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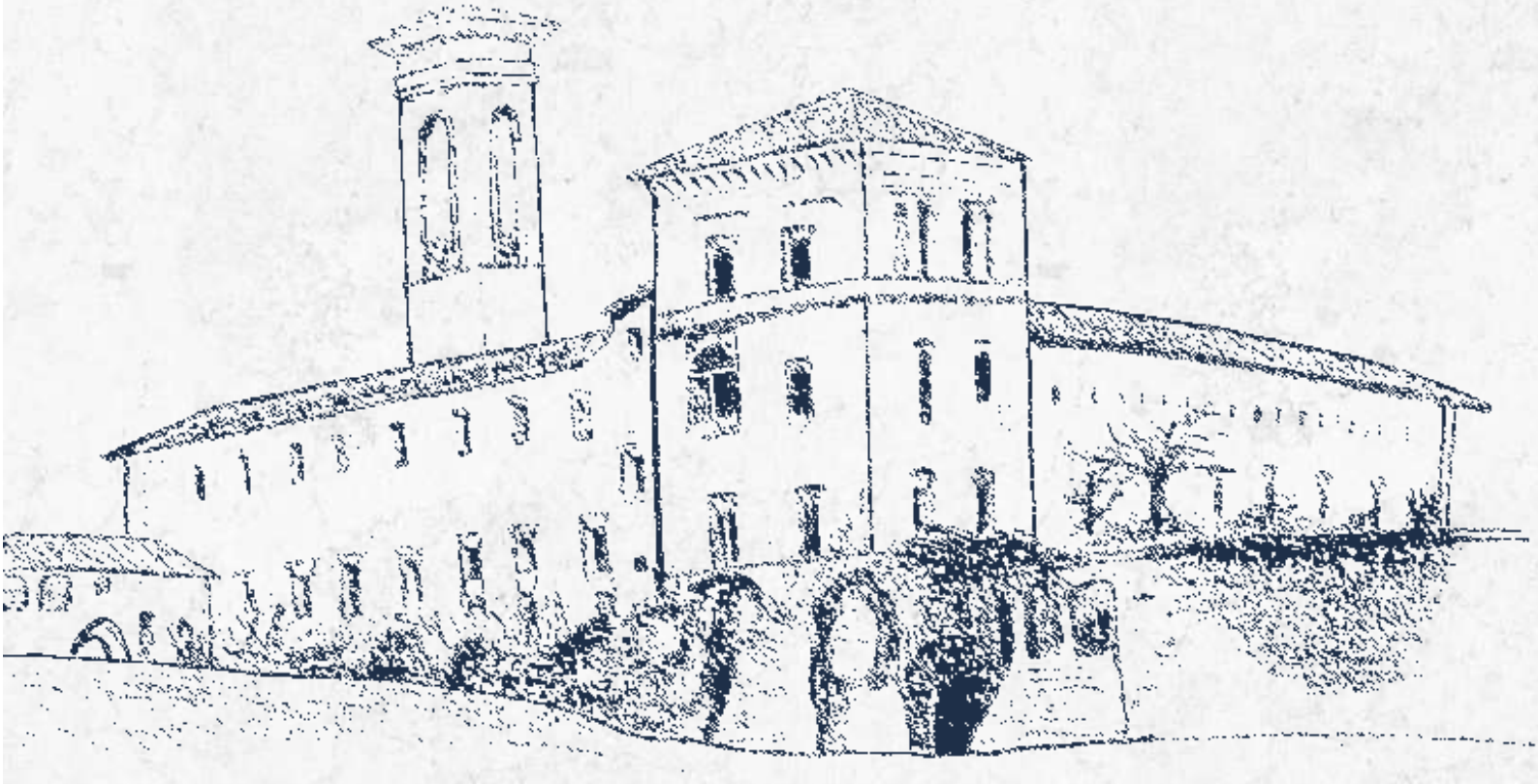

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The New Concept of a 'Worker' in the Field of Collective Dismissals

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Abstract

The most striking element in the delimitation of collective dismissal is the establishment of a numerical-percentage threshold from which an essentially individual act, such as dismissal, is transformed, for procedural purposes, into another act of collective significance. This quantitative component becomes qualitative when the focus of attention is established in the literal reference to "habitually employed workers". Here, the first of the elements of interest for the study appears, given by the notion of worker. Next to this, the personal nature of this component is translated into two other unavoidable references, such as the habitual nature of the service and the causes not inherent to the worker's person.

Keywords: *Caste prejudice; Racial Discrimination; Equality Act; Positive Duty.*

1. The Concept of a Worker as a Prerequisite for Collective Dismissal

The notion of "habitually employed workers" constitutes one of the determining assumptions in the classification of collective dismissal, making the subjective factor a fundamental factor for the application of Directive 98/59. By focusing on the trio of words, the criterion of the Court of Justice of the European Union coincides with that of practically all the other continental legal systems when it comes to separating employees from the self-employed, thus creating two opposing conceptual

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categories[1]. It ignores, however, a third one which is naturally called upon to constitute the grey or intermediate zone connecting the two fundamental nuclei.

In this sense, and just as it is a permanent headache for national judges to delimit how many figures conceal subordinate labour in the form of a civil or commercial contract, in order to give life to a "false self-employed person", the same dilemma is transferred to the European judiciary[2]. However, one difference will be fundamental: the concept of worker cannot be defined by reference to the laws of the Member States but must be interpreted autonomously and uniformly according to the concurrence or not of the three objectives criterion[3].

These guidelines selected by supranational case law prevent any possibility of the legislator or the national courts being free to place atypical figures in any other central category than the only two admitted in the Community acquis: either worker or self-employed; tertium non datur. The indices to be weighed up are: i) the fact of being someone else, as an essential element, regardless of whether it applies to the fruits or to the risks; ii) dependence, i.e., the performance of productive services under the direction and control of another person; iii) remuneration, as a consideration that is often called upon to decide the nature of the link, regardless of its form[4].

If we take into account these rigid elements foreseen for the demarcation, and focus the analysis of the concept of worker only in the context of collective dismissals, we will discover that the number of those usually employed may depend, and not just anecdotally, on whether or not certain relationships are classified as employment relationships; at the same time,

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[1] Martín Valverde, A.: "La jurisprudencia social del Tribunal de Justicia de la Comunidad Europea: evolución y tendencias recientes", *Revista Española de Derecho del Trabajo*, núm. 135 (2007).

[2] Cavalier, G. and Upex, R.: "The concept of employment contract in European Union Private Law", *The International and Comparative Law Quarterly*, Vol. 55, núm. 3 (2006) and Davidov, G.; Freedland, M. and Kountouris, N.: "The subjects of Labor Law: 'Employees' and other workers", en AA.VV. (Finkin, M. and Mundlak, G., Eds.): *Research Handbook in Comparative Labor Law*, Londres (Edward Elgar) (2015).

[3] STJUE 12 October 2004 (C-55/02), subject *Comisión c. Portugal* and García-Perrote Escartín, I.: "La aplicación por el Tribunal de Justicia de la Unión Europea de la Directiva sobre despidos colectivos y su repercusión en el Derecho español", *Actualidad Jurídica*, núm. 49 (2018).

[4] STJUE 20 September 2007 (C-116/06), subject *Kiiski* and Cabeza Pereiro, J.: "El concepto de trabajador en la jurisprudencia del Tribunal de Justicia de la Unión Europea", *Documentación Laboral*, núm. 113 (2018).

it will allow us to verify, from this privileged vantage point and with greater rigour, the characteristics that define an employee.

The first judgment in time deals with the question of whether a member of a capital board of directors who, through a mandate contract, provides services for a public limited company in Germany, must be included in the workforce for the purposes of collective redundancy. The CJEU resolves the doubt in the light of the questions referred for a preliminary ruling by the Republic of Latvia, in order to establish clearly "that a member of such a board who, in return for remuneration, provides services to the company which appointed him and of which he is an integral part, who carries out his activity under the direction or control of another body of that company and who may, at any time, be dismissed from his duties without restriction", fulfils all the requirements to be classified as an employee, even if it was a commercial and not an employment relationship formally intended to link the director to his rediscovered employer[5].

Along the same lines, there is a second pronouncement, for the case in which a German company intends to terminate its activity, terminating the employment contracts of all its employees and dispensing with the obligatory notification to the Administration of any collective redundancy plan, even though the measure would exceed the threshold of 20 workers provided for in the German regulations to be classified as such. The key was the consideration of three persons as employees or not: one of the cases called for an assessment of the case of unilateral voluntary termination of the contract; another case concerned the loss of the status of administrator in those who did not have any shareholding in the company; the last concerned those who undertook professional retraining but paid by the employment authority and not by the employer.

With a forcefulness worthy of note, the CJEU resolves the dispute by affirming the employment status of the three cases and calling for collective proceedings as soon as it wished to be dealt with in its margin.

Thus, first, the voluntary termination of the employment relationship does not detract from the fact that the person concerned was a member of the workforce for the historical purposes to be taken into account; secondly, it considers 'that although a member of the management of a capital company has a margin of discretion in the exercise of his functions which exceeds, in particular, that of an employee (...), it is no less true that he is

[5] STJUE 11 November 2010 (C-232/09), subject *Danosa* and Menegatti, E.: "The evolving concept of 'worker' in EU Law", *Italian Labour Law e-Journal*, Vol. 12, núm.1 (2019).

in a subordinate relationship to [that company]'; lastly, it also considers that the status of employees is 'persons who carry out a preparatory trainee activity of a preparatory nature in the exercise of their functions'.), the fact remains that he is in a relationship of subordination to [that company]"; have the status of workers, given that such periods are carried out under the conditions of a real and effective paid activity, for an employer and under his direction"[6].

The two rulings that act as leading cases in the matter show a clear vocation for protection, or pro-worker, when defining the subjective scope of collective dismissal. The picture becomes even clearer if we weigh up some other issues present in these, or other cases assessed by the High Court[7]:

A) The Community legislator has sought to ensure a similar protection of workers' rights throughout the Community territory. Alongside such a guarantee, "and with equal importance" [8], it has sought to measure the burdens derived for companies within the European Union, trying to counteract the possible social dumping that could follow from the decision to install or relocate companies in those countries with less protective legislation in this area[9].

The above precaution means that, although there is a certain flexibility in allowing each State to establish how to calculate the number of employees affected, two unavoidable limits are nevertheless introduced: on the one hand, the European alternatives have, in their numerical extremes, the status of minimum provisions (consequently, they admit only the play of more favourable conditions, introduced by the national legislator or the social partners); on the other hand, when it comes to assessing whether or not an employee is a worker, or, as a result, whether or not an employment relationship is terminated for reasons not related to the

[6] STJUE 9 July 2015 (C-229/14), subject *Balkaya* and Van Peijpe, Y.: "EU limits for the personal scope of Employment Law", *European Labour Law Journal*, Vol. 3, núm. 1 (2012).

[7] González de Patto, R.M.: "El impacto de la reciente jurisprudencia comunitaria en el régimen jurídico español de despido colectivo", en AA.VV. (Molina Navarrete, C., Coord.): *Impacto sobre la legislación laboral española de la jurisprudencia del Tribunal de Justicia de la Unión Europea: XXXVII Jornadas Universitarias Andaluzas de Derecho del Trabajo y Relaciones Laborales*, Sevilla (Consejo Andaluz de Relaciones Laborales) (2019).

[8] Morin, M.L., et alii: "Economic redundancy: The paradoxes of exemplary protection", en AA.VV. (GALLIE, D., Ed.): *Resisting marginalization*, Oxford (Oxford University Press) (2004).

[9] STJUE 13 February 2014 (C- 596/12), subject *Comisión c. Italia* and Taylor, Ph.: "An umbrella full of holes? Corporate restructuring, redundancy and the effectiveness of ICE regulations", *Industrial Relations*, Vol. 64, núm. 1 (2009).

worker's person, there is no margin for the national judge to ignore the pattern set by the European judicial body[10].

B) Subordination raises the question of whether the old question of personal and/or economic dependence should be weighed up from a rigid perspective, or whether it can be measured by means of a flexible criterion.

The example of the German company director is an unavoidable reference, and a model of flexicurity in this respect[11], leading the Court of Justice to advocate a "case by case" assessment under five basic parameters: i) the conditions of the contract; ii) the nature of the functions entrusted; iii) the framework for their performance; iv) the scope of the powers conferred on the person concerned, and finally; v) the control and power granted to the company in respect of this type of employee.

C) The note on remuneration has been appropriately qualified regarding the consideration that trainees deserve (when professional retraining); specifically, when it comes to classifying those who carry them out "without receiving remuneration from the employer but receiving financial assistance from the public body responsible for promoting employment for that activity". According to the CJEU, what is important is not where the consideration comes from, but that it exists and that the company is the subject on which it depends. It thus endorses what it has already held in other contexts in which it has held that remuneration exists even though its amount is low because it depends on limited productivity, not carrying out complete tasks or working a reduced number of hours per week[12].

D) At the end of the day, the legal nature that the law or case law of a Member State (employment, whether ordinary or special, senior management, commercial, etc.), or the origin or amount of the remuneration, cannot be detrimental to the rights conferred by the Directive, since what should prevail are the features of dependence, dependence and remuneration - higher or lower, it is repeated - as factors observed under the crucible of a reading in favour of the worker.

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[10] STJUE 18 enero 2007 (C-385/05), subject *Confédération Générale du Travail y otros*.

[11] Kenner, J.: "New fronteries in EU Labour Law: from flexicurity to flex-security", en AA.VV. (Dougan, M. and Currie, S., Eds.): *50 Years of the European Treaties. Looking back and thinking forward*, Londres (Hart Publishing) (2009).

[12] STJUE 3 July 1986 (C-66/85), subject *Lawrie-Blum*; STJUE 26 february1992 (C-3/90), subject *Bernini;* and STJUE 17 march 2005 (C-109/04), subject *Kranemann*.

The situation is all the clearer when what is present is not a weak character in the characteristic notes of the contract, but rather the simulation that could find protection in the rule itself, as occurs in the case of the TRADE in Spain[13], since despite their functional autonomy, they carry out their activity with a strong economic dependence on the employer or client who hires them, and can be classified for these purposes as authentic "false self-employed"[14].

This appeal to the Spanish legal system would require a second, much more subtle, rectification to consider whether a reading is possible in which it would be feasible to dispense with the notes of voluntariness and outside involvement also demanded in Article 1.3 ET, in order to lead to a notion of worker based exclusively on the concepts of dependence and remuneration[15]. This is undoubtedly a key factor in preventing domestic law from undermining the aim pursued by the European legal system and leading to disregarding a key element of the protection granted to all workers.

A nuance that has hardly been explored to date, but with unquestionable potential for expansion, is the consideration that should be given to occasional or menial work. Usually masked under the condition of friendly, benevolent, or neighbourly work in Article 1.3 d) ET, their unquestionable importance through formulas such as on-call work or zero-hours contracts has also led to other key pronouncements by the CJEU on the consideration (or not) as workers of those who provide their services through such unique links.

This is the case, in a paradigmatic example, with reintegration or re-education activities, whose valuation as work will depend on how much priority is given[16]: if the social purpose does so, there will be no benefit as an employee, because its beneficiaries "are not selected according to their capacity to carry out a certain activity but, on the contrary, it is the activities to be carried out that are conceived according to the capacity of

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[13] Cruz Villalón, J.: "El trabajo autónomo económicamente dependiente en España: breve valoración de su impacto tras algunos años de aplicación", *Documentación Laboral*, núm. 98 (2013).

[14] Valdés Dal-Ré, A.: "Lo Statuto del lavoro autonomo nella legislazione spagnola, con particolare riferimento al lavoro autonomo economicamente dipendente", *Diritto delle relazioni industriali*, Vol. 20, núm. 3 (2010).

[15] Maneiro Vázquez, Y.: "El régimen del despido colectivo en el ordenamiento europeo: contrastes y fricciones con el ordenamiento español", *Revista del Ministerio de Empleo y Seguridad Social*, núm. 12 (2017).

[16] Bell, M.: "Disability, rehabilitation and the status of worker in EU Law: Fenoll", *Common Market Law Review*, Vol. 53, núm. 1 (2016).

the persons who have to carry them out, with the aim of maintaining, recovering or promoting their work aptitude"[17]; on the other hand, when the productive work is highlighted precisely through the remuneration paid by the company to the person to whom the right to reintegration has been recognised, it can only be considered that the person concerned carried out the activity "within the framework of a relationship of subordination, services in favour of his employer for which he obtains remuneration, in such a way as to satisfy the essential requirements of the employment relationship"[18].

In a second example, he focuses his attention on the preparatory activities for a profession which only represent a first contact with what could be a future job; he considers, however, that the person who carries out these periods of apprenticeship, which "can be considered as a practical preparation linked to the actual exercise of the profession in question, must be considered as a worker, when the said periods are carried out under the conditions of a real and effective activity as an employee"[19].

1.1. "Habituality" as a Feature of the Worker: Members of the Workforce and Temporary Workers

Although the notion of worker does not distinguish between strictly temporary benefits and those of an indefinite nature, in the European definition of collective dismissal, the reference to "habitually employed workers", as the ultimate condition on which to weigh up the different contractual terminations, leads to the question of whether the latter should be considered, (or not), those that involve the fulfilment of an initially agreed condition or term. In short, the question must be whether a "temporary" worker is also a "regular" worker or not.

The obvious lacuna in this respect in the Spanish legislation has caused considerable controversy between the Administration and the Courts, and has been adequately answered by the CJEU, precisely when it resolved a preliminary ruling question from Spain.

In this respect, it makes a double distinction between, on the one hand, the consideration that the termination itself may merit and, on the other,

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[17] STJUE 31 may 1989 (C-344/87), subject *Bettray* and Menegatti, E.: "Taking EU Labour Law beyond the employment contract: the role played by the European Court of Justicie", *European Labour Law Journal*, Vol. 11, núm. 1 (2019).

[18] STJUE 26 November 1998 (C-1/97), subject *Birden*.

[19] STJUE 19 November 2002 (C-188/00), subject *Kurz* and Barnard, C.: EU *Employment Law*, 4ª ed., Oxford (Oxford University Press) (2012).

the assessment to be made of the temporary worker in the group of employees in the service of the company.

As regards the first of these aspects, it draws attention to the fact that the termination of a temporary relationship does not take place at the sole will of the employer, "but by virtue of the clauses they contain or of the applicable regulations, when they come to an end or when the task for which they were concluded is carried out"; as a result, it confirms that the "regular" temporary worker does not deserve the same protection in this respect as the permanent worker and, conversely, those who are irregular because they have been contracted in fraud of the law will find the indirect protection of forming part of the number or percentage of terminations that can be taken into account when classifying the dismissal as collective[20].

In this way, an expansive tendency can be seen in the Community concept of collective dismissals, as it is extended both in its subjective aspect (European concept of worker) and in its objective aspect (new eligible dismissals).

The perspective changes radically when we move from the singular situation of the temporary worker to his or her assessment as a possible member of the workforce, understood as a stable unit on which the ultimate index of a plural termination is based. While the Directive remains silent and tacitly refers to what is established by domestic legislation as to whether a relationship is consolidated or not, the lack of specificity of the national rule could well lead to the absurdity of considering that employees with a long-standing relationship with the company through temporary contracts are not common[21].

When integrating such an obvious gap, one could even invoke a triple legal reference which, by analogy, could serve to resolve the thorny issue of temporary staff: firstly, the systematic argument would lead to focusing attention on Article 6.4 RD 1483/2012, of 29 October (hereinafter, RDPDC), when it requires the employer, among the documentation to be provided, to submit information on employment contracts lasting less than one year; secondly, Articles 69.2 ET and 6. 5 RD 1844/1994, of 9 September, grant the right to be eligible for election in the elections

[20] Cortés, S.: "Redundancy declared void based on Directive's horizontal effect as regards collective redundancy thresholds (SP)", *European Employment Law Cases*, núm. 1 (2017) and Kenner, J.: "The enterprise, labour and the Court of Justice", en AA.VV. (Treu, T., and Perulli, A., Eds.): *Enterprise and social rights*, Alphen aan den Rijn (Kluwer Law International) (2017).

[21] STJUE 11 November 2015 (C-422/14), subject *Pujante Rivera*.

foreseen for unit representatives to those who can prove 6 months' seniority in the company, understood as having sufficient roots in order to be able to act on behalf of the workforce; lastly, Articles 72.2 b) ET and 9.4 RD 1844/1994, when calculating the workers at a centre to determine the quality of the body and the number of members to be elected, consider that "every 200 days worked or fraction thereof will count as one more worker".
Called upon to propose a solution where there is no known judicial criterion, administrative practice came to favour the systematic criterion reproduced above, except when the workers' representatives invoked the criterion of the most favourable rule, in which case, and as a sign of good faith, they came to admit the application by analogy of the electoral regulations [22].

1.2. Reasons not Inherent to the Worker

The relevance of the worker as the central figure of the institution does not end with his direct protagonist in the numerical factor but is connected in the Directive with the evident subjective bias incorporated in its reference to the "reasons not inherent to the worker".
The reference to the European legal system is as amphibological or labile as it is difficult to translate into all continental legal systems. It constitutes an unparalleled autonomous category, as the only alternative that has arisen for the purpose of reconciling a core element that radically separates the national legal systems into two large groups: those that construct the termination of the employment relationship on a causal model and those that do so regardless of any reason whatsoever. In this way, the participation of the worker's will or not now of terminating the contract will stand as the ultimate taxonomic element, and shared by all, when it comes to deciding whether a specific decision to terminate the employment relationship should be taken into account or ignored when integrating the final calculation of terminations that set the threshold for collective dismissal[23].
The transposition carried out by the Spanish rule, mimetically reproducing the terms of the European rule, leaves the national interpreter with the

[22] Fernández Domínguez, J.J.: *Expedientes de regulación de empleo*, Madrid (Trotta) (1993).
[23] Martínez Moreno, C.: "Los despidos colectivos (Directiva 98/59 CE y normas precedentes)", en AA.VV. (García Murcia, J., Coord.): *La transposición del Derecho Social Comunitario al ordenamiento español: un balance en el XX aniversario de la incorporación de España a la Comunidad Europea*, Madrid (Ministerio de Trabajo y Subjects Sociales) (2005).

task of reading one by one the salutary means of the employment contract set out in the Workers' Statute, and depending on the presence or absence of a free will of the worker in the termination of the contract, classifying that specific case as inherent or outside his or her person. As a result of which, proceed to calculate or discard it in a balance sheet, the results of which can be summarised as follows.

1.2.1. Terminations not Linked to the Employee's Will

The list of cases that must be considered to constitute a collective dismissal, in its quantitative and qualitative dimension, must be reduced to the causal expressions set out below:

A) Termination of temporary contracts, whether concluded in fraud of the law or by decision of the employer before the expiry of their term or of the condition that covered them, not in vain can they be placed in an analogous position to contracts for an indefinite period, the former having to enjoy identical protection to that granted to the latter[24].

The reason for the weighting of those entered in fraud of law within this category lies in the fact that, although the worker has formally given his consent, in its conformation there is the serious defect of violating the provisions of the law, which is why it is null, and void has no effect. As regards the latter, there is no difference with a dismissal when it is the employer who decides to unilaterally terminate a temporary contract prior to the date or event fixed for its termination.

B) Withdrawal during the probationary period. When Art. 14 ET allows either of the parties to terminate their relationship without the need to invoke any reason, it grants a freedom whose effects are far from equal depending on who exercises it: if the worker does so, there is no doubt that such termination should not be counted; however, if the initiative is the employer's, it seems clear that there is no will on the part of the employee and, consequently, it should be included in the set of terminations to be weighed up[25].

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[24] López Cumbre, L.: "Contratos temporales y extinciones por voluntad del trabajador, pero a iniciativa de la empresa. Consecuencias en el despido colectivo", *Análisis Gómez-Acebo & Pombo*, December (2015).

[25] Garrido Pérez, E.: "Ámbito material de aplicación de los despidos colectivos", en AA.VV. (Cruz Villalón, J., Coord.): *Los despidos por causas económicas y empresariales*, Madrid (Tecnos) (1996); Hießl, C. and Laleta, S.: "Implementation problems of the Collective Redundancies Directive and their consequences: the Croatian example", *Europäische Zeitschrift für Arbeitsrecht*, núm. 20 (2017) and Asquerino Lamparero, M.J.: *El régimen jurídico del periodo de prueba en el contrato de trabajo*, Albacete (Bomarch) (2017).

C) Failure to call permanent discontinuous workers. Failure to comply with what derives from art. 16.2 ET means that the employer is subject to the effects of the reaction that the regulation itself classifies as dismissal, i.e., unilateral termination; on this occasion, moreover, without invoking any cause whatsoever.

D) Termination at the will of the employee due to serious and culpable breaches that could be imputed to the employer. This case, one of the most controversial, pits what is formally a manifestation of the employee's will (which would lead to excluding its consideration in this area) against what lies at the heart of the matter (an action or omission by the employer of which the employee's decision is merely a reaction). It is easy to imagine that anyone whose working conditions are altered in a way that undermines his dignity or professional training, whose wages are not paid in due time and form, who is not provided with effective employment, who suffers moral or sexual harassment at work, etc., is far from being free when it comes to continuing his relationship with the employer, who immediately or indirectly ends up being the efficient cause of the contractual termination[26].

E) Extinction of the employer's legal personality. Two notes of the CJEU come to clear up any doubts about its consideration: firstly, and from the causal point of view, there can be no doubt as to its lack of connection with the employee's will; secondly, and for the most complex cases of judicial termination of activities (which includes dismissals authorised by the Commercial Court under Royal Legislative Decree 1/2020, of 5 May, approving the revised text of the Insolvency Act), it is clearly established that the Directive applies to "a judicial decision ordering its dissolution and liquidation due to insolvency, even if national legislation provides for the immediate termination of the employees' employment contracts in the event of such termination"[27].

F) Forced retirement of the worker based on the decision contained in the collective agreement. Even when there is indirect consent through the consent given by the trade unions representing the workers, the power incorporated by the 10th additional provision. ET leads, without any doubt, to terminations that must be considered among those that are alien to the worker's person, as their "forced" nature acts instead of the consent of the affected party[28].

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[26] Mercader Uguina, J. and De La Puebla Pinilla, A.: *Los procedimientos de despido colectivo, suspensión de contratos y reducción de jornada*, Valencia (Tirant lo Blanch) (2013).

[27] STJUE 3 March 2011 (C-235/10 a C-239/10), subject *Claes*.

[28] De Castro Marín, E.: *Despido colectivo 'de hecho'*, Navarra (Aranzadi) (2018).

G) Dismissal. As a unilateral decision adopted by the employer, its assessment only requires weighing up whether the worker could have been the ultimate cause of such a decision. In a necessary synthesis of a much more extensive logical process, it can be concluded that, from the outset, any dismissal considered unfair or null and void must be included in the calculation, insofar as reasons of form or substance have led to such recognition by the author or to the judicial declaration, clearing up any questions about the absence of any participation by the worker affected. At the same time, it is appropriate to include individual-plural dismissals stated under the same causes as those set out in art. 51 ET, i.e., those due to economic, technical, organisational and production reasons, as well as those due to the lack of budgetary appropriations in the case of non-structural public programmes [arts. 52 c) and e) ET].

1.2.2.2. Termination Linked to the Employee's Will

The other forms of termination of the contract deserve a different interpretation to the above, even though, depending on the specific circumstances involved, this original classification can and should change in some specific cases:

A) Mutual original agreement (art. 49 ET). Contracts concluded for a specific duration or for a specific task are excluded from the calculation (except, as has been explained, if they have been concluded outside the law), since "such contracts are not terminated at the initiative of the employer, but only when they come to an end or when the task for which they were concluded is carried out", not in vain in that agreement the worker showed his express acquiescence.

B) Mutual agreement (art. 49 ET). The same consideration should be given to the concurring will of the parties whether it operates in a contract subject to a term or condition, or in an open-ended contract. However, attention should be drawn to some examples from which the above conclusion can be questioned; specifically, reality shows cases of early retirements or voluntary redundancies which, far from being based on the "free" will of the worker, hide a real employment regulation plan concealed under such a channel, as a "lesser evil" offered to the workers in the face of the alternative (real "threat") of receiving the compensation strictly contemplated by law or being involved in insolvency

proceedings[29]. Once this element of compulsion has been proven, there can be no doubt about its inclusion.

C) Resignation or abandonment of the worker. Conceived as a unilateral decision without cause in the first of these cases, and informal in the second, they are a clear example that the conscious action of the worker has been the ultimate reason for the termination of the employment relationship.

D) Termination at the employee's will be due to an employer's decision to transfer or substantially modify working conditions. Form and substance are once again dissociated in these cases, as they were in Art. 50 ET; however, the resolution, as far as this discourse is concerned, must be precisely the opposite. The form refers, also on this occasion, to a decision by the worker, as provided for in arts. 40.1 and 41.3 ET; however, and unlike the case under comparison, in the substance of the question there is no breach of the law by the employer, but precisely the opposite, which could even have led, in the case of collective modifications or transfers, to a prior consultation period with the workers' representatives[30]. Precisely the fact of acting in the heat of what the law empowers him to do, as well as the procedural variant included, invite us to consider the case as an alternative reaction offered to the worker in the face of what the law includes as a rule of order, consisting of being and passing through the expression of the employer's management power under the protection of Art. 20 ET[31].

E) Death, incapacity, or retirement of the employer. "Article 1(1) of Directive 98/59 must be interpreted as not precluding national legislation under which the termination of the employment contracts of several employees whose employer is a natural person as a result of the death of that person is not considered to be collective redundancy"[32]. With this wording, the CJEU resolves one of the most important discussions that had taken place in Spanish doctrine, and which concerned the subrogation of the employer derived from the "disappearance" of the natural person employer. The term in quotation marks was intended to include, together with death, the cases of retirement or declaration of permanent disability

[29] Desdentado Bonete, A.: "La delimitación legal del despido colectivo", en AA.VV. (Godino Reyes, M., Dir.): *Tratado de despido colectivo*, Valencia (Tirant lo Blanch) (2016).

[30] STJUE 21 September 2017 (C-149/16), subject *Socha*.

[31] STJUE 21 September 2017 (C-429/16), subject *Ciupa*.

[32] STJUE 10 December 2009 (C-323/08), subject *Rodríguez Mayor* and Fernández Fernández, R.: "Fallecimiento del empresario sin sucesión hereditaria y despido colectivo a la luz de la Directiva 98/59/CE", *Noticias de la Unión Europea*, núm. 32 (2011).

of the employer, it now being clear that the variables to be combined are not business succession versus collective dismissal, but the previous binomial plus another termination with its own cause and different from that provided for in art. 51 ET[33].

F) Dismissal. As a last case designed to demonstrate the heterogeneous and complex nature of the sample, even in the employer's own unilateral decision, there are cases in which the employer's will is blurred to the point that it does not matter whether or not it is inherent in the worker's person. The easiest solution is given by fair disciplinary dismissal since the ultimate ratio for contractual termination is caused by a serious and culpable breach of contract by the person sanctioned. Also linked to his or her person are the cases of supervening ineptitude or lack of adaptation to technical modifications of the job, where the lack of will does not limit the causal and direct involvement of the individual conditions of the dismissed person. Finally, and with all the doubts derived from the fact that no will is at stake, the cases of force majeure (including the factum principals) will have to be equated to those of the "disappearance" of the natural person employer, as they have autonomy as an institution, and in the Spanish system also with a specific administrative procedure (not consultation) for their processing[34].

1.2.3. The Minimum Number of Five "Extinctions" or "Dismissals" for the Cumulation Analysed

According to recital 8 of the Directive under examination, and to calculate the number of redundancies provided for in the definition of collective redundancies, "other forms of termination of the employment contract effected at the initiative of the employer should be treated in the same way as redundancies, provided that the 'redundancies' are at least five"[35].

As can be seen, under such an interpretation there is a new mismatch between the wording of the Directive and that of the Spanish provision, which is based on the deficient transposition of the Directive derived from having translated the expression "dismissals for reasons not inherent to the worker's person" into "dismissals for economic, technical, organisational or production reasons"; to this extent, the objective scope of what should be included under the reference to "similar terminations"

[33] Navarro Nieto, F.: "Los despidos colectivos: novedades normativas y balance jurisprudencial", Revista *Doctrinal Aranzadi Social*, Vol. 6, núm. 7 (2013).
[34] Férnandez Dóminguez J.J.: *Despido por fuerza mayor*, Madrid (Civitas) (2003).
[35] STJUE 11 November 2015 (C-422/14), subject *Pujante Rivera*.

can never coincide; consequently, the wording of the Spanish provision is more restrictive than that of the European provision, "since the numerical requirement imposed by the Directive only concerns dismissals, leaving similar terminations outside its scope".
The process of equalisation, however, must also lead to a rectification of the minimum of five dismissals for the accumulation to be applicable, since while the supranational rule refers, once again, to those "reasons not inherent to the person of the worker", the Spanish rule confines them to the more restricted scope - and, therefore, in need of extension - of economic, technical, organisational and production reasons.

1.3. Subjective Selection Criterion for Terminating Workers

The question relating to the person of the worker in the context of collective redundancies cannot end without a reference to the criterion adopted for selecting those whose employment relationship is to be terminated in cases in which the measure does not affect the whole, but only part of the workforce. In this sense, articles 51.5 and 68 of the Employment Contract, in addition to article 37 of Law 31/1995, of 8 November, on the Prevention of Occupational Risks, grant priority of permanence - limited to their professional group - to those holding a representative mandate, whether electoral (staff delegates and works council members), trade union (trade union delegates), or by appointment (prevention delegates), in order to provide a formal and material guarantee against possible employer reprisals for the performance of their representative work[36].
This is not, however, the only legal provision in this respect. To this should be added that contained in additional provision 16.ª ET, to recognise the preference of permanent staff in the service of the Public Administrations who have acquired this status in accordance with the principles of equality, merit, and ability, through a selective admission procedure called for this purpose. The concession of a mere preference, and not a guarantee, as well as its application within a complex and mobile

[36] Valdés Dal-Ré, F.: "La designación de los trabajadores afectados por despidos económicos: el laberinto de la desregulación", *Relaciones Laborales*, núm. 1 (1999); Alburquerque, R.: "La fase previa al periodo de consultas: la comunicación de inicio del periodo de consultas a la representación de los trabajadores y a la autoridad laboral", en AA.VV. (Godino Reyes, M., Dir.): *Tratado de despido colectivo*, Valencia (Tirant lo Blanch) (2016) and Vivero Serrano, J.B.: "La designación de los trabajadores objeto de despido colectivo", *Aranzadi Social*, Vol. 6, núm. 7 (2013).

system of professional qualification, has led to many lawsuits provoked by the application of such normative provisions, almost always settled through the special procedural modality of collective conflict, to examine the postponement linked to the exercise of trade union freedom as a fundamental right, acting under the provisions of article 124.2 of Law 36/2011. 124.2 of Law 36/2011, of 10 October, Regulating the Social Jurisdiction, understanding that "it is not only a formal requirement aimed at guaranteeing good faith in negotiations, but an essential prerequisite for assessing the adequate justification of dismissals"[37].

In addition to what constitutes a legal obligation, art. 51.5 ET provides for the possibility that, by agreement or agreement reached in the consultation period, the parties to the negotiation may establish different priority criteria in favour of groups such as, "among others", workers with family responsibilities, workers over a certain age or people with disabilities. The open wording of the expression in quotation marks overcomes many of the drawbacks of a formula that differed markedly from the European trend[38] (and this is evident, for example, in France[39] or Germany[40]), because there is no doubt that the conventional route makes it possible to cover numerous gaps related to the favourable treatment of pregnant workers or workers on parental leave, those who have reduced their working hours to care for children or family members, people with addictions who are undergoing treatment, and a long etcetera that is easy to complete due to the subject matter.

It is precisely the contrast with one of these work-life balance rights, that of pregnant workers, which provides a new assessment from which to analyse the discrepancies between European and national legislation.

This is an occasion stemming from Council Directive 92/85 of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, when it prohibits companies from dismissing them from the beginning of

[37] Roqueta Buj, R.: "Los despidos colectivos en el sector público: causas y procedimiento", *Documentación Laboral*, Vol. 1, núm. 97 (2013).

[38] Morín, M.L. and Vicens, C.: "Despido económico, flexibilidad empresarial y estabilidad del trabajador. Lecciones de una comparación europea", *Revista Internacional del Trabajo*, Vol. 120, núm. 1 (2001).

[39] Pérez De Los Cobos Orihuel, F.: "El despido por causas económicas en Francia: estudio especial del despido colectivo", *Actualidad Laboral*, núm. 1 (1993).

[40] Gómez Gordillo, R.: "La extinción del contrato de trabajo en Alemania", en AA.VV. (Cruz Villalón, J., Coord.): *La regulación del despido en Europa: régimen formal y efectividad práctica*, Valencia (Tirant lo Blanch) (2012).

pregnancy until the end of maternity leave, except in exceptional cases not inherent to their condition[41]. It thus establishes a prohibitive or protectionist protection that expressly covers collective dismissal, which is not the case in Spanish law, where articles 53 and 54 ET only extend its protection to objective individual dismissal or dismissal classified as unfair[42].

The rectification, once again, does not come from the regulation, but from the CJEU when it applies the protection offered by Spanish law to the pregnant worker, not in vain "protection by way of reparation, even if it results in the reinstatement of the dismissed worker and the payment of the remuneration lost as a result of the dismissal, cannot replace preventive protection"[43]. In fact, "the protection afforded to the mother by the knowledge that she cannot be dismissed (except in exceptional cases) is not exactly the same as that in which], although she can be dismissed, she has a more or less intense expectation of obtaining a final judgement ordering her forced (and enforced) reinstatement in the company that has already dismissed her"[44].

In this way, the employer has the duty to justify that the pregnancy of the worker is unrelated to his choice to incorporate her among the employees who lose their jobs, for which he will have to specify the reasons by virtue of which the cause of the termination has a specific projection in the productive work of the pregnant woman.

Precisely, the natural or social possibility of biological inequality must be - and in fact is - considered, in itself, the ultimate cause of certain legal-social rules, insofar as, and as a paradigmatic example, the situation of maternity of women will act as a determining factor of the need for a singular treatment, not in the least because the protection can in no way be transferred to men, just as the condition of pregnancy, exclusive to the female sex, cannot be.

The context of this text is provided by another case law, from which it follows, in the case of a pregnant worker who was not given priority, "that dismissal on the grounds of pregnancy or for a reason essentially based on

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41 Sánchez Torres, E. and Senra Biedma, R.: "Aspectos sustanciales y procesales de los despidos antifamiliares. A propósito de las SSTC 41/2002, de 25 de February 17/2003, de 30 de enero", *Relaciones Laborales*, núm. 1 (2005).

42 Agustí Maragall, J.: "La prohibición de afectación de las trabajadoras embarazadas y en permiso de maternidad en los despidos colectivos ('salvo caso excepcional')", *Jurisdicción Social*, núm. 127 (2012).

43 STJUE 22 February 2018, (C-103/16), subject *Porras Guisado*.

44 Rodríguez Escanciano, S.: "La conciliación de la vida laboral y familiar en Castilla y León", *Revista de Investigación Económica y Social de Castilla y León*, núm. 7 (2004).

pregnancy can only affect women and therefore constitutes direct discrimination on grounds of sex, contrary to Articles 2(1) and (7) and 3(1)(c) of Council Directive 76/207 of 9 February 1976"[45].
It is urgent to raise awareness among those who are called upon to negotiate collective agreements of the timeliness/necessity of heeding the suggestion, included both in the Directive and in Spanish law, to introduce social criteria when establishing the priority of permanence of workers in the event of collective redundancies. Family burdens, disability or age are - among others - factors capable of indelibly marking entire groups in the labour market, which is why the solution would not only be appropriate, but also rational and fair.

2. Conclusions

After a comparative study of the European and national rules on collective redundancies in the light of what the Court of Justice of the European Union has been patiently deciding for more than four decades, a general reflection is necessary: it is urgent to update the Spanish law in order to adapt it to the continuous corrections that have arisen from a supranational reading of the notion of worker and the requirements of collective redundancies.

a) The concept of worker currently offers such rich profiles that it is very difficult to admit within it the traditional variants that used to accompany it, at the risk of creating excessive special statutes capable of blurring its essence. Collective dismissal offers a perfect vantage point from which to observe the need to simplify its identifying features, centring them exclusively on dependence and remuneration, thus eliminating both voluntariness (an anachronistic feature), and the fact of being outside (since neither in terms of benefits nor in terms of risks is it an element that can be fully demanded of many relationships today). In this way, a direct response would be found to some emblematic cases in which there is - well-founded - doubt as to their employment status, such as training relationships, jobs of little importance and senior management or those extravagant figures defined as dependent self-employed. Based on the two features mentioned above, one can only be a worker or not: tertium non datur.

[45] STJUE 11 November 2010, (C-232/09), subject *Danosa*.

b) The phenomenon of temporary employment, as an endemic disease that has been a feature of labour relations for too long now, has as one of its most salient effects the instability of workforces. For this reason, when the Directive demands that the habitual nature parameter be considered to measure the impact of a collective dismissal, the silence of the Spanish legislation is the only response. The simple administrative criterion established to determine the documentation to be provided in the consultation period cannot be the standard for deciding how and when the group of "regular workers" is formed. The period of one year provided for in Article 3 of the RDPDC, therefore, will have to be corrected in accordance with other indices included in Spanish law in the image and likeness of the supranational standard, such as the duration of a contract for more than six months, as this is the period for being eligible for the elections to be held in the company or work centre, or the duration of a relationship of more than 200 days, after which one more worker will have to be added to the number that will finally decide both the representative body to be elected and its number of members.

c) All the causes for termination of the employment relationship must be brought back into the category included in the Directive, which refers to "reasons not inherent to the worker's person". Any means by which an employment relationship is terminated in which the will of the affected party is involved must be excluded from the set of terminations to be weighed up when considering the existence of a collective dismissal. Thus, a sense contrary, and with the necessary nuances, the following should be included: termination ante tempus of contracts subject to a term or condition as well as - in any case - of those concluded in fraud of law, withdrawal during the trial period, failure to call permanent discontinuous workers, termination on the initiative of the worker due to serious and culpable breaches by the employer, extinction of the employer's legal personality, forced retirement derived from a collective agreement, objective dismissals due to business causes or lack of public funding and, finally, dismissal classified or recognised as unfair with the option of compensation.

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