

# “Cause” in collective dismissals

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**Abstract:** According to Spanish law, the definition of collective dismissal, as in Directive 98/59, makes reference to three primary elements: the numerical/quantitative element, the temporal element and the causal element. This latter, the identification of the causes that may justify the collective dismissal, has been the most controversial element in Spain. This study analyzes the legal definition of the causes of these collective dismissals, specifically focusing on the economic causes. It also considers the judicial control of these collective redundancies.

**Keywords:** collective dismissal, number of workers, economic cause, judicial control, reasonable judgment.

## 1. The legal definition of “cause” in collective dismissals: Community framework and Spanish regulation<sup>1</sup>

According to art. 51 of the Worker’s Statute (ET, in accordance with its initials in Spanish), collective dismissal is considered to be the termination of labor contracts based on economic, technical, organizational or production causes which affect, over a period of 90 days, at least:

- a) 10 workers, in companies with less than 100 employees.
- b) 10% of the total company employees in companies with between 100 and 300 workers.
- c) 30 workers in companies having over 300 employees.

Collective dismissal is also understood to be the termination of work contracts that affect the entire company staff, assuming that the number of affected workers exceeds 5, when this is the result of the complete cessation of the company’s business activity due to the same economic, technical, organizational or production causes.

Thus, according to Spanish law, three elements must coincide in order for collective dismissals to occur: a) a causal element, implying the existence of an economic, technical, organizational or production cause; b) a numeric element, referring to the number of terminations that are produced, and c) a time-related element, regarding the period of time over which said dismissals occur.

European community regulations, primarily included in Council Directive 98/59/EC of 20 July on collective redundancies, also consider the notion collective redundancies with regards to these three

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elements. Specifically, article 1 of the Directive states that "collective redundancies means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

- i) either, over a period of 30 days:
  - at least 10 in establishments normally employing more than 20 and less than 100 workers,
  - at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,
  - at least 30 in establishments normally employing 300 workers or more;
- ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question."

A comparison of the community directive text and article 51 ET reveals some differences between these regulations.

First, Spanish law has opted for a collective dismissal model that is based on the 90 day time reference, but applying the numeric thresholds defined in the Community regulation for the 30 day period. This option has been considered perfectly valid from a European law perspective, given that it offers added benefits to employees.

On the other hand, the scope of reference used in article 51 ET to quantify both the number of dismissals practiced as well as the number of workers on staff is the company and not the establishment, as is typically used in Community-based laws. This regulation has raised some doubts as to whether or not this regulation respects the Directive. Specifically, in a recent judgment<sup>2</sup>, the Court of Justice of the European Union (CJEU) declared that, from a European law perspective, the Spanish option is only valid if it proved to be more favorable for employees. Ultimately, this suggests that in order to qualify the dismissal as collective, it is not sufficient to use the company as the reference, as has been done in Spain, but that rather, it is also necessary to verify whether or not the thresholds established in article 51 ET are exceeded in the establishments as well.

Finally, significant differences also exist in the regulation of cause in the Community regulations and article 51 ET. The defining of the cause of the collective dismissal is quite attenuated in Community law, which limits the law to demanding that redundancies be based on "causes that are not inherent in the individual worker"<sup>3</sup>. However, art. 51 ET includes the notion that collective dismissals have economic, technical, organizational or production-based causes.

<sup>2</sup> STJUE of 30 April 2015 (C-80/14, Usdaw case), STJUE of 13 May 2015 (C-182/13, Lyttle case) and particularly in STJUE of 13 May 2015 (C-392/13, Rabal case). See the commentary on this last case by GÓMEZ ABELLEIRA, F.J., "Company, establishment and collective redundancy. Commentary on STJUE of 13 May 2015, Rabal Cañas case (C-392/13)", *Información Laboral*, no. 6, 2015.

<sup>3</sup> Spanish law considers the following to be causes inherent to the individual worker, and not therefore, attributable to causes of collective redundancies: dismissals based on the termination of the time period agreed upon for the completion of the works or service, mutual agreement, dismissals based on circumstances related to the individual worker- death, permanent invalidity and retirement-, it also fails to include dismissals that are based on ineptitude or the inability to adapt to technical developments in the job position, or those that are based on justified absences from work, or dismissals based on the worker's decision or behavior, such as abandon or resignation. Disciplinary dismissals are not considered, nor are terminations caused by the worker such as those resulting from transfers or substantial modifications in job conditions. On the other hand, since they are dismissals due to causes inherent to the employee, the following are considered: dismissals derived from judicial termination of the contract upon request of the worker, due to a company breach (see art. 50 ET), objective dismissals of economic, technical, organizational or production causes, both fair and unfair; disciplinary dismissals and those based on objective causes that are declared or recognized as being fair and, finally, redundancies based on contract termination in the case of fraudulent temporary contracts and *ante tempus* dismissals of temporary contracts.

## 2. Economic, technical, organizational or production causes: conceptual definition and consequences

Defining cause is of great importance in the regulation of collective dismissals in Spain.

This is the case since, if the company wishes to dismiss a number of employees that equals or exceeds that included in article 51 ET, due to economic, technical, organizational or production causes, it should do so based on the procedures described in art. 51 ET and RD 1483/2012, of 29 October approving the rules of procedures for collective dismissal and contract suspension and work day reduction<sup>4</sup>. This procedure, similar to that regulating Directive 98/59, assumes, among other things, that there should be a negotiation or consultation period carried out with the worker representatives for a period of thirty days, in order to prevent or reduce the number of dismissals and to seek out less traumatic alternate measures (temporary contract suspension, work condition modifications, etc.). The lack of a consultation period or behaviors that are not in accordance with good faith during this negotiation phase may result in the invalidation of the collective dismissal<sup>5</sup>. This has occurred, for example, when the company does not provide worker representatives with all of the necessary documentation to ensure the usefulness of the consultation period<sup>6</sup>, or when it is carried out over a shorter period of time than that established by the law<sup>7</sup>. On the other hand, it is also relevant since employers should accredit and prove the economic, technical, organizational and production causes for which the collective dismissal is qualified as justified or lawful<sup>8</sup>.

However, the identification of causes justifying collective dismissals is not a simple issue. For a long time, the legal definition of cause has been excessively generic and abstract. Judges have been obligated, on many occasions, to make determinations regarding cause on a case by case basis. This has led to a great legal uncertainty.

Perhaps for this reason, one of the most greatly affected aspects of collective dismissals in the legislative reform of 2012<sup>9</sup> was this defining of causes. This reform had two main purposes: on the one hand, to clearly and precisely define the circumstances resulting from the existence of economic, technical, organizational or production causes; and, on the other hand, to limit the scope of judicial control over the concurrence of the mentioned causes.

As for the definition of causes, article 51 ET identifies four areas of impact of the causes<sup>10</sup>: the area of means of production ("technical causes"), the area of systems and methods of individual work ("organizational causes"), the area of products and services that the company provides to the market ("production causes") and the area of operating results ("economic causes").

Technical causes are those that affect production methods. These causes exist when changes occur in the production means or instruments. Technical cause exists when these changes result in the introduction of new, more technically advanced machinery or systems, in the computerization or automation of a specific production activity or in improved technological or computer-based systems.

Organizational causes exist when changes occur, among others, in the area of personnel work methods and systems or in production organization methods. These causes refer to the management and

<sup>4</sup> If the number of dismissals does not exceed the thresholds described in art. 51 ET, the employer may decide to carry out the dismissals without the need to follow said procedure: it is sufficient to notify the affected worker or workers of the decision and to pay their compensation as calculated based on 20 days of salary per year of services.

<sup>5</sup> According to Spanish law, when the dismissal is null, the employer is obligated to readmit the worker to their job position, and, additionally, to pay their procedural salaries, which are those that the worker has accrued since the time of dismissal until his/her return to the company.

<sup>6</sup> STS of 27 May 2013 (Appeal no. 78/2012) and STS of 21 May 2014 (Appeal no. 182/2013).

<sup>7</sup> STS of 29 December 2014 (Appeal no. 93/2012).

<sup>8</sup> This, in accordance with Spanish law, permits the termination of the work contract with payment to the worker of a compensation that is calculated based on 20 days of salary per year of company service. On the other hand, if cause is not proven, the dismissal shall be declared unfair or unlawful, and thus the employer should either readmit the workers to their job positions or terminate the contracts, paying compensation that is calculated on 33 days of salary per year of service with the company.

<sup>9</sup> In 2012 various laws were approved that incorporated relevant labor market reforms. Specifically, collective redundancy regulation was modified via Royal Decree Law 3/2012, of 10 February on urgent measures for labor market reform (*Real Decreto Ley 3/2012, de 10 de febrero, de Medidas urgentes para la reforma del mercado laboral*), subsequently processed and approved as Law 3/2012, of 6 July on urgent measures for labor market reform (*Ley 3/2012, de 6 de julio, de Medidas urgentes para la reforma del mercado laboral*).

<sup>10</sup> See MERCADER UGUINA, J.R and DE LA PUEBLA PINILLA, A., *Los procedimientos del despido colectivo, suspensión de contratos y reducción de jornada*, Tiran lo Blanch, 2013.

use of the work force or to the combination of production factors in general, resulting in a readjustment of the production organization, even when this is not based on the prior renovation of the capital equipment, differentiating it from technical causes. To summarize, it relates to a new structuring or reordering of the company organization chart, leaving certain job positions vacant. Common examples of this would be the redistribution of staff for optimization purposes, which may or may not be linked to other causes, such as technical ones. Also, situations of company reorganization with new work distributions fall under this type of cause<sup>11</sup>.

Production causes exist "when there are changes, among others, in the demand of the products or services that the company aims to offer to the market". They refer to the area of products or services making up the company activity, its production capacity. Included in these are contracting or demand changes, a reduction of orders and, a very common cause, a loss of clients. So, contract loss or reduction is a production cause that may justify collective dismissal<sup>12</sup>.

Finally, economic causes are clearly defined in art. 51 ET which states that "economic causes are understood to exist when the company results are in a negative economic situation, in cases such as the existence of current or anticipated losses or the persistent reduction in ordinary income level or sales. In any case, it is understood that the decrease is persistent if, over a period of three consecutive quarters, the level of ordinary income or sales of each quarter is inferior to that recorded from the same quarter of the previous year". The law includes a novel element with respect to the previous legal regulation, as it requires that the negative situation may be determined, amongst other possible assumptions, by "the existence of current or anticipated losses, or the persistent decrease in the level of ordinary income or sales".

The majority of collective dismissals in Spain are justified by economic-based causes<sup>13</sup>. When appealing to technical, organizational or production causes, it is common to also allege economic causes that may reinforce or support the dismissal decision. It is precisely regarding these economic causes that some problems of relevance arise. The first comes from the fact that the law refers to a negative economic situation that may be based upon "anticipated losses". Here, the issue concerns the fact that these anticipated losses refer to future acts that are uncertain and therefore prevent the use of reliable and accurate accounting data. But in practice, the anticipation of losses may be accredited when a major client has been lost or when there has been a progressive decrease in business volume which may not be justified as a changing trend. The second issue is related to the so-called "the automatism clause"<sup>14</sup>: "in any event, it is understood that the decrease is persistent if, over three consecutive quarters, the level of ordinary income or sales from each quarter is lower than that recorded for the same quarter from the previous year", which may cause undesired effects since the law does not quantify or establish a minimum in the decrease in income.

The defining of causes based on economic, technical, organizational or production terms is also relevant when determining the instruments or measures used by employers to accredit their existence. In this regard, RD 1483/2012 differentiates based on whether the alleged cause is economic, technical, or-

<sup>11</sup> As occurred in the decision from STS of 28 January 2015 (Appeal no. 87/2014), which considered that organizational causes exist when, upon the fusion of two business entities, duplicity of work positions exists, leading to the need to simplify and reorder the different departments making up the central services.

<sup>12</sup> So it appears in STS of 21 April 2014 (Appeal no. 126/2013), in the case in which the company lost a client contract, leading to a labor surplus of 44 workers.

<sup>13</sup> There are numerous examples from recent case law on collective dismissals that are based on economic causes. Economic cause is considered to exist when it may be proven that a company has reduced its income over the first three quarters of a specific year by 18.90% as compared to the same period from the previous year. In this case it is concluded that the company is in a negative economic situation, even when it is the case that its performance over the period is beneficial, given that such a substantial reduction in income may irrevocably undermine its results if appropriate measures are not taken (SAN of 11 March 2013, Appeal no. 381/2012; similarly, the following may be cited: STS of 28 January 2014, Appeal no. 46/2013 and STS of 29 December 2014, Appeal no. 83/2014). Economic cause also exists when there is a threat of a major reduction in sales and business volume, negative operating results and financial support at the cost of indebtedness to other companies of the group (STS of 25 February 2015, Appeal no. 145/2014) or when there is a loss of key clients (STS of 25 June 2014, Appeal no. 165/2013). Likewise, economic causes exist when there are major losses in a banking entity, despite receiving public assistance (STS of 18 July 2014, Appeal no. 288/2013).

<sup>14</sup> DESDENTADO BONETE, A., "Los despidos económicos tras la reforma de la Ley 3/2012. Reflexiones sobre algunos problemas sustantivos y procesales", *Actualidad Laboral*, 2012, no. 17.

ganizational or production-based, in each case, imposing different documental obligations. The required documentation is much more demanding and rigorous if the cause is economic (art. 4 RD 1483/2012) but in any case, the omission of relevant information and documentation may lead to the invalidation of the collective dismissal.

Finally, it should be noted that the area in which the alleged cause should be considered differs based on the type of cause. According to repeated doctrine of our courts, economic cause should affect the company as a whole, whereby it is not sufficient to accredit the negative situation of one of the establishments without this situation affecting the entire company<sup>15</sup>. On the other hand, if the causes are technical, organizational or production based, the scope of assessment of the cause is restricted to the establishment, since they are causes that are located in specific points of the business life, normally affecting the functioning of one single unit<sup>16</sup>.

### 3. Scope of judicial control of the existence of causes

Greater problems have arisen in regards to the determination of the scope of the judicial control of the cause. This involves deciding whether, after the worker representatives have refuted the collective dismissal, the judge should limit himself to verifying the existence of the causes alleged by the company or if they should also determine the appropriateness and proportionality of the causes of the specific dismissal measures.

The preamble to Law 3/2012 clearly defined the objectives of the regulation of the collective dismissal: "The law now adheres to defining the economic, technical, organizational or production causes that justify these dismissals, removing other legal references that have introduced elements of uncertainty<sup>17</sup> [...] It is now clear that the judicial control of these dismissals should be in accordance with an assessment of the existence of certain acts: causes". Thus the law focuses on the existence or lack of existence of the cause that justifies the business decision. This is simplistic logic that, in theory, does not result in doubts or permit exceptions: if the court determines that the documentation and evidence submitted suggest that there is the cause as alleged by the company, the collective dismissal should be considered lawful; if this is not the case because the alleged cause has not been proven, the decision to dismiss shall be found to be unlawful.

However, in practice, this is not always the case. The courts have not always limited themselves to verifying the existence of cause in the terms described in art. 51 ET but rather, have tended to include assessment elements regarding functionality, appropriateness or proportionality of the dismissal measure in regards to the economic, technical, organizational or production situation.

STS of 17 July 2014<sup>18</sup> clearly expresses, according to the court's interpretation, the role of the court in regards to the collective dismissal causes. This judgment affirmed that, despite the forcefulness of the preamble to Law 3/2012, neither the very limited role of the courts as described in this preamble nor the absolute discretion of the employer when alleging the cause should be admitted. And for this reason, judicial control should extend beyond «cause» as a fact, not only considering the existence of constitutional interests and international commitments, but also based on the application of the general principles in the exercising of rights. Based on this premise, the Supreme Court suggested that judicial control considers the reasonable judgment of the termination measures carried out. This judgment "would offer triple projection and successive staggering: 1) On the «existence» of the cause that is legally defined as justifying the collective dismissal, 2) On the «appropriateness» of the measure adopted, in the general sense that the measure complies with the legal purposes at hand: either to correct or confront the referred cause, and 3) On the «rationality» of the measure, with the understanding that this third

<sup>15</sup> STS of 14 May 1998 (Appeal no. 3539/1997).

<sup>16</sup> STS of 13 February 2002 (Appeal no. 1436/2001).

<sup>17</sup> The legislature refers to the requirements included in the wording of art. 51 ET, prior to the reform. According to that provision, collective dismissals should contribute to overcoming company problems or ensuring future company viability, leading the courts, on numerous occasions, to make opportune judgments in regards to company management.

<sup>18</sup> Appeal no. 32/2014.

area means that business measures lacking the proportionality element should be excluded for being considered unlawful. As for the latter, proportionality should be understood as, while the courts may not establish the exact «appropriateness» of the measure to be adopted by the employer or censor «opportunity» in terms of business management, dismissals or modifications that are clearly disproportionate in regards to the legally established purpose and the sacrifices imposed on the workers must be excluded as lacking «reasonableness» and thus, being unlawful.

This technique has been applied to the courts in order to determine<sup>19</sup> whether collective dismissals are “legally valid” –when the concurrence of the legal cause alleged by the company is accredited– or, to the contrary, it is “not legally valid”-when the employer has not proven the existence of cause-.

One example may be found in the Supreme Court judgment of 26 March 2014<sup>20</sup>. In this case, the company, TeleMadrid, a regional television station, proceeded to dismiss the majority of the staff, alleging economic causes. The Supreme Court affirms that “any negative economic situation alone is not sufficient for justifying the dismissals” and, subsequently, considering the criteria of proportionality, reasonableness and even, appropriateness, declared that the alleged causes were not sufficient to justify the collective redundancy. In this case, the company attempted to dismiss 925 workers from a total staff of 1161, alleging as economic cause, the budgetary insufficiency resulting from a reduction in commercial income and from the public items funded by the entity. Furthermore, the company added its large degree of indebtedness to financial entities. The court considered the economic situation of company losses to be accredited, but added that “this is not equivalent to a negative economic situation, and that with the cause of dismissal being alleged by the company, it aimed to achieve the financial balance of the entity through a formula of decentralization, thereby taking advantage of the budgetary reduction imposed by the law, being articulated through an accounting restructuring”. Added to this is the fact that the measure, in the opinion of the court, was not proportional. The judgment affirmed that the budgetary reduction which ranges from 5% to 10%, to some extent justifies the dismissal measure, but that it is neither plausible, nor reasonable, nor proportional.

Similar reasoning was applied in the Judgment of the Spanish Supreme Tribunal (STS) from 17 July 2014<sup>21</sup>, although in this case the opposite solution was reached. In this case, it was shown that over a one year period, the company, devoted to the manufacturing of heavy machinery, had reduced its billing by 33.05%. However, over this same period, its staff had only decreased by 12.5%. Therefore, the court decided that a collective dismissal of 28.26% of the remaining staff was proportional and reasonable.

Ultimately, defining the causes and judicial control of their existence continues to be a controversial issue in both Spanish law and judicial practice, subject to case-by-case analysis and resolution.

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<sup>19</sup> According to art. 124.11 of Law 36/2011, of 10 October, Regulatory Law of Labor Courts.

<sup>20</sup> Appeal no. 158/2013.

<sup>21</sup> Appeal no. 32/2014.