonio, de tres meses anteriores y seis posteriores a la celebración del mismo (artículo 181), en virtud de los cuales el empleador se encuentra impedido de utilizar el instituto previsto en el artículo 247. A lo expuesto debe agregarse, que en aquellos casos en que el despido configure la

consolidación de un acto discriminatorio, el mismo puede ser declarado nulo y con ello alterar el orden de prelación previsto en la norma bajo análisis.

6. ¿Los trabajadores afectados por el despido por causas empresariales, ¿tienen derecho a una compensación económica o indemnización?

En el ordenamiento argentino, el despido por fuerza mayor o falta o disminución de trabajo da lugar al pago de una indemnización, cuya cuantía es determinada por el artículo 247 de la Ley 20.744 en los siguientes términos*: "(...) el trabajador tendrá derecho a percibir una indemnización equivalente a la mitad de la prevista en el artículo 245 de esta ley*." La remisión al artículo 245 tiene por objeto brindar las pautas que sirvan para determinar la fórmula de cálculo, dicha norma determina la indemnización que se le debe abonar al trabajador en el caso de producirse un despido sin causa.

El cálculo que se debe realizar incorpora dos variables; la remuneración del trabajador y la antigüedad en la prestación de servicios, debiendo abonarse en el caso de despido sin justa causa *UN (1) mes de sueldo por cada año de servicio o fracción mayor de TRES (3) meses, tomando como base la mejor remuneración mensual, normal y habitual devengada durante el último año o durante el tiempo de prestación de servicios si éste fuera menor.* Para completar el cálculo se debe tener presente que la norma prevé un tope para determinar la base de cálculo que será el equivalente de TRES (3) veces el importe mensual de la suma que resulte del promedio de todas las remuneraciones previstas en el convenio colectivo de trabajo aplicable al trabajador, al momento del despido, por la jornada legal o convencional, excluida la antigüedad. Al respecto cabe agregar que la CSJN ha fallado la inconstitucionalidad del límite a la base de cálculo establecida en el artículo 245, en el caso "Vizzoti Carlos c/ AMSA S.A. s/ Despido", en donde la aplicación del tope mencionado implicó reducir la indemnización por antigüedad a un 90,55%, y expresó que la limitación a la base salarial de la indemnización por despido sin justa causa sólo debe aplicarse hasta el treinta y tres por ciento de la mejor remuneración mensual normal y habitual computable, pues de lo contrario "*(...) significaría consentir un instituto jurídico que termina incumpliendo con el deber inexcusable del article 14 bis de la Constitución Nacional, acerca de que el trabajo gozará de la protección de las leyes y que éstas asegurarán al trabajador protección contra el despido arbitrario y condiciones equitativas de labor, contrariando el principio de razonabilidad del article 28 de la Ley Suprema*".

7. ¿Qué obligaciones tiene la empresa que realiza un despido por causas empresariales? En concreto, ¿existe obligación de recolocación de los trabajadores afectados en la empresa o en el grupo de empresas?

La empresa que habiendo sustanciado el procedimiento preventivo de crisis o tramitado el procedimiento previsto en el Decreto 325/88, culminando con el despido de los trabajadores debe cumplir con el pago de la indemnización prevista en el artículo 247 de la Ley de Contrato de Trabajo. En el caso de existir un acuerdo homologado por el Ministerio de Trabajo y Seguridad Social, el empleador se encuentra obligado a las prestaciones pactadas en dicho instrumento.

8. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales? ¿En qué supuestos el despido puede ser declarado nulo (que implique la readmisión del trabajador)?

El Decreto 265/2000, dispone en su artículo 12, que en caso de incumplimiento de las disposiciones relativas a la sustanciación del procedimiento preventivo de crisis las empresas serán pasibles de las sanciones previstas en el Régimen General de Sanciones por Infracciones Laborales. El régimen prevé la existencia de tres tipos de infracciones; leves, graves y muy graves, estableciendo una serie de sanciones graduadas en función de la gravedad y los antecedentes de la empresa. Las sanciones pueden consistir en apercibimientos, multas y en el caso de infracciones muy graves en la clausura del establecimiento, y la inhabilitación para acceder a licitaciones públicas.

Si el empleador tomare las medidas objeto del procedimiento preventivo de crisis antes de su finalización, los trabajadores afectados mantendrán su puesto de trabajo y se le deberán abonar los salarios caídos por el tiempo que hubiese transcurrido el despido o la suspensión.

9. ¿Existen especialidades en el despido por causas empresariales para las microempresas y/o pequeñas y medianas empresas?

La Ley 24.467, de la "Pequeña y Mediana Empresa", dispone que cuando las extinciones de trabajo hubiesen tenido lugar en el marco de la sustanciación del procedimiento preventivo de crisis el Fondo Nacional de Empleo podrá asumir total o parcialmente las indemnizaciones respectivas o financiar acciones de capacitación y reconversión para los trabajadores despedidos.

10. ¿Es posible el despido por causas empresariales en la Administración Pública? En su caso, ¿qué especialidades existen en relación con la definición de las causas?

La Administración Pública se encuentra excluida del ámbito de aplicación de la Ley de Contrato de Trabajo, no existiendo actualmente la posibilidad de despido por causas económicas.

11. Otras cuestiones relevantes en materia de despido por causas empresariales

El instituto del despido o por fuerza mayor o por falta o disminución de trabajo, implica una excepción al principio de ajenidad al riesgo empresario, por ello la jurisprudencia ha adoptado un criterio restringido de interpretación. Se ha sostenido jurisprudencialmente que "(...) *para justificar la falta de trabajo, no basta la mera invocación de una desesperante situación económica, sino que debe demostrar: a) la existencia de falta o disminución de trabajo que por su entidad justifique la medida dispuesta ; b) que la situación no le era imputable o que se debió a circunstancias objetivas y que el hecho determinante no obedeció al riesgo propio de la empresa; c) que observó una conducta diligente, acorde a las circunstancias, consistente en la adopción de medidas destinadas a evitar la situación deficitaria o atenuarla; d) que la causa tuviera cierta durabilidad; e) que se haya respetado el orden de antigüedad; y f) haber cumplido con el procedimiento preventivo de crisis”*.

DESPIDO POR CAUSAS EMPRESARIALES EN BRASIL

Eduardo Pragmácio Filho
Doctor y Master en Derecho del Trabajo por la PUC-SP,
Profesor de Derecho del Trabajo de la Facultad Farias Brito

Rayane Araújo Castelo Branco Rayol
Especialista en Derecho del Trabajo por la Universidad de Fortaleza

Introducción

La Constitución de la República de Brasil[79], en su artículo 7º, inciso II, protege la relación de empleo contra el despido arbitrario o sin justa causa, garantizando al trabajador una indemnización compensatoria de 40% del saldo del FGTS[80]. Además, el empleador debe, como ordena la Consolidación de las Leyes del Trabajo (CLT)[81], hacer el pago de los derechos de la rescisión (ferias proporcionales, 13º salario proporcional y saldo del salario del mes de la rescisión) y comunicarle con una antelación mínima de 30 días. Ese período de 30 días se llama "aviso previo" y, por cada trabajado en la empresa, el empleado adquiere derecho a tener 3 días más, hasta el máximo de 90 días. En ese tiempo, el empleado trabaja con una reducción de 2 horas por día en la carga horaria o con la reducción de 7 días corridos, para que pueda buscar otro empleo. El empleador puede, en lugar de conceder los días de aviso, pagar el período correspondiente.

Así, en Brasil, regla general, el despido es un derecho potestativo del empleador, sin necesidad de motivación, desde que haga el pago de la indemnización de 40% del saldo del FGTS y de los derechos de la rescisión puntualizados arriba, no existiendo una diferenciación en la ley para las empresas con problemas económicos-financieros u organizativos.

---

[79] Para acceso a la Constitución: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm

[80] El FGTS – Fondo de Garantía por Tiempo de Servicio es un derecho de todos los empleados, garantizado por el artículo 7º, inciso III de la Constitución Federal de Brasil y reglamentado por la Ley 8.036/1990. Corresponde a 8% de la remuneración del mes del empleado y será pago por el empleador en un depósito en una cuenta bancaria vinculada al gobierno, y solamente será sacado por el trabajador, regla general, por ocasión del despido por iniciativa del empleador. (http://www.planalto.gov.br/ccivil_03/leis/l8036consol.htm)

[81] Para acceso a la CLT: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del5452.htm

Con eso, la regla general es que los trabajadores no tienen estabilidad en el empleo, excepto en algunos casos establecidos por la Constitución, la ley y la jurisprudencia, de forma provisoria.

Con relación a los empleados estatales, hay dos tipos: los que ocupan cargo de proveimiento efectivo y los que ocupan cargos comisionados. Para aquellos, hay una estabilidad después de 3 años en el empleo, conforme lo dispone la Constitución Federal, en su artículo 41.

1. ¿Cómo se definen las causas que justifican un despido por causas empresariales?

No se aplica en Brasil, pues el despido es un derecho potestativo del empleador.

En la realidad, el despido por parte del empleador, es clasificado de acuerdo con la existencia de falta (conducta grave) del trabajador. Así, puede ser: (i) sin justa causa, cuando no hay razón específica para hacerlo y el trabajador no da causa al despido, o (ii) por justa causa, cuando el trabajador comete alguna conducta grave, como actos de improbidad, debiendo el empleador decir específicamente cuál (artículo 482, CLT).

Así, el empleador puede dispensar al empleado sin razón, en la modalidad "sin justa causa", debiendo solamente hacer el pago de los derechos de la rescisión (aviso previo de 30 días, en el mínimo, que puede ser trabajado o indemnizado, ferias proporcionales, 13º salario proporcional y saldo del salario del mes de la rescisión) y una indemnización equivalente a 40% de los depósitos del FGTS. Además, puede el empleado disponer del saldo total del FGTS y recibir el seguro de-desempleo, en caso de que se cumplan los requisitos de la ley específica (Ley nº 7.998/1990[82]).

Ya si el trabajador comete alguna falta grave, no hay la necesidad, por parte del empleador, de comunicarle con la antelación mínima de 30 días (aviso previo), sea de forma trabajada o indemnizada, y el trabajador pierde el derecho de recibir el pago de los derechos de la rescisión, recibiendo solamente el saldo del salario del mes de la rescisión y el deposito del FGTS del mes, pero sin poder sacarlo.

2. ¿Las causas empresariales que justifican el despido han de concurrir a nivel de toda la empresa o pueden hacerlo sólo en el centro de trabajo donde se produce el despido?

No se aplica en Brasil, pues el despido es un derecho potestativo del empleador, sin necesidad de motivación.

[82] Para acceso a esta Ley: http://www.planalto.gov.br/ccivil_03/leis/l7998.htm

En cualquier modalidad de despido por parte del empleador, sin o con justa causa, individual o colectivo, la empresa puede hacerlo a nivel de toda empresa o solo en el centro de trabajo donde se produce el despido.

3. ¿Cuál es el procedimiento que la empresa debe seguir para proceder a un despido por causas empresariales? ¿Existen especialidades en el procedimiento de despido por causas empresariales cuando el despido tiene naturaleza colectiva?

En cualquier modalidad de despido por parte del empleador, sea individual o colectivo, sin o con justa causa, la empresa debe hacer un Formulario de Rescisión, donde hay la discriminación de todo lo que está siendo pago al empleado (derechos rescisorios y otros conceptos vencidos) y hacer el pago en el plazo de 10 días desde el término del contrato de trabajo, así como registrar la Cartera de Trabajo y Previdencia Social (CTPS)[83] del empleado.

En el ordenamiento jurídico brasileño, no había una regulación del despido colectivo en la ley ni ningún criterio numérico para definir si un despido sería de naturaleza colectiva o no.

La materia fue reglamentada en 2009, por una decisión del Tribunal Superior del Trabajo (TST) al juzgar una disidencia colectiva (DC 30900-12.2009.5.15.0000)[84] en que la empresa EMBRAER dispensó aproximadamente 4,2 mil trabajadores súbitamente, sin negociar con el sindicato representante de la categoría.

El TST, al apreciar el tema, fijó la tesis de que la negociación con el sindicato es imprescindible para el despido colectivo de trabajadores. Los despidos fueron considerados válidos, pero por cuenta de la falta de información y negociación previas, el Tribunal consideró la ausencia de buena fe contractual y condenó a la empresa a pagar una indemnización compensatoria proporcional al tiempo de servicio de cada empleado[85].

---

[83] La Cartera de Trabajo y Previdencia Social (CTPS) es un documento oficial del Gobierno, obligatorio a todos los trabajadores, donde se registra su vida profesional. Todas las empresas, cuando hacen una contratación de un funcionario, tienen que hacer la anotación de la data que se inicia el empleo y de la que encera.

[84] http://aplicacao4.tst.jus.br/consultaProcessual/consultaTstNumUnica.do?consulta=Consultar&conscsjt=&numeroTst=30900&digitoTst=12&anoTst=2009&orgaoTst=5&tribunalTst=15&varaTst=0000&submit=Consultar

[85] Al respecto, el TST consideró que: "*A sociedade produzida pelo sistema capitalista é, essencialmente, uma sociedade de massas. A lógica de funcionamento do sistema econômico-social induz a concentração e centralização não apenas de riquezas, mas também de comunidades, dinâmicas socioeconômicas e de problemas destas resultantes. A massificação das dinâmicas e dos problemas das pessoas e grupos*

Con la llegada de la Ley 13.467/2017[86], titulada "Reforma Laboral", que alteró más de 100 artículos de la CLT, hubo un equiparamiento del despido colectivo con el despido individual. La reforma incluyó el artículo 477-A en la CLT, definiendo que no hay necesidad de autorización previa del sindicato o de la celebración de convención o acuerdo colectivo para su efectuación. No hay diferencias en dicho procedimiento en función del número de trabajadores afectados. En verdad, la Ley 13.467/2017 no

---

sociais nas comunidades humanas, hoje, impacta de modo frontal a estrutura e o funcionamento operacional do próprio Direito. Parte significativa dos danos mais relevantes na presente sociedade e das correspondentes pretensões jurídicas têm natureza massiva. O caráter massivo de tais danos e pretensões obriga o Direito a se adequar, deslocando-se da matriz individualista de enfoque, compreensão e enfrentamento dos problemas a que tradicionalmente perfilou-se. A construção de uma matriz jurídica adequada à massividade dos danos e pretensões característicos de uma sociedade contemporânea - sem prejuízo da preservação da matriz individualista, apta a tratar os danos e pretensões de natureza estritamente atomizada - é, talvez, o desafio mais moderno proposto ao universo jurídico, e é sob esse aspecto que a questão aqui proposta será analisada. As dispensas coletivas realizadas de maneira maciça e avassaladora, somente seriam juridicamente possíveis em um campo normativo hiperindividualista, sem qualquer regulamentação social, instigador da existência de mercado hobbesiano na vida econômica, inclusive entre empresas e trabalhadores, tal como, por exemplo, respaldado por Carta Constitucional como a de 1891, já há mais um século superada no país. Na vigência da Constituição de 1988, das convenções internacionais da OIT ratificadas pelo Brasil relativas a direitos humanos e, por conseqüência, direitos trabalhistas, e em face da leitura atualizada da legislação infraconstitucional do país, é inevitável concluir-se pela presença de um Estado Democrático de Direito no Brasil, de um regime de império da norma jurídica (e não do poder incontrastável privado), de uma sociedade civilizada, de uma cultura de bem-estar social e respeito à dignidade dos seres humanos, tudo repelindo, imperativamente, dispensas massivas de pessoas, abalando empresa, cidade e toda uma importante região. Em conseqüência, fica fixada, por interpretação da ordem jurídica, a premissa de que -a negociação coletiva é imprescindível para a dispensa em massa de trabalhadores-. DISPENSAS COLETIVAS TRABALHISTAS. EFEITOS JURÍDICOS. A ordem constitucional e infraconstitucional democrática brasileira, desde a Constituição de 1988 e diplomas internacionais ratificados (Convenções OIT n. 11, 87, 98, 135, 141 e 151, ilustrativamente), não permite o manejo meramente unilateral e potestativista das dispensas trabalhistas coletivas, por de tratar de ato/fato coletivo, inerente ao Direito Coletivo do Trabalho, e não Direito Individual, exigindo, por conseqüência, a participação do (s) respectivo (s) sindicato (s) profissional (is) obreiro (s). Regras e princípios constitucionais que determinam o respeito à dignidade da pessoa humana (art. 1 o , III, CF), a valorização do trabalho e especialmente do emprego (arts. 1 o , IV, 6 o e 170, VIII, CF), a subordinação da propriedade à sua função socioambiental (arts. 5 o , XXIII e 170, III, CF) e a intervenção sindical nas questões coletivas trabalhistas (art. 8 o , III e VI, CF), tudo impõe que se reconheça distinção normativa entre as dispensas meramente tópicas e individuais e as dispensas massivas, coletivas, as quais são social, econômica, familiar e comunitariamente impactantes. Nesta linha, seria inválida a dispensa coletiva enquanto não negociada com o sindicato de trabalhadores, espontaneamente ou no plano do processo judicial coletivo. A d. Maioria, contudo, decidiu apenas fixar a premissa, para casos futuros , de que -a negociação coletiva é imprescindível para a dispensa em massa de trabalhadores-, observados os fundamentos supra. Recurso ordinário a que se dá provimento parcial".

[86] Para acceso a esta Ley: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13467.htm

estableció nada respecto al número indicativo de trabajadores despedidos para que se pueda definir si el despido es colectivo.

Sin embargo, los despidos realizados sin la negociación con el sindicato serán válidos, pero el empleador podrá pagar una indemnización por daños materiales a ser determinado en cada caso por la justicia.

4. ¿Cómo se calcula el número de trabajadores afectados para determinar si el despido tiene naturaleza colectiva?

Según se ha dicho, no hay ningún criterio para calcular el número de trabajadores afectados para determinar si el despido tiene naturaleza colectiva.

Esa inexistencia de un criterio legal deja Brasil en un nítido atraso legislativo con el resto del mundo. A propósito, la equivalencia de los despidos individuales y colectivos (article 477-A de la CLT) demuestra eso.

5. ¿Existen trabajadores que gozan de prioridad de permanencia ante un despido por causas empresariales? En particular, ¿tienen los representantes de los trabajadores prioridad de permanencia? ¿las trabajadoras embarazadas? ¿los trabajadores de mayor edad? ¿los trabajadores con responsabilidades familiares?

No existe una prioridad de permanencia por cuenta de la regla general de no estabilidad en el empleo. Además, no existen criterios de selección o prelación de los trabajadores afectados por un despido.

Lo que existe en Brasil es que hay algunas situaciones en que los trabajadores tienen estabilidad provisoria en el empleo, como las trabajadoras embarazadas, el trabajador accidentado, el dirigente del sindicato, el integrante de la Comisión Interna de Prevención de Accidentes (CIPA) y el representante de las comisiones en el local de trabajo, situaciones en que no pueden ser despedidos.

Las trabajadoras embarazadas tienen estabilidad provisoria desde la confirmación del embarazo hasta cinco meses después del parto (artículo 10, II, "b" del ADCT[87]y Sumula 244 del TST[88])

El trabajador accidentado tiene una estabilidad provisoria de 12 meses después de la cesación del beneficio de la Previdencia Social (Seguridad Pública)[89] llamado "auxilio-

[87] Actos de las Disposiciones Constitucionales Transitorias.
[88] Para acceso a las Sumulas do Tribunal Superior do Trabalho (TST): http://www.tst.jus.br/sumulas

enfermedad accidentario". Los presupuestos para la concesión de la estabilidad son (i) el apartamiento de la empresa superior a 15 días y (ii) la percepción del auxilio-enfermedad accidentario. (artículo 118 de la Ley nº 8.213/91[90] y Sumula 378 del TST)

El empleado sindicalizado o asociado no puede ser dispensado desde el momento del registro de su candidatura al cargo de dirección o representación de entidad sindical o asociación profesional, hasta 1 año después del fin de su mandato, caso sea elegido (artículo 543, § 3º de la CLT). El mismo se aplica para el representante de las comisiones en el local de trabajo (artículo 510-D, § 3º de la CLT).

El empleado elegido para el cargo de dirección de comisiones internas de prevención de accidentes también tiene estabilidad provisoria, que empieza con el registro de la candidatura, subsistiendo, si es elegido, hasta 1 año después del final del mandato.

Además, la negociación colectiva puede garantizar otras estabilidades y/o orden de preferencia, como estabilidad para los enfermos o para los que están cerca de la jubilación.

Importante decir que esos trabajadores, con estabilidad provisoria, pueden ser despedidos si cometieren faltas graves, con la respectiva apuración.

6. ¿Los trabajadores afectados por el despido por causas empresariales, ¿tienen derecho a una compensación económica o indemnización?

No se aplica.

Lo que hay en Brasil, en el despido sin justa causa, como se ha dicho, es una indemnización de 40% del saldo del FGTS y la necesidad de comunicar el empleado 30 días antes (aviso previo) o hacerlo de forma indemnizada, así como efectuar el pago de los demás derechos de la rescisión (ferias proporcionales, 13º salario proporcional y saldo del salario del mes de la rescisión).

En caso del despido por justa causa del trabajador, no hay necesidad de aviso por parte del empleador, sea trabajado o indemnizado, y el trabajador pierde el derecho de recibir el pago de los derechos de la rescisión, recibiendo solamente el saldo del salario del mes de la rescisión.

[89] La Previdencia Social es un programa de seguridad pública del Gobierno que ofrece protección contra varios riesgos económicos (por ejemplo, la pierda de rendimientos por enfermedades, desempleo y jubilación por edad), de participación obligatoria.
[90] Para acceso a esta Ley: http://www.planalto.gov.br/ccivil_03/leis/l8213cons.htm

7. ¿Qué obligaciones tiene la empresa que realiza un despido por causas empresariales? En concreto, ¿existe obligación de recolocación de los trabajadores afectados en la empresa o en el grupo de empresas?

No se aplica.

En cualquier modalidad de despido (individual o colectivo), sin justa causa, como se ha dicho, la empresa debe solamente hacer los pagos de la rescisión y de la indemnización de 40% del FGTS, lo que no necesita para el despido por justa causa del trabajador.

No existe ninguna obligación de recolocación de los trabajadores afectados.

8. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales? ¿En qué supuestos el despido puede ser declarado nulo (que implique la readmisión del trabajador)?

No se aplica.

En cualquier despido, en caso de que no se efectúe el pago de la rescisión y demás derechos vencidos en los 10 días siguientes del fin del contrato, hay la incidencia de una multa en favor del empleado en importe equivalente a su salario, consonante con el artículo 477, § 8º de la CLT.

Si el empleador no efectúa el pago de los derechos de la rescisión al trabajador, aquel puede acudir a la justicia y reclamar el pago.

El despido es nulo solamente en los casos de despidos de trabajadores con estabilidades provisorias, caso en que se impone la reintegración al empleo o una indemnización sustituta.

9. ¿Existen especialidades en el despido por causas empresariales para las microempresas y/o pequeñas y medianas empresas?

No. En ningún tipo de despido hay especialidades para las microempresas, ni pequeñas o medianas empresas. El criterio de la dimensión de la empresa no es reglamentado en Brasil.

En verdad, en Brasil, la regulación para este tipo de empresa es muy tímida. Lo que hay es la Ley Complementar 123/2006[91], que, en sus artículos 51 y siguientes, dispone acerca de sus obligaciones laborales.

La referida ley solamente dispensa a las micro y pequeñas empresas de algunas obligaciones laborales, como la fijación del cuadro de trabajo en sus dependencias, anotaciones de ferias de los empleados en los libros de registro y posesión del libro titulado "Inspección del Trabajo". En contrapartida, no dispensa a la empresa de otras obligaciones, como anotar la Cartera de Trabajo (CTPS) y presentar la relación anual de los empleados y la relación anual de informaciones sociales (RAIS) y el registro general de los empleados y desempleados (CAGED).

10. ¿Es posible el despido por causas empresariales en la Administración Pública? En su caso, ¿qué especialidades existen en relación con la definición de las causas?

En la Administración Pública, el régimen de contratación es diferenciado.

Para tener estabilidad, o sea, tener cargo de proveimiento efectivo, las personas tienen que aprobar unas oposiciones. Consonante con el artículo 41 de la Constitución de la Republica, los empleados de proveimiento efectivo son estables después de 3 años de efectivo ejercicio.

Hay también los empleados que no ocupan cargos de proveimiento efectivo, los cuales no tienen estabilidad. Son llamados "cargos en comisión" y pueden ser despidos a cualquier momento, mediante necesidad de la Administración Pública.

Cuando la Administración Pública quiere despedir, el gobierno hay que criar Plan de Despido Voluntario (PDV) o Plan de Jubilación Incentivado (PAI)[92].

Bibliografía

BARROS, A.M. de. *Curso de Direito do Trabalho*. São Paulo: LTr.

[91] Para acceso a esta Ley: http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp123.htm

[92] El Plan de Despido Voluntario - PDV y el Plan de Jubilación Incentivado - PAI son instrumentos utilizados tanto por las empresas y por la Administración Pública como una forma de reducción de la plantilla de personal, con el fin de optimizar los costos y de racionalización en la gestión de personas. Generalmente, las empresas o la Administración Pública dan al empleado cosas como salario y asistencia médica por 6 meses o 1 año, etc.

BONFIM, V. *Curso de Direito do Trabalho*. Rio de Janeiro: Impetus.

DELGADO, M. G. *Curso de Direito do Trabalho*. São Paulo: LTr.

MARTINEZ, L. *Curso de Direito do Trabalho*. São Paulo: Saraiva.

SIMÃO, R. de M. "Dispensa coletiva antes e depois da reforma trabalhista". (link: https://www.conjur.com.br/2017-dez-01/reflexoes-trabalhistas-dispensa-coletiva-antes-depois-reforma-trabalhista)

PRAGMÁCIO FILHO, E. *A boa-fé nas negociações coletivas trabalhistas*. Sao Paulo: LTr

http://www1.folha.uol.com.br/mercado/2017/07/1903972-governo-prepara-plano-de-demissao-voluntaria-para-servidores.shtml (sobre plan de despido voluntario creado por el Gobierno para los servidores públicos-empleados del estado)

Glosario/Lista de siglas:

FGTS: Fondo de Garantía por Tiempo de Servicio
CLT: Consolidación de las Leyes del Trabajo
CTPS: Cartera de Trabajo y Previdencia Social
TST: Tribunal Superior del Trabajo
CTPS: Cartera de Trabajo y Previdencia Social
RAIS: Relación Anual de Informaciones Sociales
CAGED: Registro General de Empleados y Desempleados

DESPIDO POR CAUSAS EMPRESARIALES EN CHILE

Francisco Tapia Guerrero – Carmen Elena Domínguez
Profesores de la Facultad de Derecho de la Pontificia Universidad Católica de Chile

Introducción

En el ordenamiento jurídico chileno, existe un sistema de terminación del contrato de trabajo causado y que contempla indemnizaciones legales, de acuerdo a la causal invocada y procedencia de las mismas. Entre las causales de terminación es posible distinguir aquellas de carácter objetivo, como el vencimiento del plazo o el cumplimiento de la obra, de aquellas otras de carácter subjetivo, como las causales fundadas en conductas culposas del trabajador. Hay también causales de carácter económico – empresarial.

Chile incorporó el año 1966, a través de la ley 16.455, una causal de carácter económico que permitía poner término al contrato de trabajo basado en las "necesidades de funcionamiento de la empresa". Esta causal fue posteriormente suprimida, atendido al abuso en su ejercicio, a la vez que las reformas de fines de los años setenta, incorporaron el libre desahucio con pago indemnizatorio, esto es, se permitía al empleador poner término al contrato "pagando" una suma acotada de dinero y sin mayor fundamentación de los hechos que sustentaban esta causal. La Ley 19.010 de 1990 restringió el uso de la causal de desahucio a tres hipótesis, y estableció una nueva causal, la de las necesidades de la empresa cuyo uso comenzó a presentar los mismos efectos no queridos de su antecesora de 1966.

De acuerdo a la ENCLA 2011[93] de la Dirección del Trabajo, el uso de la causal de necesidades de la empresa se mantiene alrededor del 7% anual, siendo mayoritario el uso de las causales objetivas asociadas a contratos de duración fija o determinable como el "vencimiento del plazo" y la "conclusión de la obra o faena determinada". Los datos de la ENCLA no muestran mayores diferencias a la hora de usar esta causal respecto al sexo de los trabajadores, pero sí de acuerdo al tamaño de la empresa, siendo mayor su uso de parte de la pequeña y microempresa.

A partir de la reforma laboral procesal del año 2008, la jurisprudencia comenzó a ser más estricta en la fundamentación fáctica del despido, esto es, en la concurrencia de las

[93] En la ENCLA 2014, no se incorpora información sobre las causales invocadas para poner término a los contratos de trabajo, por lo que no se dispone de estadística fidedigna que puede confirmar o contradecir esta tendencia. Ver ENCLA 2014 en http://www.dt.gob.cl/documentacion/1612/articles-108317_recurso_1.pdf

hipótesis de hecho que la justifican, especialmente en cuanto a la prueba de sus consideraciones fácticas. Tanto es así, que de acuerdo a un estudio del año 2017, el 90,3% de los despidos por necesidades de la empresa, impugnados judicialmente, eran resueltos en favor del demandante (trabajador)[94].

Por otra parte, el año 2014, la Ley 20.720 sustituyó el régimen concursal vigente por una ley de reorganización y liquidación de empresas y personas, introduciendo una nueva causal de término del contrato de trabajo que puede comprenderse dentro de aquellas denominadas "por causas empresariales" y concretamente referida, al sometimiento del empleador a un procedimiento concursal de liquidación de sus bienes. El año 2017, la Dirección del Trabajo registra 812 finiquitos por esta causal, representando el 0,1% de los finiquitos ratificados ante el órgano administrativo ese año.

1. ¿Cómo se definen las causas que justifican un despido por causas empresariales?

En el ordenamiento jurídico chileno, es posible identificar dos causales de término del contrato de trabajo de carácter económico - empresarial: la causal de necesidades de la empresa y el sometimiento del empleador a un procedimiento concursal de liquidación.

Por una parte, el artículo 161 del Código del Trabajo recoge la causal de término del contrato de trabajo por necesidades de la empresa, en los siguientes términos:

"*(…) el empleador podrá poner término al contrato de trabajo invocando como causal las necesidades de la empresa, establecimiento o servicio, tales como las derivadas de la racionalización o modernización de los mismos, bajas en la productividad, cambios en las condiciones del mercado o de la economía, que hagan necesaria la separación de uno o más trabajadores*".

La jurisprudencia nacional ha señalado que las hipótesis fácticas presentadas por el texto legal son sólo a modo ilustrativo y no taxativas al emplearse las expresiones "tales como", de modo que se trata de situaciones indicadas a modo ejemplar, admitiéndose en consecuencia, otras que constituyan el fundamento fáctico de las necesidades de la empresa. Estas hipótesis -dirán los tribunales de justicia- apuntan a condiciones económicas, financieras o tecnológicas que no tienen su origen en la voluntad o en la responsabilidad del empleador.

[94] Libertad y Desarrollo, La causal de despido por necesidades de la empresa. Serie Informe Justicia nº 016, Septiembre, 2017. En http://lyd.org/wp-content/uploads/2017/11/SIJ-16-La-causal-de-despido-por-necesidades-de-la-empresa-Septiembre2017.pdf

A mayor abundamiento, la jurisprudencia ha sostenido que es posible diferenciar en dos las hipótesis propuestas por el empleador: una primera, en que se agrupan aquellos rasgos estructurales de instalación de la empresa, que provocan cambios en la mecánica funcional de la misma; y una segunda, en que se contemplan aquellas situaciones que importan -en general-, la existencia de un deterioro en las condiciones económicas de la empresa que hace inseguro su funcionamiento

En general, los tribunales de justicia han entendido que las situaciones económicas, financieras o técnicas que den sustento a la invocación de esta causal deben ser objetivas, ajenas, graves y permanentes, que hagan además necesaria la separación del trabajador despedido, para que el despido sea declarado como justificado.

Por otra parte, el artículo 163 bis del Código del Trabajo, prevé una segunda causal económico- empresarial, relacionada a los procesos de liquidación de empresas y que busca, agilizar el pago de los créditos laborales para trabajadores de empresas insolventes y declaradas de esta manera en un procedimiento de liquidación concursal. Así, la norma citada establece que:

"*El contrato de trabajo terminará en caso que el empleador fuere sometido a un procedimiento concursal de liquidación. Para todos los efectos legales, la fecha de término del contrato de trabajo será la fecha de dictación de la resolución de liquidación*", agregando una serie de reglas especiales que alteran la regulación que contenía el Código Civil sobre la prelación de créditos laborales y la general del estatuto laboral.

2. ¿Las causas empresariales que justifican el despido han de concurrir a nivel de toda la empresa o pueden hacerlo sólo en el centro de trabajo donde se produce el despido?

Respecto a la primera de las causales señaladas, la procedencia de la causal de término debe fundarse en la concurrencia de condiciones económicas, financieras o técnicas objetivas, ajenas, graves y permanentes que afecten a la "empresa, establecimiento o servicio".

En consecuencia, los supuestos fácticos que hacen procedente la aplicación de esta causal no exigen que afecte a toda la empresa, pudiendo abarcar sólo un establecimiento o servicio de la misma.
Sin perjuicio de lo anterior, la jurisprudencia ha ponderado la "ajenidad" en la aplicación de esta causal según la imposibilidad de la empresa de tomar otro camino

para responder a los cambios del mercado o del negocio, como la relocalización del trabajador en otras funciones y/u otro establecimiento.

Asimismo, tratándose de una medida de desvinculación "que haga necesaria la separación del trabajador", se ha considerado jurisprudencialmente que si a la vez, se adoptan otras medidas que van en contra de la línea seguida en el despido, como puede ser el hecho de contratar trabajadores para que realicen la labor de aquél que ha sido despedido, el despido ha carecido de justificación. No necesariamente se sigue esa línea de razonamiento cuando se acredita que la medida del despido ha sido una de última *ratio*, en cuanto se han adoptado medidas tendientes a evitarlo, o que se han hecho esfuerzos para que los despidos no afecten a otros trabajadores, asumiendo medidas internas de racionalización en ese sentido.

Respecto a la segunda de las causales señaladas, dado que la misma presupone una situación de insolvencia del empleador que hace necesario la entrada de éste a un procedimiento concursal, la unidad de análisis es la empresa y no centros de trabajo considerados individualmente.

En el ordenamiento jurídico chileno no existen medidas legalmente aceptadas en caso de crisis como la suspensión de los contratos de trabajo.

3. ¿Cuál es el procedimiento que la empresa debe seguir para proceder a un despido por causas empresariales? ¿Existen especialidades en el procedimiento de despido por causas empresariales cuando el despido tiene naturaleza colectiva?

En el ordenamiento jurídico chileno, el procedimiento que rige el término del contrato por invocación de la causal de necesidades de la empresa exige cumplir con los siguientes requisitos:

a. Aviso previo: El empleador deberá comunicar por escrito al trabajador, personalmente o por correo certificado, la terminación del contrato de trabajo, con una anticipación mínima de 30 días de la fecha de cesación de los servicios. Podrá sustituir este aviso por el pago de una indemnización equivalente a treinta días de remuneración.
b. Publicidad: Copia de la carta de despido, debe enviarse a la Inspección del Trabajo competente, dentro del mismo plazo.
c. Contenido de la comunicación: La carta de despido deberá contener la siguiente información:
    - La o las causal(es) legal(es) de término del contrato de trabajo invocadas por el empleador;

- Los hechos en los que funda la o las causal(es) invocada(s);
- El monto de las indemnizaciones por término de contrato que se pagará al trabajador;
- El estado de cumplimiento de las obligaciones previsionales hasta el último día del mes anterior a la comunicación.

d. Efectos de la comunicación:
   - La carta de despido pone término al contrato de trabajo a partir de la fecha de cesación de los servicios indicada en la carta.
   - La carta de despido constituye una oferta irrevocable de pago, y en tal sentido, obliga al empleador al pago de los montos declarados en la comunicación.
   - La carta de despido fija los "hechos" constitutivos de la causal que está fundando el despido, y por lo tanto, en caso de impugnación de ese despido, el empleador deberá probar los hechos en ella invocados "sin que pueda alegar en juicio hechos distintos como justificativos del despido". (Artículo 454, n°1 del Código del Trabajo).

Si bien la ley señala que las omisiones o errores en los que se incurra con ocasión de estas comunicaciones y que no tengan relación con la obligación de pago íntegro de las cotizaciones previsionales, no invalidarán el despido, conllevarán ésos, además de la sanción administrativa, la calificación judicial de ese despido como injustificado.

Por otra parte, la causal del artículo 163 bis, prevé un procedimiento especial:

a. Comunicación al trabajador del término del contrato de trabajo, por parte del liquidador que conoce del procedimiento concursal al que se sometió o fue sometido el empleador, el que deberá entregarse dentro de los 6 días hábiles siguientes, contados desde la fecha de notificación de la resolución judicial de liquidación de bienes que haya hecho el tribunal que conoce del procedimiento concursal.
b. Publicidad: Copia de esta comunicación, debe ser enviada por el liquidador a la Inspección del Trabajo competente, dentro del mismo plazo.
c. Registro de las comunicaciones: Las Inspecciones del trabajo deberán llevar un registro actualizado de estas comunicaciones.
d. Contenido de la Comunicación: Si bien, no existe un contenido determinado por ley de la comunicación antes referida, si se indica que el liquidador deberá adjuntar a ella, el certificado del procedimiento concursal de liquidación de bienes del empleador, emitido por la Superintendencia de Insolvencia y Reemprendimiento, en el que se indica: los datos de inicio del procedimiento concursal de liquidación de bienes del empleador, el tribunal competente, la individualización del proceso y la fecha de dictación de la resolución de liquidación.

e. Efectos de la comunicación: La comunicación pone término al contrato de trabajo, dando derecho al pago de indemnizaciones.

Cabe señalar, que la comunicación tendrá además el efecto de poner término al fuero, y a su respecto no procederá la sanción especial de la ineficacia que se aplica a los despidos ocurridos estando impagas las cotizaciones previsionales (artículo 162).

El error u omisión en que se incurra con ocasión de esta comunicación no invalidará el término de la relación laboral. Sin perjuicio de ello, la Inspección del Trabajo, de oficio o a petición de parte, podrá informar a la Superintendencia de Insolvencia y Reemprendimiento, el incumplimiento de este deber, la que podrá sancionar los hechos imputables al liquidador.

Finalmente, en Chile no existe la figura de los despidos colectivos por lo que no existe norma especial al respecto.

4. ¿Cómo se calcula el número de trabajadores afectados para determinar si el despido tiene naturaleza colectiva?

N/A

5. ¿Existen trabajadores que gozan de prioridad de permanencia ante un despido por causas empresariales? En particular, ¿tienen los representantes de los trabajadores prioridad de permanencia? ¿Las trabajadoras embarazadas? ¿los trabajadores de mayor edad? ¿Los trabajadores con responsabilidades familiares?

En Chile, se establecen prohibiciones al uso de la causal de necesidades de la empresa respecto de ciertos colectivos de trabajadores en razón de su condición o actuación:

a. Trabajadores que gozan de licencia médica por enfermedad común, profesional o accidente del trabajo, pero sólo respecto del ejercicio de esta causal, sin que sea aplicable a otras causales, en cuyo caso el despido se difiere hasta el cese de la respectiva licencia, doctrina ésta que prima, pues se ha sostenido en votos disidentes, que podría ser el despido nulo o ineficaz;
b. Trabajadores que gozan de los fueros legales o estados de excepción en los casos de maternidad, representación sindical, fueros paternales, o bien cuando se participa en una negociación colectiva. En estos casos el despido es nulo, se le debe reinstalar en el puesto de trabajo con el pago de los salarios caídos, de modo que procede la reincorporación. Cuando el despido es antisindical o discriminatorio grave, el trabajador opta entre una indemnización adicional y el reintegro.

Por su parte, la causal del 163 bis no reconoce colectivos respecto a los cuales no sea procedente, y por lo tanto, puede invocarse tanto respecto a trabajadores con fuero como a trabajadores con licencia médica por enfermedad común, profesional o accidente del trabajo. La norma solo establece un tratamiento especial respecto a las trabajadoras que gozan de fuero maternal, el cual no implica la prohibición del uso de esta causal, si no el pago de una indemnización especial, adicional, equivalente a la última remuneración mensual devengada por cada uno de los meses que restare de fuero.

6. ¿Los trabajadores afectados por el despido por causas empresariales, ¿tienen derecho a una compensación económica o indemnización?

En Chile, la invocación de la causal de necesidades de la empresa conlleva el pago de una indemnización por término de contrato equivalente a treinta días de la última remuneración mensual por cada año de servicio prestado por el trabajador de forma continua a ese empleador o fracción superior a seis meses, con un límite máximo de trescientos treinta días de remuneración (once meses).

La base de cálculo sobre la cual se contabilizará el monto total de la indemnización será la "última remuneración mensual", entendiéndose por tal, toda cantidad que estuviere percibiendo el trabajador en razón de la prestación de servicios, incluidas las cotizaciones de seguridad social de cargo del trabajador y las regalías o especies avaluadas en dinero, con excepción de la asignación familiar legal, los pagos por horas extraordinarias y los beneficios o asignaciones que se hayan otorgado en forma esporádica o por una sola vez.

En caso de impugnarse el despido ante los tribunales de justicia, éstos podrán declarar el despido como injustificado aplicando un recargo indemnizatorio del 30%. Cabe señalar, sin embargo, que para que proceda el pago de la indemnización por término de contrato cuando se invoca esta causal, el artículo 163 del Código del Trabajo exige una antigüedad mínima de un año de prestación de servicios.

No obstante lo anterior, si el empleador se niega al pago indemnizatorio, la comunicación del despido constituye título ejecutivo y el trabajador puede pedir se le pague hasta el 150% de la indemnización por años de servicios prometida pagar en dicha carta. Se discute jurisprudencialmente cuando existe negativa del empleador. En este caso, debe demandarse en proceso de ejecución y no declarativo, que es el caso cuando se pide la declaración judicial del despido injustificado.

Por su parte, la comunicación de término del contrato de trabajo por estar el empleador en un procedimiento concursal de liquidación de bienes, obliga al liquidador al pago a cada trabajador de las indemnizaciones antes señaladas.

El uso de esta causal, respecto a trabajadores que gozan de fuero maternal, obliga al pago adicional de una indemnización equivalente a la última remuneración mensual devengada por cada uno de los meses que restare de fuero.

7. ¿Qué obligaciones tiene la empresa que realiza un despido por causas empresariales? En concreto, ¿existe obligación de recolocación de los trabajadores afectados en la empresa o en el grupo de empresas?

En el ordenamiento jurídico-laboral español, la empresa no tiene obligaciones adicionales, al pago de las indemnizaciones antedichas. En consecuencia, no existe, la obligación legal de recolocar a los trabajadores afectados por el despido en la empresa o en el grupo de empresas.

8. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales? ¿En qué supuestos el despido puede ser declarado nulo (que implique la readmisión del trabajador)?

En Chile, el incumplimiento empresarial de la normativa sobre despido por causas empresariales traerá consecuencias, dependiendo de si la causal se acredita o no en juicio. Si el empleador no logra acreditar en juicio los hechos fundantes de la causal invocada o si acreditándolos, el juez considera que los mismos no son de la entidad necesaria para conformar la causal invocada, ese despido será declarado improcedente y se condenará al empleador a pagar la indemnización por años de servicios con un recargo del 30%.

Si no se invoca causal alguna, se sancionará ese despido como injustificado y sin causa legal, aplicándose un recargo indemnizatorio del 50%.

Si se niega el empleador al pago indemnizatorio, podrá –como ya se señaló- demandarse ejecutivamente la indemnización legal y un recargo de hasta el 150% de ésa.

En estas mismas categorías sancionatorias, también podemos mencionar el despido declarado ineficaz porque el empleador no cumplió con su obligación de pagar de forma íntegra las cotizaciones previsionales del trabajador. Para este caso, el tribunal condenará al empleador al pago de todas las remuneraciones y cotizaciones previsionales que se adeuden desde la separación del trabajador y hasta el momento de

la "convalidación" del despido mediante el entero de las cotizaciones adeudadas ante los organismos de seguridad social respectivos. Esto significa que no obstante el término del contrato, el empleador queda obligado al pago de las remuneraciones hasta que pague el total de las cotizaciones previsionales adeudadas.

Esto ocurre porque el empleador descuenta, retiene y entera, las cotizaciones previsionales a los trabajadores. Si no las entera en la respectiva entidad previsional, incurre además en el delito de apropiación indebida, aunque no es frecuente que se siga por esta conducta, la causa criminal correspondiente. La jurisprudencia exige en estos casos, que haya existido el pago de las remuneraciones y se haya practicado el descuento y retención y que sólo se aplica cuando se trata del despido hecho por el empleador y no cuando éste proviene del trabajador o despido indirecto.

No obstante lo anterior, puede pedirse la nulidad del despido aun cuando se haya invocado esta causal, en los casos en que sean aplicables las normas relativas a la nulidad del acto por adolecer de objeto ilícito.

Es el caso de los trabajadores amparados por fuero laboral – como ocurre con las trabajadoras
protegidas por causa de maternidad, los trabajadores que han participado en una negociación colectiva, los representantes sindicales o, los trabajadores que sin contar con la protección del fuero laboral, hayan sido despedidos en represalia de su afiliación sindical, participación en actividades sindicales o negociación colectiva.

Asimismo, cuando se ha denunciado el despido con vulneración de derechos fundamentales por discriminación grave, el trabajador podrá optar entre la reincorporación y las indemnizaciones legales por término de contrato, incluida una adicional que fija el juez entre seis y once meses de remuneración mensual.

9. ¿Existen especialidades en el despido por causas empresariales para las microempresas y/o pequeñas y medianas empresas?

En el ordenamiento jurídico chileno no existe ninguna especialidad en relación con el procedimiento de despido por causas empresariales en relación con la dimensión de la empresa.

10. ¿Es posible el despido por causas empresariales en la Administración Pública? En su caso, ¿qué especialidades existen en relación con la definición de las causas?

Al sector público no se le aplica el Código del Trabajo sino el Estatuto Administrativo, con la sola excepción de las empresas del Estado, y supletoriamente a los demás, en aquellas materias que no se encuentren reguladas en los estatutos especiales. De este modo, no se aplica la causal de las necesidades de la empresa a los funcionarios públicos. El Estatuto Administrativo establece la regulación del cese de la relación funcionaria, pero no contempla una causal como empresarial como la de las necesidades de la empresa.

DESPIDO POR CAUSAS EMPRESARIALES EN COLOMBIA

Diana María Gómez Hoyos
Directora de Especializaciones-Facultad de Derecho y Ciencias Políticas
Universidad de La Sabana (Chía/Cundinamarca/Colombia)

Introducción

A octubre de 2000, 26 empresas habían solicitado al Ministerio de Trabajo colombiano autorización de cierre. De estas solicitudes, 16 fueron admitidas (se terminaron los contratos de 473 trabajadores); las otras, se negaron o se archivaron por el Ministerio, o las empresas cambiaron de decisión. En ese año, 19 empresas pidieron autorización para hacer despidos colectivos de 596 trabajadores, autorizándose 293[95].

La web Aliadolaboral.com realizó una consulta en más de 300 empresas del país, preguntando por qué despiden a los colombianos de sus empleos. Las respuestas fueron: improductividad laboral (44%), contribución para un mal ambiente laboral (32%), faltas y atrasos (9%), agresividad con los jefes (15%) y mala presentación personal (7%). Y como sexta razón, está la reestructuración empresarial[96].

Según el informe de trabajo decente del observatorio laboral de la Universidad del Rosario, al cierre del año 2014 el Ministerio de Trabajo había recibido 53 solicitudes por parte de empresas para realizar despidos, autorizándose 9; finalizaron los contratos de trabajo de 410 empleados[97].

En Barrancabermeja (Santander), 3.030 empresas fueron liquidadas entre los años 2014 y 2017, con ocasión de la suspensión del proyecto de modernización de la refinería de petróleo de este municipio[98]. A marzo de 2015, se habían despedido 557 trabajadores de Ecopetrol, por la disminución del valor del petróleo.

---

[95] http://www.eltiempo.com/archivo/documento/MAM-1266921

[96] http://www.aliadolaboral.com/personas/se4/BancoConocimiento/P/p-principales-causa-despido-colombianos/p-principales-causa-despido-colombianos.aspx?CodSeccion=8

[97] https://www.elespectador.com/noticias/economia/masacre-laboral-vista-colombia-tres-empresas-quieren-re-articulo-597929

[98] OVALLE GÓMEZ, CRISTIAN ANDRÉS. Crisis social en Barrancabermeja refleja dependencia al petróleo. En: UN Periódico, abril 2018, pág. 5, columna 1.

Al inicio del mes de noviembre de 2015, 3 importantes empresas presentaron peticiones al Ministerio de Trabajo para despedir a más de 8.000 empleados: Hyundai (4.000), Pacific Rubiales (3.200) y Archie's (1.200)[99].

En los primeros días de julio de 2017, la Fiscalía General de la Nación despidió a más de 5.000 funcionarios. Se anunció que "*la redistribución de cargos se debe a que se creó una unidad especial para el desmantelamiento de las organizaciones y conductas criminales responsables de homicidios y masacres que atentan contra defensores de derechos humanos, movimientos sociales, movimientos políticos, que amenacen o atenten contra las personas que están participando en la implementación de los acuerdos y la construcción de paz*"[100].

Todos los anteriores datos, dan muestras de que, en el país, como en muchos otros del mundo, en los últimos años ha habido cierres o despidos masivos de trabajadores. Las razones, son varias: crisis económica, caída en el precio del petróleo, fusiones, fracasos empresariales, reducción de costos. Incluso, "falta de previsión o imaginación", según algunos[101].

De todas formas, para diciembre de 2017, de acuerdo con la ANDI[*], el panorama laboral en Colombia durante los últimos 4 años se había mantenido favorable, conservando tasas de desempleo de un dígito, como resultado de los avances sociales y las reformas implementadas para promover la formalización. Indica que a pesar de la desaceleración e incertidumbre económica, Colombia continuaba generando nuevos puestos de trabajo[102].

Si nos referimos a actividad económica, se encuentra que, en el promedio enero – octubre de 2017, frente al año anterior, los puestos de trabajo aumentaron en 246.000. Las actividades que más contribuyeron fueron agropecuarias (149.000), actividades inmobiliarias y servicios a las empresas (91.000), industria manufacturera (90.000), servicios comunales y personales (49.000). De otro lado, el empleo se redujo en comercio, hoteles y restaurantes (-91.000), construcción (-44.000), e intermediación financiera (-24.000)[103].

[99] https://www.noticiasrcn.com/nacional-pais/centrales-obreras-desacuerdo-solicitud-despidos-masivos-tres-empresas

[100] https://www.publimetro.co/co/colombia/2017/07/03/despido-masivo-la-fiscalia-general-la-nacion.html

[101] http://www.laboris.net/static/em_opinion_jose-ramon-pin.aspx

[*] Asociación Nacional de Empresarios de Colombia.

[102] http://www.andi.com.co/Uploads/ANDIBalance2017Perspectivas%202018_636529234323436831.pdf

[103] http://www.andi.com.co/Uploads/ANDIBalance2017Perspectivas%202018_636529234323436831.pdf

1. ¿Cómo se definen las causas que justifican un despido por causas empresariales?

En Colombia, acorde con la jurisprudencia y la doctrina, las formas de terminación del contrato de trabajo, se pueden agrupar en causales objetivas, causales originadas en la voluntad del trabajador, del empleador o de ambas partes, o por orden administrativa o judicial.

El despido es una facultad que tiene el empleador de terminar los contratos de trabajo. La Corte Constitucional ha dicho que "*el despido se conoce normalmente como la forma de terminación de la relación laboral por decisión unilateral del empleador*" (sentencia C-371 de 2004).

Se regula el despido justo y el despido indirecto o auto despido (artículo 62 del Código Sustantivo del Trabajo –en adelante CST- modificado por el artículo 7 del Decreto 2351 de 1965), lo mismo que la terminación unilateral del contrato de trabajo sin justa causa (artículo 64 del CST modificado por el artículo 28 de la Ley 789 de 2002). Conjuntamente, existen causas o modos generales o legales de terminar el contrato de trabajo (artículo 61 del CST modificado por el artículo 28 de la Ley 50 de 1990), protección especial ante despidos colectivos (artículo 67 de la Ley 50 de 1990) y regulación sobre cierre de empresas (artículos 464 y 466 del CST). Varias de las normas anteriores, reglamentadas por el Decreto Único del Sector Trabajo (Decreto 1072 de 2015) que deroga de forma integral, disposiciones anteriores de naturaleza reglamentaria, que versen sobre las mismas materias.

Existen casos en los que el empleador toma la decisión de terminar unilateralmente los contratos de trabajo por razones relacionadas con reestructuración empresarial, cambios operativos, técnicos, de producción o económicos, lo que no se considera despido justificado. El artículo 28 del CST enuncia que "*El trabajador puede participar de las utilidades o beneficios de su empleador, pero nunca asumir sus riesgos o pérdidas*" y por tanto se debe pagar una indemnización como si hubiere existido despido sin justa causa.

Ahora bien; en cuanto a la suspensión del contrato de trabajo, el numeral tercero del artículo 51 del CST consagra como causal la "*suspensión de actividades o clausura temporal de la empresa, establecimiento o negocio, en todo o en parte, hasta por ciento veinte (120) días por razones técnicas o económicas u otras independientes de la voluntad del empleador, mediante autorización previa del Ministerio de Trabajo...*" Y los literales "e" y "f" respectivamente del artículo 61 del CST, establecen que el contrato de trabajo termina por liquidación o clausura definitiva de la empresa o

establecimiento y por suspensión de actividades por parte del empleador durante más de ciento veinte (120) días.

2. ¿Las causas empresariales que justifican el despido han de concurrir a nivel de toda la empresa o pueden hacerlo sólo en el centro de trabajo donde se produce el despido?

Podemos acudir al artículo 51 del CST que señala la "*suspensión de actividades o clausura temporal de la empresa, establecimiento o negocio, en todo o en parte* (…)". Y al artículo 67 de la Ley 50 de 1990 que se refiere a "(…) *terminar labores total o parcialmente* (…).

Lo anterior significa, que puede aplicarse el despido cuando se presente a nivel de toda la empresa, o únicamente en el centro de trabajo en el cual se deben hacer los despidos por parte del empleador.

3. ¿Cuál es el procedimiento que la empresa debe seguir para proceder a un despido por causas empresariales? ¿Existen especialidades en el procedimiento de despido por causas empresariales cuando el despido tiene naturaleza colectiva?

Importante mencionar que cuando el contrato de trabajo termina por liquidación o clausura definitiva de la empresa o establecimiento o por suspensión de actividades por parte del empleador durante más de ciento veinte (120) días, el ya citado artículo 61 del CST manifiesta que el empleador deberá solicitar el correspondiente permiso al Ministerio de Trabajo; así mismo, informar por escrito a sus trabajadores de este hecho. El Ministerio debe dar respuesta en un término de dos (2) meses, so pena de incurrir "*en causal de mala conducta sancionable con arreglo al régimen disciplinario vigente*", si su demora es injustificada.

Por otro lado, acorde con el artículo 466 del CST modificado por el artículo 66 de la Ley 50 de 1990, "*Las empresas que no sean de servicio público no pueden clausurar labores, total o parcialmente, en forma definitiva o temporal, sin previa autorización del Ministerio de Trabajo, salvo fuerza mayor o caso fortuito, y sin perjuicio de las indemnizaciones a que haya lugar por razón de contratos de trabajo concertados por un tiempo mayor. Para tal efecto la empresa deberá presentar la correspondiente solicitud y en forma simultánea informar por escrito a sus trabajadores tal hecho*".

Esta norma agrega que "*La suspensión de actividades o clausura temporal de la empresa, establecimiento o negocio, en todo o en parte, hasta por ciento veinte (120) días, suspende los contratos de trabajo. Cuando la empresa reanudare actividades*

deberá admitir de preferencia al personal licenciado, en condiciones no inferiores a las que disfrutaba en el momento de la clausura. Para tal efecto, deberá avisar a los trabajadores la fecha de reanudación de labores. Los trabajadores que debidamente avisados no se presenten dentro de los tres (3) días siguientes, perderán este derecho preferencial".

Y su parágrafo concluye que "*el Ministerio de Trabajo resolverá lo relacionado con la solicitud en un plazo no mayor de dos meses. El incumplimiento injustificado de este término hará incurrir al funcionario responsable en causal de mala conducta, sancionable con arreglo al régimen disciplinario vigente*".

A través del Decreto 1072 de 2015 (Único del Sector Trabajo), se integró la reglamentación. El numeral 1 del artículo 2.2.1.1.6 sobre cierre de empresa, dice a la letra: "1. *Es prohibido al empleador el cierre intempestivo de su empresa. Si lo hiciere, además de incurrir en las sanciones legales, deberá pagarles a los trabajadores los salarios, prestaciones e indemnizaciones por el lapso que dure cerrada la empresa*".

Como complemento del artículo 466 del CST, el 67 de la misma Ley 50 de 1990 (que modificó el artículo 40 del Decreto 2351 de 1965), referido a la protección en caso de despidos colectivos, describe el trámite a seguir:

Si el empleador requiere hacer despidos colectivos o suspender actividades hasta por ciento veinte días (120) por razones técnicas o económicas u otras independientes de su voluntad, debe solicitar autorización previamente al Ministerio de Trabajo con las debidas explicaciones sobre los motivos que tiene, y allegar justificaciones. Insiste en informar simultáneamente a los trabajadores sobre la solicitud realizada al ente estatal.

¿Cuándo concede el Ministerio la autorización? Cuando el empleador se vea afectado por hechos tales como "*la necesidad de adecuarse a la modernización de procesos, equipos y sistemas de trabajo que tengan por objeto incrementar la productividad o calidad de sus productos; la supresión de procesos, equipos o sistemas de trabajo y unidades de producción; o cuando estos sean obsoletos o ineficientes, o que hayan arrojado pérdidas sistemáticas, o los coloquen en desventaja desde el punto de vista competitivo con empresas o productos similares que se comercialicen en el país o con los que deba competir en el exterior; o cuando se encuentre en una situación financiera que lo coloque en peligro de entrar en estado de cesación de pagos, o que de hecho así haya ocurrido; o por razones de carácter técnico o económico como la falta de materias primas u otras causas que se puedan asimilar en cuanto a sus efectos; y en general los que tengan como causa la consecución de objetivos similares a los mencionados*".

"*La solicitud respectiva deberá ir acompañada de los medios de prueba de carácter financiero, contable, técnico, comercial, administrativo, dependiendo del caso, que acrediten debidamente la misma*".

La Corte Suprema de Justicia en su Sala Laboral (sentencia CSJ SL4220-2016, rad. 50752) señaló que "*la comunicación informando a los trabajadores de la petición de la empresa al Ministerio para que se le autorizara el despido colectivo, no requiere ni exige de ritualidades, formalidades o solemnidades específicas, y por ende hay libertad probatoria para acreditar este hecho, pues lo que se busca es que, por cualquier medio idóneo, se informe o comunique a los trabajadores que pudiesen verse afectados con la iniciación del trámite para obtener tal autorización*". Se debe garantizar la efectiva comunicación a los trabajadores que se pudiesen ver afectados con la autorización de despido colectivo, como ya lo ratificó la sentencia SL5132-2017, rad. 46162.

Respecto a si habría reintegro cuando se autoriza debidamente un despido colectivo, la misma Corporación consideró en la sentencia CSJ SL-2006, rad. 27582 -citada por la SL5132-2017- que es claro el entendimiento de la normatividad al contener una previsión del legislador para los casos de despido colectivo por parte del empleador, o cuando debe terminar labores, parcial o totalmente, "*que por esa misma razón descarta la posibilidad del reintegro a un empleo que ha desaparecido, por cuanto el permiso otorgado expresa el reconocimiento del Estado de haber comprobado que existe para el empleador alguno de los motivos calificados en la ley que le permite efectuar despidos de trabajadores en los porcentajes*" que al efecto menciona la ley.

Dice la sentencia también que "*Ha sido clara la jurisprudencia, adoptada por mayoría, en señalar que el despido colectivo, considerado frente a cada uno de los trabajadores afectados con la decisión, siempre supone una terminación unilateral por determinación del patrono, vale decir, un despido puro y simple, puesto que el empleador voluntaria y autónomamente resuelve terminar los contratos de los trabajadores que el mismo selecciona según sus propios intereses, manteniendo el vínculo jurídico con otros empleados*".

Sin embargo, adicional a lo antes mencionado, existe la Ley 1116 de 2006, que se refiere al régimen de insolvencia empresarial, que no se le aplica, entre otros, a las entidades de derecho público. Hay 5 clases de acreedores en los que se incluye a los titulares de acreencias laborales. Y en el numeral 5 del artículo 50 sobre los efectos de la apertura del proceso de liquidación judicial, expone que "*la terminación de los contratos de trabajo, con el correspondiente pago de las indemnizaciones a favor de los trabajadores, de conformidad con lo previsto en el Código Sustantivo del Trabajo, para lo cual no será necesaria autorización administrativa o judicial alguna quedando*

sujetas a las reglas del concurso, las obligaciones derivadas de dicha finalización sin perjuicio de las preferencias y prelaciones que les correspondan". Así mismo, "*disponer la remisión de una copia de la providencia de apertura del proceso de liquidación judicial al Ministerio de la Protección Social [hoy Ministerio de Trabajo], con el propósito de velar por el cumplimiento de las obligaciones laborales*.

En el concepto 11052 de febrero 4 de 2013 de la Superintendencia de Sociedades, se cita la sentencia C-071 de 2010 de la Corte Constitucional, que precisamente declaró constitucional la normatividad sobre liquidaciones judiciales de empresas. Señaló que "*la medida de dar por terminados los contratos de trabajo a consecuencia de la declaratoria de liquidación judicial, no responde al querer caprichoso, omnímodo o injustificado del empleador. Por el contrario, está vinculada a la finalidad de propender por el mejor aprovechamiento del patrimonio del deudor, en procura de optimizar la garantía de satisfacción del conjunto de obligaciones y créditos reconocidos, incluso con prelación de las acreencias salariales y prestacionales de los trabajadores"*. Añade la Corte que *"tanto el patrono como el empleado, y desde luego el juez, pueden dar por terminadas las relaciones laborales, siempre que se respeten los derechos de los trabajadores*".

Aclara la misma Corporación, que la liquidación de una empresa, no es lo mismo que un despido colectivo:

> "*El fenómeno que la norma acusada prevé, no responde a una situación de despido colectivo de trabajadores (...)". "Se trata de una decisión que no se origina en la voluntad unilateral del patrono de poner fin de manera selectiva a determinadas relaciones laborales, sino en la constatación de la autoridad jurisdiccional sobre el estado de insolvencia por el que atraviesa el empleador, corroboración guiada por el propósito de proteger el crédito –privilegiando el laboral –, con miras a un aprovechamiento racional del patrimonio del deudor. Como quiera, que se trata de una situación jurídica distinta, que posee sus propios mecanismos de control, no es admisible como lo sugiere el demandante, que se condicione la decisión de terminación contractual a una autorización judicial o administrativa previa de las autoridades laborales*".

Concluye que:

> "[L]*a norma que dispone la terminación de los contratos laborales como consecuencia de la declaratoria judicial de liquidación, en el marco de un proceso de insolvencia empresarial, no vulnera la protección constitucional que se brinda al derecho al trabajo (Article 25, 53 y preámbulo), ni el debido proceso*

> *(Article 29), en razón a que se trata de una medida que no obedece a la voluntad omnímoda e incontrolada del empleador. Por el contrario, se encuentra justificada en razones fundadas en la necesidad de proteger el crédito y de propiciar un mejor aprovechamiento de los activos en beneficio de todos los acreedores. De manera concurrente, se contemplan mecanismos de compensación como la indemnización causada en razón a que la terminación contractual se origina en motivo no imputable al trabajador*".

Lo anterior quiere decir, que un despido colectivo y una terminación de los contratos por liquidación judicial, son distintos y por tanto los procedimientos para que haya lugar a ellos, también son diferentes. En el despido colectivo interviene el Ministerio de Trabajo y en la declaratoria judicial de liquidación de empresas, la Superintendencia de Sociedades.

4. ¿Cómo se calcula el número de trabajadores afectados para determinar si el despido tiene naturaleza colectiva?

El cálculo tiene relación con el total de los vinculados con contrato de trabajo y el porcentaje establecido por la ley, el cual está en los rangos de 30% a 5% Entre más trabajadores tenga la empresa, menor es el porcentaje que se determina.

Es así como el numeral 4 del artículo 67 de la Ley 50 de 1990 determina que:

> "4. *El Ministerio de Trabajo no podrá calificar un despido como colectivo sino cuando el mismo afecte en un período de seis (6) meses a un número de trabajadores equivalente al treinta por ciento (30%) del total de los vinculados con contrato de trabajo al empleador, en aquellas empresas que tengan un número superior a diez (10) e inferior a cincuenta (50); al veinte por ciento (20%) en las que tengan un número de trabajadores superior a cincuenta (50) e inferior a cien (100); al quince por ciento (15%) en las que tengan un número de trabajadores superior a cien (100) e inferior a doscientos (200); al nueve por ciento (9%) en las que tengan un número de trabajadores superior a doscientos (200) e inferior a quinientos (500); al siete por ciento (7%) en las que tengan un número de trabajadores superior a quinientos e inferior a mil (1.000) y, al cinco por ciento (5%) en las empresas que tengan un total de trabajadores superior a mil (1.000)*".

5. ¿Existen trabajadores que gozan de prioridad de permanencia ante un despido por causas empresariales? En particular, ¿tienen los representantes de los trabajadores prioridad de permanencia? ¿las trabajadoras embarazadas? ¿los trabajadores de mayor edad? ¿los trabajadores con responsabilidades familiares?

En Colombia se deben respetar los principios de igualdad, de no discriminación, de protección. Por tanto, debe tenerse en cuenta si los trabajadores gozan de algún fuero. Y realmente, por ley y por jurisprudencia (basados en principios de la Constitución Política), ya son varios los fueros que se han creado[104].

Así son varios los grupos de trabajadores que tienen estabilidad laboral reforzada y que debe tenerse en cuenta su protección especial para determinarse por el empleador, su despido.

6. ¿Los trabajadores afectados por el despido por causas empresariales, ¿tienen derecho a una compensación económica o indemnización?

En Colombia, los despidos por reestructuración empresarial y en general causas económicas no son considerados despidos justos; se establece entonces una indemnización por despido sin justa que tiene que ver, no con el tamaño de la empresa ni con el número total de trabajadores despedidos, sino con el patrimonio líquido gravable para determinar si dicho resarcimiento de perjuicios es del 100% o es del 50%

De acuerdo con el numeral 6 del artículo 67 de la Ley 50 de 1990, "*Cuando un empleador o empresa obtenga autorización del Ministerio de Trabajo para el cierre definitivo, total o parcial, de su empresa, o para efectuar un despido colectivo, deberá pagar a los trabajadores afectados con la medida, la indemnización legal que le habría correspondido al trabajador si el despido se hubiera producido sin justa causa legal. Si la empresa o el empleador tiene un patrimonio líquido gravable inferior a mil (1.000) salarios mínimos mensuales, el monto de la indemnización será equivalente al cincuenta por ciento (50%) de la antes mencionada*".

El Estatuto Tributario colombiano (artículo 282), define el patrimonio líquido gravable como el resultado de restarle al patrimonio bruto el monto de las deudas del contribuyente en el último día del año o periodo gravable (patrimonio líquido =

[104] Ver: protección constitucional a las mujeres en estado de embarazo (Corte Constitucional sentencia SU-070 de 2013, T-098 de 2015 y T-030 de 2018), trabajadores con fuero sindical (Corte constitucional sentencia T-326 de 2002 y Superintendencia de sociedades, concepto 11052), prepensionados (Corte Constitucional sentencia T-638 de 2016 y T-183 de 2013), madres cabeza de familia (Corte Constitucional sentencia T-316 de 2013) ; trabajadores discapacitados (Corte Constitucional sentencia T-057 de 2016 y SU-049 de 2017)

Patrimonio bruto – Deudas). Y el patrimonio es el valor residual de los activos del ente económico, después de deducir todos sus pasivos.

En cuanto a la indemnización por despido sin justa causa, en el país depende de la modalidad contractual (artículo 64 del CST modificado por el artículo 28 de la Ley 789 de 2002). Si es un contrato de trabajo a término fijo, la indemnización corresponde a los salarios del tiempo que faltare para cumplir el plazo estipulado del contrato. Si se trata de un contrato de trabajo por duración de la obra o labor, los salarios del lapso de la duración de la obra o la labor contratada, mínimo 15 días. Y si por el contrario es un contrato a término indefinido, depende del último salario devengado y del tiempo laborado A la par, rige un parágrafo transitorio que cubre a los trabajadores que al momento de entrar en vigencia la Ley 789 de 2002, tuvieren diez (10) o más años al servicio continuo del empleador, a quienes se les aplicará la tabla de indemnización establecida en la Ley 50 de 1990[105], exceptuando el parágrafo transitorio, el cual se aplica únicamente para los trabajadores que tenían diez (10) o más años el primero de enero de 1991.

7. ¿Qué obligaciones tiene la empresa que realiza un despido por causas empresariales? En concreto, ¿existe obligación de recolocación de los trabajadores afectados en la empresa o en el grupo de empresas?

No hay normatividad sobre despidos por causas empresariales en ese sentido, pero sí en relación con suspensión de actividades o clausura temporal de la empresa, establecimiento o negocio, en todo o en parte, hasta por ciento veinte (120) días por causas técnicas, económicas u otras independientes distintas a la voluntad del empleador, como se mencionó en el ítem 3 de este escrito. Conforme con el artículo 466 del CST, ya visto, la empresa debe recibir de forma preferencial al personal licenciado; sus condiciones serán iguales o inferiores a las que tenía en el momento de la clausura o suspensión temporal; la empresa debe dar aviso a los trabajadores, cuándo se reinician

[105] a). Cuarenta y cinco (45) días de salario cuando el trabajador tuviere un tiempo de servicios no mayor de un año; b). Si el trabajador tuviere más de un (1) año de servicio continuo y menos de cinco (5), se le pagarán quince (15) días adicionales de salario sobre los cuarenta y cinco (45) básicos del literal a), por cada uno de los años de servicio subsiguientes al primero, y proporcionalmente por fracción;c). Si el trabajador tuviere cinco (5) años o más de servicio continuo y menos de diez (10), se le pagarán veinte (20) días adicionales de salario sobre los cuarenta y cinco (45) básicos del literal a), por cada uno de los años de servicio subsiguientes al primero, y proporcionalmente por fracción; y d). Si el trabajador tuviere diez (10) o más años de servicio continuo se le pagarán cuarenta (40) días adicionales de salario sobre los cuarenta y cinco (45) días básicos del literal a), por cada uno de los años de servicio subsiguientes al primero y proporcionalmente por fracción.

las tareas y si no se presentan dentro de los tres (3) días siguientes, perderán el derecho preferencial.

8. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales? ¿En qué supuestos el despido puede ser declarado nulo (que implique la readmisión del trabajador)?

Acorde con el numeral 5 del artículo 67 de la Ley 50 de 1990, "*no producirá ningún efecto el despido colectivo de trabajadores o la suspensión temporal de los contratos de trabajo, sin la previa autorización del Ministerio de Trabajo, caso en el cual se dará aplicación al artículo 140 del Código Sustantivo del Trabajo*".

El artículo 140 sobre salario sin prestación de servicios, advierte que durante la vigencia del contrato el trabajador tiene derecho a percibir el salario aun cuando no haya prestación del servicio por disposición o culpa del empleador.

De lo antepuesto se infiere que los contratos de trabajo seguirán vigentes porque el despido colectivo no tuvo eficacia jurídica. Por orden del empleador, el trabajador no presta el servicio. Se seguirán causando todos los derechos laborales, no solamente el salario, sino las prestaciones sociales, las vacaciones y en general aquellos derechos que se desprenden de la contratación laboral.

Vale la pena mencionar que en sentencia SL17656-2017 con rad. 48433, dijo la Corte Suprema de Justicia que "… *cuando el ad quem afirmó que el Ministerio del Trabajo debe realizar un trabajo de campo que permita verificar el número total de trabajadores existentes y los restantes después de los despidos para poder determinar el despido colectivo en los porcentajes señalados, de ninguna manera quiso significar con ello, que la jurisdicción del trabajo no estuviera competencia para hacer tal declaración*".

En la sentencia CSJ SL16805-2016, la Corte Suprema de Justicia señaló:

> "*Nótese que el legislador le atribuyó competencia para catalogar un despido como colectivo al Ministerio de Trabajo, según lo previsto en el citado article 67 de la Ley 50 de 1990. Sin embargo, como el despido colectivo, por el hecho de estar autorizado administrativamente, no deja de ser despido, en caso que corresponda ordenar el pago de alguna indemnización legal o convencional por la desvinculación de un número significativo de trabajadores, y se presente diferencias entre los trabajadores despedidos con el empleador, será la justicia*

ordinaria laboral a quien le corresponderá dirimir este conflicto jurídico y en últimas definir si se presentó o no despido masivo".

9. ¿Existen especialidades en el despido por causas empresariales para las microempresas y/o pequeñas y medianas empresas?

En el ordenamiento jurídico colombiano, no hay normatividad especial sobre microempresas, o medianas y pequeñas empresas. Se aplica la regla general.

10. ¿Es posible el despido por causas empresariales en la Administración Pública? En su caso, ¿qué especialidades existen en relación con la definición de las causas?

Según el artículo 464 del CST, "*las empresas de servicios públicos que no dependan directa ni indirectamente del Estado no pueden suspender ni paralizar labores sino mediante permiso del Gobierno o dándole aviso a éste, con seis meses de anticipación cuando menos, a fin de que puedan tomarse oportunamente las providencias que aseguren la continuidad del servicio*".

El artículo 465 contempla que "*en cualquier caso en que se presentare, de hecho, la suspensión de los servicios en algunas de las empresas a que se refiere el artículo anterior, el Gobierno queda autorizado para asumir su dirección y tomar todas las providencias necesarias para restablecer los servicios suspendidos y garantizar su mantenimiento*".

En la sentencia T -793 de 2000, la Corte Constitucional apuntó que "*la estructura, funciones y planta de personal de las entidades públicas no constituyen elementos inalterables. Las necesidades del servicio, los nuevos retos a los que se enfrentan las entidades públicas, la superación de ciertos problemas, factores económicos, son, entre muchas, razones por las cuales en algunas ocasiones resulta necesario proceder a reestructurar entidades públicas".* Añadió que *"tales procesos no pueden realizarse de manera libre, sino que a las autoridades les asiste el deber de respetar ciertos parámetros, entre ellos, respetar y proteger los derechos de los trabajadores".* Y por ello*, "el retiro de su personal debe ir acompañado de las garantías necesarias para que el trabajador no quede desprotegido en sus derechos y el proceso en sí no se convierta en un elemento generador de injusticia social*".

Ya en la sentencia C-479 de 1992 se decía que "*en los procesos de privatización, transformación y reestructuración de entidades públicas y en las sustituciones patronales que se produzcan como consecuencia de esas políticas públicas, sólo pueden adelantarse sobre la base del constante y prevaleciente respeto a la dignidad de los*

trabajadores, a su estabilidad en los empleos y a sus derechos fundamentales y al respeto de lo pactado en convenciones colectivas, pactos colectivos, laudos arbitrales, reglamentos de trabajo".

¿Qué pasa con la protección a la maternidad en entidades públicas? La sentencia ya citada SU 070 de 2013 consideró que:

> "*Cuando se trata de una trabajadora que ocupaba en provisionalidad un cargo de carrera y el cargo sale a concurso o es suprimido, se aplicarán las siguientes reglas: (…) (ii) si hubo supresión del cargo o liquidación de la entidad, se le debe garantizar a la trabajadora en provisionalidad, la permanencia en el cargo hasta que se configure la licencia de maternidad o de ser ello imposible, el pago de salarios y prestaciones, hasta que la trabajadora adquiera el derecho a gozar de la licencia.*
>
> *(…) Cuando se trata del cargo de una trabajadora de carrera administrativa que es suprimido por cuenta de la liquidación de una entidad pública o por necesidades del servicio, se configuran las siguientes hipótesis: (i) en el caso de la liquidación de una entidad pública, si se crea con posterioridad una entidad destinada a desarrollar los mismos fines que la entidad liquidada, o se establece una planta de personal transitoria, producto de la liquidación, habría lugar al reintegro en un cargo igual o equivalente y al pago de los salarios y prestaciones dejados de percibir[68]; (ii) si no se crea una entidad con mismos fines o una planta de personal transitoria, o si el cargo se suprimió por necesidades del servicio, se deberá ordenar el pago de los salarios y prestaciones hasta que se configure el derecho a la licencia de maternidad*".

Por su parte, existe en el país la figura comúnmente conocida como "retén social", cuyo objeto es la protección especial para empleados que resulten afectados por el programa de renovación y modernización del Estado, que consiste en la imposibilidad de retirarlos del servicio, previsto en la Ley 790 de 2002, luego complementada y modificada por la Ley 812 de 2003 y reglamentada por los Decretos 190 y 396 de 2003.

La providencia T- 824 de 2014 recordó que "*en los procesos de renovación institucional, debe evitarse al máximo la restricción de los derechos de los grupos sociales que puedan verse afectados, cuando la reforma implique la modificación de la estructura de las planas de personal. La Ley 790 de 2002, prevé mecanismos especiales de estabilidad para los trabajadores o funcionarios que se verían particularmente afectados en los procesos de reforma institucional*": grupos vulnerables, personas en

condición de debilidad manifiesta, mujeres, niños, personas de la tercera edad, personas con discapacidad. Esas medidas se conocen como retén social.

El artículo 12 de la Ley 790 dispuso que: "*no podrán ser retirados del servicio en el desarrollo del Programa de Renovación de la Administración Pública, las madres cabeza de familia sin alternativa económica, las personas con limitación física, mental, visual o auditiva, y los servidores que cumplan la totalidad de los requisitos, edad y tiempo de servicio para disfrutar de su pensión de jubilación o de vejez en el término de tres (3) años contados a partir de la promulgación de la ley*".

El fallo T-638 de 2016 aclaró lo anterior, así: "*el hecho de que el término de 3 años se cuente a partir de la fecha de promulgación de la Ley 790 de 2002 es una condición claramente modificada por el Plan Nacional de Desarrollo -812 de 2003-, pues esta última prolongó la vigencia del retén social a todo el plan de renovación de la administración pública, no ya al que fue objeto de regulación transitoria por parte de la Ley 790*".

A través del tiempo se ha considerado que la figura del despido colectivo, no es aplicable a los trabajadores oficiales. Así lo manifestó la Corte Suprema de Justicia, en la sentencia SL12894-2016, rad. 50161: "*Suponer que la figura de los despidos colectivos es aplicable a los trabajadores oficiales implica hacer nugatorias las disposiciones constitucionales y legales que autorizan a las autoridades públicas para suprimir empleos, pues de ser así esta facultad no podría utilizarse sin la previa autorización del Ministerio del Trabajo, cuando el número de afectados rebase el tope previsto en el numeral 4 del artículo 67 de la Ley 50*".

En cuanto a la condición de prepensionado, la Corte Constitucional afirmó en la sentencia T- 357 de 2016:

> "*la condición de prepensionado, como sujeto de especial protección, no necesita que la persona que alega pertenecer a dicho grupo poblacional se encuentre en el supuesto de hecho propio de la liquidación de una entidad estatal y cobija incluso a los trabajadores del sector privado que se encuentren próximos a cumplir los requisitos para acceder a una pensión por lo que puede decirse que tiene la condición de prepensionable toda persona con contrato de trabajo que le falten tres (3) o menos años para reunir los requisitos de edad y tiempo de servicio o semanas de cotización para obtener el disfrute de la pensión de jubilación o vejez*".

Y se agregó que:

> "*En suma, la estabilidad laboral de los prepensionados es una garantía constitucional de los trabajadores del sector público o privado, de no ser desvinculados de sus cargos cuando se encuentren ad portas de cumplir con los requisitos para acceder a la pensión de vejez. De otro lado, no basta la mera condición de prepensionado, sino que se precisa verificar si hubo afectación de los derechos fundamentales*".

En la sentencia T- 638 de 2016, la Corte Constitucional volvió a explicar que "*los procesos de renovación institucional encuentran sustento en la necesidad de adecuar la estructura orgánica de la administración a las cambiantes exigencias económicas y sociales, con el propósito de lograr una adecuada prestación de los servicios a cargo del Estado, y un manejo eficiente de los recursos públicos*", lo que debe realizarse evitando al máximo la restricción de los derechos de los grupos sociales que puedan verse afectados, cuando la reforma institucional implica la modificación de la estructura de las plantas de personal.

Se esclareció también que el retén social se aplica tanto a servidores en provisionalidad como de libre nombramiento y remoción, precisamente para no transgredir los derechos a la igualdad y a la seguridad social en pensiones.

El retén social tiene como sustento la ley y la jurisprudencia constitucional. Pero su génesis se desprende de principios tales como el derecho a la igualdad, a la seguridad social y dignidad, consagrados en la Constitución Política. Es el reconocimiento de derechos fundamentales que deben resguardar a todas las personas. Y aunque la Ley 790 de 2002 institucionalizó la reestructuración y el retén social para la Rama Ejecutiva del nivel central, se ha venido aplicando a otros entes y a servidores de carrera, en provisionalidad y de libre nombramiento y remoción.

DESPIDO POR CAUSAS EMPRESARIALES EN COSTA RICA

Alexander Godínez Vargas
Profesor de la Universidad de Costa Rica y
de la Universidad Estatal a Distancia del mismo país

Isabel C. Jaramillo Arango
Consultora en Derecho del Trabajo, Recursos Humanos
y Responsabilidad Social Empresarial

Introducción

En Costa Rica, la figura del despido por causas empresariales, tanto de naturaleza individual como colectiva, no se encuentra regulado en el Código de Trabajo. Causas empresariales sí están previstas como motivo de suspensión colectiva y temporal de los contratos de trabajo, sin responsabilidad para los patronos y trabajadores. En este caso, existe un procedimiento administrativo que se debe cumplir ante la Dirección Nacional de Inspección (otrora Inspección General de Trabajo) para la comprobación de la causa en que fundamenta la empresa la suspensión colectiva del contrato de trabajo y en protección de los derechos de los trabajadores.

Ni siquiera durante las crisis económicas universales de los años 2008 y 2009 ni en la del 2013, que también afectaron al país, se pensó en modificar ese régimen para introducir la posibilidad del despido individual o colectivo por causas empresariales.

En el 2008 como consecuencia del "Plan de Medidas contra la Crisis" -también denominado "Plan Escudo"-, se presentó a la Asamblea Legislativa el Proyecto de "Ley de Protección de los Trabajadores en Momentos de Crisis" (Expediente Legislativo Nº 17315-) y en el 2013, el Proyecto de "Ley que garantiza la aplicación de medidas temporales para la protección del empleo en tiempos de crisis" (Expediente Nº 18.080). En ambos casos, aunque no fueron finalmente aprobados, su características común es que no regulaban el despido, sino que facilitaban otras acciones que fortalecieran el mantenimiento del empleo, por medio de redistribución o reducción de la jornada de trabajo o la reducción de salarios manteniendo la misma jornada para cierto personal de alta dirección, si pago de indemnizaciones.

Por otra parte, habiéndose establecido constitucional y legalmente, un régimen de libre despido, salvo muy pocas excepciones, la ausencia de una regulación expresa de causas empresariales que justifiquen el despido de uno o más trabajadores, no ha sido un impedimento para que el empleador pueda ajustar su planilla a sus necesidades.

Tampoco la negociación colectiva ha tenido frecuentemente, como uno de sus objetivos, el establecimiento de condiciones que regulen esta potestad del empleador. Por un lado, porque en el sector público, que es dónde la actividad sindical encuentra un desarrollo significativo, existen algunas normas relativas al despido por causas objetivas –que por cierto, es con un costo mayor que el despido en condiciones normales- y de otro, porque en el sector privado, dónde sí existe una ausencia total de regulación, la actividad sindical es poco relevante y le afecta todavía el desarrollo del solidarismo (una forma asociativa de carácter especialmente mutualístico y considerada en algunas ocasiones por el Comité de Libertad Sindical de la OIT, como práctica laboral desleal y por ello, antisindical).

No existen estadísticas, ni aún en el sector público, que permita conocer número de despidos por causas empresariales realizados o el número de trabajadores afectados, especialmente en épocas de crisis económica registradas en su país.

1. ¿Cómo se definen las causas que justifican un despido por causas empresariales?

Como advertíamos con anterioridad, en el sector privado, solo el artículo 74 del Código de Trabajo, consagra alguna causa empresarial que afecta la continuidad de la prestación de servicios. Sin embargo, esta regula no para el despido, sino para la suspensión temporal de los contratos de trabajo, sin responsabilidad para el patrono ni para los trabajadores. En concreto, se trata de la "*falta de materia prima para llevar adelante los trabajos, siempre que no sea imputable al patrono*".

En este supuesto, para que la suspensión del contrato sea válida, sin que el empleador deba cancelar los salarios, debe iniciar ante la Dirección Nacional de Inspección de Trabajo, la "comprobación plena de la causa" que origina la suspensión, dentro de los tres días posteriores al hecho que la origina (artículo 75).

Existiendo un régimen general de libre despido, la demostración de la existencia de causas empresariales por motivos económicos, técnicos, organizativos o de producción u otros semejantes, sí será relevante cuando frente a la decisión de despido, sea individual o colectivo, uno o más trabajadores aleguen la existencia de un acto discriminatorio y con ello, soliciten la reinstalación en el trabajo o el pago de las indemnizaciones sustitutivas.

El detalle de lo que puede considerarse como un motivo económico, técnico, organizativo o de producción, tampoco está definido en la legislación. En los malogrados proyectos legales del 2008 y 2013, sí se adelantaba algún criterio de precisión –insuficiente en todo caso- sobre conceptos tan genéricos como "crisis

económica"; sin embargo, esa situación debía demostrarse no para una empresa determinada, sino en un sector económico, y "*se entenderá como crisis económica una reducción por tres meses consecutivos del índice mensual de actividad económica", calculado por el Banco Central de Costa Rica* (vgr. Expediente Nº 17.315).

2. ¿Las causas empresariales que justifican el despido han de concurrir a nivel de toda la empresa o pueden hacerlo sólo en el centro de trabajo donde se produce el despido?

La legislación laboral no dispone de una norma expresa que indique que la causa empresarial alegada, deba emplearse en un ámbito determinado, de modo que tanto puede emplearse como motivo para el cese de contratos en toda la empresa, como en una parte de ella, sea un centro de trabajo determinado, o incluso unidades organizativas inferiores al mismo, siempre que la afectación de los puestos de trabajo por esa causa pueda demostrarse.

Tampoco existe una diferencia de trato, según sea una causa económica o una distinta, de naturaleza, técnica, organizativa o de producción.

3. ¿Cuál es el procedimiento que la empresa debe seguir para proceder a un despido por causas empresariales? ¿Existen especialidades en el procedimiento de despido por causas empresariales cuando el despido tiene naturaleza colectiva?

En el ordenamiento jurídico costarricense, en relación con afectaciones colectivas del contrato de trabajo, solo está previsto el cumplimiento de un procedimiento administrativo en el supuesto de la suspensión temporal de los contratos, no así para el despido. En caso de suspensión, se debe iniciar el procedimiento administrativo ante la Dirección Nacional de Inspección de Trabajo, entidad adscrita al Ministerio de Trabajo y Seguridad Social, con el fin de que ésta realice las comprobaciones necesarias de la causa en la que se funda la suspensión. En los casos en los que sea por la falta de materia prima para llevar delante los trabajos, siempre que no sea imputable al patrono, la prueba de su existencia correrá a cargo del empleador (artículo 74 CT).

Así mismo, el artículo 76 Ibídem establece que durante la suspensión de los contratos de trabajo el patrono puede ponerles término a los mismos, cubriendo a los trabajadores el importe del preaviso, el auxilio de cesantía y demás indemnizaciones que pudiere corresponderle.

No existe norma legal que exija la apertura de un periodo de consultas con los representantes de los trabajadores, ni sindicales ni no sindicales –vgr. Comités

Permanentes de Trabajadores o representantes libremente elegidos por los trabajadores-, de previo al despido por causas empresariales; por consiguiente, la decisión puede adoptarse de manera unilateral, sin importar el número de trabajadores afectados, salvo que con ocasión de la firma de un convenio colectivo de trabajo o de un arreglo directo, se disponga un procedimiento concertado o de consulta previa.

Luego, en aquellos casos en los que se tenga por planteado un conflicto colectivo, sea por un sindicato de trabajadores o por los representantes de una coalición temporal de ellos, lo que podría tener relación con causas empresariales por motivos económicos, técnicos, organizativos o de producción, la autoridad administrativa o judicial o el conciliador privado designado por las partes, será quien autorice el despido solicitado por el empleador, con audiencia previa a los representantes de los trabajadores (artículo 620 CT).

4. ¿Cómo se calcula el número de trabajadores afectados para determinar si el despido tiene naturaleza colectiva?

No existe norma legal que defina cuando un despido es de naturaleza colectiva, de modo que no se impone un determinado número de trabajadores afectados, ni tampoco que tenga como referencia el centro de trabajo o la empresa en su totalidad. De hecho, en materia del ejercicio del derecho de huelga, que es un claro referente de las medidas de presión en medio de un conflicto colectivo, el ámbito de referencia es tanto la empresa o la institución, como el establecimiento o el centro de trabajo (artículo 371 CT)

Tampoco se hace una distinción entre despidos por causas empresariales o despidos por causas no inherentes a la persona del trabajador.

5. ¿Existen trabajadores que gozan de prioridad de permanencia ante un despido por causas empresariales? En particular, ¿tienen los representantes de los trabajadores prioridad de permanencia? ¿las trabajadoras embarazadas? ¿los trabajadores de mayor edad? ¿los trabajadores con responsabilidades familiares?

Tanto el Convenio núm. 135 como la Recomendación núm. 143 de la OIT, sobre los representantes de los trabajadores, han sido ratificados por el país; y aunque especialmente esta última, no debería haber sido objeto de ratificación, tiene plena aplicación en el ordenamiento interno.

Derivado de lo anterior, el artículo 6 inciso f) de la Recomendación dispone que debe reconocerse "*la prioridad que ha de darse a los representantes de los trabajadores respecto de su continuación en el empleo en caso de reducción del personal*".

Luego, ante la ausencia de una norma especial sobre los criterios de selección de los trabajadores afectados en el sector privado por un despido por causas empresariales, es la empresa quien determina cuáles son los trabajadores afectados por el despido, respetando esencialmente, el principio de igualdad y no discriminación.

Adicionalmente, el Código de Trabajo, consagra varios fueros de protección para algunos trabajadores, que también limitarían la decisión de despido. Las personas protegidas por fueros especiales, en un régimen de libre despido, tiene una protección que refuerza su estabilidad en el empleo, de modo que no pueden ser despedidos sino es con autorización de un tercero y en caso de incumplimiento de este debido proceso, pueden solicitar su reinstalación por medio del procedimiento judicial sumarísimo previsto en el artículo 540 CT.

Los trabajadores con fuero son los siguientes:

1. Los servidores y las servidoras del Estado en régimen de empleo regulado por el Estatuto del Servicio Civil, cuya separación debe ser aprobada por el Tribunal de Servicio Civil.
2. Las demás personas trabajadoras del sector público para cuya separación deba seguirse un debido proceso o tenga un fuero semejante, normalmente por ley especial convención colectiva, arreglo directo, arreglo conciliatorio o laudo arbitral.
3. Las mujeres en estado de embarazo o período de lactancia, cuyo despido debe ser autorizado por la Dirección Nacional y la Inspección General del Trabajo (artículo 94 CT).
4. Las personas trabajadoras adolescentes –menores de 18 años-, cuyo despido debe ser autorizado por la Dirección Nacional y la Inspección General del Trabajo (artículo 91 de la Ley N.° 7739, Código de la Niñez y la Adolescencia, de 6 de enero de 1998).
5. Los trabajadores miembros de un sindicato en formación, hasta un número de veinte que se sumen al proceso de constitución, los dirigentes de trabajadores sindicalizados, los afiliados que presenten su candidatura para ser miembros de su junta directiva y cuando no exista sindicato, los representantes libremente elegidos por sus trabajadores, según las condiciones descritas en el artículo 367 CT, y cualquier otra persona beneficiaria de una disposición tutelar del fuero sindical –se supone que deben entenderse incluidos, entre otros, los promotores del movimiento sindical-, cuyo despido debe ser autorizado por la Dirección Nacional y la

Inspección General del Trabajo.

6. Las denunciantes y los denunciantes de hostigamiento sexual, cuyo despido debe ser autorizado por la Dirección Nacional y la Inspección General del Trabajo (Ley N.º 7476, Ley contra el Hostigamiento Sexual en el Empleo y la Docencia, de 3 de febrero de 1995).
7. Los trabajadores afectados por un conflicto colectivo, a partir de que se considere planteado, durante la conciliación, el arbitraje, la huelga o el procedimiento que debe seguirse con motivo de una convención colectiva fracasada, cuyo despido debe ser autorizado por la autoridad administrativa, judicial o el ente privado encargado de tramitarlo (artículo 620 CT).
8. Los trabajadores del sector privado que gocen de algún fuero semejante a los ya descritos mediante ley, normas especiales o instrumentos colectivo de trabajo[106].

En todos estos casos, las distintas normas legales relacionadas con el seguimiento de este debido proceso, lo que obligan al empleador es a demostrar la existencia de una causa justa de despido, que son las previstas en los artículos 81 y 369 CT, que son causas subjetivas disciplinarias; con lo que no bastaría con demostrar la existencia de una causa objetiva como son las causas empresariales por motivos económicos, técnicos, organizativos o de producción. En este sentido, estos fueros no se aplican exclusivamente en protección de actos discriminatorios, sino especialmente, en protección de la estabilidad en el empleo; salvo, lo que pareciera obvio, que estemos en frente del cierre de la empresa.

Para aquellos trabajadores de mayor edad y los trabajadores con responsabilidades familiares, no existe norma que los ampare con un fuero especial. Lo que si ha introducido la Reforma Procesal Laboral aprobada mediante la Ley Nº 9343 del 23 de enero de 2016, es una protección especial en materia de discriminación en el que las personas tienen derecho a solicitar la tutela mediante un proceso sumarísimo, con motivo del despido o cualquier otra medida disciplinaria o discriminatoria, que les garantiza como medida cautelar la reinstalación y en sentencia, la posibilidad de que se declare nulo el despido, como sucede con los trabajadores con fuero, cuando se demuestra el incumplimiento del debido proceso para su despido (artículo 540 CT).

[106] Acerca de la posibilidad de que por medio de un convenio colectivo de trabajo, los trabajadores mejoren los derechos legalmente establecidos, entre ellos su régimen de estabilidad en el empleo, vid. Sala Constitucional de la Corte Suprema de Justicia, resolución Nº 5886-2000 de las 14:59 horas del 6 de junio del 2000. En sentido similar, vid. Sala Segunda de la Corte Suprema de Justicia, resolución Nº 242-2002 de las 10:50 horas del 22 de mayo del 2002.

6. ¿Los trabajadores afectados por el despido por causas empresariales, ¿tienen derecho a una compensación económica o indemnización?

Las compensaciones económicas o indemnizaciones que le corresponden a los trabajadores del sector privado que son objeto de un despido colectivo, son las mismas que se establecen para despidos por razones subjetivas disciplinarias (artículos 28, 29 y 31 CT). En consecuencia, no hay ninguna ventaja patrimonial para el empleador porque se trate de una extinción por criterios objetivos y estas indemnizaciones económicas tampoco se modifican en atención al tamaño de la empresa.

Si se trata de un trabajador contratado por tiempo indefinido, le corresponden dos indemnizaciones. La primera, el preaviso, de conformidad con las siguientes reglas: *a)* después de un trabajo continuo no menor de tres meses ni mayor de seis, con un mínimo de una semana de anticipación; *b)* después de un trabajo continuo que exceda de seis meses y no sea mayor de un año, con un mínimo de quince días de anticipación; y *c)* después de un año de trabajo continuo con un mínimo de un mes de anticipación (artículo 28 CT). La segunda, el auxilio de cesantía, de conformidad con las siguientes reglas: 1. Después de un trabajo continuo no menor de tres meses ni mayor de seis, un importe igual a siete días de salario; 2. Después de un trabajo continuo mayor de seis meses pero menor de un año, un importe igual a catorce días de salario; 3. Después de un trabajo continuo mayor de un año, con el importe de días de salario indicado en la siguiente tabla: a) AÑO 1: 19,5 días por año laborado; b) AÑO 2: 20 días por año laborado o fracción superior a seis meses; c) AÑO 3: 20,5 días por año laborado o fracción superior a seis meses; d) AÑO 4: 21 días por año laborado o fracción superior a seis meses; e) AÑO 5: 21,24 días por año laborado o fracción superior a seis meses; f) AÑO 6: 21,5 días por año laborado o fracción superior a seis meses; g) AÑO 7: 22 días por año laborado o fracción superior a seis meses; h) AÑO 8: 22 días por año laborado o fracción superior a seis meses; i) AÑO 9: 22 días por año laborado o fracción superior a seis meses; j) AÑO 10: 21,5 días por año laborado o fracción superior a seis meses; k) AÑO 11: 21 días por año laborado o fracción superior a seis meses; l) AÑO 12: 20,5 días por año laborado o fracción superior a seis meses; y m) AÑO 13: y siguientes 20 días por año laborado o fracción superior a seis meses. En ningún caso podrá indemnizarse más que los últimos ocho años de relación laboral (artículo 29 CT) y el cálculo del salario diario se obtiene del salario promedio del último semestre de labores (artículo 30 CT).

Si se trata de un trabajador contratado a tiempo fijo o por obra determinada, le corresponden dos indemnizaciones. La primera, la indemnización de daños y perjuicios, "que se calcularán en relación con el tiempo de duración del contrato resuelto, con la importancia de la función desempeñada y con la dificultad que el trabajador tenga para

procurarse cargo o empleo equivalente, o el patrono para encontrar sustituto, todo a juicio de los Tribunales de Trabajo". La segunda, la indemnización fija, que es un día de salario por cada siete días de trabajo continúo ejecutado o fracción de tiempo menor, la que en ningún caso esta suma podrá ser inferior a tres días de salario y si el contrato se ha convenido por seis meses o más o la ejecución de la obra, por su naturaleza o importancia, debía durar ese plazo u otro mayor, nunca podrá ser inferior a veintidós días de salario (artículo 31 CT).

7. ¿Qué obligaciones tiene la empresa que realiza un despido por causas empresariales? En concreto, ¿existe obligación de recolocación de los trabajadores afectados en la empresa o en el grupo de empresas?

El empleador solo tiene la obligación de asumir el pago de las indemnizaciones ya indicadas. No hay una norma legal en el sector privado que expresamente ordene asumir planes de acompañamiento social o de recolocación externa o interna en relación con los trabajadores afectados por el despido o de priorizar su recontratación futura. Las empresas han implementado acciones como las descritas lo han hecho de manera voluntaria, como parte de sus políticas internas de Responsabilidad Social Empresarial.

8. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales? ¿En qué supuestos el despido puede ser declarado nulo (que implique la readmisión del trabajador)?

Si bien no existe una regulación expresa sobre despido por causas empresariales, la violación durante su ejecución de las normas generales que protegen la estabilidad de los trabajadores aforados y a todos los trabajadores del quebranto del principio de igualdad y de no discriminación, puede dar lugar a una sentencia condenatoria que anule el despido, ordene la reinstalación con el pago de salarios caídos y el pago de otras indemnizaciones asociadas, como las relacionadas con el eventual daño moral que pudo haberse causado. Adicionalmente, la ley prevé la imposición de las multas respectivas por quebranto de las normas prohibitivas, que oscilan entre 1 y 23 salarios base.

La posibilidad de habiendo sido declarado nulo el despido, pueda convertirse la orden de reinstalación en el pago de una mayor indemnización, no está previsto, aunque puede ser objeto de acuerdo extrajudicial entre las partes. En todo caso, el trabajador puede comunicar al juez su deseo de no reinstalarse, aunque sí de recibir el resto de indemnizaciones.

Para que el despido no sea declarado nulo, el empleador tiene la carga probatoria de aportar el expediente que acredite el cumplimiento del debido proceso en el que fue

autorizado por un tercero el despido del trabajador o bien, aportados los indicios de discriminación por el trabajador, el motivo objetivo que justifica el despido[107].

9. ¿Existen especialidades en el despido por causas empresariales para las microempresas y/o pequeñas y medianas empresas?

No existe ninguna especialidad con relación al procedimiento de despido por casusas empresariales para las microempresas y/o pequeñas y medianas empresas.

10. ¿Es posible el despido por causas empresariales en la Administración Pública? En su caso, ¿qué especialidades existen en relación con la definición de las causas?

La propia Constitución Política consagra que los servidores públicos "*sólo podrán ser removidos por las causales de despido justificado que exprese la legislación de trabajo, o en el caso de reducción forzosa de servicios, ya sea por falta de fondos o para conseguir una mejor organización de los mismos"* (artículo 192).

Sobre los procesos de reestructuración o de reorganización administrativa, la Sala Constitucional de la Corte Suprema de Justicia, ha recordado que la reestructuración y la reorganización administrativa "*constituyen procedimientos tendientes a modernizar a la Administración Pública, con el fin de aumentar su eficiencia y eficacia, logrando mejorar los servicios que ésta presta, amén de la consecuente reducción del gasto público*", siempre y cuando se respeten los procedimientos de reorganización ya establecidos en la legislación ordinaria. De acuerdo con estos procedimientos "corresponde al jerarca determinar cuál es la organización interna más adecuada para el ente, en razón de los fines que debe cumplir", lo cual puede derivar en "*el establecimiento de nuevos órganos o en su oportunidad, una distribución interna de competencias que no impliquen potestades de imperio", consecuencia de lo cual pueden suprimirse o transformarse las plazas existentes*[108].

De acuerdo al artículo 47 del Estatuto del Servicio Civil, de aplicación para los empleados del Poder Ejecutivo, en el caso de la reducción forzosa de servicios o de trabajos por falta de fondos, la falta de ellos debe ser "absoluta"; y en el evento de la reducción forzosa de servicios para conseguir una más eficaz y económica

[107] Teniendo por cierto el proceso de reestructuración seguido por la empresa, que significó una "mejora económica", se tiene por no demostrada la discriminación sindical en el acto de despido; vid. Sala Segunda de la Corte Suprema de Justicia, resolución Nº 649-2015 de las 9:45 horas del 19 de junio del 2015.

[108] Resolución Nº 13660-2004 de las 18:21 horas del 30 de noviembre del 2004.

reorganización de los mismos, esa reorganización debe afectar por lo menos al sesenta por ciento de los empleados de la respectiva dependencia.

La misma norma legal, dispone algunas reglas de priorización en la selección del personal cuyo contrato puede ser cesado, al indicar que se hará "*tomando en cuenta la eficiencia, la antigüedad, el carácter, la conducta, las aptitudes y demás condiciones que resulten de la calificación de sus servicios*".

Los Tribunales también se han referido a lo que debe considerarse como reorganización "eficaz y económica", con motivo de los reclamos interpuestos por los funcionarios cesados. En algunos casos, exigen que se demuestre que la afectación del puesto sea consecuencia de que es "*dispensable en la estructura vigente y además de imposible integración en la nueva organización institucional*"[109]; o la "*absoluta objetividad, transparencia y seriedad*" de la decisión ejecutada, "*de ahí la exigencia de estudios técnicos calificados que puedan validar la toma de decisiones*"[110]. En este contexto, tales indicaciones jurisprudenciales nos deberían llevar a la exigencia de un estudio individualizado de cada puesto en función del nuevo modelo organizativo; sin embargo, en algunos casos solo se ha exigido la objetividad de un perfil "general" y la determinación de las plazas que necesariamente deben cumplir con aquél[111].

No faltan tampoco las sentencias que han rechazado, en el evento de reorganizaciones o reestructuraciones, el examen de "las habilidades o el desempeño" del funcionario, al considerar que con ello se aplica una causal subjetiva no autorizada por el constituyente[112]. No obstante, si bien se trata de una causal en la que primero deben demostrarse circunstancias objetivas, la priorización del personal que debe ser cesado, si puede considerar aspectos relacionados con la calidad y excelencia del servicio recibido del funcionario.

Los funcionarios afectados con la supresión de su contrato reciben dos beneficios: a) una indemnización de un mes por cada año o fracción de seis o más meses de servicios prestados –en comparación con la regla general del article29 CT que consiste en otorgar

[109] Vid. Sala Constitucional de la Corte Suprema de Justicia, resolución Nº 1846-2000 de las 14:57 horas del 29 de febrero del 2000.

[110] Vid. Sala Constitucional de la Corte Suprema de Justicia, resolución Nº 4951-2000 de las 16:37 horas del 27 de junio del 2000.

[111] Vid. Sala Segunda de la Corte Suprema de Justicia, resolución Nº 834-2007 de las 9:45 horas del 7 de noviembre del 2007. En sentido contrario, negando la posibilidad de que el nuevo perfil justifique el despido de trabajadores que no los cumplen por inidoneidad sobrevenida, vid. de la misma Sala, la resolución Nº 599-2010 de las 8:50 horas del 23 de abril del 2010.

[112] Vid. Sala Segunda de la Corte Suprema de Justicia, resolución Nº 1257-2009 de las 9:40 horas del 4 de diciembre del 2009.

de 19.5 a 22 días de salario por cada año servido con un reconocimiento máximo de lo correspondiente a 8 años- (artículo 36); y b) el derecho preferente para volver a ocupar un puesto en la administración, con la limitación de que en caso de que ello suceda en un plazo que es inferior a la cantidad de meses de salario recibidos como indemnización, deberá devolver el monto que corresponda al período en que no ha estado cesante (artículo 47).

DESPIDO POR CAUSAS EMPRESARIALES EN REPUBLICA DOMINICANA

Sarah Roa
Abogada miembro de la Sección de Jóvenes Juristas de la Asociación Dominicana de Derecho de Trabajo y de la Seguridad Social (ADDTSS)

Introducción

En la República Dominicana, el ordenamiento jurídico laboral permite que el empleador termine uno o varios contratos de trabajo que le vinculen con sus trabajadores por imposibilidad de ejecución ante razones económicas específicas y bajo autorización de la autoridad de Trabajo. En estos casos, el empleador está exento del pago de las prestaciones laborales (preaviso y cesantía). En cambio, debe pagar una asistencia económica computada de acuerdo al tiempo de labor del trabajador.

Debemos hacer una aclaración previa a contestar esta plantilla, a los fines de que el lector comprenda bien el sistema jurídico dominicano. En nuestro país la palabra ¨*despido*¨ es utilizada a los fines de la terminación del contrato de trabajo por faltas atribuibles al empleado, puede ser justificado o injustificado, esta situación en caso de controversia será probada en el tribunal, por lo tanto y para los fines de este trabajo entenderemos por despido a la terminación del contrato de trabajo por causas empresariales.

1. ¿Cómo se definen las causas que justifican un despido por causas empresariales?

En República Dominicana, la Ley 16-92, del 29 de mayo de 1992, que aprueba el Código de Trabajo (el "Código") establece las condiciones por las cuales el contrato de trabajo puede terminar entre empleadores y trabajadores ante imposibilidad de su ejecución en razón de causas empresariales relacionadas a motivos económicos o de producción.

El artículo 82, del Código de Trabajo, prevé tres supuestos: *(i) por la muerte del empleador o su incapacidad física o mental, siempre que estos hechos produzcan como consecuencia la terminación del negocio (ii) por agotamiento de la materia prima objeto de una industria extractiva y (iii) por restructuración o liquidación judicial de la empresa, siempre que cese totalmente la explotación del negocio o por su cierre o reducción definitiva de su personal resultantes de falta de elementos para continuar la explotación, incosteabilidad de la misma u otra causa análoga.*

2. ¿Las causas empresariales que justifican el despido han de concurrir a nivel de toda la empresa o pueden hacerlo sólo en el centro de trabajo donde se produce el despido?

La normativa laboral dominicana no define expresamente si las causas deben concurrir a nivel de toda la empresa o únicamente en el centro de trabajo específico donde se produce. La ley exige que dichas causas produzcan una "*imposibilidad de ejecución*"[113] del contrato de trabajo, básicamente fundamentado en que el objeto principal de actividad de la empresa no pueda ejecutarse.

Se entiende que, si el motivo es la cesación de la producción de la empresa, las causas deben concurrir a nivel de toda la empresa de forma tal que la operación del negocio de la empresa sea insostenible. En cambio, la legislación dominicana permite –bajo los supuestos mencionados anteriormente[114]- que la empresa disminuya su personal, de lo cual se induce que podría afectar un sector específico de la empresa y no a todos los empleados.

3. ¿Cuál es el procedimiento que la empresa debe seguir para proceder a un despido por causas empresariales? ¿Existen especialidades en el procedimiento de despido por causas empresariales cuando el despido tiene naturaleza colectiva?

La legislación dominicana establece el procedimiento a seguir en los casos de terminación del contrato de trabajo por cierre definitivo de la empresa o reducción de su personal como resultado de la falta de elementos para continuar sus operaciones, incosteabilidad u otra causa relacionada. La ley no prevé particularidades especiales en función del número de trabajadores afectados.

La autoridad de trabajo juega un papel decisivo pues es la encargada de evaluar y aprobar o denegar al empleador la terminación de los contratos de trabajo por causas económicas.

El procedimiento es el siguiente:

i. La empresa debe depositar una solicitud a la Autoridad de Trabajo indicando la necesidad de terminar los contratos de trabajo de sus empleados por motivos económicos y los documentos que justifican tal necesidad.
ii. La Autoridad de Trabajo realizará una investigación para comprobar la existencia o no de las causas alegadas para la terminación de los contratos.

[113] Artículo 68.3 del Código de Trabajo.
[114] Ibíd, artículo 82 numerales 4 y 5.

iii. De comprobar las causas expuestas, autorizará a la empresa la terminación de los contratos de trabajo en un plazo de 15 días.

Si la empresa entiende que los motivos económicos no serán permanentes, tiene la posibilidad de suspender los contratos de trabajo –previa autorización de la Autoridad de Trabajo- por un tiempo máximo de 90 días en un período de 12 meses (prorrogables en casos de que persistan las causas de la suspensión) y en los supuestos siguientes:

i. La falta o insuficiencia de materia prima siempre que no sea imputable al empleador.
ii. La falta de fondos para la continuación normal de los trabajos, si el empleador justifica plenamente la imposibilidad de obtenerlos.
iii. El exceso de producción con relación a la situación económica de la empresa y a las condiciones del mercado.
iv. La incosteabilidad de la explotación de la empresa.

4. ¿Cómo se calcula el número de trabajadores afectados para determinar si el despido tiene naturaleza colectiva?

Las leyes laborales no establecen particularidades respecto a la cantidad de contratos de trabajo terminados por imposibilidad de cumplimiento o causas económicas atribuibles a la empresa, es decir, no prevé los criterios para determinar el carácter individual o colectivo de la medida, esto únicamente se verá en la cantidad de trabajadores afectados por la situación, pudiendo determinar a partir de este punto si el despido es colectivo o sólo afecta una pequeña parte de los empleados de la empresa.

5. ¿Existen trabajadores que gozan de prioridad de permanencia ante un despido por causas empresariales? En particular, ¿tienen los representantes de los trabajadores prioridad de permanencia? ¿las trabajadoras embarazadas? ¿los trabajadores de mayor edad? ¿los trabajadores con responsabilidades familiares?

En el sistema jurídico dominicano, no existen criterios de selección de los trabajadores afectados por un despido por causas empresariales. Como norma general, por tanto, corresponde a la empresa determinar los trabajadores afectados por el despido, debiéndose respetar, en cualquier caso, el principio de igualdad y no discriminación y demás derechos fundamentales y libertades públicas.

En cambio, existen normas de permanencia en caso de disminución de personal por razones económicas que otorgan privilegios ante las reducciones, de acuerdo al siguiente orden de prevalencia[115]:

1. Trabajadores extranjeros solteros.
2. Trabajadores extranjeros casados.
3. Trabajadores extranjeros casados con personas dominicanas.
4. Trabajadores extranjeros que hayan procreados hijos dominicanos.
5. Trabajadores dominicanos solteros.
6. Trabajadores dominicanos casados.

Adicionalmente, la ley otorga prioridad a los trabajadores con mayor tiempo en la empresa, y si todos tienen el mismo tiempo, el empleador tiene derecho a elegir bajo su propio criterio, salvo convención al respecto.[116]

6. ¿Los trabajadores afectados por el despido por causas empresariales, ¿tienen derecho a una compensación económica o indemnización?

Conforme la normativa laboral dominicana, en los casos de terminación de los contratos de trabajos por razones económicas imputables a la empresa, el trabajador tiene derecho a una asistencia económica de acuerdo a la siguiente escala:

i. De cinco (5) días de salario ordinario después de un trabajo continuo no menor de tres (3) meses ni mayor de seis (6) meses;
ii. De diez (10) días de salario ordinario después de un trabajo continuo no menor de seis (6) meses ni mayor de un (1) año; y
iii. De quince (15) días de trabajo ordinario por cada año de servicio prestado después de un año (1) de trabajo continuo

La ley no especifica particularidades especiales en función del tamaño de la empresa.

7. ¿Qué obligaciones tiene la empresa que realiza un despido por causas empresariales? En concreto, ¿existe obligación de recolocación de los trabajadores afectados en la empresa o en el grupo de empresas?

En el estado actual de la legislación dominicana, una vez terminada la relación laboral por motivos económicos de la empresa, el empleador no tiene obligación alguna de

[115] Ibíd, artículo 141.
[116] Ibíd, artículo 142.

recolocar o intentar recolocar a los trabajadores afectados en otros puestos de trabajo de la empresa o, en su caso, en otras empresas pertenecientes al mismo grupo económico.

8. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales? ¿En qué supuestos el despido puede ser declarado nulo (que implique la readmisión del trabajador)?

La terminación definitiva del contrato laboral por motivos económicos puede ser anulada en los casos en que se compruebe que no existían las causas requeridas por la ley o por violación al procedimiento legal establecido. Sin embargo, dado que dicha terminación requiere de la aprobación de la Autoridad de Trabajo, en escasas ocasiones se podría considerar la nulidad de la terminación de un contrato de trabajo por la no concurrencia de las causas legales que dan motivo a la imposibilidad de cumplimiento del contrato.

En caso de nulidad de la terminación del contrato por causas económicas de la empresa, la autoridad judicial podría declarar resuelto el contrato de trabajo con responsabilidad para el empleador u ordenar la readmisión del trabajador, si procede y le es requerido. En el supuesto de nulidad, la sanción contra el empleador que incurre en una terminación irregular por supuestos motivos económicos contra el trabajador es el pago de las indemnizaciones correspondientes al preaviso[117], auxilio de cesantía[118] y hasta seis meses de salario, pues la jurisprudencia entiende que dicha situación se traduce a un despido injustificado.[119]

9. ¿Existen especialidades en el despido por causas empresariales para las microempresas y/o pequeñas y medianas empresas?

En el marco jurídico actual no existe ninguna especialidad en relación con la terminación contractual por causas empresariales en función de la dimensión de la empresa. Esto es, no existe ninguna especialidad/peculiaridad para las microempresas o pequeñas y medianas empresas.

10. ¿Es posible el despido por causas empresariales en la Administración Pública? En su caso, ¿qué especialidades existen en relación con la definición de las causas?

La legislación dominicana, particularmente la Ley de Función Pública -que regula las relaciones de trabajo de las personas que prestan servicio en instituciones públicas del

[117] Ibíd, artículo 76.
[118] Ibíd, artículo 80.
[119] SCJ, 15 de mayo de 1956, B.J. 550, pág. 986; 21 de diciembre de 1966, B.J. 673, pág. 2552

Estado, los municipios y las entidades autónomas- prevé la posibilidad de desvincular el servidor público ante la supresión del cargo de carrera por interés institucional, siempre y cuando no existiere la posibilidad de ser reubicado en otro cargo.

En estos casos, el servidor público de carrera (que ingresó al Sistema de Carrera Administrativa) cuyo cargo ha sido suprimido por interés institucional y no existe puesto de trabajo vacante para re-colocación, ni califique para recibir pensión o jubilación, tendrá derecho a una indemnización equivalente al sueldo de un (1) mes por cada año de trabajo o fracción superior a seis (6) meses, sin que el monto de la indemnización pueda exceder los salarios de dieciocho (18) meses de labores.

11. Otras cuestiones relevantes en materia de despido por causas empresariales

- El Ministerio de Trabajo, a través de la Dirección General de Trabajo (DGT), es la autoridad administrativa encargada de evaluar las solicitudes sobre terminación de contrato de trabajo por cierre definitivo de empresa o reducción definitiva de personal. Después de ponderar la solicitud de acuerdo a las leyes vigentes, la DGT emitirá una resolución aprobando o no el cierre o reducción definitiva de personal dentro de un plazo de 15 días.
- En nuestro país, si bien han ocurrido terminaciones contractuales por motivos económicos de la empresa no existe información estadística que permita evaluar la realidad actual. Varios factores han provocado dificultades económicas para las empresas que producen terminación de contratos laborales. Entre estos factores se encuentran: la eliminación de incentivos fiscales, cambios de producción de las empresas (de producción industrial a importaciones, economía de servicios), entre otros. Los negocios más afectados han sido las Zonas Francas Industriales y las pequeñas y medianas empresas.
- El sistema jurídico laboral dominicano requiere de una reforma que permita ofrecer soluciones novedosas y efectivas ante las situaciones económicas de dificultad que pudiesen enfrentar las empresas, particularmente las medianas y pequeñas empresas. En ocasiones, las empresas deciden por cerrar sus operaciones sin posibilidad alguna para los trabajadores de obtener el pago de las indemnizaciones que les corresponden.

DESPIDO POR CAUSAS EMPRESARIALES EN URUGUAY

Mario Garmendia Arigón
Profesor Agregado de Derecho del Trabajo y de la Seguridad Social (Facultad de Derecho, Universidad de la República, Montevideo, Uruguay), Profesor Titular de Derecho del Trabajo (Facultad de Derecho, Universidad CLAEH, Punta del Este, Uruguay), Magíster en Derecho del Trabajo

Introducción

En Uruguay no existe una regulación específica en materia de despidos por causas empresariales. En rigor, habría que decir que el Derecho positivo laboral uruguayo contiene escasas referencias al propio *concepto* de despido, el que ha sido construido a partir de los desarrollos doctrinarios y jurisprudenciales.

En general, las normas que aluden al despido tienen carácter *elíptico*, en el sentido de que apuntan a establecer las consecuencias económicas que habrán de tener aquéllos (es decir: están dirigidas a regular lo que se conoce como la *indemnización por despido*, su forma de cálculo y las circunstancias que eximen al empleador de la obligación de pagarla).

La normativa está enfocada, entonces, a determinar lo que habrá de acontecer cuando el empleador despide a un dependiente, pero en cambio, no establece condiciones o requisitos a cumplir por parte de aquél cuando hace efectivos los despidos. De este modo, la legislación uruguaya no exige la invocación de una causa determinada a los efectos de que le quede habilitada al empleador la posibilidad de despedir, a no ser que aquél pretenda invocar una razón disciplinaria como la determinante del despido (la configuración de la notoria mala conducta –que debe probar el empleador y que le eximirá de la obligación de pagar la indemnización por despido) o que el trabajador promueva una demanda sosteniendo que su despido tuvo una inspiración antisindical (en cuyo caso el empleador deberá probar que la causa del mismo fue otra, según se dirá más adelante).

Por otra parte, no existen estadísticas que midan la cantidad de despidos en general, ni sobre los que responden a causas empresariales en especial. A pesar de ello, es notorio que en periodos de crisis económica los despidos se incrementaron en forma exponencial, siendo factor fundamental en la generación de niveles de desempleo que superaron el 20% durante la profunda crisis que a comienzos del presente siglo afectó a Uruguay y a otros países de la región.

1. ¿Cómo se definen las causas que justifican un despido por causas empresariales?

El Derecho positivo uruguayo no contiene una definición de despido ni tampoco establece exigencias o condiciones de cuyo cumplimiento dependa la licitud del mismo. Las referencias normativas (consagradas fundamentalmente a través de leyes que sucesivamente se han ido adoptando a partir de la década de los años '40), tienen por objeto principal la determinación de las consecuencias económicas que habrán de recaer sobre el empleador que despide.

Dichas consecuencias consisten en el establecimiento de una indemnización tarifada (cuyo monto se calcula tomando en cuenta la antigüedad y la remuneración del trabajador) que beneficia al trabajador y que se hace exigible en forma automática, es decir, sin que sea necesario que el dependiente deba probar el hecho de haber padecido daños como consecuencia del despido. En este sentido, la ley parte de la premisa de que todo despido genera ciertos daños que son inherentes a su propia naturaleza y a la reparación de los mismos es que apunta la ya mencionada indemnización tarifada.

El trabajador pierde el derecho a recibir dicha indemnización sólo cuando el despido se produce por su *notoria mala conducta*, noción que tampoco se encuentra definida por la ley y cuyo sentido ha sido desarrollado por la doctrina y la jurisprudencia.

Ninguna norma exige explícitamente al empleador que deba basar su decisión de despedir en una determinada causa. No existen condicionamientos a este respecto y, por lo tanto, es posible y lícito que el despido tenga como causa alguna circunstancia que pueda ser calificada como *empresarial*, entendiendo por tal a cualquiera que responda a una razón que tenga origen en el interés o conveniencia primordial del empleador, pudiendo estar motivada en razones de carácter económico o ser de índole técnica, organizativa o de producción.

Ahora bien, es importante señalar que cuando decimos que el despido *puede* encontrar su causa en alguna de estas razones, ello no significa que sea *exigible* al empleador la demostración de que su decisión haya estado motivada en las mismas. En este sentido, comúnmente se da por entendido que el ejercicio del despido es de carácter libre, en cuanto no se requiere que el empleador deba invocar o demostrar la existencia de una causa determinada para proceder en tal sentido.

De todos modos, también es del caso precisar que pueden existir situaciones en las que sí podría recaer sobre el empleador la carga de demostrar y probar que su decisión de despedir a un trabajador tuvo una determinada causa. Se trata de aquellos casos en que el trabajador afectado por el despido promueve una demanda judicial (por exigencia

expresa de la ley, es necesario que lo haga acompañado por su organización judicial, con la que habrá de conformar un litisconsorcio activo necesario) reclamando que aquél sea declarado nulo por haber estado motivado en una finalidad antisindical. Si esto acontece, el empleador tendrá que asumir la carga de probar la existencia de una causa razonable, relacionada con la capacidad o conducta del trabajador, o basada en las necesidades de la empresa, establecimiento o servicio u otra de entidad suficiente para justificar la decisión adoptada.

2. ¿Las causas empresariales que justifican el despido han de concurrir a nivel de toda la empresa o pueden hacerlo sólo en el centro de trabajo donde se produce el despido?

No existen reglas específicas a este respecto. Como se señaló antes, no es exigible al empleador que invoque o pruebe la existencia de una causa determinada para proceder al despido de un dependiente. En el caso particular del despido que es cuestionado por razones sindicales –como ya fuera dicho- para exonerarse de la responsabilidad que se le atribuye, el empleador debe probar la existencia de una causa razonable, relacionada con la capacidad o conducta del trabajador, o basada en las necesidades de la empresa, establecimiento o servicio u otra de entidad suficiente. Por lo tanto, las razones que se pueden invocar (y que el empleador deberá demostrar) pueden tener su origen, tanto en la empresa (considerada en su integralidad), como también en el establecimiento o servicio específico.

3. ¿Cuál es el procedimiento que la empresa debe seguir para proceder a un despido por causas empresariales? ¿Existen especialidades en el procedimiento de despido por causas empresariales cuando el despido tiene naturaleza colectiva?

No existe ninguna previsión al respecto. La normativa no establece procedimientos o exigencias de algún tipo que deban ser cumplidas por el empleador al disponer los despidos, cualquiera sea la razón de los mismos (y con la ya señalada puntualización referida a aquellos casos en que se invoca una razón antisindical por el trabajador y su organización sindical). Tampoco existen disposiciones que establezcan tales requisitos en relación a despidos colectivos.

4. ¿Cómo se calcula el número de trabajadores afectados para determinar si el despido tiene naturaleza colectiva?

No está regulado el concepto de "despido colectivo" ni sus consecuencias. Por consiguiente, no existen previsiones que contemplen ningún criterio o fórmula de cálculo al respecto.

5. ¿Existen trabajadores que gozan de prioridad de permanencia ante un despido por causas empresariales? En particular, ¿tienen los representantes de los trabajadores prioridad de permanencia? ¿las trabajadoras embarazadas? ¿los trabajadores de mayor edad? ¿los trabajadores con responsabilidades familiares?

En el ordenamiento uruguayo no existen criterios de selección de los trabajadores afectados por un despido por causas empresariales. Como norma general, por tanto, corresponde a la empresa determinar los trabajadores afectados por el despido, debiéndose respetar, en cualquier caso, el principio de igualdad y no discriminación y demás derechos fundamentales y libertades públicas. De todos modos, tampoco hay impedimento para que mediante negociación colectiva se puedan acordar criterios o reglas a cumplir en un determinado sector de actividad o empresa; aunque tal tipo de acuerdos no sea demasiado frecuente.

Si bien no pueden ser propiamente calificados como criterios de selección o de determinación de un orden para proceder a los despidos, sí existen determinadas situaciones en que ciertos trabajadores reciben una protección más intensa contra los despidos. Se trata, por lo general, de casos en que la legislación los hace destinatarios de una tutela más intensa al asumir que se encuentran en una situación de mayor vulnerabilidad. Así, por ejemplo, los trabajadores que padecen una enfermedad común, han sufrido un accidente de trabajo o una enfermedad profesional, la trabajadora grávida o que ha dado a luz recientemente, o aquellos que han denunciado una evasión ante el organismo de seguridad social, son algunos de los destinatarios de una mayor tutela de su estabilidad laboral durante los periodos en los que se ven afectados por las situaciones antes descriptas y durante ciertos plazos posteriores al cese de las mismas (que varían según cada situación). En estos casos, la legislación incrementa el monto de la indemnización que debe recibir el trabajador, llevándola al doble (p. ej. trabajador enfermo) o triple (p. ej. trabajador que ha sido víctima de un accidente de trabajo o enfermedad profesional) o, en otros casos, sumándole otros adicionales a la tarifa establecida para el despido común (p. ej., en el caso del despido de la trabajadora grávida o madre reciente, se adicionan seis salarios mensuales). También es del caso mencionar que a nivel de la jurisprudencia (aunque sin que existan normas que así lo impongan) se ha considerado disvalioso el despido de un trabajador añoso, que se encuentre próximo a la jubilación. En ciertos casos de este tipo, se ha incrementado el importe económico de la indemnización por despido (superando la tarifa que determina la ley) sobre la base de que se trataría de un despido “abusivo” o “especialmente injustificado”.

6. ¿Los trabajadores afectados por el despido por causas empresariales, ¿tienen derecho a una compensación económica o indemnización?

Sí, tienen derecho a recibir una indemnización por despido que impone la ley según una tarifa que considera el importe del salario vigente y la antigüedad del trabajador. La única circunstancia que puede provocar que el trabajador pierda su derecho a recibir la indemnización por despido, es la que se produce cuando se configura la denominada *notoria mala conducta*, hipótesis que debe ser probada por el empleador.

7. ¿Qué obligaciones tiene la empresa que realiza un despido por causas empresariales? En concreto, ¿existe obligación de recolocación de los trabajadores afectados en la empresa o en el grupo de empresas?

La normativa uruguaya no contiene ninguna previsión a este respecto. La recolocación de los trabajadores a veces se plantea como reivindicación de carácter sindical y se sustenta exclusivamente sobre la capacidad de presión que esté en condiciones de desarrollar el colectivo de los trabajadores. De todos modos, existen varios ejemplos en que los sindicatos han tenido éxito en este tipo de planteamientos, incluso en casos en que no se trata de grupos de empresas (por ejemplo, en el sector de la banca privada, en el ámbito de los prestadores de salud y otros).

8. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales? ¿En qué supuestos el despido puede ser declarado nulo (que implique la readmisión del trabajador)?

Como se indicó, no existe en Uruguay una normativa que establezca exigencias en relación a la causa de los despidos, como no sea lo ya señalado en relación a los despidos antisindicales. En este específico caso, el despido será declarado nulo si el empleador no consigue probar que el mismo respondió a una causa razonable, relacionada con la capacidad o conducta del trabajador, o basada en las necesidades de la empresa, establecimiento o servicio u otra de entidad suficiente para justificar la decisión adoptada. Si esto sucede, el trabajador debe ser efectivamente reintegrado a su puesto de trabajo y recibir el pago de los salarios correspondientes al tiempo en que no trabajó como consecuencia de la decisión empresarial nula.

9. ¿Existen especialidades en el despido por causas empresariales para las microempresas y/o pequeñas y medianas empresas?

No hay normas al respecto.

10. ¿Es posible el despido por causas empresariales en la Administración Pública? En su caso, ¿qué especialidades existen en relación con la definición de las causas?

La relación de trabajo en el sector público (Administración Pública estatal) es objeto de una regulación especial y diferente a la de la actividad privada. El concepto de *despido* es ajeno a dicha regulación, en tanto el *funcionario público* se beneficia de un sistema de estabilidad que sólo le hace pasible de perder su empleo en casos de *ineptitud*, *omisión* o *delito*, que deben ser constatados mediante un procedimiento administrativo (sumario). No está previsto, por lo tanto, el *despido por causas empresariales* en la Administración Pública.

DISMISSAL DUE TO BUSINESS REASONS IN CANADA.

Eric Tucker,
Professor at Osgoode Hall Law School, York University.

Cristopher Grisdale,
Associate at Farris, Vaughan, Wills & Murphy LLP, Vancouver

Abdalla Bargawi,
Third-Year Law Student at Osgoode Hall Law School, York University

Introduction

In the 2014 issue of the Comparative Labor Law Dossier, we set out the legal framework related to dismissals due to business reasons in Canada. In this issue, we provide an update on any changes that have occurred since the 2014 issue. Before doing so, four introductory points warrant brief discussion.

First, as in 2014, Canada remains a liberal market economy and as such the law places few restrictions on the employer's freedom to dismiss an employee. In particular, the law places no restriction on the freedom of employers to dismiss employees for business reasons. However, dismissed employees are entitled to certain rights, the most important of which is notice of termination or pay in lieu of notice.

Second, it must also be noted at the outset that the unionized and non-unionized employees operate under somewhat different legal regimes. Non-unionized employees derive their rights from their individual contracts of employment, which are governed by the common law and minimum standards laws. Unionized employees (about 30% of the labour force) derive their rights from the collective agreement. However, collective agreement coverage in the private sector (where layoffs due to business reasons are far more likely) is less than 16%, compared to 75% in the public sector.[120] Workers covered by collective agreements cannot make claims under the common law but they are covered by minimum standards laws.

Unionized employees are generally better protected against dismissal than non-unionized employees. This is because collective agreements typically restrict the employer's freedom to dismissal by providing that dismissals shall only be for just

[120] Calculated from Statistics Canada, CANSIM Table 282-0077 online at http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2820077&&pattern=&stByVal=1&p1=1&p2=31&tabMode=dataTable&csid=.

cause. However, just cause protection does not restrict the freedom of the employer to dismiss for business reasons. In principle, individual employees could also negotiate protection against dismissal, including dismissal for business reasons, but this is very unusual.

Third, Canada is a federal state and labour and employment is primarily of provincial jurisdiction. In this brief survey, we cannot discuss the laws of every province, so we have chosen to focus on the province of Ontario, Canada's most populous, and occasionally consider federal labour laws, which govern about ten percent of the labour force. With the exception of Quebec, the differences between provincial laws tend to be small.

Fourth, Canada does not publish statistics on dismissals for business reasons, but we can get a sense of the extent of the phenomenon from other data. During the last recession, beginning in October 2008 and bottoming out in July 2009, total employment declined by 431,000 or 2.5% of the workforce. While not all job loss was due to economic reasons, it is fair to assume that a significant proportion was. Since July 2009, there has been net job growth but, it was not until the end of 2017 the unemployment rate dropped below what it was in 2008.[121] Even while there was net job growth during this period, some workers continued to lose jobs due to business reasons. Unemployment statistics in 2012/13 show that job losers constituted about 50% of the newly unemployed, but not all job losers lost their jobs for business reasons.[122] Outside of the context of the 2008 recession, data on firm entry and exit rates discloses that between 2000 and 2008 12.3% of all firms exited the market annually, affecting 1.9% of the labour force, but not all firms exit for business reasons.[123]

1. How are the causes that justify a redundancy or a dismissal due to business reasons defined?

As a liberal market economy that does not restrict the freedom of employers to dismiss workers due to business reasons, there has been no need to define the term.

---

[121] Statistics Canada, "Average Annual Unemployment Rate" online: < http://www.stats.gov.nl.ca/statistics/labour/pdf/unemprate.pdf>.

[122] "EI Monitoring and Assessment Report 2012/13" (Employment and Social Development Canada, March 2014), at 21. About 15% are job leavers. The remainder are workers who have not worked in the past year. More recent reports do not contain data on reason for unemployment.

[123] OANA CIOBANU AND WEIMIN WANG, "Firm Dynamics: Firm Entry and Exit in Canada, 2000 to 2008" (Statistics Canada, Catalogue no. 11-622-M — No. 022, Research Paper, The Canadian Economy in Transition Series, January 2012). It should be noted that on average 10.8% of firms were new entrants and employed 1.9% of employees.

1.1. Common Law

At common law, an employer is permitted to dismiss an employee for any reason and, indeed, is not required to provide the dismissed employee with the reasons for the dismissal. The only obligation placed on the employer at common law is to provide the employee with reasonable notice (discussed in more detail below).

1.2. Minimum Standards Legislation

In Ontario, the *Employment Standards Act* (ESA) deals with minimum standards, including several matters related to termination.[124] However, it does not require the employer to provide reasons for dismissal and it does not restrict the employer's common law freedom to dismiss for business reasons.

The *Canada Labour Code* (CLC)[125], which applies to federally regulated employees, is similar, except that it provides that in certain circumstances an employee is entitled to reasons for dismissal. This is in aid of a provision that entitles individuals to challenge their dismissal as unjust. However, the CLC specifically provides that it is not an unjust dismissal to terminate an employee "*because of lack of work or because of the discontinuance of a function*."[126]

Of importance here is that the Canada Industrial Relations Board (CIRB), which is responsible for enforcing the CLC, provides a great deal of deference to employers in the determination of whether there was a "lack of work" or a "discontinuance of a function." Indeed, this limitation has been interpreted to be a limitation on the jurisdiction of the CIRB, thereby allowing "*employers to respond to the economic forces that may adversely affect their businesses and to allow them to manage the scope of their activities and reorganize the way in which the activities of the business are conducted so that they can operate in the most efficient and productive manner*" without interference by the CIRB.[127]

---

[124] Employment Standards Act, 2000, SO 2000, c 41. There is other protective legislation addressing occupational health and safety and employment discrimination. These are not considered here other than to note that they each restrict the freedom of employers to dismiss employees for specific reasons, such as on the basis of race or gender, or for exercising rights under these acts. As under the ESA, proof that the dismissal was entirely for business reasons would be a complete to defence to a claim that the employee had been unlawfully dismissed, but no case law has developed defining business reasons.

[125] Canada Labour Code, RSC 1995, C L-2 s 241(1).

[126] *Ibid*, s 242(3.1)(a).

[127] RE BELLANY AND CN NORTH AMERICA, [1996] CLAD No 128 at 6. Also see: RE EVRARD ET BELL CANADA, 2017 CarswellNat 5085 at paragraph 111.

1.3. Collective Bargaining

It is useful here to distinguish between four different phases of collective bargaining: (1) the certification process; (2) negotiations for a first collective agreement; (3) the life of the collective agreement; (4) the duration of a strike/lock-out.

Employers can dismiss employees for business reasons during the certification process. However, if a union brings an unfair labour practice claim against the employer on the basis of the dismissal, section 96(5) of the Ontario *Labour Relations Act* (LRA) places the onus on the employer to prove that the dismissal was for business reasons and not for any other reason that infringes the LRA.[128]

Once the union is certified, the employer can only dismiss an employee for just cause. As of 1 January 2018, employees' rights not to be dismissed without just cause after the union has been certified have become entrenched in the LRA. Specifically, section 12.1 of the LRA stipulates that, once a union is certified, an employer cannot discharge an employee without just cause and this prohibition remains in force until a collective agreement is reached or the union ceases to represent the employees in the bargaining unit, whichever occurs earlier. Given the infancy of this section, it has yet to be subjected to interpretation. It can be assumed, however, that the understanding of just cause would be similar to the interpretation of dismissal for just cause during the life of the collective agreement.

Typically, collective agreements provide that there shall be no lay-offs or dismissals without just cause. Arbitrators interpreting collective agreements have consistently held that just cause protection does not restrict the freedom of employers to dismiss for business reasons. Unions have rarely been able to negotiate more substantial restrictions on the freedom of employers to terminate employees for economic reasons.

As of 1 January 2018, the LRA has entrenched employees' right not be dismissed without just cause during a lawful strike/lockout until a new collective agreement is concluded or the union ceases to represent the employees in the bargaining unit.[129] Any violation of this statutory prohibition can be subjected to grievance arbitration.[130] Given the infancy of this section, it has yet to be subjected to interpretation. It can be assumed, however, that the understanding of just cause would be similar to the interpretation of dismissal for just cause during the life of the collective agreement.

[128] SO 1995, C 1.
[129] S 80.1(1).
[130] S 80.1(2).

2.The business reasons that justifying the dismissal, must they concur in the entire company or only concur in the workplace where dismissal occurs?

As in 2014, employers are free to dismiss employees in any part of the company they choose on the basis of business reasons.

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there any specialties in such procedure in cases of redundancies (that is, when there is a collective dismissal)?

3.1. Common Law

At common law, there is no set procedure that must be followed to conduct a dismissal for business reasons. There is, however, an implied duty to give employees reasonable notice of termination or pay in lieu of notice (discussed below). The courts have developed a doctrine that employees are entitled to good faith and fair dealing in the manner of dismissal, but this is unlikely to arise in the context of dismissals for economic reasons.[131]

3.2. Minimum Standards Legislation

Pursuant to the ESA, s. 54, absent just cause, it is unlawful for an employer to terminate an employee, continuously employed for three months, without notice or pay in lieu of notice (discussed below). Terminations for business reasons do not excuse the employer from the duty to provide notice.

Where the employer terminates the employment of *50 or more employees* at the employer's establishment in the *same four-week period* the ESA, s. 58, requires more extended notice periods. The length of the notice period varies depending on the number of employees being terminated, the shortest being 8 weeks (50 to 199 dismissed) and the longest being 16 weeks (more than 500).[132] Employees may also be given pay in lieu of notice.

In addition to longer notice periods, mass termination requires the employer to provide the government with information, including the economic circumstances surrounding the termination, the number of employees being terminated and the dates of termination.[133] That information must also be posted in the workplace.[134] There is no

[131] HONDA CANADA INC. V KEAYS, [2008] 2 SCR 362.
[132] O Reg 288/01, s 3.
[133] *Ibid.*

obligation to consult with the government or the employees or union in advance of a mass termination or after notice has been given. The information provided is not used to assess whether the terminations were lawful; rather, it is used for government informational purposes and planning.

For federally regulated employees, the CLC, s. 230, requires employers to provide written notice or pay in lieu of notice. The CLC, s. 241, also provides employees with a right to obtain written reasons for dismissal. The CLC also makes special provision for mass terminations, defined as the dismissal of fifty or more employees in a four-week period. Notice must be given to the government 16 weeks before the first termination with a copy to the employees or union. The notice must set out the dates of the termination, the number of employees to be terminated and the reasons for the termination.[135] The employer must establish a joint planning committee, consisting of at least four members, half of whom must be employee representatives, which is to meet with the goal of developing an adjustment program that either eliminates the necessity of terminations or minimizes their impact and assists dismissed employees. An arbitrator may be appointed to assist if the parties cannot agree, but the arbitrator cannot review the employer's decision to terminate employees.[136]

3.3. Collective Bargaining Legislation

Collective bargaining legislation does not create procedural requirements for terminations due to economic reasons. The existence of special procedures governing lay-offs for business reasons will depend on the content of the collective agreement. We are not aware of studies that have examined the extent to which collective agreements create specific procedures to be followed in the case of proposed lay-offs. In the absence of collective bargaining language, unionized workers are covered by minimum standards laws and so would gain the benefit of the procedures they impose for mass terminations.

Even in the absence of collective agreement language imposing procedures regarding lay-offs for business reasons, it is not uncommon for unionized employers to meet with the union to discuss ways of minimizing the impact of dismissals on redundant workers. This could result in agreements that increase termination pay, supplement pension entitlements, provide assistance with job retraining and relocation or address any other matter the parties agree on.

---

[134] ESA, s 58(5); *Ibid*.
[135] CLC, s 212; *Canada Labour Standards Regulations*, CRC, C 986, s 26.
[136] CLC, ss 214-226.

4. How is the number of affected workers calculated in order to determine the individual or collective nature of the dismissal?

Whether the dismissals are individual or collective is really only pertinent for the purposes of the ESA, discussed in paragraph 3.2 above. As stated, where the employer terminates the employment of *50 or more employees* at the employer's establishment in the *same four-week period* the ESA, s. 58, requires more extended notice periods.

5. Are there groups of workers who have priority in a dismissal for business reasons? Particularly, do workers´ representatives have priority? And pregnant workers? Elder workers? Workers with family responsibilities?

At common law, the employer retains complete discretion over who to terminate. No employee has any implied priority over any other when it comes to terminations for business reasons. Minimum standards laws have not displaced the common law in this regard, except that human rights laws do not allow the employer to discriminate on various prohibited grounds, including sex, race, age, etc.

Under the collective bargaining regime, unions often negotiate that terminations shall be by seniority. The scope of seniority clauses varies. For example, seniority may be plant-wide or limited to a particular department.

6. Are workers affected by a dismissal due to business reasons entitled to an economic compensation?

As we have noted, Canadian workers dismissed for business reasons are entitled to notice or pay in lieu of notice dismissal for business reasons. As well, redundant workers who qualify are entitled to employment insurance benefits.

6.1. Common Law

The common law requires that an employer provide notice or pay in lieu of notice when dismissing employees for business reasons. The determination of the amount of notice depends on whether there is a contractual provision that governs the issue. If the notice period is specified in the employment contract, the period specified or payment in lieu thereof governs the provision of notice as long as the notice period or pay in lieu is not lower than that found in the ESA and is conscionable.[137]

[137] *Kielb v National Money Mart,* 2017 ONCA 356 at paragraphss 11-14.

If the notice period is not set out in the employment contract or is invalid, the amount of notice or pay in lieu of notice is governed by the common law, which stipulates that the notice or pay in lieu thereof must be "reasonable." The calculation of reasonable notice at common law is to be determined according to four factors: character of the employment; length of service; age of the employee; and availability of similar employment.[138] Economic circumstances may play a limited role in calculating reasonable notice.

Recently, the Ontario Court of Appeal has taken the position that the employer's economic status does not affect the amount of reasonable notice that the employee is entitled to receive at common law. Specifically, in *Michela v St. Thomas of Villanova Catholic School,* the Ontario Court of Appeal held that "*an employer's poor economic circumstances do not justify a reduction of the notice period to which an employee is otherwise entitled having regard to the*" four factors mentioned above.[139] At the same time, the Ontario Court of Appeal held that the same rule does not apply to employees, but the consideration of "*difficulty in securing replacement employment should not have the effect of increasing the notice period unreasonably*."[140] That is, while the economic situation of the employer has no impact on the amount of notice that ought to be provided, economic circumstances that can affect the employee's ability to find replacement employment can increase the notice period as long as the increase is reasonable.

6.2. Minimum Standards Legislation

The ESA provides minimum entitlements to notice or pay in lieu of notice. Non-unionized employees must opt to either pursue a common law claim or a claim under the ESA. The basic qualification to a claim under the ESA is that an employee must have been continuously employed for more than three months. The amount of notice increases with job tenure. Basically, employees are entitled to a week of notice or pay in lieu of notice for every year of service for a maximum of eight weeks.[141] Regulations under the ESA exclude some workers from the termination provisions. The only exclusion related to business reasons is for employees terminated during a strike or lock-out.[142] Where there is a mass termination (see 3.2) employees are entitled to longer notice periods or pay in lieu of notice.

---

[138] *Bardal v The Globe and Mail* (1960), 24 DLR (2d) 140. However, the factors to be taken into consideration are not limited to these four factors and other factors that are relevant to the circumstances at hand can be taken into consideration.

[139] 2015 ONCA 801 at paragraph 22.

[140] *Ibid* at paragraph 20.

[141] ESA, ss 54-57.

[142] O Reg 288/01, s 2(1)8.

In addition to notice, long-term employees are entitled to severance pay. To qualify for severance, the employee must have been employed with the employer for at least five years and the employer must have a payroll of at least $2.5 million or there must have been a permanent discontinuance of all or part of the employer's business and 50 or more employees were terminated within a six-month period. The amount severance increases with the length of service, basically calculated at one week of pay for every year of service up to a maximum of 26 weeks.[143]

6.3. Employment Insurance Act

The object of the Employment Insurance Act[144] (EIA) is to provide insurance against the risk of termination to individuals discharged without fault. Employees discharged for business reasons are eligible, provided they otherwise meet the requirements of the Act. These include having worked a minimum number of insurable hours in a defined period before being terminated, being ready, willing and able to work, and actively seeking work. Where a dismissed employee is eligible for employment insurance, the weekly benefit is 55% of the claimant's weekly insurable earnings.[145] The maximum benefit period of benefits depends on the kind of claim at hand and whether it also includes specialized benefits related to, *inter alia*, pregnancy and parental leave. The benefit period for a regular dismissal on the basis of business reasons ranges between 14 and 45 weeks, depending on the unemployment rate in the region and the number of insurable hours.[146]

7. What are the obligations of a company that carries out a dismissal due to business reasons? In particular, is there an obligation to relocate affected workers within the company or the group of companies?

In cases of mass terminations of 50 or more employees in a period of 4 weeks, the ESA requires the employer to provide advance notice of and information about the planned termination to the government.[147] However, beyond the extend notice, discussed above, this requirement does not provide workers with any additional protections. There are no other obligations imposed on employers by law. However, the parties are free to negotiate over the terms and conditions of employment, either individually or in a collective agreement where the workplace is unionized, and they may stipulate other

[143] ESA, ss 64-65.
[144] SC 1996, C 23.
[145] S 14(1).
[146] EIA, Schedule 1. Canada, Parliamentary Information and Research Services, The Employment Insurance Program in Canada: How It Works, (Ottawa: Library of Parliament 2013) at 5.
[147] ESA, s. 58; O.Reg. 288/01, s. 3.

obligations that arise in the context of dismissals due to business reasons. Apart from the most privileged managerial employees, individuals rarely negotiate additional protections. The most common protection for unionized workers is that dismissals for economic reasons shall be governed by seniority. Unionized employees whose positions are terminated will often have the right to "bump" into jobs held by more junior employees that they are qualified to perform. Minimum standards laws do not impose an obligation on employers to relocate employees terminated by business reasons within the company or group of companies, however they may have an economic incentive to do so in order to avoid the cost of providing notice and severance payments that would be payable if the employees were terminated.

8. What are the consequences that arise from breach or non-compliance with the legal procedure regarding redundancies due to business reasons? In which cases is the dismissal considered null (that is, that implies the worker´s readmission)?

8.1. Common Law

Employees who are terminated without reasonable notice or pay in lieu of notice may sue for wrongful dismissal. Generally, their damages are limited to the amount of notice to which they are entitled, but additional damages may be awarded where the employer has acted in bad faith in the manner of dismissal and the employee has suffered damages as a result. Courts do not have the power to order reinstatement for failure to provide notice or pay in lieu of notice. In rare instances, where the employer has acted in bad faith, which has caused the employee damages beyond the loss of pay, aggravated or punitive damages may be awarded.

8.2. Minimum Standards Legislation

If an employee chooses to pursue an ESA claim rather than a common law claim, they can submit a complaint to the Employment Standards Branch of the Ministry of Labour. Employees are no longer required to attempt to resolve the claim with their employer directly. Once submitted, the complaint will then be assigned to an Employment Standards Officer who will assess the merits of the complaint and may attempt to facilitate a voluntary settlement.[148] If the officer concludes that an employer has notice or severance obligations, then it is within the officer's power to make an order to pay the amount owed. There is no longer a cap placed on the amount that the officer can order. An employer who has violated the ESA by failing to pay termination or severance pay may also be penalized, but this rarely occurs. There is no power to

[148] ESA, s 101.1

reinstate employees who have been dismissed in violation of their statutory notice entitlements.

8.3. Collective Bargaining Law

Since it is not a violation of labour relations statutes to dismiss employees for business reasons, no remedy is provided. However, if the employer contravenes the newly enacted provisions of the LRA that prohibit dismissals without cause in certain time periods (discussed in 1.3), then the union can pursue grievance arbitration. Similarly, if the collective agreement restricts the employer's freedom to dismiss, and the union believes that the employer has violated the collective agreement, then the union may seek a remedy through the arbitration process. Arbitrators have broad remedial authority, but since collective agreements typically only require that economic terminations are to be by seniority or that notice is to be given, damages are the usual remedy. However, if an employee with greater seniority was dismissed, the arbitrator could order reinstatement with back pay. A similar remedy could be ordered if the arbitrator found that the dismissal was not for business reasons.

9. Are there specialties in the dismissal due to business reasons for micro companies and/or small and medium enterprises?

The common law makes no express provision for small and medium sized employers (SMEs). As noted previously, the ESA does vary termination and severance entitlements for small firms. The mass termination provisions (discussed in 3.2) are only triggered where 50 or more employees are discharged over the course of a four-week period and so would not apply to most SMEs. Similarly, SMEs are unlikely to be required to provide dismissed workers with severance pay (discussed in 5.2) because the entitlement only arises in workplaces with a payroll above $2.5 million or when 50 or more employees are terminated in a six-month period because of a permanent discontinuance.

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 business causes?

The freedom of the government or crown corporations to dismiss employees is similar to that of private employers. Therefore, there has not been a need to define "business causes" in this particular context any more than they have been defined for the private sector. Further, the Crown is now treated uniformly under the common law, minimum standards, and collective bargaining statutes. The common law has always treated the

Crown in the same manner as any other party and placed the same employment obligations upon it. Prior to the most recent legislative reform, the ESA had a number of limitations on its application vis-à-vis the Crown. However, these limitations have been removed and all of the ESA obligations discussed above apply to the Crown in the same manner as any other employer.[149] Collective bargaining statutes do not treat the Crown differently when it is the employer, meaning the Crown bears the same obligations as any other employer would be under the relevant statute.

[149] ESA, s 3.1.