COMPARATIVE LABOR LAW DOSSIER
DISMISSALS DUE TO BUSINESS REASONS

Abstract

El Comparative Labor Law Dossier (CLLD) de este número 2/2014 de IUSLabor ha estado dedicado a los despidos por causas empresariales e incorpora artículos, elaborados por académicos de prestigio, de la regulación en materia de despidos colectivos y despidos por causas empresariales en, además de España, Bélgica, Francia, Italia, Reino Unido, Chile, México, Uruguay, Canadá y Estados Unidos.

The Comparative Labor Law Dossier (CLLD) in this issue 2/2014 of IUSLabor is dedicated to redundancies and dismissals due to business reasons. Elaborated by internationally renowned academics, this issue's CLLD includes the regulation of redundancies and dismissals due to business reasons in, aside from Spain, Belgium, France, Italy, United Kingdom, Chile, Mexico, Uruguay, Canada and the United States.

Título: Despidos por causas empresariales
Palabras clave: despido, despido colectivo, causas empresariales.
Keywords: dismissal, redundancies, business reasons.

Summary

DISMISSAL DUE TO BUSINESS REASONS IN BELGIUM

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Introduction

Dismissals due to business reasons are mostly connected to collective redundancies. In 2013, 132 companies started the information and consultation procedure (with an announcement) which is obliged in case of collective redundancies, 8865 employees were involved (983 in Brussels, 3759 in Flanders and 4123 in Wallonia). The metal production industry was affected the most, with collective redundancies relating to 2986 employees. 140 companies ended the information and consultation procedure in 2013, resulting in 15717 dismissed employees (942 in Brussels, 9372 in Flanders and 5665 in Wallonia), while at the start of the procedure 16316 jobs were threatened. The procedure thus might have saved 605 jobs. In the metal production sector, 8797 employees lost their employment in 2013, leaving the other sectors far behind. In 2012 "only" 8044 employees lost their jobs in a collective redundancy, in 2011 there were 5654 and in 2010 there were 12862. (Statistics of Federal Government Service of Work Labour and Social Dialogue / FOD WASO, www.werk.belgie.be/defaultTab.aspx?id=30532)

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

The Belgian legal system does not differentiate specific causes for the 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 workers' 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-) workers' representatives states that these reasons are restricted to the closure of an enterprise, the closure of a branch of an enterprise and the 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 nr. 24 (regarding the to be followed procedure in case of collective redundancies) is 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 new Collective agreement nr. 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. Do the business reasons that justifying the dismissal must concur in the whole company or can they only concur in the workplace where dismissal occurs?

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 a protected employee and a collective redundancy, the Belgian law does not specify whether the reason has to relate to the whole company or the specific workplace. Yet again both options seem to be allowed.

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?

There are three different options.

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.

2. Protected employees

a. Workers' representatives:

The Act of 19 March 1991 ruling the special dismissal procedure for protected (candidate-) workers' representatives installed a special procedure. There are only two valid causes to dismiss a worker's representative: with urgent cause (e.g. the behavior 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 workers' representatives which can e.g. conclude collective agreements for a specific sector) by 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 Work Council (Nationale Arbeidsraad). The joint labour committee (or the NAR) 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 personnel. This means he can't dismiss in case of a closing 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 court. Before the employer can dismiss the representative, the president of the labour court has to recognize the existence of the economic and technical reasons. The court will state its decision in a judgment, against which the protected employees can appeal. 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 court 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 (e.g. business reasons) for the dismissal and any hesitation will work in favor of the dismissed employee.

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 nr. 24 of 2 October 1975 and others (including the EU directive 75/129/EEG of 17 February 1975).

To be qualified as a collective redundancy under Collective agreement nr. 24, the dismissals, taking place in a period of 60 days, need to affect:

- 10% of the 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% of the employees in a company with at least 300 employees in the year before the dismissal.

If this is the case the procedure goes as follows: the employer needs to inform the workers' 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 workers' 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 workers' representatives on possibilities to prevent or diminish the collective redundancy and to reduce the negative consequenses of the dismissals for the employees. The workers' 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 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 workers' 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), workers' 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 workers' 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.

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 nr. 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 nr. 9, the works council has to be informed an consulted before any announcement.

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

The 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 workers' representatives have to be consulted. Of course the

discrimination acts of 10 May 2007 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) workers' representatives is quite complex.

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

1. Compensation due to collective redundancy

The Compensation due to collective redundancy is regulated by Collective Agreement nr. 10 of 8 May 1973. Strangely, this collective agreement has a different understanding of a collective redundancy than Collective agreement nr. 24 (see question 3).

To be qualified as a collective redundancy under Collective agreement nr. 10 (art. 2), the dismissals, taking place in a period of 60 days, need to affect:

- 6% of the employees in a company with more than 20 and less than 59 employees in the year before the dismissal;
- 10% of the employees in a company with more than 60 employees in the year before the dismissal.

These conditions 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 on unemployment benefit 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 workers' 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.

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.

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 month 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;
- etc.

The 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 150,79 euro, with a maximum of 3.015,80 euro. For every year the age of the employee reaches above 45, there will be an addition of 150,79 euro, with a maximum of 2.865,01 euro. These amounts are coupled to the evolution of the index.

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

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

Although not legally obliged, 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 workers' 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 workers' representatives, so a clean closure of the company is possible and collective redundancies will not lead to massive collective actions.

Collective agreement nr. 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 nr. 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 start 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.

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

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

1. Protected (candidate) workers' 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 organisation (mostly a trade union) can ask his reintegration in the company under the same conditions as before. He has to ask this reintegration by registered letter, in a term of 30 days after the notification of the termination of the contract or after the day on which the candidacy for the elections of workers'

representatives are made public in case this date is later than the date of the notification 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 workers' representative does not ask the reintegration, the employer has to pay a compensation equal to his current wage of:

- Two years, in case of 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 workers' 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.

2. Collective redundancies

The procedure is laid down in the generally binding Collective agreement nr. 24, the breaching of its rules can be criminally persecuted (article 56 Act of 5 December 1968 on collective agreements) or result in 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 nr. 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).

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 punished according to the Social Criminal Code. Also administrative fines are possible.

Article 48 of the Act of 8 April 2003 sets a special fine on the breach of article 11 of Collective agreement nr. 9 ruling the information and consultation of the works council in case of 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.

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

The Renault Act and Collective agreement nr. 24 define a collective redundancy only for companies with over 20 employees. Their procedures thus are not applicable on small enterprises with less than 20 employees. However, The Royal Decree of 9 March 2006 on the activation policy also defines a collective dismissal for enterprises with less than 20 employees and even for enterprises with less than 12 employees. The Royal

Decree of 9 March 2006 obliges the employers to install an employment cell (see question 6), however this is only facultative for employers with less than 20 employees. Nonetheless it is obliged when the small enterprise wants to make use of a special early retirement system.

The Act of 26 June 2006 regarding the closure of an enterprise is only applicable for an enterprise with 20 or more employees. However this number can be lowered to 10 if the company was declared bankrupt before the closing.

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

There is no difference in the legal regimes when the company is part of a holding or a business group. However, if the holding or business group has a European dimension and a European works council is installed, also this one has to be notified (and consulted) of the restructuring since they could have an impact on other branches. The procedure is laid down in the EU Directive 2009/38 of 6 May 2009, which was implemented by Collective agreement nr. 101 of 21 December 2010.

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?

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.

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 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) workers' 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 nr. 109 (which generally binding) made it obliged for the employer to give the employee the concrete reasons for the dismissal. The reasons can never be manifestly unreasonable, but a dismissal because of business reasons will normally be accepted. Of course also before Collective agreement nr. 109 an (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 nr. 109 does not apply to collective redundancies.

DISMISSAL DUE TO BUSINESS REASONS IN FRANCE

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Introduction

Employment relationships in France are highly regulated, in particular with regard to termination of employment. The main sources of law that govern employment relationships are essentially the Labor Code, collective bargaining agreements and case law of the French Supreme Court (*Cour de Cassation*).

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 (i.e., without justification or indemnities) during the probationary period or «trial period». The duration of this probationary period is either fixed in the labor contract or in a collective agreement. Law also organizes a subsidiary minimum termination notice must be complied with during the probationary period[1].

After the probationary period, an employment contract can only be terminated in certain circumstances, depending upon whether the contract is entered into for a fixed term[2] or an indefinite term. Resignation (*démission*) is the ending of the contract by the employee. The resignation is only valid if the employee resigns of his own free will and not, for example, because the employer puts pressure on him to resign. An employee who wishes to resign must respect any period of notice imposed by law, contained in his contract or in a collective agreement, or customarily applied in his particular industry. If the employee does not give the required period of notice, the employer may be entitled to damages and interest for any resulting loss.

Regarding indefinite-term employment contracts, an employer can terminate the contract at any time, but it must be able to justify from a real and serious cause of termination (*cause réelle et sérieuse*), and it must comply with the applicable dismissal procedure which varies depending on the type of dismissal.

[1] Labor Code (LC), Article L1221-19.
[2] Ferkane Y., Joly L., Mihman N., «Contrats à durée déterminée en France», *IUSLabor* 1/2014 p. 10. Such contracts normally come to an end at the expiration of the fixed term. The «Code du Travail» does, however, provide for the contract to be brought to an end before the expiration of the term in a number of circumstances, namely agreement between the parties, serious wrongdoing, or «force majeure».

Real and serious cause means that the dismissal has to be exact, precise, objective and of a sufficiently serious nature to justify the dismissal. This requirement applies to any type of dismissal regardless of the age/position/length of service of the employee and the headcount of the company.

It is up to the employer to prove the reality and the seriousness of the grounds for dismissal on the basis of objective and material evidence. 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.

There are two major categories of dismissals based on real and serious cause:

- Dismissals based on the employee's behavior ("dismissals for personal/professional reasons", such as a poor performance, the employee's negligence or the employee's inability to work).
- Dismissals based on economic grounds ("dismissals for economic reasons/for business reason"). Dismissals for economic reasons can be either individual or collective, depending on whether one or more positions are to be eliminated or significantly modified.

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

According to Article L.1233-3 of the French Labor Code, a redundancy (or dismissal due to business reasons) is «*a dismissal decided by the employer for one or more reasons that are not related to the employee, which result from the elimination or transformation of a position, or a modification, refused by the employee, of an essential element of the employment contract, notably due to economic difficulties or technological changes*».

Where the employer invokes economic difficulties to support the redundancy, the legitimacy of the redundancy is dependent on the real and serious nature of the economic difficulties at the time of the redundancies.

The French Supreme Court has taken a very restrictive approach in its interpretation of acceptable economic reasons.

Dismissals due to business reasons are often contemplated owing to the financial difficulties encountered by the company (financial losses, non-offsettable loss of

markets, long-lasting drop in activity, etc.) as well as the company's shutdown[3]. Case law has accepted that the general economic situation (product prices, cost of raw materials) be taken into account to justify a restructuring operation[4].

The difficulties experienced by the company must however be real and serious and cannot be the result of the employer's intentional and fraudulent behavior. In general, the loss of a market, a slowdown in sales or lower turnover or profits during the year prior to the redundancy do not qualify as economic difficulties[5].

According to legislation, economic difficulties and technological changes are not the only two possible causes for redundancy proceedings[6].

If not justified by economic difficulties or technological changes, a restructuring operation must be indispensable to safeguard the company's competitiveness or that of the group's line of business to which the company belongs.[7] The existence of a threat to its competitiveness must be established.[8] But restructuring with a view to safeguarding competitiveness does not imply the existence of immediate economic difficulties. It implies anticipating risks and where applicable, difficulties to come. Hence, restructuring for the sake of safeguarding competitiveness is seen more as a preventive measure. In other words as the *Cour de cassation* stated "[t]he employer can anticipate foreseeable economic difficulties and take advantage of a healthy financial situation in order to adapt its organization to market evolution in the best possible way"[9]. French courts highly scrutinize the need to restructure the company in order to remain competitive as an economic ground, which is more debatable than losses, and verify that there is truly a need to restructure the company in question in order for the company/group/line of business to remain competitive. French courts thus tend to require that the company convince them that had it not implemented the redundancy plan in question, the company/group/line of business would have faced serious economic difficulties. In practice, it is therefore difficult to determine in advance whether or not a French court will uphold this type of economic ground.

Courts are not empowered to restrict the company's choice of possible solutions to safeguard the competitiveness of the company or of the group's business sector.

[3] Cour de cassation., Employment Div. (herafter "*Soc.*") , January 16, 2001
[4] Soc., Dunlop decision, November 21, 2006, n°05-40.656
[5] Soc., June 8, 2005, n°03-41.410; Soc.,, Employment Div., July 12, 2004, n°02-43.610
[6] Soc., January 16, 2001
[7] Soc., April 5 1995, *Thomson Tubes* ; P. Lokiec, « Les juges et le contrôle de la sauvegarde de la compétitivité », *SSL* 2007, n° 1334, p. 6
[8] Soc., July 4, 2006, n°04-46.261
[9] Soc., January 11, 2006, n°04-46.201, n°05-40.977

Better management or the interests of the company invoked by a financially healthy company are not considered valid grounds to demonstrate that the restructuring is necessary to preserve the company's competitiveness.

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

When a company, which does not belong to a group of companies, proceeds to a redundancy, the economic grounds are assessed at the level of said company.

However, when a company is part of a group of companies and proceeds to a redundancy, the economic grounds are in principle assessed at group level, unless it can be established that there are various lines of business within the group, in which latter case the economic grounds are assessed at the level of the group's line of business to which the company proceeding to the redundancies belongs.

However, where a company is part of a group of companies and proceeds to a redundancy, the economic grounds are in principle assessed at group level, unless it can be established that there are various lines of business within the group, in which latter case the economic grounds are assessed at the level of the group's line of business to which the company proceeding to the redundancies belongs. There must be valid economic grounds either at group level if the group only operates in only one line of business, or at the level of the line of business in which the company operates if the group operates in several lines of business.

In regard to safeguarding competitiveness, judge's ruling on the merits of a case must establish that there are indeed economic difficulties at the level of the group's line of business to which the company belongs or that there is a threat to the competitiveness of said line of business.

Determining at which level there must be valid economic grounds for a company to carry out collective redundancies is critical, as companies belonging to a group often wrongly believe that it is sufficient to have valid economic grounds at company level.

As far as a company belonging to a group is concerned, the fact that said company is experiencing valid economic grounds at company level is not sufficient. There must be valid economic grounds either at group level if the group only operates in only one line of business, or at the level of the line of business in which the company operates if the group operates in several lines of business.

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 France, the procedure to follow in cases of dismissal for business reasons varies depending on the number of employees concerned, the size of the enterprise and the presence (or not) of staff representative bodies[10].

The greater the number of employees involved, the more burdensome the procedure becomes for the employer. The employer needs to fulfill various obligations towards the Works Council, the local labor authorities (*Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi*, i.e. Regional Directorate for Companies, Fair Trading, Consumer Affairs, Labor and Employment –which is known as 'DIRECCTE') and the employees concerned.

The most complicated procedure is for large redundancies, which requires the employer not only to inform and consult the employee representative bodies (works councils and the health and safety committee) and implement dismissal ordering criteria, but also to implement a social plan to limit the number of dismissals, assist employees made redundant to find new employment and mitigate the impact of their redundancy.

In any case, any dismissal on economic grounds would be judged null and void if the consultation procedure had not been complied with.

- Dismissal of a single employee

The steps for dismissing one employee for business reasons are similar to that of dismissal for personal/professional reasons, subject to some specific additional requirements.

The employer must send or hand-deliver a notice of a pre-dismissal meeting under the same conditions as those outlined in the dismissal procedure for personal/professional reasons. During the meeting, the employer must explain the reasons for the dismissal and propose to the employee within companies with fewer than 1.000 employees, a personalized redeployment agreement.

This redeployment scheme, which was negotiated at national level, aims at accelerating employee redeployment and provides for measures such as social and psychological support, orientation, coaching, training and assessment of professional skills, etc.

[10] A. Lyon-Caen, « La procédure au cœur du droit du licenciement économique », *Dr. ouvrier* 2002. 161,

The employee has 14 days as of the receipt of the information note to accept or refuse the personalized redeployment agreement. If the employee accepts, the employment contract will be considered as terminated by mutual agreement between the parties as from the expiration date of the 14-day period.

Within companies with 1.000 employees or more, a redeployment leave financed in part by the employer, which purpose is to allow the employee to benefit from training measures and job search program. The duration of such leave is 4 months minimum and nine months maximum. The redeployment leave takes place during the notice period, during which the employee does not have to perform.

Then, the employer must send a notification of the dismissal to the employee after a minimum waiting period of 7 business days (15 days for an executive employee). The dismissal letter must explain in detail the economic reasons for the dismissal and their impact on the employee's position or employment contract.

The employer must refer to the "personalized redeployment convention" or "redeployment leave" and remind the employee of the remaining period of time for him/her to opt for such retraining program. It enables to state that the employee has a right of priority for re-employment for one year after the dismissal if the company envisages to hire employees with the same qualifications and if the employee elects to use such right of priority within a year from the end of the relationship.

Finally, the employer must notify the "*Directeur Départemental du Travail*" (Local Labor Administration) of the dismissal within 8 days following the date of the sending of the dismissal letter.

- Dismissal of two to nine employees (collective dismissal)[11]:

The employer must set up a list outlining objective criteria to be used for determining the order in which the employees will be dismissed[12] (e.g. seniority, family situation, age, qualifications, etc.). The employer must provide written notification to the employee representatives (Works council) with all supporting documents explaining the reasons for the collective dismissal and providing sufficient details on the latter.

At the earliest three days later, the employer must meet with the employee representatives. In addition to the meeting, the employer must send to each employee to be dismissed a convocation letter to attend a pre-dismissal meeting, under the same

[11] LC Art. L. 1233-8 to L. 1233-10
[12] LC Art. L. 1233-5

conditions as those outlined in the dismissal procedure for personal/professional reasons.

The employer must hold individual pre-dismissal meetings with each employee to be dismissed and provide him/her with the personalized redeployment convention or redeployment leave[13]. A minimum waiting period of at least 7 business days after the meeting must elapse before these dismissal letters can be sent to each employee and such sending must be performed by registered letter with return receipt requested. The employer must then notify the "*Directeur Départemental du travail*" of the dismissals within eight days following the date of the sending of the dismissal letters.

- Dismissal of at least ten employees (collective dismissal)[14]:

In cases where an employer intends to collectively dismiss at least 10 employees within a 30-day period, the procedural steps are more substantial and may be summarized as follows: this procedure deals specifically with the social consequences of the restructuring discussed during the first part of the procedure (see further above), i.e., the collective dismissal that should result from said restructuring. Article L. 1233-34 of the Labor Code allows the Works Council to appoint a CA for assistance during its consideration of the information presented by the management on the proposed economic dismissals. Such appointment results in three Works Council meetings (instead of two, as with other dismissals).

Up to 2013 the law did not set a deadline for the issuance of works council opinions. This has translated into a stronger negotiating position for employees, as works councils have been empowered to stall the collective redundancy process for long periods of time by requesting additional information from the employer or delaying a request for expert assistance. Under existing law, social plans can also be challenged for insufficiency and result in the suspension or the cancellation of a redundancy procedure. On 11 January 2013, a national inter-professional agreement (*accord national interprofessionnel* or ANI) was signed between French employer organizations and three national trade unions on a new economic and social model to promote business competitiveness and protect employee jobs and career paths. Negotiated at the invitation of the government, the 2013 ANI served as the basis for a new "flexisecurity" bill.

The rules on collective dismissals in France have been reformed by legislation passed

[13] F. Héas, « Le droit au reclassement du salarié en cas de restructuration de l'entreprise ou d'altération de sa santé », *Dr. ouvrier* 2007. 452
[14] LC Art. L. 1233-28 to L. 1233-33

on 14 June 2013 (*Loi de sécurisation de l'emploi* – LSE)[15]. Under this new legislation, consultation of the works council and health and safety committee on a "large" collective (i.e. when a company with at least 50 employees plans at least 10 job cuts) will be subject to new time limits.

Previously, the redundancy process had not been subject to specific deadlines. For large international businesses wishing to restructure or, for example, close a manufacturing plant, this made it very difficult to forecast how long it would take to complete a collective dismissal procedure involving more than nine employees. This is mainly because the employer must first consult with and obtain an opinion from the works council before any definitive decision is taken. Failure to follow this process is a criminal offense under French law. Although works councils do not have the power to veto the restructuring, they often use delaying tactics. Many companies experience delays in the implementation of a restructuring project, lasting up to several years, when the works council or unions are able to obtain a court order to suspend the consultation process for various reasons, including allegations that they have not received sufficient information to issue an opinion.

In this context, it was vital for employers that the works council consultation process was clarified. The consultation deadline can be included in a collective bargaining agreement entered into with union representatives. In the absence of such an agreement, the LSE Bill provides that the consultation should be completed in two to four months, depending on the number of employees concerned (two months when fewer than 100 dismissals are planned, three months for 200 to 250 dismissals, and four months when more than 250 employees are to be dismissed). At the end of the consultation period, the works council will be deemed to have been consulted, even if they have refused to issue the legally required "opinion" before the employer can start to implement any restructuring project and serve notice on the affected employees. The works council also has the right to get help from an "expert" (e.g., a chartered accountant), whose costs are fully paid by the employer, to better understand the economic and financial situation of the French company and the industry to which it belongs. Under the LSE Bill, such expertise should be sought in a timely manner to comply with the new deadlines.

The works council must give its opinion within two, three or four months of the first consultation meeting, depending on whether 10-99, 100-249 or at least 250 job cuts are planned. If the works council fails to give its opinion within this period, it is nonetheless deemed to have been consulted.

[15] P.-H. Antonmattei, « Grands licenciements pour motif économique, des innovations séduisantes à parfaire », *Sem. Soc. Lamy*, 2013, n° 1570 p. 15 ; « 24 regards sur la sécurisation de l'emploi », *SSL* 2013, n° 1592.

However, the legislation has introduced a new obligation for the company will have to seek the French labor administration's agreement to its redundancy plan. Such a plan has to be discussed with the union's representatives and/or the works council in the course of the consultation process and includes everything that the employer will offer to terminated employees to help them find a new job (including mobility aid, training and additional severance packages). The labor administration's agreement should be made within eight days if the unions have agreed to the redundancy plan, or otherwise within 21 days. Without the labor administration's agreement, the company can elect to resume the consultation process or to bring the matter before the administrative court, which has to make a judgment within three months. If that judgment is appealed, the court of appeal and the Supreme Court each have three-month deadlines to issue a ruling.

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

Where an employer is unable to internally redeploy its employees, it is required to define the criteria that shall be applied to govern the order of the contemplated redundancies[16].

In principle, the criteria defining the order of redundancies are defined by both the Labor Code and the relevant Collective Bargaining Agreement, where applicable. In addition, it should be noted that the criteria selected to determine the order of redundancies may only be fixed after the employer has consulted with the works council and/or the staff delegates on this issue.

Pursuant to Article L.1233-5 of the Labor Code, an employer must determine the order of redundancies based on the following legal criteria:

- The number of dependants, 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/her professional category.

The above criteria must be applied on a professional category basis. Case law defines a professional category as all employees in a company performing similar duties and with comparable professional training[17].

[16] F. Géa, « L'ordre des licenciements à l'épreuve de la logique contractuelle », *RDT* 2012. 218
[17] Soc., February 13, 1997,

Accordingly, where an employer wishes to eliminate a position, the criteria selected to determine the employee to be made redundant must be applied within the professional category of the eliminated position. Where the employer foresees eliminating all of the positions within a professional category, it is no longer necessary to select criteria to determine the order of the redundancies. Furthermore, the order of the redundancies must be assessed at overall company level and not merely at site level.

Finally, it is possible to provide that an employee who volunteers to leave can be made redundant, in order to avoid making redundant an employee who may be redeployed. However, it is important that the relevant employee comes to a voluntary decision to leave.

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 take civil action to obtain damages for the loss incurred.

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

Employees made redundant are entitled to the following indemnities:

- Severance pay

The employee must receive severance pay (*indemnité conventionnelle de licenciement*) in accordance with his/her length of service and the provisions of the relevant CBA. The calculation of severance pay is generally based on the employee's average salary during his/her final three or twelve months of employment, depending on which is more favorable to the employee. The employee's basic salary and bonuses are used to calculate the average salary.

The employee receives statutory severance pay (*indemnité légale de licenciement*), where severance pay provided for by the relevant CBA is lower than statutory severance pay or where no collective bargaining agreement applies within the company.

- 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 (*indemnité compensatrice de préavis*), which corresponds to the salary he/she would have received had he/she worked during the relevant period.

- Indemnity in lieu of paid holiday

The employee is entitled to receive an indemnity in lieu of paid holiday (*indemnité compensatrice de congés payés*) corresponding to the days accrued but untaken at the time of the employment contract is terminated.

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

As seen above, there are three types of redundancy procedures, based on the number of the redundancies implemented and the number of employees within the company:

- The redundancy of a single employee: it does not require a collective redundancy plan or a consultation of the works council, except for consultation on the selection criteria for the order of redundancies;
- The redundancy of fewer than 10 employees: the works council 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 works council and the implementation of a collective redundancy plan.

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

Employees made redundant have the possibility of filing a claim before the Employment Tribunal.

An employee can base his/her claim on the absence of real and serious grounds for redundancy. A redundancy that is not based on real and serious grounds is considered unfair and gives rise to the payment of damages to the employee. In companies with at least 11 employees and for employees with at least two years' service, the damages amount to at least six months' salary. Where the employee has less than two years' service or the company employs fewer than 11 employees, damages are also awarded, but there is no minimum set amount.

Moreover, where the employer fails to comply with the redundancy procedure, the court may award the employee damages for the loss incurred.

In companies with at least 11 employees and for employees with at least two years' service, the damages amount to 1 month's salary. Where the employee has less than two years' service or the company employs fewer than 11 employees, damages are also awarded, but there is no minimum set amount.

The judge can also decide to cancel the redundancy, notably when the employees were made redundancy in the absence of a job preservation plan or in application of an invalid plan. In such cases, the employees are entitled to be reinstated to their former job or, failing such, to an equivalent position, unless the reinstatement proves physically impossible. Failing reinstatement, the employees will be granted damages in compensation thereof.

In addition, particularities of the redundancy procedure may entail specific penalties. For instance, failure to consult the staff representatives may result in civil penalties (nullification of the proceedings) or criminal penalties. The employer may notably be sentenced for non-compliance with the rules governing the selection criteria for the order of the redundancies or for non-compliance with the job preservation plan.

8. Are these 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 and/or medium enterprises, a personalized redeployment convention provides psychological assistance, professional counseling and coaching, professional abilities evaluation, and training, in order to facilitate the redeployment of the employee after his or her dismissal. These measures are put in place by the Employment Agency.

The employee has 14 days as of the receipt of the information note to accept or refuse the personalized redeployment convention. If the employee accepts the personalized redeployment convention, the employment contract will be considered as terminated by mutual agreement between the parties as from the expiration date of the 14-day period.
However, the employee will be entitled to a dismissal indemnity calculated according to the collective bargaining agreement applicable to the company. For the purpose of determining the dismissal indemnity, the notice period the employee would have been entitled to in the event he or she would have refused the personalized redeployment convention is taken into account.

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

First, where a company is part of a group of companies and proceeds to a dismissal due to business reasons, the economic grounds are in principle assessed at group level.[18]

Within companies with 1.000 employees or more, a redeployment leave financed in part by the employer, which purpose is to allow the employee to benefit from training measures and job search program. The duration of such redeployment leave is four months minimum and nine months maximum. The redeployment leave takes place during the notice period, during which the employee does not have to perform. In the event the duration of the redeployment leave exceeds the length of the notice period, the end of the employment contract is postponed until the end of the redeployment leave. During the redeployment leave exceeding the notice period, the employer must continue to pay a monthly remuneration to the employee equal to 65 % of the average monthly gross remuneration received by the employee over the last 12 months.

In accordance with Article L.1233-4 of the French Labor Code, an employee may only be made redundant if his/her redeployment within the group to a position in the same professional category or a lower one proves to be impossible.

Besides, Article L.1233-4-1 of the French Labor Code provides that when a company or the group to which it belongs is set up outside the French territory, the employer asks employees prior to dismissal on economic grounds, if they agree to receive proposals for redeployment abroad, in each of the places where the group is set up, and if so what possible restrictions they would accept concerning the characteristics of the jobs offered, particularly with regard to salary and location. The employee has 6 days to accept or not the proposals for redeployment abroad.

The "Florange law": the law "*restoring prospects for the real economy and industrial employment*", known as the *Florange* law, which was adopted by the French Parliament on 24 February 2014 in response to ArcelorMittal's 2013 closure of the Florange blast furnace in northeast France.

The main measure of this law is the requirement that companies employing more than 1.000 employees in France and/or Europe must research a purchaser in the event that the company contemplates closing a profitable site that could potentially lead to a

[18] Soc., June 25, 1992, n° 90-41.244

redundancy exercise.

When a company contemplates closing a site in France under the conditions above, it has to, among other things:

1. Inform its work council and the labor administration of its intent to close the site no later than the consultation process for the contemplated collective redundancy exercise;
2. Inform, by any appropriate means, the potential purchasers of its intent to sell the site;
3. Draft a document presenting the site that provides the necessary information to potential buyers;
4. Provide access to any necessary information to companies that want to acquire the site (except if this information could be harmful to the company's interests or jeopardize its continued activity);
5. Take into consideration any purchase offers; and
6. Provide a motivated response to each of the purchase offers.

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 French legal system, provisions from the Labor Code specifically concern private sector employees. The public sector employees enjoy a specific protection from dismissal under public law.

However, it exist various dismissal procedures:

- Disciplinary dismissal;
- Dismissal for incapacity;
- Dismissal for professional misconduct;
- Dismissal in the interest of the service (i.e suppression of the post or refusal of the modification of an essential clause).

Regarding the definition of the business reasons, such a type of dismissal does not exist in the French public sector.

IL LICENZIAMENTO PER MOTIVI ECONOMICI IN ITALIA

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Introduzione

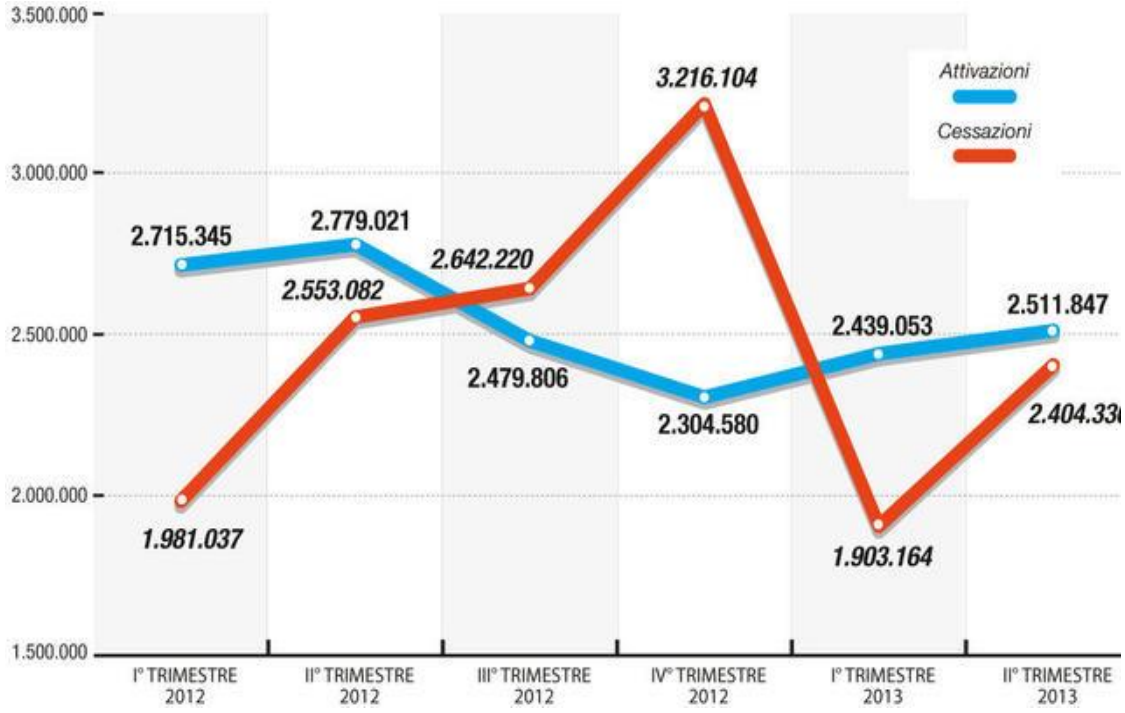
La Riforma del mercato del lavoro, adottata con L. n. 92 del 28 giugno 2012, è interventuta in materia di licenziamenti, in particolare, ridisegnando il quadro sanzionatorio di quelli individuali. Prima della novella, l'art. 18 dello Statuto dei Lavoratori, norma cardine di tale disciplina, prevedeva a prescidere dalla tipologia di recesso, un'unica sanzione: la reintegra del lavoratore accompagnata da un'indennità risarcitoria.

Nel sistema vigente ci sono quattro regimi sanzionatori a seconda delle ragioni e in funzione del tipo di licenziamento: discriminatorio, disciplinare e per giustificato motivo oggettivo. Le causali sono rimaste immutate, anche se è inevitabile che la rimodulazione delle conseguenze sanzionatorie abbia effetto anche sull'interpretazione delle varie fattispecie. Il sistema di tutela reintegratoria si connota oggi per la presenza di due distinti modelli: quello accompagnato da un risarcimento dei danni pieno (articolo 18, primo comma), nei casi di licenziamento discriminatorio, nullo o intimato nei casi di irrecedibilità, e quello accompagnato da un risarcimento limitato (articolo 18, quarto e settimo comma), nelle ipotesi di ingiustificatezza qualificata, in cui cioè l'illegittimità stessa risulti maggiormente conclamata e, quindi, grave. Per ciò che concerne invece il licenziamento per giustificato motivo oggettivo e soggettivo, nelle aziende che occupano più di 15 dipendenti nell'unità produttiva ove è stato intimato il licenziamento (ovvero più di 15 dipendenti nell'ambito dello stesso Comune e in ogni caso per le imprese con più di 60 dipendenti), permane un livello di tutela reintegratoria ma c.d. depotenziata. In questi casi, a fianco della reintegrazione del lavoratore, gli effetti risarcitori sono limitati, in quanto il risarcimento dei danni viene garantito solo in misura ridotta.

Infine, nelle altre fattispecie di illegittimità del licenziamento, viene applicata una tutela meramente indennitaria, anch'essa nelle due diverse tipologie: nella misura piena, regolata dall'articolo 18, quinto comma, che si applica alle ipotesi di ingiustificatezza "non grave" del licenziamento, e in misura ridotta, disciplinata dal sesto comma, relativa, invece, ai vizi formali e procedurali.

Per quanto attiene alle statistiche sui recessi datoriali, dal Rapporto sul primo anno di applicazione della Riforma del mercato del lavoro, pubblicato dal Ministero del lavoro nel gennaio 2014, emerge che il licenziamento costituisce circa il 9% delle cessazioni dei rapporti di lavoro. Il licenziamento per giustificato motivo oggettivo rappresenta circa il 75% del totale dei licenziamenti, mentre l'incidenza di quello collettivo negli ultimi trimestri si attesta intorno all'1%. La quasi totalità dei licenziamenti per giustificato motivo oggettivo, giusta causa e giustificato motivo soggettivo si concentra nei rapporti di lavoro a tempo indeterminato (oltre l'80%); nel tempo determinato tali cause superano di poco il 10% e sono residuali nell'apprendistato. Rispetto alla dimensione aziendale, nell'arco dei dodici mesi successivi all'entrata in vigore della legge 92/2012, i licenziamenti per giustificato motivo oggettivo sono avvenuti per il 75% in imprese con meno di 15 addetti.

Grafico 1. Attivazioni/cessazioni di contratti di lavoro, andamento trimestrale



Fonte: Ministero del Lavoro. Grafico a cura di Pierluigi Tolot

1. Come il Legislatore o la magistratura definiscono le cause che legittimano un licenziamento per motivi economici?

Nell'ordinamento italiano per licenziamento cosiddetto "economico" s'intende il recesso per giustificato motivo oggettivo intimato a causa di «ragioni inerenti all'attività

produttiva, all'organizzazione del lavoro e al regolare funzionamento di essa» (art. 3 della legge 15 luglio 1966 n. 604).

Pertanto, le ragioni "economiche" non si riferiscono ad un inadempimento del lavoratore, ma a specifiche esigenze aziendali che impongono la soppressione del posto di lavoro. Due sono le condizioni all'uopo richieste: a) l'effettività delle esigenze aziendali richiamate nella motivazione del licenziamento; b) un nesso di causalità tra tali esigenze e il licenziamento.

Occorre specificare, però, che le scelte di gestione dell'imprenditore non sono sindacabili dal giudice, che si deve limitare a pronunciare solo sulla loro effettiva realizzazione e consistenza, in virtù del principio di libertà dell'iniziativa economica privata ex art. 41 della Costituzione. Inoltre in presenza di clausole generali, tra cui sono espressamente comprese anche le norme in tema di recesso, «il controllo giudiziale è limitato esclusivamente, in conformità ai principi generali dell'ordinamento, all'accertamento del presupposto di legittimità e non può essere esteso al sidacato di merito sulle valutazione, tecniche, organizzative e produttive che competono al datore di lavoro» (art. 30, 1° comma della L. n. 183/2010). La l. n. 92/2012 ha poi precisato che l'inosservanza delle disposizioni relative al sindacato di merito «costituisce motivo di impugnazione per violazione norme di diritto».

In sede giudiziale è, invece, possibile verificare la coerenza del licenziamento rispetto alla modifica organizzativa alla stregua delle «comuni regole tecniche di buona organizzazione»: sarebbe quindi ingiustificato un licenziamento che, secondo tali «regole», non appaia come conseguenza indefettibile rispetto alla, pur insindacabile, scelta tecnico-organizzativa ovvero non sia legato a quest'ultima da uno stretto nesso di causalità (ad es. licenziamento di un lavoratore non interessato da un processo di riorganizzazione).

2. Le ragioni economiche che legittimano il licenziamento devono riguardare l'intera impresa o solo l'unità produttiva dove avviene il licenziamento?

Quando il datore di lavoro decide di intimare un licenziamento per motivi economici, la ragione tecnico, organizzativa e produttiva deve incidere su tutta la realtà aziendale e non solo sul luogo di lavoro, in cui si verifica il licenziamento. Il licenziamento deve configurarsi come una *extrema ratio* e secondo orientamento giurisprudenziale consolidato, il datore di lavoro deve dimostrare l'insussistenza di posizioni alternative non solo nell'ambito dello stabilimento in cui il lavoratore era adibito, ma in tutte le sedi della società (obbligo di *repechage*). Ovviamente, nel caso in cui il lavoratore rifiuti il

trasferimento presso una sede diversa, l'obbligo potrà ritenersi rispettato, con conseguente legittimità del licenziamento.

3. Quale è la procedura che l'impresa deve seguire per avviare un licenziamento per motivi economici? Ci sono profili specifici con riferimento al numero dei lavoratori interessati dal licenziamento?

La procedura da seguire innanzitutto è differente a seconda che trattasi di licenziamento individuale o collettivo, il quale deve essere attivato da 5 lavoratori in poi.

- Licenziamento individuale

Il licenziamento deve essere comunicato per iscritto indicando, contestualmente, i motivi che lo hanno determinato. Se il datore di lavoro rientra nei requisiti dimensionali dell'18 dello Satuto dei lavoratori, (si ricorda aziende che occupano più di 15 dipendenti nell'unità produttiva ove è stato intimato il licenziamento ovvero più di 15 dipendenti nell'ambito dello stesso Comune e in ogni caso per le imprese con più di 60 dipendenti), a seguito della Riforma del 2012, è stato previsto un ulteriore obbligo di natura procedurale, consistente nell'esperimento di un tentativo di conciliazione preventivo in sede amministrativa, davanti alla Direzione Territoriale del lavoro (DTL).

Il datore di lavoro deve far precedere l'intimazione del licenziamento "economico" da una comunicazione con la quale dichiara l'intenzione di procedere allo stesso indicandone i motivi, nonchè le eventuali misure di assistenza alla ricollocazione del dipendente interessato.

La procedura è finalizzata ad esaminare la sussistenza di soluzioni alternative al recesso e deve concludersi entro venti giorni dalla trasmissione della convocazione da parte della DTL, a meno che le parti, di commune avviso, non ritengano di proseguire il confronto per il raggiungimento di un accordo.

Se la conciliazione ha esito positivo trovano applicazione gli ammortizzatori sociali e, in particolare, l'Assicurazione sociale per l'impiego (l'ASpI); in tale caso può essere previsto l'affidamento del lavoratore ad un'agenzia per il lavoro, ovvero ad un'Agenzia di collocamento o di ricollocazione professionale.

Se il tentativo fallisce (o in assenza di convocazione da parte della DTL), il datore può procedure a intimare il licenziamento al dipedente, nel rispetto del termine del preavviso. Nell'eventualità di una successiva fase giudiziale, il comportamento complessivo delle parti, desumibile anche dal verbale redatto in sede di conciliazione o

dalla proposta conciliativa avanzata dalla ente amministrativo, è oggetto di valutazione da parte del giudice ai fini della determinazione dell'indennità risarcitoria. Il comportamento delle parti è oggetto di valutazione, da parte del giudice, anche ai fini della condanna alle spese processuali *ex* art. 91 e 91 Cod. Proc. Civ.

A distanza di un anno, però, dall'introduzione di tale onere procedurale aggiuntivo, il Legislatore è tornato su tale materia, con l'adozione del D.L.28 giugno 2013, n. 76 (c.d."pacchetto lavoro" predisposto dal Governo Letta) con l'obiettivo di deflazionare il carico giudiziario, introducendo tale previsione: «la mancata presentazione di una o entrambe le parti al tentativo di conciliazione è valutata dal giudice ai sensi dell'articolo 116 del codice di procedura civile» (inserito all'ultimo periodo del nuovo art. 7, comma 6, della legge n. 604/1966). L'omessa comparizione delle parti davanti al conciliatore diviene, dunque, un fattore dal quale il giudice può desumere argomenti di prova nell'eventuale giudizio.

- Licenziamento collettivo

La L. n. 223/1991 contempla due fattispecie di licenziamenti collettivi: quello «per riduzione del personale» (art. 24) e quello «per messa in mobilità» (art. 4). Nel primo caso per dare corso a un licenziamento è necessario che l'imprenditore abbia un organico complessivo di più di 15 dipendenti e che «intenda» licenziare almeno 5 lavoratori in un arco temporale di 120 giorni.

La causa della dismissione dev'essere unitaria e riconducibile ad una riduzione o trasformazione di attività di impresa (intesa come il complesso delle energie lavorative e del sostrato produttivo idoneo a realizzare gli scopi aziendali) o del lavoro. Tale definizione ha una portata tendenzialmente onnicomprensiva, per cui deve ritenersi che ricomprenda anche ipotesi nelle quali l'imprenditore riduca solo la forza lavoro occupata in dipendenza di innovazioni o ammodernamenti tecnologici, senza realizzare una contrazione di strutture o di attività (cosiddetto licenziamento tecnologico) o anche solo per ridurre i costi aziendali.

Tra il momento in cui, in presenza dei diversi presupposti appena ricordati, matura la decisione imprenditoriale di procedere al licenziamento collettivo e il momento dell'effettiva espulsione del singolo lavoratore dal processo produttivo, la legge pone la c.d. procedura di mobilità –identica per entrambe le fattispecie– la cui funzione è evidentemente di attutire, ove possibile, gli effetti del licenziamento collettivo sull'occupazione aziendale e sul mercato del lavoro.

Per avviare la procedura, la legge impone all'imprenditore l'obbligo di comunicare preventivamente alle RSU e alle associazioni di categoria aderenti alle confederazioni maggiormente rappresentative i motivi tecnici e organizzativi che determinano la necessità di ridurre il personale; il numero, la collocazione aziendale e i profili professionali del personale eccedente, nonchè del personale abitualmente impiegato; i tempi di attuazione del programma di mobilità; le eventuali misure programmate per fronteggiare le conseguenze sul piano sociale dell'attuazione del programma: il metodo di calcolo di tutte le attribuzioni patrimoniali diverse da quelle già previste dalla legislazione vigente e dalla contrattazione (art. 4, 3° comma, L. n. 223/1991, come modificato dal D. Lgs. n. 151/1997).

La procedura, introdotta dalla comunicazione, può articolarsi in due fasi: una, eventuale e preliminare, e l'altra subordinata all'esito negativo della prima.

La prima fase, cosiddetta sindacale, può aver luogo, ad iniziativa del sindacato, entro 7 giorni dalla data di ricevimento della comunicazione e deve, comunque, svolgersi in un arco temporale non superiore a 45 giorni. Tale fase si sostanzia in un libero confronto tra l'imprenditore e il sindacato finalizzato a ricercare un accordo che risolva in tutto o in parte il problema delle eccedenze.

Esaurita questa fase si configurano due possibili situazioni: o è stata raggiunto un accordo oppure la procedura è stata infruttuosa; in questo secondo caso la legge prevede l'apertura di un'ulteriore fase conciliativa in sede amministrativa.

Recependo un precedente orientamento giurisprudenziale, la L. n. 92/2012 ha stabilito che gli eventuali vizi della comunicazione «possono essere sanati, ad ogni effetto di legge, nell'ambito di un accordo sindacale concluso nel corso della procedura di licenziamento collettivo».

Una volta conclusa l'intera procedura, che nel complesso non può avere durata superiore a 75 giorni, qualora permanga la necessità di intimare tutti o soltanto alcuni dei licenziamenti inizialmente previsti nella «comunicazione», il datore di lavoro ha la facoltà di individuare in concreto i lavoratori colpiti dal provvedimento espulsivo, secondo criteri di cui alla risposta seguente.

4. Nel sistema giuridico italiano, ci sono gruppi di lavoratori che mantengono una priorità di continuazione del rapporto rispetto ai licenziamenti per motivi economici o comunque criteri per determinare quali saranno i lavoratori interessati dal licenziamento?

- Licenziamento individuale

In caso di licenziamento individuale non sono previsti criteri di scelta ovviamente, però, il datore di lavoro è tenuto a rispettare i principi di parità di trattamento, non discriminazione e I diritti fondamentali in genere oltre ai periodi di irrecedibilità (lavoratrice in gravidanza, durante il congedo di maternità, paternità e parentale, in costanza di matrimonio, durante il periodo di comporto).

- Licenziamento collettivo

Nel licenziamento collettivo, invece, l'individuazione dei lavoratori da licenziare –a norma dell'art. 5 L. n. 223/1991– deve avvenire in base alle esigenze tecnico produttive e organizzative dell'azienda e nel rispetto dei criteri previsti dai contratti collettivi. In mancanza di questi ultimi, la scelta deve essere effettuata nel rispetto dei seguenti concorrenti criteri normativi: carichi di famiglia; anzianità; esigenze tecnico-produttive ed organizzative. I criteri contemplati dall'accordo collettivo possono essere totalmente diversi da quelli meramente suppletivi individuati dalla legge, ma devono essere dotati del carattere dell'astrattezza e non possono essere, ovviamente, discriminatori o violare alcune particolari disposizioni dettate dalla legge come inderogabili. In particolare, il numero degli invalidi soggetti alla disciplina del collocamento obbligatorio non può essere inferiore alle percentuali previste dalla legge 68/1999. L'impresa non può, altresì, licenziare una percentuale di manodopera femminile superiore alla percentuale di manodopera femminile occupata con riguardo alle mansioni prese in considerazione.

5. Il licenziamento per motivi economici che è stato dichiarato legittimo dà diritto al lavoratore interessato a una compensazione economica?

In Italia in ogni caso di legittima cessazione del rapporto di lavoro viene riconosciuta un'indennità denominata trattattamento di fine rapporto, calcolata dividendo per 13,5 tutto quello che il lavoratore ha percepito nel corso dell'anno a titolo non occasionale e con esclusione di quanto corrisposto a titolo di rimborso spese (art. 2120, 2°comma, Cod. Civ.). La cifra ottenuta deve essere rivalutata con l'applicazione di una maggiorazione annua composta da un tasso fisso dell'1,5% e inoltre del 75% dell'aumento dell'indice dei prezzi al consume rilevato dall'ISTAT (Istituto Nazionale di Statistica). I presupposti e le modalità di corrresponsione del TFR, prima della

cessazione del rapporto, sono determinate dallo stesso art. 2120 Cod. Civ. e dalla L. n. 53/2000. In alcuni casi di insolvenza o di inadempienza, il datore di lavoro è sostituito nella corresponsione del TFR da un «Fondo di garanzia» (L. n. 297/1982).

6. In aggiunta alla compensazione economia, quando applicabile, quali altri obblighi derivano per l'impresa dal licenziamento per motivi economici?

A partire dalla Riforma del 2012 è stato introdotto un contributo da versare in caso di licenziamento di un lavoratore a tempo indeterminato, per cause a lui non imputabili (pari al 41% del massimale ASpI; da gennaio 2014, ammonta a 489, 61 euro per ogni anno di anzianità aziendale)

Inoltre, nel caso dei licenziamenti collettivi nel precedente sistema, *ex* L. n. 223/1991, l'atto di recesso prevedeva la corresponsione di un'indennità al lavoratore immesso nelle liste di mobilità. A seguito della Riforma del 2012, le disposizioni sulla mobilità ordinaria sono state però abrogate con decorrenza dal 1 gennaio 2017. Pertanto i lavoratori licenziati a far data dal 31 dicembre 2016 non potranno essere collocati in mobilità ordinaria, in quanto l'iscrizione nelle liste decorre dal 1 gennaio 2017, giorno successivo alla data di licenziamento. Questi potranno beneficiare a tale data, ricorrendone i requisiti, esclusivamente dell'indennità di disoccupazione (ASpI) o della mini ASpi, ancorchè proveniente da una procedura di licenziamento collettivo.

Al fine di garantire un graduale passaggio dal vecchio al nuovo sistema di prestazioni a tutela del reddito, la legge di riforma introduce altresì un regime transitorio, prevedendo per i lavoraori collocati in mobilità a decorrere dal 1° gennaio 2013 e fino al 31 dicembre del 2016 una graduale riduzione della durata dell'indennità. L'indennità di mobilità garantisce, per un periodo predeterminato, ai lavoratori licenziati un trattamento economico sostitutivo della retribuzione da lavoro persa. L'importo dell'indennità di mobilità è per i primi 12 mesi: il 100% del trattamento di Cassa Integrazione Guadagni straordinaria percepito o che sarebbe spettato nel periodo immediatamente precedente il licenziamento; per i periodi successivi: 80% del predetto importo. Tuttavia l'indennità di mobilità non può superare un massimale mensile il cui importo viene rivalutato annualmente.

7. Quali sono le conseguenze che derivano da un licenziamento per motivi economici erogato senza il rispetto delle procedure di legge?

- Licenziamento individuale

Nel primo caso, qualora il licenziamento avvenga in forma orale e non per iscritto, sarà nullo e si applica, a prescindere da requisiti dimensionali, il regime sanzionatorio previsto per i licenziamenti discriminatori che consiste in una tutela reintegratoria piena, unitamente alla corresponsione di un'indennità risarcitoria «commisurata all'ultima retribuzione globale di fatto maturate al giorno del licenziamento sino a quello della effettiva reintegrazione», in misura che comunque non potrà essere inferiore a cinque mensilità, e alla quale dovrà essere dedotto quanto percepito, nel periodo di estromissione, per lo svolgimento di altra attività. Infine, dovranno essere corrisposti anche i contributi assistenziali e previdenziali, unitamente al versamento delle sanzioni per omessa contribuzione.

Mentre in caso di mancanza della motivazione del licenziamento o di violazione della procedura dinnanzi alla DTL *ex* art. 7 della L. n. 604/1966, trova applicazione la tutela indennitaria ridotta, ossia il risarcimento onnicomprensivo da 6 a dodici mensilità (art. 18, comma 6, dello Statuto dei lavoratori).

- Licenziamento collettivo

A seguito della Riforma del 2012, la violazione della procedura non è più causa di inefficacia (con conseguente applicazione della tutela reintegratoria), prevedendosi ora per tali ipotesi solo una tutela indennitaria (da 12 a 24 mensilità). Mentre la tutela reintegratoria piena è prevista, come per i licenziamenti individuali, nell'ipotesi di mancata osservanza della forma scritta.

Infine la tutela reintegratoria, però, con un'indennità limitata a 12 mensilità viene mantenuta nell'ipotesi di violazione dei criteri di scelta.

8. Esistono regimi speciali in caso di licenziamento per motivi economici nelle micro-imprese o nelle imprese di piccole e medie dimensioni?

- Azienda con meno di 15 dipendenti

L'art. 8 della L. n. 604/1966 dispone che: «il datore di lavoro è tenuto a riassumere il prestatore di lavoro entro il termine di tre giorni o, in mancanza, a risarcire il danno versandogli un'indennità di importo compreso tra un minimo di 2,5 mensilità e un

massimo di 6 mensilità dell'ultima retribuzione globale di fatto, avuto riguardo al numero di dipendenti occupati, alle dimensioni dell'impresa, all'anzianità di servizio del prestatore di lavoro, al comportamento e alle condizioni delle parti».

- Azienda con più di 15 dipendenti (ovvero più di 15 dipendenti nell'ambito dello stesso Comune e in ogni caso per le imprese con più di 60 dipendenti)

A seguito della modifica dell'art. 18 dello Statuto dei Lavoratori, in caso di illegitttimità di un licenziamento "economico", il comma 7°, prevede ora due fattispecie. La prima attiene all'ipotesi in cui il giudice «accerti la manifesta insussistenza del fatto posto a base del licenziamento per giustificato motivo oggettivo», caso in cui scatta la reintegrazione; la seconda riguarda le «altre ipotesi in cui [il giudice] accerta che non ricorrono gli estremi del predetto giustificato motivo e, in tal caso, trova applicazione la tutela indennitaria prevista dal quinto comma».

Nel primo caso, il regime che interviene è definito reintegratorio debole e prevede, nello specifico, la reintegra del lavoratore, ma con un'indennità risarcitoria dovuta dal giorno del licenziamento fino a quello dell'effettiva reintegra per un massimo di dodici mensilità dell'ultima retribuzione globale di fatto. Da tale indennità sono detratti *l'aliunde perceptum,* quanto percepito nello svolgimento di altra attività e l'*aliunde percipiendum*, ovvero quanto il lavoratore avrebbe potuto percepire cercando con diligenza una nuova occupazione. Il datore di lavoro è condannato altresì al versamento dei contributi previdenziali e assistenziali per tutto il periodo dell'estromissione, però, senza applicazione di sanzioni per omessa o ritardata contribuzione, per un importo pari al differenziale contributivo esistente tra la contribuzione che sarebbe stata maturata nel rapporto di lavoro e quella accreditata al lavoratore in conseguenza dello svolgimento di altre attività lavorative. In tale caso, il giudice ha facoltà anche se rileva la sussistena dei presupposti cui è discende tale conseguenza sanzionatoria, di non procedere comunque a disporre il regime di reintegra depotenziato, avendo il Legislatore utilizzato il termine «può» applicare e non «ordina» la reintegra.

Per quanto attiene all'altra ipotesi prevista dal Legislatore, il giudice che dichiari risolto il rapporto applica una tutela meramente indennitaria in una misura che può variare da un minimo di dodici ad un massimo di ventiquattro mensilità dell'ultima retribuzione globale di fatto, tenendo conto (ed adeguatamente motivando), oltre che dell'anzianità di servizio del lavoratore: a) del numero dei dipendenti occupati; b) delle dimensioni dell'attività económica; c) del comportamento e delle condizioni delle parti. Inoltre il giudice dovrà tenere conto del comportamento delle parti nella procedura preventiva al licenziamento (art. 7, L. n. 604/1966). La prima giurisprudenza di merito post Riforma

del 2012 ha ritenuto rientrare «nelle altre ipotesi» il mancato assolvimento dell'obblido di *repêchage.*

9. Quali conseguenze esistono con riferimento al regime legale del licenziamento per motivi economici quando il licenziamento avviene in un gruppo di imprese?

• Licenziamenti individuali

In presenza di un gruppo d'imprese, che sia configurabile come un unico centro di imputazione dei rapporti giuridici, la giurisprudenza maggioritaria ritiene che l'obbligo di *repêchage* riguardi tutte le imprese del gruppo e non solo l'impresa dalla quale il lavoratore formalmente dipende. Inoltre costituisce una circostanza considerata rilevante dai Giudici del Lavoro al fine della sussistenza o meno del requisito numerico costituente il presupposto della cosiddetta tutela reale del lavoratore licenziato, per quanto ancora oggi rilevante dopo le modifiche apportate dalla c.d. Riforma Fornero all'art. 18 dello Statuto dei Lavoratori, poichè in tali fattispecie è stato ritenuto che la forza lavoro, a cui si deve fare riferimento debba essere incrementata del numero dei dipendenti di tutte le aziende del gruppo.

• Licenziementi collettivi

Per quanto riguarda la disciplina dei licenziamenti collettivi, fatte salve le già citate disposizioni di cui alla Legge 223/1991, che fanno espresso riferimento a una nozione unitaria d'impresa a taluni specifici fini, il gruppo d'imprese è stato ritenuto rilevante a livello giurisprudenziale.

In particolare, nel caso sia ravvisabile in un gruppo d'imprese un unico centro d'imputazione dei rapporti di lavoro, si deve fare riferimento a tutte le imprese del gruppo, ai fini dell'accertamento dei requisiti dimensionali e quantitativi stabiliti dall'art. 24 della l. n. 223/1991, per l'applicazione della disciplina dei licenziamenti collettivi da essa dettata.

Conseguentemente, in ipotesi di più di cinque licenziamenti contestuali nelle imprese del gruppo, troverà applicazione la normativa di cui alla l. n. 223 del 1991, e la mancata applicazione dell'iter procedurale previsto dall'art. 4 di detta legge comporterà l'inefficacia dei licenziamenti comminati.

10. E' possibile avviare un licenziamento per motivi economici nella Pubblica Amministrazione? In questi casi quali adattamenti esistono con riferimento alla definizione di cause economiche?

Si può avere il licenziamento del dipendente pubblico anche per giustificato motivo oggettivo. Tuttavia, a differenza di quanto avviene nell' impiego privato, le esigenze organizzative del datore danno luogo all'istituto dell'eccedenza di personale e del collocamento in disponibilità. Di conseguenza il giustificato motivo oggettivo nel pubblico impiego si riferisce esclusivamente a circostanze inerenti al lavoratore stesso: l' interdizione dai pubblici uffici, che può derivare da una sentenza penale di condanna; la sopravvenuta inidoneità fisica, purchè non sia possibile inquadrare il lavoratore in livelli equivalenti o anche inferiori.

DISMISSAL DUE TO BUSINESS REASONS IN SPAIN

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Introduction

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

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

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

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

The Spanish legal system allows dismissals due to business reasons, distinguishing between economic causes and TOP causes (technical, organizational or productive). As mentioned, the definition and regulation of these causes has, in recent years (specialy as

a result of the 2012 labor reform), evolved so as to facilitate the concurrence of these causes.

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

- Economic causes: It is understood that economic causes concur when the results of the company derive a negative economic situation, in cases such as the existence of present or expected losses, or the persistent decline in the level of ordinary revenues or sales. In any case, the decrease is considered persistent if for three consecutive quarters the level of revenues or sales each quarter is lower than in the same quarter of the previous year. Therefore, due to this definition, a company with benefits but with expected losses or a decline in revenues or sales during three consecutive quarters can legally procede to a dismissal for business reasons.

- TOP causes: It is understood that exist technical causes when changes occur, among others, in the field of the means or instruments of production; organizational reasons exists when changes occur, among others, in the field of systems and working methods or the organization of production; and productive causes exist when changes occur, among others, on the demand for the products or services the company intends to place on the market. According to these definitions, it is clear that, nowadays, in Spain it is not difficult for a company to allege TOP causes so as to procede with a dismissal.

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

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

In the Spanish legal system, accordint to the Supreme Court's doctrine, when the cause alleged by the company is an economic cause, it is required that this cause affect the entire company and not just the work center where the dismissal occurs. On the

contrary, if the alleged causes are TOP, the rule is more flexible and it allows the technical, organizational or productive mismatch to affect only the wokplace where it is needed to perform the dismissal, without requiring that cause to concur in the rest of the company.

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

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

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

- Collective redundancies

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

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

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

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

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

After the development o fht econsultation period, the employer must notify the labor authority of the result of the negotiation. If the company and workers' representatives have reached an agreement, the employer must also transfer a full copy of the agreement to the labor authority. In absence of an agreement, the employer must inform the workers' representatives and the labor authority of its final decision regarding the redundancies and its conditions.

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

- No collective redundancies

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

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

a) Written notice to the employee affected by the dismissal, 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 of salary per year of service, with maximum of 12 monthly payments.
c) Notice period of 15 days, computed from the delivery of the written communication of the dismissal to the workers' representatives.

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

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

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

- Explicit retention priority

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

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

- Implicid retention priority

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

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

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

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

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

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

relation to the amount of the economic compensation to which the worker is entitled in relation to the size of the company.

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

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

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

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

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

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

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

- Collective redundancies: according to article 124 of the Law 36/2011, October 10, regulatory of the social jurisdiction (LJS, hereinafter), collective redundancies will be declared:

  - Unfair/wrongful when the employer has not proven the concurrence of the business cause alledge in the written comunitation send to the workers' representatives. In this case, the company may choose between reinstaiting the affected workers to their job post or paying them the economic compensation for unfair dismissal, equivalent to 33 day's pay per year of service with a maximum of 24 monthly payments.

  - Null when the company has proceded to a redundancy without complying with the legal obligation to develop a consultation period with the workers' representatives or given them the legally required documentation, as well as when the dismissals is discriminatory or violates workers' fundamental rights and public freedoms. It is important to note that the company's default on its obligation to negotiate in good faith during the consultation period with the workers' representatives is considered cause for annulment, because the consultation period not has been carried out effectively with the objetive of achieving an agreement. In this case, the worker has the right to be reinstated in his/her workplace and the right to unpaid wages.

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

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

- No collective redundancies. The individual or not collective dismissal due to business reasons will be declared (article 123 LJS):

- Unfair/wrongful when the company has not complied with the formal requirements established in article 53.1 ET (written communication, provision of compensation and notice). However, the lack of notice or an excusable error in the calculation of compensation does not lead to an unfair dismissal, notwithstanding the employer's obligation to pay the wages corresponding to the days of unfulfilled notice or payment of the economic compensation in its correct amount.

- Null/void when:
  a) The dismissal is discriminatory or violates workers' fundamental rights and public freedoms.
  b) The dismissal is fraudulent as it has tried to avoid the rule established in article 51.1 ET for collective redundancies. In this sence, this article establishes that when the company carries out redundancies in successive periods of 90 days without exceeding the thresholds for collective dismissals and without the occurrence of new business causes, the dismissals must be considered fraudulent.
  c) The dismissal affects wokers that are exercicing their right to lisences and leaves of absence due to maternity, paternity or to take care of child or dependent family members or victims of gener violence in the terms stablished in sections c), d) and e) of article 123 LJS.

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

In the Spanish legal system there are no specialties in the definition, criteria or procedure of the dismissal due to business reasons in relation to the size of the company. That is, there are no specialties for microcompanyes 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 procedur for collective redundancies: when the company has fewer than fifty employees the maximum duration of the consultation period is reduced from 30 to 15 days.

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

In the Spanish legal system, the only specialty that exists in relation to the legal regime of dismissal due to business reasons when the dismissal occurs within a company that is part of a holding or business group is in relation to the documentation the company

must deliver to the workers' representatives in the consultation period in the context of collective redundancies.

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

- When the company that initiates the procedure is part of a holding or business group with the obligation to prepare consolidated financial statements and when the controlling company is established in Spain, the documentation must include the annual accounts and consolidated management report of the controlling company of the group, duly audited (when legally required), when there are debit or credit balances with the company that has initiated the redundancy procedure.

- If there is no requirement to prepare consolidated accounts, in addition to the legally required financial documents of the company that initiated the redundancy procedure, the company must give the workers' representatives the financial documentation of the other companies part of the holding, duly audited (when legally required), when these companies have their headquarters in Spain, have similar activity or belong to the same economic sector and have debir or credit balances with the company that has initiated the redundancy procedure.

In this context, it is interesting to note that the case law has raised a debate about the scope of the business causes when the redundancy takes place in a company that is part of a holding or business group: company vs. holding or business group. However, the majority of the court decisionts have stated that, notwithstanding the above mentioned obligation of financial documentation, the scope of the economic cause or the TOP causes must be assessed in the campany that initiated the redundancy procedure and not in the whole holding or business group.

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

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

Regarding the definition of the business reasons, the additional provision 20th of the Worker's Statute states that it is understood that economic casusas 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 reasins when changes occur, among others, the field of systems and methods of work of the workers assigned to public service.

DISMISSAL DUE TO BUSINESS REASONS IN THE UK

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Introduction

Dismissals due to economic reasons in the UK is effectively considered under two different systems, depending on the number of dismissals taking place; however, it must be noted that one system does not automatically mean compliance with the other, and as such where there are in excess of 20 dismissals it is probably better viewed as an additional element of obligation rather than two distinct and mutually exclusive systems.

Between January 2013 and March 2014, according to Office for National Statistics, there have been 624,000 dismissals in the UK for redundancy reasons.

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

The UK legal system allows dismissals due to business reasons in two different contexts. Where the dismissal forms part of a collective set of dismissals a wide definition contained in s.195(1) of the Trade Union Labour Relation (Consolodation) Act 1992 (TULRCA, hereinafter) is applied, which covers 'references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related'. Where the dismissal is individual (or less than 20) rather than the collective (more than 20) there is a requirement that any such dismissal is fair in accordance with the law relating to unfair dismissal pursuant to Part X of the Employment Rights Act 1996 (ERA, hereinafter). Such dismissals are defined at s.139 ERA, which considers them through three distinct sub-categories:

- When the employer is ceasing business

Falling within this sub-category is relatively easy to determine. It simply requires looking at whether a business which was previously in operation has shut down. However, this category does not just cover permanent cessations of business but also covers temporary cessations, and thus if a business closes down for renovation purposes for a matter of months this might also fall within this category.

- When the employer is moving his place of business

It is clear from case law, including *Managers (Holborn) Ltd v. Hohne* [1977] IRLR 230, that not all business premises moves could justify dismissal, but only moves that were deemed to be substantial. Thus determining the employee's place of work was important in order to determine how substantial such a move of premises was. Judicial confusion surrounding the correct test for determining an employee's place of work was brought to an end by the Court of Appeal in *Bass Leisure Ltd v. Thomas* [1997] IRLR 513. The Court of Appeal held that the correct approach was a factual approach, which looked at where in fact the employee actually worked on a daily basis, rather than a contractual approach, which took into account contractual provisions such as mobility clauses which may have provided alternative places of work for an employee.

- When the employer is reducing his workforce number

This is quite a wide category, and covers a number of different situations including where there is less work available for the workforce, or where the work is being rationalized or where more efficient practices are being adopted. The question to be asked is whether requirement of the employer for employees to do work of a particular kind has ceased or diminished? The employer is free to adopt the most efficient practices, and it is difficult to question such managerial decisions.

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

In the UK legal system, where the dismissals are affecting more than 20 workers then the focus will be on the single establishment (the workplace) at which the worker is employed. This is in line with the jurisprudence of the Court of Justice of the European Union (CJEU, hereinafter); however, the Court of Appeal in the recent *Woolworths* litigation has referred this matter to the CJEU, asking the question whether such dismissals ought to be viewed across the whole company or individual workplaces. Thus the current position may alter depending on that ruling, which is expected in early 2015.

Whereas, according to s.139(2) ERA, where the dismissal for business reasons is impacting upon individuals then the focus is on the entire company, along with the business of any associated employer that is considered, rather than just the workplace where the the dismissal will occur.

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 UK legal system, the procedure to follow in cases for dismissal for business reasons varies depending on whether the dismissal is collective or not.

- Non-collective Redundancies

If an employer can show that dismissal was for a redundancy reason, then unless the employer has acted with clear unfairness then that dismissal will generally be deemed to be a fair one. There are two central obligations placed on an employer under these circumstances: make reasonable efforts to find suitable alternative employment, and to undertake consultation on an individual basis.

The obligation on an employer is to take reasonable steps to find alternative employment for an employee facing redundancy. In deciding whether a position is suitable for an individual an objective assessment of the role and the skill set of the individual concerned should be undertaken.

In terms of consultancy case law has held that a reasonable employer will hold individual consultation with those facing the prospect of dismissal by reason of redundancy. The principles that underpin the content of the consultation can be read in *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price & Others* [1994] IRLR 72, which stated that a fair consultation ought to involve:

a) Consultation when proposals are still at a formative stage;
b) Adequate information on which to respond;
c) Adequate time in which to respond;
d) Conscientious consideration by an authority of the response to consultation.

Consultation in this context is about giving the individual affected a fair and proper opportunity to understand fully the matters being consulted, and to have their views considered properly.

There are no set procedures or time frames for such consultation, just that sufficient consultation has taken place.

- Collective Redundancies

The UK transposed their obligations under the Council Directive 98/59/EC using the second Option available to them which did not link the number of redundancies to the size of the establishment, but instead merely focused on the number of redundancies. To qualify as a collective redundancy there must be, over a reference period of 90 days, a proposal to make at least 20 workers redundant.

Where there is 20 redundancies proposed the company must consult with worker representatives at least 30 days before making any redundancies. Consultation is to take place with trade union representatives, where the workforce is represented by a trade union, or with elected employee representatives (the procedure for selection is contained at 118A and 118B TULRCA) where there is no trade union representatives, or if the employer does not recognize the trade union.

The period of consultation is increased to 45 days before any redundancies can be effected where there are 100 or more employees affected by the proposed redundancies. Reference to a period of consultation lays down the minimum period of consultation.

The aim of the consultation is to negotiate measures so as to avoid or reduce the number of redundancies and to mitigate the consequences for affected workers with social measures, such as relocation or training measures so as to increase theses worker's employability. This is in line with the ECJ case of *Junk v Kuhnel*. The key is negotiation, as it is expressed at s.188(2) TULRCA that consultation has to be 'undertaken by the employer with a view to reaching agreement with the appropriate representatives'.

The employer, in complying with their consultation obligation, has to disclose certain information in writing to the appropriate employee representatives, which includes:

a) The reason for the proposed redundancies
b) The numbers and descriptions of employees whom it is proposed will be dismissed by reason of redundancy
c) The total number of employees of that same description employed at the establishment in question
d) The method that eill be adopted to select employees to be made redundant
e) The proposed method of carrying out the redundancies
f) The proposed method of calculating the amount of redundancy payments

Pursuant to regulation 3 of the Collective Redundancies (Amendment) Regulations 2006, an employer is also obliged to inform the Secretary of State about any pending collective redundancies either 30 days or 45 days (depending on the number of redundancies) before any notice of dismissal has been issued. This notice must identify the representatives that are being consulted, when consultation began, along with any further information the Secretary of State may require. A copy of this notice must be sent to the representatives. Failure to give this notice may result in a fine.

One of the more controversial aspects of TULRCA is that it introduces an exception to the need for consultation where it was not reasonably practicable to comply with the requirements to provide information or consult, but where they have taken all such steps to try and comply as is reasonably practicable in the circumstances. This defence is considered on a case by case basis; however, it appears to be only available in the most exceptional of circumstances, such as where there is a loss of a key work contract which requires instant closure of a business, or part therof.

It should be noted that consultation of the collective does not release the employer from the obligation to consider individual consultation (noted above).

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

The UK legal system does not give retention priority in dismissal for business reasons to any particular group of workers, nor is there a list of criteria that ought to be applied in determining who is to be selected for redundancy purposes. The employer is free to determine the criteria which will be used in selecting employees to be dismissed by reason of redundancy. The key requirement, developed through case law, is that the employer establishes criteria for selecting employees which do not rely solely on the subjective views of the person making the selection, but which can be objectively scored, for example attendance records, disciplinary records and length of service.

In determining appropriate criteria the employer must ensure that none of the criteria creates a discriminatory effect. For instance, where attendance is used as a criterion, absences through, for example, maternity leave must obviously be discounted. This is of paramount importance given that any such concurrent claim for discrimination as a result of discriminatory criterion which ahs led to a redundancy dismissal will not be subject to a statutory cap on the compensation that can be awarded.

The employer must then ensure objective application of the criteria in a fair manner. In determining the fairness of the application the standard to be achieved is to be measured against how a reasonable employer would have applied those criteria. Consistency is clearly a key requirement in application.

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

Workers that are dismissed due to business reasons declared fair in the UK have the right to economic compensation, which is linked to their age, length of service and weekly wage. However, this right is only available to employees who have worked for their employer for at least two years continuously.

For every year that a worker has worked continuously for a business up to the age of 22 they will receive half a weeks pay, for years service, between 22 and 41 they receive one week's pay, and for years service whislt aged over 41 they receive one and a half weeks pay. However, this is capped in two ways:

1. The calculation is capped at 20 years. As such the employees best 20 years are taken into account (so usually their final 20 years of service due to the age criterion);
2. A week's pay is capped at a statutory maximum, which currently stands at £464. As such the calculation uses the lower of the workers weekly pay or £464.

Redundancy payments are protected against corporate insolvency by being deemed a guaranteed paymentunder Part VI ERA. Payment pursuant to s.167 ERA will be made by the Secretary of State out of the National Insurance Fund where insolvency prevents such payment being made by the employer. This will reflect the outstanding balance due to the employee.

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

There is very few additional company obligations aside from economic compensation placed on an employer where the dismissal is due to business reasons.

However, before the expiration of an employees notice period, pursuant to s.52 ERA, an employee, if they have been continuously employed for more than two years, will be

entitled to reasonable time off to look for new employment or to make arrangments for retraining. This time of is to be paid at an appropriate hourly rate.

Although not explicit, an employer may read the obligations under the collective redundancies scheme, that of mitigating the consequences of any compulsory redundancies, as including initiatives such as redlopoying or retraining the redundant employees. However, such will be dependent on the employer.

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

In the UK legal system the consequences for non-compliance with the appropriate legal procedures again must be looked at depending on whether the dismissal was a collective redundancy or an individual redundancy.

- Collective redundancy

Where there has been a failure by the business to either inform or consult with the affected workforce, pursuant to s.188 TULRCA, or a failure with respect electing employee representatives for the purpose of receiving information and consulting, pursuant to s.188A TULRCA, a complaint may be presented to an employment tribunal on that ground. This can be made by:

1. Any of the employees affected by the failure to elect employee representatives, or any of the employees dismissed following such a failure;
2. Where there has been a failure to inform or consult, a complaint on this ground can be made by either any of the employee representatives, trade union representatives, or affected employees.

Failure to comply with the collective redundancy system results in the award of a protective award, pursuant to s.189(2) TULRCA. This covers the pay which an employee would have received during the protected consultation period, and as such will be subject to a maximum of 45 days. Unlike the calculation for a redundancy payment there is no statutory maximum pay adopted. The tribunal generally commences their consideration of the protective award from the top down. It initially applies the maximum of 45 days, with the burden being on the employer to make submissions as to why a lesser figure ought to be awarded.

Similar to that above for redundancy payments, in the event of insolvency resulting in an employer not being able to pay then a protective award is treated as wages and as

such is considered a guaranteed payment under Part VI ERA, and will be paid out of the National Insurance Fund.

- Non-collective redundancy

Non compliance with either substantive fairness or procedural fairness will see the whole dismissal be deemed an unfair dismissal under Part X ERA. Normally this would result in economic compensation being awarded by a tribunal.

Alongside economic compensation for unfair dismissals the tribunal has the more powerful remedies of reinstatement or reengagement available to them. These two remedies are the primary remedies for unfair dismissal, and must be considered by the tribunal first. Although these do not void or nullify the dismissal as such, in practical terms the effect is the same:

1. Reinstatement. Where a reinstatement order is considered relevant by the employment tribunal then this will have the effect of reinstating the employee in to their old position and treating them as if the dismissal had not taken place. According to s.116(1) ERA, in making a decision whether this order is appropriate the tribunal will take into account the employee's wishes, the practicability for the employer to comply with the order, and whether it would be just to order reinstatement.

2. Reengagement. Where reinstatement is not considered appropriate the tribunal will consider whether the employee can be engaged with a successor of the employer or an associated employer in a comparable position to that previously occupied. The same three factors will be considered in determining whether such an order is appropriate in the circumstances.

There are also common law remedies that would have the same effect of nullifying or voiding the dismissal. These are available where there has been a wrongful dismissal (or a dismissal in repudiatory breach of the employment contract). Such remedies are discretionary and require evidence that trust and confidence between the employee and employer can be maintained, and that damages would be an inadequate remedy. The two common law remedies available are:

1. Specific performance.
2. Injunction.

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

In the UK legal system there are no general specialties in the process of dismissal depending on the size of the enterprise, other than it is a factor that the tribunal may take into account in determining the fairness of the dismissal, pursuant to s.98(4) ERA.

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

Where an employing company forms part of a holding or business group it is the individual company, rather than the wider business group that remains the employer for the purposes of the dismissal. Being such does not alter the legal obligations of that subsidiary company. Consultation must still take place even where decisions have been taken by the parent company, for example about staffing levels, and about which the necessary information has not been received from the parent company. If there is a failure to comply with the consultation requirements as a result of such lack of information then it is the subsidiarty that bears the consequences. As such, the obligation to provide sufficient comnsultation does not change, but the burden on gaining access and providing such information can clearly be higher in such circumstances.

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?

Generally speaking there is no distinction between private and public employment, as such being an employee in a public administration does not alter the approach to dismissals due to business reasons, and employees dismissed for such reasons are subject to the same procedures and have the same rights as listed above; this is further confirmed in the case of *USA v Nolan* [2009 IRLR 923, where the employer was the US Government. However, pursuant to s.159 ERA any employee who is treated as a civil servant for pension purposes is excluded from the individual redundancy scheme, which does remove civil servants from the right to a redundancy payment system. However, such workers usually have a term in their contract providing for such payment, in which contractual compliance is required.

DESPIDO POR CAUSAS EMPRESARIALES EN CHILE

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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 disciplinario, 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 basada en las "[n]ecesidades de funcionamiento de la empresa", la que fue posteriormente suprimida, atendido al abuso en su ejercicio, a la vez que las reformas de fines de los años setenta, incorporó el libre desahucio con pago indemnizatorio, esto es, 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. A partir de la reforma laboral procesal del año 2008, la legislación ha sido más estricta en la fundamentación fáctica del despido, esto es, de la concurrencia de las hipótesis de hecho que la autorizan, con lo que se han fortalecidos las exigencias en la aplicación de esta causal como una de carácter económico-empresarial, especialmente en cuanto a la prueba de sus consideraciones fácticas.

De acuerdo a la última información entregada por la ENCLA 2011 de la Dirección del Trabajo, el uso de la causal de las 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.

1. ¿Cómo se definen (legislación/órganos judiciales) las causas que justifican un despido por causas empresariales?

El ordenamiento jurídico chileno recoge en el artículo 161 del Código del Trabajo una causal de término del contrato de trabajo de carácter económico-empresarial en los siguientes términos:

> "[E]l 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.

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.

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

En el ordenamiento jurídico laboral chileno, la procedencia de la causal de término del contrato de trabajo por necesidades de la empresa 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.

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 dicho procedimiento en relación con el número de trabajadores afectados?

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/las causal/es legal/es de término del contrato de trabajo invocadas por el empleador;
   - Los hechos en los que funda la/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.

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

4. ¿En el ordenamiento jurídico de Chile existen colectivos de trabajadores que gozan de prioridad de permanencia o criterios de selección de los trabajadores afectados por un despido por causas empresariales?

En el ordenamiento jurídico nacional, se establecen prohibiciones al uso de esta causal de término del contrato de trabajo frente a 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.

5. ¿El despido por causas empresariales que sea declarado correcto/procedente da lugar al derecho del trabajador de obtener una indemnización?

En el ordenamiento jurídico chileno, la invocación de esta causal 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 paga 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.

6. Además de, en su caso, el reconocimiento de una indemnización al trabajador, ¿qué obligaciones empresariales se derivan del despido por causas empresariales?

El ordenamiento jurídico chileno no contempla obligaciones adicionales al pago de la indemnización correspondiente en caso de término del contrato de trabajo por causas empresariales, a no ser que se trate de una vulneración de los derechos fundamentales del trabajador con motivo del despido, caso en el cual procede el daño moral. Ello en procedimiento especial de tutela de derechos. Puede también el juez establecer otras medidas reparatorias, como cuando se ha tratado de un despido discriminatorio, que se efectúe de parte de la condenada una jornada de capacitación destinada a la comunidad laboral en la que se enseñen los valores de la no discriminación, o la obligación de establecer en el reglamento interno de la empresa una especial declaración de no discriminación.

7. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales?

En el ordenamiento jurídico chileno, 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.

8. ¿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.

9. ¿Qué consecuencias existen en relación con el régimen jurídico del despido por causas empresariales el hecho que el despido se produzca en el marco de una empresa que forma parte de un grupo de empresas?

El grupo de empresas no tiene reconocimiento legal, sólo jurisprudencial a través de la doctrina de la unidad económica, que establece que se ha tratado de una misma relación jurídica aquella que se haya podido trabar entre el trabajador y empresas que forman parte de un mismo grupo de empresas, trátese de aquellas por dependencia o por coordinación, de modo que nace la responsabilidad laboral de todas ellas en forma indistinta, esto es, responden todas, de aquellas obligaciones laborales en favor del trabajador. Es así como un trabajador que ha prestado servicios para empresas de un grupo de empresas, tendrá el reconocimiento total de la antigüedad en el trabajo a efectos indemnizatorios. Para llegar a ello, el tribunal ha podido establecer que se trata de un grupo de empresas a través de la prueba indiciaria. Se encuentra en tramitación legislativa una moción parlamentaria de ley que define al grupo de empresas, a efectos básicamente de la negociación colectiva.

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 empresarial como la de las necesidades de la empresa.

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

Una de las características del sistema de relaciones laborales chileno es la baja tasa de sindicalización, y en consecuencia, de acción colectiva, ambas en porcentajes inferiores al 10% de la PEA, lo que hace que la actividad contractual colectiva no sea relevante, salvo en ciertos sectores como la minería, en que esos porcentajes se alteran significativamente. Por lo mismo, no resulta relevante la negociación colectiva en materia de despidos, ni existe una cultura negociadora relevante, que permita establecer una negociación de concesiones que favorezca el empleo, en las situaciones de crisis. Por lo mismo, respecto del 90% de los trabajadores, la regulación del despido tendrá origen legal y no contractual.

DESPIDO POR CAUSAS EMPRESARIALES EN MÉXICO

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Introducción

Como se podrá apreciar a continuación los despidos empresariales debido a una causa económica, motivos técnicos, organizativos o de producción, existen en la legislación mexicana, pero sólo en el apartado de relaciones colectivas de trabajo. Además todo procedimiento de despido o de terminación de las relaciones laborales en toda la empresa, requiere de la aprobación de los tribunales de trabajo o de la realización de procedimiento especial ante dichos tribunales.

Por otra parte, los despidos empresariales, si bien si se han presentado en nuestro país,[19] no existe información estadísticas que los pueda clasificar como tales (ver cuadros finales).

En México, la legislación laboral establece despidos en materia individual y colectiva.

Las causales de despido en materia individual son muy precisas. Dentro de las mismas, como se puede observar a continuación, no contempla despidos individuales por causas económicas (artículo 47):

I. Engañarlo el trabajador o en su caso, el sindicato que lo hubiese propuesto o recomendado con certificados falsos o referencias en los que se atribuyan al trabajador capacidad, aptitudes o facultades de que carezca. Esta causa de rescisión dejará de tener efecto después de treinta días de prestar sus servicios el trabajador;
II. Incurrir el trabajador, durante sus labores, en faltas de probidad u honradez, en actos de violencia, amagos, injurias o malos tratamientos en contra del patrón, sus familiares o del personal directivo o administrativo de la empresa o

[19] La industria automotriz es un claro ejemplo de paros técnicos en México, que pueden implicar el despido de una parte de los trabajadores. Al respecto ver: Montiel, Yolanda, "Jornada reducida o despido. La participación democrática de los trabajadores en las decisiones de Volkswagen en Puebla", *El Cotidiano*, núm. 115, México, 2002, pp. 115 y 116; Quiroz Trejo, José Othón; "La crisis de la industria automotriz en México: ¿paradigma o caso aislado?", *El Cotidiano*, noviembre-diciembre de 2009, México, pp. 115-123.

establecimiento, o en contra de clientes y proveedores del patrón, salvo que medie provocación o que obre en defensa propia;

III. Cometer el trabajador contra alguno de sus compañeros, cualquiera de los actos enumerados en la fracción anterior, si como consecuencia de ellos se altera la disciplina del lugar en que se desempeña el trabajo;

IV. Cometer el trabajador, fuera del servicio, contra el patrón, sus familiares o personal directivo administrativo, alguno de los actos a que se refiere la fracción II, si son de tal manera graves que hagan imposible el cumplimiento de la relación de trabajo;

V. Ocasionar el trabajador, intencionalmente, perjuicios materiales durante el desempeño de las labores o con motivo de ellas, en los edificios, obras, maquinaria, instrumentos, materias primas y demás objetos relacionados con el trabajo;

VI. Ocasionar el trabajador los perjuicios de que habla la fracción anterior siempre que sean graves, sin dolo, pero con negligencia tal, que ella sea la causa única del perjuicio;

VII. Comprometer el trabajador, por su imprudencia o descuido inexcusable, la seguridad del establecimiento o de las personas que se encuentren en él;

VIII. Cometer el trabajador actos inmorales o de hostigamiento y/o acoso sexual contra cualquier persona en el establecimiento o lugar de trabajo;

IX. Revelar el trabajador los secretos de fabricación o dar a conocer asuntos de carácter reservado, con perjuicio de la empresa;

X. Tener el trabajador más de tres faltas de asistencia en un período de treinta días, sin permiso del patrón o sin causa justificada;

XI. Desobedecer el trabajador al patrón o a sus representantes, sin causa justificada, siempre que se trate del trabajo contratado;

XII. Negarse el trabajador a adoptar las medidas preventivas o a seguir los procedimientos indicados para evitar accidentes o enfermedades;

XIII. Concurrir el trabajador a sus labores en estado de embriaguez o bajo la influencia de algún narcótico o droga enervante, salvo que, en este último caso, exista prescripción médica. Antes de iniciar su servicio, el trabajador deberá poner el hecho en conocimiento del patrón y presentar la prescripción suscrita por el médico;

XIV. La sentencia ejecutoriada que imponga al trabajador una pena de prisión, que le impida el cumplimiento de la relación de trabajo;

XIV Bis. La falta de documentos que exijan las leyes y reglamentos, necesarios para la prestación del servicio cuando sea imputable al trabajador y que exceda del periodo a que se refiere la fracción IV del artículo 43; y

XV. Las análogas a las establecidas en las fracciones anteriores, de igual manera, graves y de consecuencias semejantes en lo que al trabajo se refiere.

Si el trabajador incurre en alguno de los supuestos arriba señalados, el empleador puede despedir al trabajador sin incurrir en responsabilidad alguna. Sin embargo es necesario que le avise el despido al trabajador por escrito. En donde se le indique claramente la conducta o conductas que motivan la rescisión y la fecha o fechas en que se cometieron. Además el aviso de despido debe entregársele personalmente al trabajador en el momento mismo del despido o bien, comunicarlo a la Junta de Conciliación y Arbitraje (tribunales de trabajo), dentro de los cinco días hábiles siguientes. En este caso, el empleador debe proporciónale a la Junta el último domicilio que tenga registrado del trabajador a fin de que la autoridad se lo notifique en forma personal. En caso de que no se realice el despido de la manera antes señalada, dicho despido se considera como injustificado y en ese sentido nulo.

Como se puede observar, en ninguno de los supuestos arriba señalados la LFT contempla un **despido empresarial en materia individual.** Sin embargo, si establece una **terminación de la relación laboral en materia colectiva** (artículo 34 Fr. II) Dicho despido colectivo se puede presentar bajo dos supuestos: la **reducción del personal** o el despido de todos los trabajadores por el cierre de la empresa (artículo 433 LFT).

1. ¿Cómo se definen (legislación/órganos judiciales) las causas que justifican un despido por causas empresariales?

Las causas que justifican un despido empresarial colectivo, están claramente señaladas en la LFT en el artículo 434. Los diferentes supuestos, pueden implicar tanto la reducción de personal de la empresa o la terminación de la relación de trabajo que involucre a la totalidad del personal de la empresa:

I. La fuerza mayor o el caso fortuito no imputable al patrón, o su incapacidad física o mental o su muerte, que produzca como consecuencia necesaria, inmediata y directa, la terminación de los trabajos;
II. La incosteabilidad notoria y manifiesta de la explotación;
III. El agotamiento de la materia objeto de una industria extractiva;
IV. Las relaciones de trabajo para la explotación de minas que carezcan de minerales costeables o para la restauración de minas abandonadas o paralizadas; y
V. El concurso o la quiebra legalmente declarada, si la autoridad competente o los acreedores resuelven el cierre definitivo de la empresa o la reducción definitiva de sus trabajos.

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

La LFT no contempla si las causas empresariales que permiten a la empresa proceder a un despido por causas empresariales deben concurrir en toda la empresa (unidad económica de producción o distribución de bienes o servicios, artículo 16 LFT) o pueden concurrir sólo en el centro de trabajo (conocido en México como establecimiento, es decir la unidad técnica que como sucursal, agencia u otra forma semejante, sea parte integrante y contribuya a la realización de los fines de la empresa, artículo16 LFT) donde existan problemas económicos.

3. ¿Cuál es el procedimiento que la empresa debe seguir para proceder a un despido por causas empresariales? ¿Existen especialidades en dicho procedimiento en relación con el número de trabajadores afectados?

Si se presenta un despido empresarial colectivo por cuestiones económicas, se deben de seguir procedimientos diferentes, dependiendo el motivo del mismo (artículos 433-439 LFT). En donde se puede observar, que si bien es decisión unilateral del empleador despedir personal de manera parcial o total, siempre debe dar aviso a la Junta de Conciliación y Arbitraje, para que se decida si proceden o no dichos despidos, habiendo en muchos casos, un procedimiento especial a seguir:

1. Cuando se trate de la fuerza mayor o el caso fortuito no imputable al patrón, o su incapacidad física o mental o su muerte, que produzca como consecuencia necesaria, inmediata y directa, la terminación de los trabajos. Se debe dar aviso de la terminación a la Junta de Conciliación y Arbitraje, para que ésta apruebe o desapruebe la terminación.
2. Cuando se trate de la incosteabilidad notoria y manifiesta de la explotación. El patrón, previamente a la terminación, debe obtener la autorización de la Junta de Conciliación y Arbitraje, de conformidad con las disposiciones aplicables a los conflictos colectivos de naturaleza económica.
3. Cuando se trate del agotamiento de la materia objeto de la industria extractiva. El patrón, previamente a la terminación, debe obtener la autorización de la Junta de Conciliación y Arbitraje.
4. Cuando se trate del concurso o la quiebra legalmente declarado, si la autoridad competente o los acreedores resuelven el cierre definitivo de la empresa o la reducción definitiva de sus trabajos. Se debe dar aviso de la terminación a la Junta de Conciliación y Arbitraje, para que ésta apruebe o desapruebe la terminación.

5. Cuando se trate de la implantación de maquinaria o de procedimientos de trabajo nuevos, que traiga como consecuencia la reducción de personal, a falta de convenio, el patrón debe obtener la autorización de la Junta de Conciliación y Arbitraje.

4. ¿En el ordenamiento jurídico de México existen colectivos de trabajadores que gozan de prioridad de permanencia o criterios de selección de los trabajadores afectados por un despido por causas empresariales?

Como ya se ha señalado, la LFT establece que cuando se trate de reducción de los trabajos en una empresa o establecimiento, se tomará en consideración el escalafón de los trabajadores, a efecto de que sean reajustados los de menor antigüedad (artículo 437).

5. ¿El despido por causas empresariales que sea declarado correcto/procedente da lugar al derecho del trabajador de obtener una indemnización?

Salvo cuando se trate de las relaciones de trabajo para la explotación de minas que carezcan de minerales costeables o para la restauración de minas abandonadas o paralizadas, los trabajadores tienen derecho a una indemnización de tres meses de salario y a recibir la prima de antigüedad-doce días de salario, que no puede ser mayor a dos salarios mínimos, por cada año de servicio- que les corresponda (artículo 436).

Cuando se trate de la implantación de maquinaria o de procedimientos de trabajo nuevos, que traiga como consecuencia la reducción de personal, a falta de convenio, el patrón debe obtener la autorización de la Junta de Conciliación y Arbitraje. Los trabajadores reajustados tienen derecho a una indemnización de cuatro meses de salario, más veinte días por cada año de servicios prestados o la cantidad estipulada en los contratos de trabajo si fuese mayor y a la prima de antigüedad que le corresponda.

6. Además de, en su caso, el reconocimiento de una indemnización al trabajador, ¿qué obligaciones empresariales se derivan del despido por causas empresariales?

A parte de la indemnización establecida en la LFT, cuando se trate de reducción de los trabajos en una empresa o establecimiento, se tomará en consideración el escalafón de los trabajadores, a efecto de que sean reajustados los de menor antigüedad (artículo 377).

7. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales?

No realizar los despidos colectivos de naturaleza económica según lo señala la LFT, da lugar a un despido injustificado y en consecuencia nulo. Teniendo el trabajador el derecho de demandar despido injustificado y encontrándose en la posibilidad de ejercer dos acciones a su elección: que se le reinstale en el trabajo que desempeñaba, o que se le indemnice con el importe de tres meses de salario, a razón del que corresponda a la fecha en que se realice el pago (artículo 48).

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

En el ordenamiento jurídico mexicano no existe ninguna especialidad en relación con el procedimiento de despido por causas empresariales en relación con la dimensión de la empresa. Esto es, no existe ningún derecho del trabajo especial para las microempresas o pequeñas y medianas empresas.

9. ¿Qué consecuencias existen en relación con el régimen jurídico del despido por causas empresariales el hecho que el despido se produzca en el marco de una empresa que forma parte de un grupo de empresas?

En México no existe un con un régimen jurídico del despido por causas empresariales para empresas que formen parte de un grupo de empresa. En el caso de México la noción de empresa en el derecho del trabajo es muy limitada.

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 México, se suele hablar de cese del nombramiento y no de despido, en el caso de los trabajadores al servicio del Estado. Por otro lado, la Ley Federal de los Trabajadores al Servicio del Estado no contempla una causal de despido o cese por motivos empresariales.

Sin embargo, el Poder Ejecutivo, dependiendo de la naturaleza de la empresa pública, puede dar por terminadas las relaciones laborales, como ha sucedido recientemente, en el caso de la Compañía de Luz y Fuerza del Centro. Empresa que fue creada por un decreto presidencial y que ha sido extinta también por un decreto presidencial[20], ya que

[20] Decreto por el cual se crea el organismo descentralizado Luz y Fuerza del Centro, 08/02/1994. Consultar en: http://www.sener.gob.mx/webSener/res/Acerca_de/DecLFC.pdf

se tratan de organismos pertenecientes a la Administración Pública,[21] en donde la Suprema Corte ha señalado que es posible terminar las relaciones de trabajo por causa de fuerza mayor.[22]

Decreto por el que se extingue el organismo descentralizado Luz y Fuerza del Centro. 11/10/2009 Consultar en: http://www.dof.gob.mx/nota_detalle.php?codigo=5114004&fecha=11/10/2009

[21] Décima Época. Registro: 2002582. Segunda Sala. Jurisprudencia. Semanario Judicial de la Federación y su Gaceta Libro XVI, Enero de 2013, Tomo 2 Materia(s): Constitucional Tesis: 2a./J. 178/2012 (10a.) Página: 729 "Organismos descentralizados. Al ser entidades integrantes de la administración pública paraestatal, forman parte del poder ejecutivo." El presidente de la República tiene a su cargo el desarrollo de la función administrativa en el orden federal la cual, para efectos funcionales y de organización, se divide en administración pública centralizada y paraestatal; la centralizada tiene como principal característica la dependencia directa e inmediata de los órganos y sub-órganos que realizan dicha función con aquél, con base en un sistema de controles, mando y vigilancia de tipo jerárquico superior-inferior (de manera vertical), mientras en la paraestatal la dependencia es indirecta y mediata, porque sin existir con el Ejecutivo una relación jerárquica, los organismos que la componen se vinculan en distintos grados con la administración centralizada y, por ende, con el titular de dicho Poder, a través de distintos mecanismos de control y vigilancia por parte de éste hacia aquéllos (de manera horizontal). Ahora bien, independientemente de que las relaciones entre el titular del Ejecutivo Federal con las dependencias centralizadas y las entidades paraestatales se den de manera distinta, lo cierto es que ambas realizan funciones públicas en el ámbito administrativo a fin de cumplir con los objetivos que les corresponden en el marco de las leyes, los planes y los programas del desarrollo nacional que compete ejecutar al presidente de la República. De ahí que la circunstancia de que el Poder Ejecutivo se deposite en este último en el ámbito federal como responsable de la administración pública y pueda llevar a cabo sus atribuciones directamente por conducto de las dependencias de la administración pública centralizada o indirectamente con la colaboración de las entidades de la administración pública paraestatal, significa que los organismos descentralizados forman parte de dicho Poder en sentido amplio. Esta situación es aplicable en los ámbitos de gobierno local y municipal, porque la descentralización administrativa en cualquiera de los tres órdenes de gobierno guarda la misma lógica, esto es, la de crear entes dotados de personalidad jurídica y autonomía jerárquica, pero sujetos a controles indirectos para desarrollar actividades administrativas específicas con agilidad y eficiencia. Tesis de jurisprudencia 178/2012 (10a.). Aprobada por la Segunda Sala de este Alto Tribunal, en sesión privada del veintiuno de noviembre de dos mil doce.

[22] Décima Época. Registro: 2003675. Segunda Sala. Tesis Aislada. Semanario Judicial de la Federación y su Gaceta. Libro XX, Mayo de 2013, Tomo 1 Materia(s): Constitucional Tesis: 2a. XL/2013 (10a.) Página: 985 "Organismos descentralizados. Causa de fuerza mayor para la terminación de las relaciones colectivas e individuales de trabajo con sus trabajadores. La genera, previo procedimiento laboral, el decreto presidencial que extingue a una entidad de esa naturaleza". Atento a la naturaleza jurídica de los organismos descentralizados y a su propia personalidad jurídica diversa de la del Ejecutivo Federal, cuando éste emite un decreto de extinción de un organismo descentralizado genera una causa indirecta y mediata de terminación de las relaciones de trabajo, que posibilita el inicio del procedimiento conducente para que la autoridad en materia de trabajo se pronuncie sobre la efectiva terminación de las relaciones laborales, por actualizarse una causa de fuerza mayor conforme al artículo 434, fracción I, de la Ley Federal del Trabajo, pues el citado decreto extingue la fuente de trabajo de los trabajadores de la entidad paraestatal, lo que constituye una cuestión ajena y externa al patrón, ya que no puede concebirse al Presidente de la República y a los órganos que integran la administración pública paraestatal como un solo ente del Estado para efectos de las relaciones laborales que mantiene un organismo descentralizado con sus trabajadores. Lo anterior es así, porque los organismos públicos descentralizados no actúan con la

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

Es importante remarcar que en el caso mexicano no existen estadísticas que nos señalen la existencia de despidos empresariales. Lo que no quiere decir que dicho fenómenos no existan.

Si bien la tasa de desempleo no es alta (5.9), si afecta más a los jóvenes, en donde la tasa de desempleo es prácticamente del doble (9.5).[23] Además, se debe señalar que la informalidad laboral constituye un espacio desconocido en donde actualmente se desarrollan más del 60% de las relaciones laborales en el país.

En México el Instituto Nacional de Estadística y Geografía (INEGI), en su base de datos estadísticos refleja los siguientes datos respecto a su población económicamente activa al primer trimestre del 2014 y la población en desocupación.

Cuadro 1. Población económicamente activa 2013

Indicador	Total	Hombres	Mujeres
Población económicamente activa (PEA)	51.790.637	32.171.182	19.619.455
Población ocupada	49.305.839	30.645.359	18.660.480
Población desocupada	2.484.798	1.525.823	958.975

* Elaboración propia con datos del INEGI.

El mismo INEGI reflejo como datos en el 2011 de los conflictos colectivos, los que se muestran en la siguiente tabla. Sin embargo, no se especifica en la relación algún porcentaje que nos determine los casos de despidos colectivos que se llevan a cabo en México (ver cuadro 2). Lo mismo sucede con las estadísticas proporcionadas por la Junta Federal de Conciliación y Arbitraje (ver cuadros 3, 4 y 5).

personalidad del Estado y, en ese sentido, no puede sostenerse que el decreto de extinción de un organismo descentralizado sea un decreto que involucra al patrón para efectos de no darse la causa de fuerza mayor aludida; y no lo involucra porque el Presidente de la República no tiene esa calidad, sino que el patrón es el propio organismo público descentralizado, que se ve extinguido a través del decreto presidencial que lleva a cabo una autoridad con la que no existe relación jurídica como el patrón. Amparo directo en revisión 3345/2012. Sindicato Mexicano de Electricistas y otros. 30 de enero de 2013. Cinco votos. Ponente: Luis María Aguilar Morales. Secretaria: Úrsula Hernández Maquívar.

[23] La Jornada, "México, entre los países con peor desempeño en reducir el desempleo y recuperación salarial: OIT", http://www.jornada.unam.mx/2013/12/18/economia/028n2eco (consultado 22/05/2014).

Cuadro 2. Conflictos colectivos y motivos por sector económico 2011

Conflictos colectivos de trabajo y motivos por entidad federativa y sector de actividad económica 2011 Cuadro 2.3.7

Entidad federativa Sector de actividad económica	Total de conflictos	Motivos del conflicto									
		Total	Nuevas condiciones de trabajo	Titularidad de contrato	Pago de cuota sindical	Suspensión de relaciones laborales	Aumento de salario	Revisión de contrato	Firma de contrato	Otros	No especificado
Estados Unidos Mexicanos	**797**	**825**	**2**	**671**	**3**	**1**	**7**	**7**	**84**	**46**	**4**
Agricultura, ganadería, aprovechamiento forestal, pesca y caza	12	12	0	12	0	0	0	0	0	0	0
Minería	1	2	0	1	0	0	0	0	1	0	0
Extracción de petróleo y gas	0	0	0	0	0	0	0	0	0	0	0
Electricidad y agua	1	1	0	0	0	0	0	0	1	0	0
Construcción	86	70	0	47	0	0	0	0	17	5	1
Industrias manufactureras	184	186	1	167	0	0	2	2	2	12	0
Comercio	190	198	0	174	1	0	1	4	17	1	0
Transportes, correos y almacenamiento	62	62	0	43	0	0	0	0	2	16	1
Información en medios masivos	3	3	0	3	0	0	0	0	0	0	0
Servicios financieros y de seguros	4	4	0	2	0	0	1	0	1	0	0
Servicios inmobiliarios y de alquiler de bienes muebles	3	3	0	3	0	0	0	0	0	0	0
Servicios profesionales	17	17	0	14	0	0	0	0	2	0	1
Dirección de corporativos y empresas	0	0	0	0	0	0	0	0	0	0	0
Servicios de apoyo a los negocios	82	83	0	78	0	0	3	1	0	1	0
Servicios educativos	27	27	0	20	1	0	0	0	3	3	0
Servicios de salud y de asistencia social	8	8	1	7	0	0	0	0	0	0	0
Servicios de esparcimiento y culturales	2	2	0	2	0	0	0	0	0	0	0
Servicios de hoteles y restaurantes	106	117	0	79	0	0	0	0	37	1	0
Otros servicios, excepto del gobierno	24	24	0	15	0	1	0	0	1	6	1
Actividades del gobierno	4	5	0	4	1	0	0	0	0	0	0
No especificado	1	1	0	0	0	0	0	0	0	1	0

*INEGI. Estadísticas sobre relaciones laborales de jurisdicción local de los EUM 2011. file:///D:/alfredo.juridicas/Downloads/Laborales_2011.pdf Consultado 7/06/14

Cuadro 3. Conflictos laborales obrero-patronales en el ámbito de jurisdicción federal ante la Junta Federal de Conciliación y Arbitraje

Año	Registradas	Resueltas
1994	903	742
1995	831	803
1996	1,565	1,057
1997	885	867
1998	1,284	927
1999	771	768
2000	396	423
2001	405	504
2002	488	292
2003	392	335
2004	349	337
2005	361	344
2006	442	411
2007	471	464
2008	504	483
2009	336	335

2010	359	400
2011	450	413
2012	466	459
2013	189	255

*Elaboración propia datos del 1er. Informe de Labores de la STPS 2012-2013.

Cuadro 4. Asuntos por tipo de juicios 2012-2013

Tipo de juicio	**Número de asuntos en trámite al cierre del mes de octubre**
Conflictos colectivos	326
Emplazamientos a huelga	985
Huelgas	27
Total	1.338

*Informe Anual de Labores Diciembre 2012- Octubre 2013 (consultado 07/06/14) http://www.stps.gob.mx/bp/secciones/junta_federal/secciones/documentos/ANEXO%20ESTAD%C3%8DSTICO-JFCA-2013.pdf

Cuadro 5. Asuntos en trámite: 326. 2012-2013

Concepto	**Ene. 13 – Oct. 13**	**Dic. 12 – Oct. 13**	**Dic. 06 – Oct. 07**	**Dic. 00 – Oct. 01**	**Dic. 94 – Oct. 95**
Recibidos	402	469	370	364	1,563
Terminados	263	319	382	378	895
Índice de terminación	65.4%	68.0%	103.2%	103.8%	57.3%
Asuntos conciliados	103	109	94	7	12
Índice de conciliación	39.2%	34.2%	24.6	1.9%	1.3%

*Informe Anual de Labores Diciembre 2012- Octubre 2013 (consultado 07/06/14) http://www.stps.gob.mx/bp/secciones/junta_federal/secciones/documentos/ANEXO%20ESTAD%C3%8DSTICO-JFCA-2013.pdf

Por otra parte, la conflictividad laboral individual atendida por la Procuraduría Federal de la Defensa del Trabajo (Profedet) en el período 2006-2012, estuvo centrada en los siguientes motivos: reclamos de aportaciones (41.0%), solicitudes de designación, de beneficiarios (12.7%), **despidos injustificados (12.4%)** y reclamos de prestaciones establecidas conforme a la Ley Federal del Trabajo (12.1%), entre otros con menor participación. Del servicio de representación jurídica al mes de junio, patrocinó y

obtuvo resolución favorable para 10,159 demandas promovidas ante la Junta Federal de Conciliación y Arbitraje, lo que representa un valor de efectividad del 89.6% en atención a las demandas presentadas por los trabajadores a través de dicha dependencia federal[24]. En el primer bimestre de 2014[25], se concluyeron 3,989 juicios y se resolvieron a favor del trabajador 3,485 convenios y ejecuciones de laudo a favor de los trabajadores y sus beneficiarios con un monto recuperado de 329.7 millones de pesos.

En razón a los asuntos atendidos por la Profedet de acuerdo al motivo de conflicto[26] por despido y rescisión de contrato tanto en conciliación, asesoría y juicio podemos percatarnos del alto porcentaje que ocupan de la totalidad la terminación de la relación laboral sin importar las causales del mismo, pero no se reflejan en dichas estadísticas la existencia de despidos empresariales en materia individual, a lo que se confirma lo dicho.

[24]Informe de rendición de cuentas 2006-2012 (consultado el 15/05/2014) http://www.profedet.gob.mx/profedet/pdf/IRC_PROFEDET_2_PROFEDET.pdf.

[25] Información institucional del órgano desconcentrado a febrero del 2014 (consultado 15/05/2014) http://www.profedet.gob.mx/profedet/pdf/informe_transparencia.pdf

[26] Estadísticas del Sector (consultado 25/05/2014) http://www.stps.gob.mx/bp/secciones/conoce/areas_atencion/areas_atencion/web/menu_infsector.html

DESPIDO POR CAUSAS EMPRESARIALES EN URUGUAY

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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 referencias normativas 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 se 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 (legislación/órganos judiciales) las causas que justifican un despido por causas empresariales?

El Derecho positivo uruguayo no contiene una definición de despido ni tampoco consagra 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 a 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 dicho procedimiento en relación con el número de trabajadores afectados?

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. ¿En el ordenamiento jurídico de Uruguay existen colectivos de trabajadores que gozan de prioridad de permanencia o criterios de selección de los trabajadores afectados por un despido por causas empresariales?

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).

5. ¿El despido por causas empresariales que sea declarado correcto/procedente da lugar al derecho del trabajador de obtener una indemnización?

La única circunstancia que puede provocar que el trabajador pierda su derecho a recibir la indemnización por despido, es aquella en que el mismo ha estado determinado por notoria mala conducta, la que debe ser demostrada por el empleador.

6. Además de, en su caso, el reconocimiento de una indemnización al trabajador, ¿qué obligaciones empresariales se derivan del despido por causas empresariales?

No existen previsiones a este respecto.

7. ¿Qué consecuencias se derivan del incumplimiento empresarial de la normativa legal sobre despido por causas empresariales?

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 pretendidamente 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.

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

No hay normas sobre el punto.

9. ¿Qué consecuencias existen en relación con el régimen jurídico del despido por causas empresariales el hecho que el despido se produzca en el marco de una empresa que forma parte de un grupo de empresas?

No hay normas sobre el punto.

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?

No está previsto que las causas empresariales puedan ser invocadas por la Administración Pública para disponer despidos de sus funcionarios. Éstos poseen un régimen laboral que comúnmente es calificado como estatutario, que contiene disposiciones específicas que brindan una tutela intensa de la estabilidad laboral, que en general sólo habilitan la destitución en casos de ineptitud, omisión o delito, comprobados mediante sumario.

DISMISSAL DUE TO BUSINESS REASONS IN CANADA

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Introduction

Canada is 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.

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 31% of the labour force[27]) derive their rights from the collective agreement. They 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 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.

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, although the current unemployment rate is still higher than it was in 2008.[28] Even while there is net job growth, some workers continue to lose jobs due to

[27] Union density in the public sector is 74.6% and 17.5% in the private sector.

[28] Sharanjit Uppal and Sébastian LaRochelle, "Employment Changes Across Industries During the Downturn and Recovery" Statistics Canada, Catalogue no. 75-006-X, Insights on Canadian Society, April 2013).

business reasons. Unemployment statistics report that job losers constitute about 50% of the newly unemployed, but not all job losers lose their jobs for business reasons.[29] 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.[30]

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.

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

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.

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.

1.2 Minimum Standards Legislation

In Ontario, the *Employment Standards Act* (ESA) deals with minimum standards, including several matters related to termination.[31] However, it does not require the

[29] "EI Monitoring and Assessment Report 2012/13" (Employment and Social Development Canada, March 2014). About 15% are job leavers. The remainder are workers who have not worked in the past year.

[30] 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.

[31] Employment Standards Act, 2000, S.O. 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 employees 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.

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)[32], 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."[33]

1.3 Collective Bargaining

Labour relations statutes do not prohibit unionized employers from shutting down for business reasons. While collective agreements typically 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.

2. Must the business reasons that justify the dismissal concur in the whole company or can they concur in the workplace where dismissal occurs?

Employers are free to dismiss employees in any part of the company they choose.

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 relation to the number of workers affected?

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.[34]

[32] *Canadian Labour Code*, RSC 1995, c L-2 s 241(1).
[33] Ibid., s. 242(3.1)(a).
[34] *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362.

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 without (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 begin terminated, the shortest being 8 weeks (50 to 199 dismissed) and the longest being 16 weeks (more than 500). 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. That information must also be posted in the workplace.[35] There is no 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.[36] 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.[37]

[35] ESA, s. 58; O. Reg. 288/01, s. 3.
[36] CLC, s. 212; Canada Labour Standards Regulations, C.R.C., c. 986, s. 26.
[37] Ibid, ss. 214-226.

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 include 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.

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

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 vary. For example, seniority may be plant-wide or limited to a particular department. As well, unions sometime negotiate that notice of economic lay-offs must be given.[38]

[38] D. Brown and D. Beatty, *Canada Labour Arbitration*, 3 ed (Aurora: Canada Law Book, 1992, loose-leaf), c 6.

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

5.1 Common Law

The common law requires that an employer provide notice or pay in lieu of notice when dismissing employees for business reasons. The amount of notice or pay in lieu of notice 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.[39] Economic circumstances may play a limited role in calculating reasonable notice. During a recession, employees will find it harder to find re-employment and this weighs in favour of extending notice periods. However, during a recession employers need to be able to reduce their workforce at a reasonable cost. Courts have articulated the position that the economic outlook for both the employer and the employee must be considered in determining reasonable notice, but have not given economic factors too much weight.

5.2 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 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.[40] 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.[41] Where there is a mass termination (see §3.2) employers are entitled to longer notice periods or pay in lieu of notice.

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

[39] *Bardal v. The Globe and Mail* (1960), 24 D.L.R. (2d) 140.
[40] ESA, ss. 54-57.
[41] O.Reg. 288/01, s. 2(1)8

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.[42]

5.3 Employment Insurance Act

The object of the Employment Insurance Act[43] (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 average weekly insurable earnings. The maximum benefit period ranges between 14 and 45 weeks, depending on the unemployment rate in the region and the number of insurable hours.[44]

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

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 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.

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

7.1 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

[42] *ESA*, ss. 64-65.

[43] S.C. 1996, c. 23.

[44] Canada, Parliamentary Information and Research Services, The Employment Insurance Program in Canada: How It Works, (Ottawa: Library of Parliament 2013) at 5.

has acted in bad faith in the manner of dismissal and the employee has suffered damages as a result.

7.2 Minimum Standards Legislation

If an employee chooses to pursue an ESA claim rather than a common law claim, generally they are required to attempt to resolve the matter directly with their employer before making a complaint to the Employment Standards Branch of the Ministry of Labour. If the complaint is assigned to an Employment Standards Officer, then the officer will assess the merits of the complaint and may attempt to facilitate a voluntary settlement. 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, up to a maximum of $10,000. An employer who has violated the ESA by failing to pay termination or severance pay may also be penalized, but this rarely occurs.

7.3 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 collective agreement restricts the employer's freedom, 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.

8. 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 provided 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.

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

The primary issue that arises in this context is the question of who is the employer or can be held liable for the employer's responsibilities, the holding company or the subsidiary. This can make a difference where the subsidiary has gone bankrupt but the holding company remains solvent or, in the employment standards context, whether the employees are entitled to severance pay.

In the first instance, a determination has to be made about who is the employer. The most common test is a multi-factor test that aims to determine which entity exercises the greatest control over the performance of work.[45] Where the subsidiary operates at arm's length from the holding company it will likely be found to be the employer for the purposes of the common law as well as for minimum standards and collective bargaining law.

Even after there has been a determination of who is the employer, it may also be possible to establish that the holding company is jointly responsible for the obligations of the subsidiary under related or common employer provisions. However, the mere fact that two entities have common ownership is not sufficient. In the absence of some further connection between the operations of the parent and subsidiary it is extremely unlikely that joint liability will be found.[46]

Finally, in some circumstances it is possible for employees to obtain an oppression remedy available under Canadian business corporations' statutes. As creditors of the corporation they can bring an action on the basis that a corporate restructuring was unfairly prejudicial to or unfairly disregarded their interests.[47]

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.

[45] *York Condominium Corporation* [1977] OLRB Rep. 645.
[46] Downtown Eatery (1993) Ltd. v. Ontario (2001), 54 O.R. (3d) 161 (Ont. C.A.).
[47] Ibid.

DISMISSAL DUE TO BUSINESS REASONS IN THE UNITED STATES OF AMERICA

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Introduction

As an introductory note, one should remember in speaking about U.S. labor and employment law that we do not have a "unitary" system of the type one might find, for example, in Germany. Rather, because of the nature of our federal system, we have a mix of state and federal law that conditions the employment relationship. For an outsider (and yes, at times for us!) this can be confusing.

In a number of instances, for example, in the case of minimum wage law, federal law (by Congressional mandate) does not displace state law. State law can supplement federal law by stating higher minimum wage rates.

In other cases, federal law and state law may both provide prohibitions against, e.g., employment discrimination. The complaining individual may elect which system of protections to invoke. For example, federal law states limits on liabilities for discrimination that state law may not have.

Today, employment is regarded as a matter of contract. Contract law is a matter for the states. In the United States, the default rule is, that unless the parties contract otherwise, employment in the private sector is presumed to be on an at-will basis. Broadly speaking, European systems –and perhaps others– put a premium on employment stability. The U.S. puts a premium on capital mobility. This generalization helps to explain some of the diversion one sees between U.S. employment law and the law of other systems.

As a result of the at-will rule, employers are free to discharge employees for any reason that does not offend a positive enactment of law, e.g., statutes that forbid discharge *on the grounds of* race, color, religion, national origin, sex, age, etc. Economic grounds always constitute a valid reason for discharge, so long as such grounds are not a pretext for a discriminatory or otherwise unlawfully grounded discharge.

I do not have figures for dismissals for economic reasons. As of May 31, 2014, the U.S. Bureau of Labor Statistics reports the unemployment rate at 6.3%, or 9.8 million persons. Readers should note that persons without a job who have not looked for work

over the prior 4 weeks are not counted as unemployed. As of December 2013, 37.7% of all unemployed persons were long-term unemployed (defined as unemployed for 27 or more weeks). For further information, see http://data.bls.gov/timeseries/LNS14000000

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

As noted, employment in the U.S. in the private sector is presumed to be on an at-will basis, unless the parties have contractually arranged otherwise. Employers are free to discharge for any reason that does not offend a postitive enactment of law. Only in cases where a prohibited ground is alleged to be the basis for discharge (e.g., race, sex, age, etc.) would the question of motive arise. The burden is on the employee to show that a discharge was based on a prohibited ground. The employer would come forward with reasons to rebut the employee's charge. Economic grounds constitute a good ground for discharge.

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

Because of the American at-will approach, this question does not arise in our system. Employers remain free to discharge for any economic reason.

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?

Under the WARN Act [Worker Adjustment and Retraining Notification Act], an employer must provide notice 60 days in advance of covered plant closings and mass layoffs. The notice must be provided to the employees or their Union representative, to any State dislocated worker unit and to appropriate units of State government.

A covered employer must have 100 or more employees. Hourly and salaried workers, as well as managerial and supervisory employees must receive notice.

Notice must be given if a workplace is to be closed and an employment loss will be suffered by 50 or more employees for 30 or more days, or if a mass layoff will result in job loss for 500 or more employees for more than 30 days, or in the case of employers with 50-499 employees, if 33% of the workforce will suffer job loss for 30 or more days.

Exceptions to giving of notice exist. A summary of the Act and further details can be found at: http://www.doleta.gov/programs/factsht/warn.htm .

Research has shown that the WARN Act has not been very effective in providing for notice or for retraining (the Act does not itself require retraining, only notice).

For employees represented for the purposes of collective bargaining: under the National Labor Relations Act, an employer would typically have at least the duty to bargain with the union representing its employees over the effects of a closure, and it may also have to bargain over the decision to cease operations where the work will be done by other employees (including those employed by another employer).

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

In contrast to, e.g., German law, United States law makes no provision for protected groups of workers in dismissals for business (economic) reasons. As long as layoffs are made for economic reasons, they are not legally challengeable.

An employer will be well advised to be able to show that it has used "reasonable factors other than age" in making decisions about redundancies to avoid Age Discrimination in Employment Act claims in situations where groups of employees over the age of 40 may be subject to dismissal. Standards that appear neutral but that have a "disparate impact" on a group protected by statute may put the employer to its proof that it did not discriminate, and in the case of age, for example, used reasonable factors other than age to make layoff decisions. However, the burden to show proof that the employer discriminated is high, and courts have given great leeway for employers' "business judgments."

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

In the U.S., a worker who loses his or her position may have a claim for unemployment compensation. Unless contractually required, there would be no claim for economic compensation against the employer. This is another aspect of the employment at will rule.

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

Under U.S. law (a provision of "COBRA" –the "Consolidated Omnibus Budget Reconciliation Act"), workers who will lose their health benefits have the right to continue the benefits provided by their employer's group health plan. Depending on the ciurcumstances, coverage may continue for a period of 18 or 36 months. However, the employee must pay the costs for the entire premium up to 102% of the cost of the plan. Because the employer is not required to make contributions, this can make coverage far more expensive than it was while the worker was employed. Individuals often find the cost prohibitive and do not elect, or find it economically impossible, to continue coverage.

Under the Affordable Care Act ("Obamacare") individuals may turn to the ACA's Health Insurance Marketplace to obtain coverage. For further information, see http://www.dol.gov/dol/topic/health-plans/cobra.htm and related links.

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

As seen, there are few provisions in U.S. law that restrict or condition redundancies. The penalties for failing to give WARN Act notice are backpay and benefits for the period of violation, up to 60 days.

Several states have their own versions of the federal WARN Act, and some have more robust penalties and requirements.

Failure to bargain with a union over redundancies and closures may lead to a variety of penalties, depending on the situation. In some extraordinary circumstances, this may include an order to reopen a facility.

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

In a word, no.

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

In American law, the framework as described is of no legal significance in terms of dismissals.

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 quite possible to dismiss public employees because of financial exigencies, and this has occurred on a rather widespread basis in the U.S. since the financial crisis of 2008. What legal rights public employees might have, and what requirements government actors might have, depend upon several factors. Because the U.S. is a federal system, public employers may be the federal government, its branches and the agencies thereof; the 50 state governments, as well as the District of Columbia, and U.S. territories, and local subdivisions of the states (cities, counties, etc.). The laws conditioning public employee rights depends upon the identity of the employer.