DISMISSAL EFFECTED BY AN EMPLOYER FOR ONE OR MORE REASONS RELATED TO THE INDIVIDUAL WORKERS CONCERNS

SPANISH REPORT

EWL Student Conference Ciudad Real March 2018

Iván García de León Pérez
Enrique Medina Fernández
Adrián del Rio Angosto
Luis Miguel Vioque Galiana
Luis Vallejo Martínez

TABLE OF CONTENTS

1. DEFINITION

We understand the dismissal as the termination of the employment contract by decision or unilateral will of the employer. In our system, only when a just cause exist that decision can be adopted, whose absence has negative consequences for the employer (reinstatement of employment, or money compensation), and so we talk about the causality of dismissal against free dismissal.

The requirement of just cause is not the only guarantee of stability in employment, along with other guarantees have arisen as the requirement of written form for the validity of the dismissal, an expression of cause and date, and the possibility of claiming jurisdictionally against to the business decision.

We collect the general list of causes of termination of the employment in the article 49 ET, which allows the identification of three groups:

1. Causes linked to the unilateral will of one of the parts.

2. Causes linked to the joint will of the parts, expression of mutual agreement.

3. Causes that physically or legally prevent the continuity of the contract: death, retirement or incapacity of the employer.

The first of the mentioned categories is the main point on this study. It deals with the hypothesis of extinction due to causes linked to the unilateral will of one of the parts: the employer.

The two major categories of dismissal that will be analysed are disciplinary dismissal and objective dismissal for reasons inherent to the worker.

1.1. Disciplinary dismissal

The cause it is contemplated in the article 49.1.k) ET connected to the art. 54 ET.
It is the most severe sanction that the employer can impose on the worker based on a breach of contract that affect the obligations arised from the employment contract.
In addition it will have to be severe, because it must reach certain entity, and guilty, because it must be imputable to the worker, whether due to fraud, fault or negligence.
Article 54 ET typified the specific causes referring to the disciplinary dismissal:

a) Repeated and unjustified absences of attendance or punctuality.

b) Indiscipline or disobedience.

c) Verbal or physical offenses.

d) Transgression of contractual good faith and abuse of trust.

e) Voluntary reduction of performance.

f) Habitual drunkenness or drug addiction.

g) Bullying.

1.2. Dismissal for objective circumstances.

Another dismissal category it is the dismissal for objective circumstances, collected in article 49.1.1) ET and regulated in articles 52 and 53 ET.

An objective incompatibility between the employee and the job or in the need to reduce jobs for technical, economic or organizational reasons are the reasons that justify this type of dismissal.

The specific reasons that may justify the dismissal are set out in article 52 ET:

a) Ineptitude of the worker.

b) Lack of adaptation to technical modifications.

c) Economic, technical, organizational or production causes.

d) Missed work attendance absences.

e) Insufficient public budget.

1.3. Collective dismissal and force majeure.

Article 49.1 ET still contains two other cases of termination of the contract by unilateral decision of the employer:

The collective dismissal, 49.1.i) regulated in the art 51 ET, is a form of termination of the employment contract by initiative or decision of the employer characterized by its cause and personal reach. The collective dismissal must affect all or a significant number of workers in relation to the total workforce.

The employer must prove the existence of any of the causes, inherent to the activity or operation of the company (such as technical, economic, organizational, or production) and its reasonableness to justify a measure such as the termination of employment contracts.

Regarding dismissals due to force majeure, 49.1.h) ET sets out that the contract of employment will be extinguished by force majeure verified; it is a single procedure regardless of the number of workers affected.

2. Relevant factors.

The size of the company and the number of workers play a very important role in dismissal.

These factors become requirements for dismissal in case of economic, technical, organizational or production causes where the dismissal will be processed by collective if (Article 51 ET):

a) When there is a total cessation of the activity of the company, and the number of affected workers is more than five.

b) The dismissals without involving the closure of the company, affect at least ten workers in companies with less than 100 workers

c) The dismissals affect at least 10 percent of workers in those companies that occupy between one hundred and three hundred workers.

d) The dismissals affect at least thirty workers in which they occupy more than three hundred.

If these numerical requirements are not reached, the termination of employment contracts will have to be processed according to the dismissal rules due to objective circumstances.

The sum of all the workers at the time of initiating the procedures, independently of the modality of contract of work or its professional category constituted the reference base to apply those number percentages.

Another relevant factor when studying dismissal is the public or private nature of the employer or legal link of employment relationship.

In our legal system, there are different types of public employees, such as labour and functionary personnel.

· Functionary are those who have passed an opposition process and administrative law rules work for the Public Administration, the labour relationship.

· The labour personnel are those workers of the Public Administrations with contractual link and whose labour relation the statute of the workers rules, with similarity to the private company.

For many years, it was understood that the labour personnel at the service of the Public Administrations could not be dismissed for disciplinary reasons, because it was interpreted that the termination of employment contracts based on economic causes was not possible in entities that are not based on profit pursuit but are intended for the provision of public services. However, this situation changed with Law 3/2012, of July 6 of urgent measures to reform the labour market, where the possibility of non-

disciplinary dismissal of labour personnel at the service of Public Administrations is expressly regulated.

Moreover, in the case of functionary personnel, in reference to the disciplinary dismissal, it lacks systematic regulation. In the EBEP (Basic statute of the public employee), there is no legal rule in this regard. In the absence of special regulation, it is necessary to resort to the common regulation (arts. 49. ET).

The difference is that the public entrepreneur is strongly subject to constitutional principles of legality and prohibition of arbitrariness, so there is a much stronger protection in the public nature of the dismissal compared to the private entrepreneur, who has a bigger range of action in covered by the company's freedom acts.

3. Sources of law

The following rules collect the sources of dismissal regulation in our country:

3.1. The Constitution

The article 35.1 of our Constitution establishes "the duty to work and the right to work". Our Constitutional Court with a sentence 22/1981 of July 2 clarified that the right to work, suppose, among other things, the right to stability in employment and judicial control of it. This right establishes the need of the causality of dismissal by the employer to guarantee the defense of the worker.

Article 35 CE does not grant a job to the worker, but it requires an action through public authorities. In correlation with the previous article, the article 40 CE establishes the obligation of the State to direct its public policies in orientation to full employment or to maintain a social security system with guarantees of attention to unemployment. What article 35 CE tries to establish is the right of access to the labour market with constitutional guarantees as equality and non-discrimination.
But it does not guarantee a job, for that reason it corresponds to the State through its policies to promote collective or individual freedom and equality by making them real and effective in addition to remove any obstacle that prevent or hinder its fullness as the article 9.2 CE states.

The right to work has a double aspect: individual and collective, both are recognized respectively in arts. 35.1 and 40.1 of our Constitution.

On the one hand, in its individual aspect, it is specified in the right of continuity or stability in employment, it means, to not be dismissed if there is no just cause.

On the other hand, in its collective dimension, the right to work implies a mandate to the public authorities to carry out a policy of full employment.

Opposite to the previous right to work, we find enterprise's freedom of Article 38 CE that establishes the capacity of each company to decide on its objectives and establish its own planning according to its resources or to the current and potential market demands.

Therefore, it has needed a concordance between the freedom granted to the employer in the adoption of decisions related to the management of his company and the protection of the worker and his interests.

3.2. Worker's Statute

The current legal regulation of the termination of the employment contract is found in the Workers' Statute (from now ET) recently reformed by Royal Legislative Decree 2/2015, of October 23, in articles 49 to 57.

The ET's purpose is to provide a regulation of the relations between worker and employer that are constructed from a work contract, recognizing the respective rights and obligations. Composed of 97 articles, the ET includes the main labour rights that every worker has.

Jurisprudence also has a relevant role, through its role of interpretation and application of legal and conventional rules.

The Worker's Statute was originally approved and published in the Official State Bulletin on 14 March 1980: since then it has been subject to numerous modifications

being one of the most controversial the last one Labour Reform (Royal Decree Law 3/2012).

This reform had a serious impact on labour relations, since some mechanisms were introduced to carry out a deep adjustment of the workforce in both sectors, the public and the private.

Some mechanisms are the reduction of compensation for unjustified dismissal, the elimination of administrative and judicial controls that limit the adoption of those same decisions or also the abolition of procedural salaries.

These factors make the dismissal without cause more flexible and cheaper, without any motivation or legal justification.

Consequently, the effect of the reform has been the exponentially increase of unemployment registry[1].

3.3. Supranational rules.

Among the international rules that deal with labour termination are the OIT Convention number 158 of 1982 and the Charter of Fundamental Rights of the European Union (CDFUE from now) in the European area.

The OIT Convention No. 158 regulates the protection of the worker against the arbitrary and unjustified termination of the employment relationship and against the economic and social difficulties involved in the loss of employment. In particular, the Convention provides:

a) The obligation to motivate the dismissal with a just cause with the consequent prohibition of arbitrary or unjustified dismissals.

b) Formal guarantees in defense of the worker.

[1] In February 2012, the growth rate of registered unemployment is practically the double in the same month in 2011. The increase in unemployment was 112,269 people, which is considerably different from the growth in the same month of 2011, which was 68,260 people.

c) The right to oppose dismissal on an impartial authority or judge.

d) The right to compensation for the end of services.

Within the European Union, Article 30 CDFUE recognizes the right of workers to their protection in case of unjustified dismissal as a fundamental social right, indicating, "Every worker has the right to protection in case of unjustified dismissal, in accordance with Union law and national laws and practices".

The relevance of art. 30 CDFUE is based on the fact that, in recognizing the right to protection in the case of unjustified dismissal, rejecting the "ad nutum" dismissal, the causeless one.

4 CRITERIA FOR ALLOWING DISMISSALS

In first place, it is necessary to determine the existence of a causality principle around the dismissal in Spain, and this is the causality required for the employer to terminate a work contract. This essentially depends on two factors: the legal definition of the causes that determines the margin of freedom to dismiss and the compensation that in each case the employer have to pay.

In second place, we have to mention briefly to the Constitutional Court Sentence n. 22/1981 in which the content of labour low is developed. The own sentence said, ‘‘the labour law does not end with the freedom of work; supposed also the right to a job and as such present a double aspect: individual and collective, both recognized in the articles 35.1 and 40.1 of our Constitution.

4.1 Is there a need for a valid reason for termination? How is the reason defined and what criteria apply?

About the criteria that allow the dismissal is necessary to explain first that in Spain there are two types of dismissal; the labour legislation distinguish between disciplinary dismissal and objective dismissal, now we are going to explain the criteria that applies in each chase:

4.1.1 Disciplinary dismissal

The reasons that justify the objective dismissal are: a) repeated and unjustified absences of attendance or punctuality; b) indiscipline or disobedience; c) verbal or physical offenses to the employer or other persons; d) offense of contractual good faith or trust abuse when the employee works; e) voluntary and continued decrease in the work performance; f) the drug or alcohol addiction that have a negative impact in the work; g) harassment based on race, ethnic, religious, disability, age or sexual orientation grounds for the employer and other persons of the company.

a.) Repeated and unjustified absences of attendance or punctuality

Until the 2012 labour reform, this kind of dismissal required not only a certain number of absences at the same time this absences need to reach a certain percentage in a specific period. The labour reform of 2012 brought with it an important reform of the regulation contained in the article 52 d) of the Status of Workers. Now the norm authorizes the dismissal for absences of work attendance, even justified but intermittent, that reach twenty percent of the working days in two consecutive months, provided that the total of the absences of attendance in the previous twelve months reaches five percent of working days, or twenty-five percent in four discontinuous months within a period of twelve months.

There are certain cases that are excluded, but it must be taken into account that those absences of attendance that obey the situation of medical leave due to common contingencies of the worker must be computed for the possible dismissal. In other words, involuntary absences of work assistance will be taken into account.

The excluded cases as absences are the absences due to:

- Legal strike for the duration of the same,
- Exercise of activities of legal representation of workers,
- Work accident,
- Motherhood,
- Risk during pregnancy and lactation,
- Diseases caused by pregnancy, childbirth or lactation,
- Fatherhood
- Licenses and holidays,

• Illness or non-work accident when the leave has been agreed by the official health services and have a duration of more than twenty consecutive days,

• Those motivated by the physical or psychological situation derived from gender violence.

b.) Indiscipline or desobedience

According to the courts, disobedience must be understood as failure to comply with orders and instructions issued directly by the employer, or by the person delegated by him, in the regular exercise of his management powers. The orders must be clear, specific and correspond to the scope of the company and the faculties or functions of the worker.

The indiscipline implies an attitude of open confrontation against the orders of the employer in the regular exercise of their functions of management and organization of work, accompanied by a breach, conscious and voluntary, of the obligations of the employment contract for the person of the worker.

The Law refers to serious and culpable breaches of the worker, the sanction of dismissal must be the last to be applied by the employer, as it is the most serious, if these characteristics do not concur, the worker's conduct would deserve a lighter sanction than the dismissal.

The jurisprudence has repeatedly maintained the criteria that the orders and instructions of the employer are presumed legitimate, falling on the worker the duty to comply with those.

However, and in accordance with what is indicated by the jurisprudence, the worker could disobey the employer's orders if these, by their nature and significance, affect the dignity of the worker, in the case of orders that affect the workers private life, or when exists situations of physical danger to the worker. The worker must accredit all these circumstances.

Finally, an example of dismissal for disobedience would be the refusal to work of the workers designated to perform minimum services on strike, or to work in essential services on strike, provided that these services have been established in accordance with the legislation.

Verbal or physical offenses to the employer or other persons

Verbal offenses are expressions, oral or written, that constitute a moral offense to the person who suffers or receives them, such as insults, threats or blackmail.

In particular, physical offense means the unjust attack of one person to another, by making it the object of an aggression that mortifies or harms their body integrity.

Therefore, and in accordance with the Statute of Workers, the verbal and physical offenses to the employer, to the other workers of the company, or to the relatives who live with them justify the cause of dismissal.

Although it is normal for these aggressions (verbal or physical) to occur in the workplace, it must be understood that the norm includes those others that occur at other times or places, whenever their connection to work is proven

Undoubtedly, the offense must be serious, in the sense of making difficult the coexistence between the offended and the offender, without it being necessary to constitute a crime or infringement.

In addition, and as in all cases of dismissal, the concurrent circumstances and the intentionality of the worker must be assessed, because the same word, the same gesture or the same act may have different transcendence and significance in different cases.

But not only the circumstances that affect the worker, also those related to the victim, must be assessed, since the previous provocation is configured as an exculpatory circumstance of the worker's behaviour.

c.) Offense of contractual good faith or trust abuse when the employee works

We will speak of breach of contractual good faith when, on the part of the worker, when a breach of the obligations of fidelity with the company is caused, provided that the worker acts with conscience that his conduct is causing that violation; without the Law requiring that, necessarily, a detriment be derived for the company.

This cause refers to the breach of the obligations of loyalty, diligence and loyalty required for good labour order and the interests of the company.

The assumptions of breach of contractual good faith are multiple, being some the following:

- Unfair competition, understood as the activity of the worker aimed at performing tasks of the same nature or branch of production that is developing under a work contract, without the consent of the employer and whenever it is caused to that a real or potential harm. In any case, it is very important to emphasize that majority jurisprudence understands that does not exist unfair competition if there is no evidence of harm to the employer.
- The abusive use of the powers or faculties attributed to the worker, being examples of this; have without the consent of the company, material of the same or exercise functions outside the position that is occupied. This type also includes accounting fraud, banking irregularities, customer diversion, etc...
- Obtain particular benefits fraudulently by appropriation of materials, money or industrial formulas of the company, particularly when the worker is obliged to custody, regardless of the amount of its value, using means of the company for private purposes, or through workouts with the same purpose. In these last two cases, the worker's behaviours must have certain entity and disproportion to be entitled to dismissal.

As we have already pointed out, the economic damage caused by the worker's action to the company, as well as the seriousness of the conduct, must be addressed by putting it in relation to the employee's performance.

- The negligent behaviour of the worker, violating the minimum duty of diligence.
- The performance of work in a situation of temporary disability if the activity performed evidences the aptitude for work or is of such a nature as to impede or delay the cure.
- Irregular actions such as coercion or threats to colleagues that do not support the strike, or cause damage to facilities or company assets.
- Cause damage by recklessness.
- Falseness in terms of training, qualifications or skills required by the company.
- The falsehood to obtain permits or licenses for cases not legally provided for.

e) Voluntary and continued decrease in the work performance

According to the courts, a decrease in performance is voluntary when it is due to the negligent, fraudulent and culpable action of the worker. This requirement of voluntariness does not occur in the case of "ineptitude" of the worker who, if known or occurred after his effective placement in the company, will constitute a cause for objective dismissal of the contract, or a cause of extinction due to permanent disability of the worker.

Based on this definition, we can point out that the requirement of voluntariness does not occur in cases such as the pregnancy of the worker or the change of position or functions of the worker. Neither can be considered as a cause of dismissal, because the note of voluntariness is not present, the decrease in performance due to the lack of raw materials.

The company have to prove the voluntariness at the time of making the dismissal because is not presumed.

In addition, and in accordance with legal regulations, the decrease in performance must be continued, that is, the severity of this decrease derives precisely from its permanence in time, not just a sporadic decline of it. The law does not say to what period of time reference is made, so the Court will decide the matter, if the worker challenges the dismissal.

As in the rest of the causes of objective dismissal, to know if the sanction of dismissal is proportionate, it will be necessary to attend to the concrete circumstances of the case, and establish a comparison between the current and previous performance. In this regard, jurisprudence has used various systems or criteria for comparison, such as custom, the performance of the average worker or other colleagues, or the previous performance of the worker himself.

Likewise, it will also be understood that there is a decrease in the performance of the worker when the objectives stated in the contract are not met as minimum, as long as they are not abusive, and must be treated because of an attainable performance by any capable worker with an ordinary performance.

f) The drug or alcohol addiction that have a negative impact in the work

Jurisprudence understands habitual drunkenness that is not sporadic, although in some cases it will suffice unusual drunkenness to justify dismissal, as in the case of drivers or workers engaged in customer service. Therefore, drunkenness is not considered cause for dismissal if it is not repeated or habitual, in terms of drug addiction, the mere fact of the worker being in possession of drugs for their own consumption, when this circumstance does not affect transcendently and directly in the labour sphere, it will not lead to dismissal.

But the norm not only requires that the worker suffers from habitual drunkenness or drug addiction, but that, to constitute cause of dismissal, these addictions must have a negative impact on their work. Thus, and according to the courts, the negative impact on work due to habitual drunkenness or drug addiction would consist, for example, in the decrease of performance, in the possibility of causing personal or material damage, etc.

The employer have to prove the negative repercussion in the work.

g) Harassment based on race, ethnic, religious, disability, age or sexual orientation grounds for the employer and other persons of the company

Interpreting the legal wording of this case, we can point out that, harassment consists of any conduct that has as objective or consequence to threaten the dignity of the people, creating for them a habitat or humiliating, offensive and even intimidating environment.

Harassment, in this case, must be done by a worker and with respect to other co-workers or the employer. It would be differentiated from the mobbing, or moral harassment, carried out by the employer, and would result in the contract termination at the worker's will, as it is a breach by the employer.

The conducts indicated constitute legitimate cause of disciplinary dismissal, unlike others already analysed, it is not required that it is a habitual behaviour, so that a single act of the worker constituting harassment would lead to his dismissal.

With regard to sexual harassment or because of sex, the jurisprudence states that the conduct constituting sexual harassment can be very varied and of different intensity. There are cases in which a single act can constitute harassment, due to its intensity and seriousness, and others in which the harassment consists of a repetition of the same or similar behaviour on the part of the harasser; in others, however, a repetition of the same or different behaviours will occur.

With regard to behaviours or behaviours that could be considered harassment, it may be verbal or physical behaviour, such as looks and gestures, use of double-gender or insinuating expressions, jokes or jokes of a sexual nature, display of pornography, implementation of compromising proposals, touching, rubbing, kissing, proposing sexual relations and, finally, sexual abuse or aggression, with use of physical violence. The behaviour consists of addressing another person, whether a partner or the employer, with sexual advances or suggestions, being clear to the harasser that the victim does not wish to be the object of such suggestions or suggestions, in such a way that an intimidating environment is generated for the victim.

Sexual assault constitutes, in addition to a crime, a form of physical offense worthy of disciplinary dismissal. In this regard, the courts also consider conduct of disciplinary dismissal conducts that do not come to be considered sexual harassment, but that harm the privacy or sexual dignity of the victim, and must be in the specific case to qualify the conduct.

4.1.2 Objective dismissal.

The objective dismissal is characterized because it is not based on a worker's non-compliance, but on a series of causes, of which neither the worker nor the company are guilty.

Article 52 of the Workers' Statute, in accordance with the new regulations, lists the objective causes of termination of the contract: a) objective dismissal due to ineptitude of the known worker or subsequent worker; b) objective dismissal due to lack of adaptation of the worker to the technical modifications carried out in his job; c) objective dismissal for lack of assistance to work and e) objective dismissal due to insufficient budget allocations.

a) Objective dismissal due to ineptitude of the known worker or subsequent worker

The ineptitude existing prior to the fulfilment of a trial period cannot be claimed after said compliance.

As we can see, the ineptitude of the worker that allows resorting to this type of dismissal is that which has been known, or that occurs, subsequent to the hiring of the worker.

This cause of dismissal refers to a lack of skills, physical or mental, or knowledge to perform the work for which the worker has been hired, unknown at the time of hiring or occurred after hiring. Examples of situations such as the one described would be the withdrawal of the driver's license from a professional driver, the discovery that the worker has lied in his curriculum and does not have the qualification or training for which he was hired, the non-renewal of the permits for residence and work in the case of foreign workers.

Thus, the Supreme Court has indicated, in the first place, that it must be a general ineptitude for all or the most essential tasks or functions of the job, not enough that the ineptitude refers only to some specific functions considered separately (STS of July 14, 1982).

It is also required that the ineptitude or lack of aptitude be of certain entity, in relation to the work performed by the worker, so that it prevents him from rendering his services, and that is durable or with vocation for permanence, and not temporary or circumstantial.

Also, the jurisprudence of the Supreme Court has been demanding also since ancient (STS of 14-7-1982) that the ineptitude is due to causes beyond the worker's own, because if the worker's guilt mediated we would fall within the scope of disciplinary dismissal.

Finally, and to close the legal requirements of this cause of dismissal, it must be taken into account that the collective agreement of application does not contemplate, for this type of case, the relocation of the worker in another job and performing different functions; because, if that were the case, there would be no place for dismissal for this reason.

b) Objective dismissal due to lack of adaptation of the worker to the technical modifications carried out in his job

Previously, the employer must offer the worker a course aimed at facilitating adaptation to the changes made. The time allocated to the training will in any case be considered as effective work time and the employer will pay the worker the average

salary that he / she received. The employer cannot agree extinction until at least two months have elapsed since the modification was introduced or since the training aimed at adaptation has ended. "

The norm indicates that the employer cannot agree the extinction until at least two months have elapsed since the modification was introduced or since the training aimed at adaptation has ended. That is, the worker can only be dismissed when, after receiving the necessary training, and after the necessary time for that adaptation, which the Workers' Statute establishes in two months, the worker has not adapted to the modifications that have been made at the work place.

It should also be taken into account that the changes made in the workplace of the worker must be reasonable, in relation to the operation of the company. In this regard, the courts have also indicated that "reasonable change" should be understood as one that respects the functions of the job. In accordance with what is stated, article 39 establishes that it will not be possible to invoke the causes of objective dismissal of supervening incompetence or lack of adaptation in the event of performing functions other than the usual ones because of functional mobility.

In addition, and as established by the norm, to be able to attend to this cause of dismissal, the training course must be offered, that the worker carries out and that, after two months from the end of that course, the worker continues without adapting, really and effectively, to the technical changes made.

The argument that the worker has not obtained a positive result in the training course would not give rise to this type of dismissal, and more if it were the company itself or an entity on its behalf that provides the course. The lack of adaptation must occur and be checked, therefore, by the performance of their work by the worker.

Finally, you can only resort to this type of dismissal when after having offered the worker the appropriate training and having given him a time to adapt it, he still does not adapt.

c) Objective dismissal for lack of assistance to work and

d) Budgetary reasons

The regulations also include as a cause of objective dismissal the lack or insufficiency of budget allocation for those non-profit organizations that carry out public programs financed by the Administration.

4.2 Can dismissal be considered as an ordinary tool of company management or is it an instrument that can be used only if there is no other real alternative?

As we have explained at the beginning, the dismissal in Spain is determined by the principle of causality, which determines that the termination of a work contract cannot be carried out without just cause. However, analysing the operation of the dismissal in Spain, we will observe that the causes that justify it can be more or less demanding.

In the first place, the causality of dismissal is, like any other regulation, what its guarantees of compliance are worth. In the limit, the causes can be so little demanding that ... in fact they are almost not causes, but only make up the unilateral capacity of the employer to dismiss. In Spain, we are very close to that, and then we will explain why.

The causes, that we analysed in the previous section, are very lax, and, therefore, the dismissal will be easier. This element is especially relevant if one takes into account that the regulation does not establish a priority with respect to other forms of temporary adjustment that can be used by companies instead of dismissal. Priority, according to the dictionary of the RAE, is the "advance or preference with which something must be attended to with respect to something else with which it is compared".

This is a lack that our work order has: dismissal can be the last or the first form of labour adjustment. This lack of regulation gives the employer the free power to decide and, therefore, according to the empirical evidence available.

To what has been described above, it is added that there is no distinction in the regulation between causes of adjustment to conjectural or structural situations, so that dismissal (the most definitive and structural measure because the employment relationship ends) can be used to respond to a cause merely conjectural.

In such a way that the combination of some very lax causes and of the capacity granted to the employer to use at any time the dismissal, has turned this into the first adjustment element of the companies.

The causes for dismissal in Spain are certainly very lax. Especially since the last labour reform in 2012, which determined that before a mere economic situation of the company this could proceed to the dismissal for economic reasons.

After this reform, the economic causes have been so weakened that there are hardly any companies that already use the other causes justifying the dismissal

(technical, organizational or production), which in reality have been defined by that reform in a similar way, but on which (even so) there is a greater need for evidence than for economic ones.

5. FORMAL AND PROCEDURAL REQUIREMENTS: is there a specific form of communication/notification and period of notice required?

The Spanish labour legislation requires that the act of dismissal respect the formalities and the indispensable requisites for it to be considered valid; otherwise, they could turn it into an unfair dismissal.

Article 55.1 of the ET, establish:

"The dismissal must be notified in writing to the worker, stating the facts that motivate and the date on which it will have effects. By Collective Agreement may establish other formal requirements for dismissal.''

The ET indicate that the employer is not satisfied with expressing his unequivocal will to dismiss so that the dismissal is formally correct and admissible, but must do so following specific requirements: it must do so "in written form", constituting the document in which the business will manifest the dismissal of what is commonly known as the "dismissal letter".

The letter of dismissal will be different depending on the type of dismissal we are dealing with, if it is objective or if it is disciplinary.

a) Disciplinary dismissal

Regarding the formal requirements of disciplinary dismissal, it must be taken into account that it does not require prior notice; it must be notified in writing to the worker by means of the corresponding dismissal letter and does not give any right to compensation.

The worker has 20 working days to contest this dismissal, which requires a quick and accurate analysis of the contents of the dismissal letter.

We present below the six requirements that a disciplinary dismissal letter must meet, a case that requires special care in its drafting and its interpretation:

1. Background: There are events or circumstances prior to the decisive facts of the dismissal that are relevant to explain the latter. It can be, for example, a strange behavior of the worker that arouses the suspicions of the employer and provokes

a deeper investigation on his part, or a business decision that supposes a change in the previous "status quo", unchaining a conflict between the worker and the employer or another person.

2. Each and every one of the acts of the worker that have led to a serious breach of his obligations must be explained in a concrete manner, indicating how he has carried out said acts, identifying, by way of example:
   • the means of the company that would have used to perform these acts
   • business property objects that you have subtracted
   • the people you have insulted or attacked, what the worker said, how you assaulted the other person.
3. When: It is essential to indicate the dates and, if possible, hours, in which the worker has committed each of the previous acts.
4. Where: The identification of the place or places where the previous acts are carried out may be relevant. If they take place outside the workplace, the specific address must be provided, while if they occur inside, the room and place where they take place will be specified.
5. How: The company must inform in the letter of dismissal about how the worker's acts have come to their knowledge, taking care that the means used for their discovery do not violate the right to privacy of the latter.
6. Why: An explanation should be offered as to why the specific acts carried out by the tracker entail a serious breach of their contractual obligations, and it is convenient to refer to the specific legal and conventional provisions that regulate this matter.

b) Objective dismissal

The dismissals for objective reasons have as their common denominator their origin in reasons unrelated to the worker himself and his behaviour. The formalities to follow in this type of dismissals are several:

1. Written comunication

The fundamental content of the communication is the will of the employer to terminate the contract, which defines, the date on which that extinctive will be effective, obviously subsequent to the reception of the communication itself, "the facts" that motivate the extinction:

The breach of the written communication requirement or the insufficiency of its content may result in the declaration of inadmissibility of the extinct decision.

2. Compensation

Despite the initial justification for the termination of the contract, the worker is entitled to be compensated for the loss of his job: 20 days of salary per year of services rendered, with fractions of twelfths per month or fraction of a month that exceeds the annual multiple, and an absolute limit of twelve months. The salary will be the one received on the date of termination, which is known by the company, subject to the worker proving that he was entitled to another superior. The time of services also consists of the company, so, in principle, setting the amount of compensation does not present difficulties.

The law prevents that this compensation must be made available to the worker, really, without having to do anything else but perceive it and this simultaneously with the delivery of written notice of the cessation.

Failure to comply with or insufficient compliance with this requirement leads to the dismissal being unfair, in case of excusable error in the calculation, or even inadmissibility, without prejudice to the employer's obligation to pay the correct amount.

3. Prior notice and permission

The law has provided for an advance notification of the termination of its effects, so that it establishes a 15-day notice. The omission of this requirement does not determine the nullity of the decision, nor its inadmissibility, but it is compensated with the payment of the salaries corresponding to the days totally or partially omitted.
The notice gives rise to a permit of six hours per week, so that the worker can look for a new occupation.

5.1 What are the consequences of the infringement of these rules?

The doctrine of the Supreme Court (STS 15/01/2008) establishes that the omission of the period of notice will only be accompanied by the legal consequence of paying compensation equivalent to the salary amount of those days.

The provision of compensation is a formal requirement, autonomous and whose breach does law for certain exceptional situations of corporate insolvency reserve. The purpose of the provision, by requiring the aforementioned provision of compensation, is

that the worker has the amount legally established as compensation at the same time of the communication of the termination agreement ("simultaneously"). Therefore, the doctrine indicated, regarding the consequences of error in the determination of the amount, is related to the safeguarding of that right. It has been understood that the right is not satisfied if the sum made available were inexcusable, which would have corresponded according to the parameters established by law.

The delivery of the letter and compensation is considered simultaneous if a bank transfer is ordered the same day, but not if it is ordered 3 days later (STS 23.04.2001); The Administration is also subject to the provisions when act as an employer (STS 28.05.2001).

6. THE ROLE OF LABOUR AUTHORITY, WORKERS REPRESENTATION AND COLLECTIVE BARGAINING.

6.1 LABOUR AUTHORITIES

The Labour Authority is an administrative body that plays a very important role in various business procedures, as: collective dismissal, strike periods, work done by 16 years old minors, etc, but it doesnt play any important role in individual dismissal.

6.2 TRADE UNIONS AND COLLECTIVE AGREEMENTS

Collective agreements can limit the causes of dismissal and introduce procedural rules that the parts have to respect. With regard to disciplinary dismissal, in the absence of a collective agreement applicable to the employment relationship that is intended to extinguish, the only sanctions that can be imposed (if there is proven cause for it) are those typified in Art. 54 ET. f the fault is reflected in the collective agreement of application, the employer has the power to impose the sanction established in the regime of faults and sanctions established collectively.

7. JUDICIAL CONTROL OFDISMISSAL

7.1 SCOPE OF CONTROL OF COURTS

The scope of application of the Courts is related with the object of its control: reasons of legitimacy and reasons of merit.

In Spain, the jurisdiction of the social order is competent to resolve the pretensions regarding dismissal, both in its individual and collective aspects. Thus, Law

36/2011 of October 10, regulating the social jurisdiction, establishes in its art. 2 that "the jurisdictional authority of the social order known of the litigations that was promoted between employers and employees as a result of the work contract and the contract of availability, and in the exercise of other rights and obligations in the domain of working relationship ".

In the social order, the concept of a single instance governs. The instance could be defined as each of the phases of the process carried out before a different judicial body (thus, if the process continues before another body we could speak of second instance). This means that the matter is only known in its entirety by a judicial body but does not imply that the judgment can not be appealed before a higher body. Thus, the eventual second instance would consist of a new phase, before a higher judicial body, where the matter would be prosecuted in its entirety, at the request of one of the parties, because of the latter was not satisfied with the judicial decision.

According to the art. 6 LJS, Social Courts shall be competent to hear in a single instance all the processes attributed to the social jurisdictional order, except of what is expressly attributed to other Courts in the Law.

With respect to dismissal, Social Courts will be in charge for hearing the dismissal request, with the exception of collective dismissals, which will be hear by the Superior Court of Justice in a single instance (Article 7.a) LJS) and of the collective dismissals contested by the workers' representatives, which will be heard by the Social Chamber of the National Court (Article 8 of the LJS).

Regarding to territorial jurisdiction, the courts of the place where the services are provided or of the domicile of the defendant will be competent, at the option of the plaintiff.

With respect to the appeals of dismissal judgments, which are of an extraordinary nature, the Superior Courts of Justice will hear the petition for appeal against the resolutions issued by the Social Courts of their district, while the Social Chamber of The Supreme Court will be competent to hear the appeals of cassation established in the Law, the review of final judgments issued by the courts of the social order.

The control carried out by the courts responds to checking whether the reasons for dismissal are valid, reasons that must have been informed by the employer to the worker through the letter of dismissal. To facilitate access to the courts in matters of

dismissal, the assistance of a lawyer or solicitor is not required, being optional for the worker.

This establishes a procedural regulation that allows judges to control the employer´s decision. This implies that, faced with the decision to terminate the company, the worker has the right to have a judge control the existence of the case and with it the legitimacy of the business decision. Hence, business decisions must be subject to control that will not only affect the causal requirement, but also respect for the other conditions and requirements set forth in the law.

7.2 VALID REASONS, PROPORTIONALITY, ADECUACY AND NECESSITY OF THE EMPLOYER´S DECISION IN THE TERMINATION OF THE CONTRACT

The main difference between the disciplinary dismissal and the objective dismissal for reasons inherent to the worker's person is that the disciplinary dismissal revolves around the worker's non-compliance, while the objective dismissal for objective reasons inherent to the worker is based on a kind of objective incompatibility between the worker and the workplace.

Regardless of whether it is a disciplinary or objective dismissal for reasons inherent to the worker's person, in each dismissal the Judge will have to make an individualized analysis of each specific dismissal and attend to the objective and subjective circumstances that occur in the dismissal, as well as the entity and imputability of the breach. Depending on the cause that leads to the termination of the contract, we distinguish different analyzes that must be carried out by the judge.

1. Disciplinary dismissal

When the cause of the dismissal is the repeated and unjustified absence of attendance or punctuality to the work, always it will be necessary to make a specific and individualized analysis looking for proportionality and adequacy between the fact, the person and the sanction.

Regarding verbal or physical offenses, the assessment of the seriousness of the offense requires the judges to assess the objective and subjective circumstances concurrent. As established in the jurisprudence, "the same word, act or gesture may have the greatest seriousness in a given situation and absolutely lack it in others".

When there is a continuous and voluntary decrease in the normal or agreed performance, it is usually resorted to an objective criterion, in which the judge compares the performance of the affected with that of other workers, and, to a greater extent, a subjective, comparative criterion with the previous performance of the worker. Regarding disciplinary dismissal, the jurisprudence reiterates that the seriousness of the breach must be assessed according to its nature, frequency or reiteration and also in response to the concurrent circumstances in the provision of services, such as the characteristics of the job or qualification Professional of the worker. A "gradualist" evaluation must be done to achieve full adequacy between the facts, the person affected and the seriousness of the sanction.

2. Objective dismissal for reasons inherent to the worker's person.

The causes in which the lack of interest of the continuity of the contract responds to the worker's professional shortage, are:

- Ineptitude of the worker. The requirement of proportionality determines that it is not ineptitude less, but must be sufficient to make it reasonable to adopt the extinctive measure.
- Lack of adaptation to technical modifications. The judge will analyze if a series of accumulated requirements concur. These are the following:

1) That the modifications are related to the introduction of new technologies for the worker, becoming inept to carry out the tasks entrusted.
2) That said modifications affect the job that the worker has been performing so far
3) That the changes are "reasonable", that is, that they are functions different from the usual ones
4) The employer must previously offer the worker a course aimed at facilitating adaptation to the modifications carried out.
5) A minimum period of two months has to elapse from the introduction of the technical modifications or from the end of the training aimed at adaptation.

- Excessive worker morbidity. The judge must assess whether the number of justified absences computable has been significantly high, since it must exceed 20 per cent of working days in two continuous months provided that the total absence of attendance in the previous twelve months reaches 5 per 100 working days, or 25 per 100 in four discontinuous months within the period of one year.

7.3 QUALIFICATION OF THE UNFAIR DISMISSAL

In the judgment decision, the judge will qualify the dismissal as appropriate, inadmissible or void. Both in the disciplinary dismissal and in the objective, the worker can contest the business decision jurisdictionally (articles 53.3 ET and 120 LJS). The dismissal qualification has the same effects in the disciplinary dismissal and in the objective, except for some qualification.

a. FAIR DIMISSAL: In the case of disciplinary dismissal, it is considered appropriate when the breach of the work contract alleged by the employer is proven in the dismissal letter and the employer has complied with the prescribed procedural requirements. In the event of objective dismissal for reasons inherent to the worker, the dismissal will be qualified as appropriate when the employer, having complied with the formal requisites, certifies the concurrence of the legal cause indicated in the written communication (Article 53.4, penultimate paragraph, ET and article 122.1 LJS). In both dismissals, the parties are released from their respective obligations, except for those that, having been previously born, were pending.

b. IMPROCED DISMISSAL: The declaration of inadmissibility corresponds to two possible situations. On the one hand, in an identical manner both for the disciplinary dismissal and for the objective, when the non-compliance alleged by the employer is not proven, or if there is no evidence of the seriousness of the worker's conduct or the existence of the assumptions inherent in the worker's person that justify the adoption of an objective dismissal. On the other hand, when the dismissal in its form did not comply with the provisions of section 1 of this article (articles 55.4 ET and 108.1 LJS). This last situation is only contemplated for disciplinary dismissal.

c. NULL DISMISSAL: The causes of nullity, as well as the consequences of said qualification, are the same for both types of dismissals. The qualification of nullity corresponds to the cases provided in articles 53.4 ET for the case of objective dismissal for reasons inherent to the worker, and in art. 55.5 ET for the case of disciplinary dismissal. As a general rule, dismissal is null when it has as motive any of the causes of discrimination provided for in the Constitution and in the Law, or when it occurs with violation of fundamental rights and public freedoms of the worker. But also the dismissal is void, unless its origin is declared for reasons not related to those circumstances, in other five cases, which we have described in the sections on reinforced protection to certain categories of workers: 1. When it affects pregnant

workers, whenever it occurs in the period between the beginning of pregnancy and the maternity period, 2) when it affects workers during the period of suspension due to maternity, paternity, risk during pregnancy, risk during breastfeeding, or related diseases 3) when it affects workers who return to work at the end of periods of suspension of the contract due to maternity, adoption or foster care, provided that no more than 9 months have elapsed since the date of birth, adoption or fostering of the child, 4) when it affects workers who request or enjoy parental leave (Article 37 ET) or leave of absence (article 46.3 ET) 5) when it affects workers who are victims of gender violence.

7.4 BURDEN OF PROOF

It is the employer who bears the burden of proving in court the truth of the facts attributed to the worker as a reason for his dismissal (Article 105.1 LJS). In addition, he also has the burden of proving that he delivered the letter of dismissal to the worker or that, at least, he put all the means to do so in the event that it was alleged by the worker that it was not delivered to him. This letter of dismissal is the written notification to the worker; In this regard, it should be noted that legally the dismissal letter is an act different from the notification in which the facts that motivate the dismissal and the date on which it will take effect (Article 55.1 ET).

7.5 LIMITS AND PRESCRIPTION PERIODS OF LEGAL ACTION

The prediction of an expiration period for the exercise of claims for dismissal responds to the need not to maintain indefinite legal links. In effect, the basis of the legal concepts of expiration and limitation is to provide security of legal relationships, preventing the judge from examining a case when the plaintiff exceeds the period established for the start of their actions.

With respect to the actions of the worker derived from the dismissal, the worker has a period of 20 days to file the dismissal request; this is determined by art. 59.3 ET, which states that "the exercise of the action against dismissal or termination of temporary contracts shall expire twenty days after the one in which it occurred. The days will be working and the expiration period for all purposes. The expiration period

will be interrupted by the presentation of the request for conciliation before the public body of mediation, arbitration and competent conciliation ".

Likewise, art. 103.1 LJS establishes that "The worker may claim against dismissal, within twenty business days following the one in which it occurred. Said period shall be expiration for all purposes and shall not be computed on Saturdays, Sundays and holidays at the seat of the jurisdictional organ".

It is a period of expiration, so the right to claim is only born if it is exercised within the legal term, and can be assessed both at the request of a party and ex officio by the court itself, unlike the statute of limitations. The computation of the term begins from the day that the dismissal takes effect.

In accordance with arts. 63 and 65.1 LJS with the conciliation request the expiration period of the dismissal action is suspended, resuming the computation again the day following the conclusion of the conciliation act, or after 15 days since it was called if it had not been celebrated.

Finally, it should be noted that, regarding to disciplinary dismissal, it must be taken into account if the fault that is attributed to the worker is prescribed or not. Very serious absences, which are obviously the only ones that can be sanctioned with dismissal, prescribe sixty days from the date on which the company became aware of its commission and, in any case, after six months of having been committed. If the faults are continued, the calculation of the limitation period begins from the last fault.

7.6 Conciliatory Hearing/ Extrajudicial resolution of conflicts

In accordance with art. 63 LJS, the dismissed worker cannot claim directly before the Labor Court against the business decision that ends the employment relationship; for this, before it must necessarily attempt an extrajudicial or administrative conciliation, except in the assessed cases in which this requirement is exempted in art. 64 LJS.

The purpose of these acts of prior conciliation is to reach an agreement between the dismissed worker and the employer. To this end, an act is held before the Service, Section or Autonomous Center destined for the knowledge of these matters, where the conciliatory Lawyer tries to reach an agreement in which the company recognizes the

dismissal as inadmissible, indemnifying the worker, accepting this and giving the act concluded with compromise.

If no agreement is reached or if the defendant does not appear, the pre-procedural budget will be deemed fulfilled and a claim may be filed with which the process begins. This demand must refer to the same events referred to in the act of conciliation or mediation (Article 80.1c LJS) and must be accompanied by the accreditation of the celebration of this act (Article 81.3 LJS).

In accordance with art. 68.1 LJS expressly recognizes the enforceability of what was agreed upon in the conciliation, which constitutes the title to begin the execution process as if it were a matter of a judgment, without the need for judicial ratification.

7.7 Enforcement of the judgement

All judgments on dismissal of the Social Courts are appealable in supplication before the corresponding Social Chamber of the different TSJ, according to art. 191.3 LJS. Once the judgment has been handed down, it may determine that the dismissal is in accordance with the law or, on the contrary, by estimating the worker's claims, decreeing the dismissal or nullity of the dismissal.

In the cases in which the sentence object of recusal decreed that the dismissal is inadmissible or null there are two possibilities to make effective the judicial decision: while the appeal is processed, the reinstatement of the worker, or the indemnification by the employer and the extinction of the contract. We will analyze in this regard the execution of provisional sentences in the cases of reinstatement or compensation of the worker.

7.7.1 Execution of provisional sentences. The reinstatement of the worker

In cases where the sentence declaring the dismissal as unfounded is subject to appeal and the worker is readmitted, the employer is obliged to pay the worker the same salary that was received prior to the dismissal, the worker must continue providing their services. The employer is authorized to exempt the worker from providing their services until the definitive resolution, paying their salary without compensation (articles 111, 112, 297 LJS).

If the sentence declared the nullity of the dismissal and likewise opt for the reinstatement of the worker, according to arts. 113 and 297.2 LJS will adopt the same measures as for unfair dismissals.

In the event that the employer claims the worker's resumption of work, or that the worker claims the employer's compliance with the obligation to pay the salary, the judge will resolve the matter by listening to the parties (Article 298 LJS). The case of the worker's failure to rejoin the job in an unjustified way entails the definitive loss of wages (Article 299 LJS).

In this case the worker refuses to return to the job during the processing of the appeal, once obtained a final ruling declaring the dismissal unfair or void the company, must return to offer the worker readmission in accordance with art. 278 LJS and STS 1412/2014 of October 20, 2015, without being able to compute for indemnification purposes the time in which the worker did not join his job by his own decision.

On the other hand, if the sentence that was favorable to the worker was revoked in whole or in part, the worker is not obliged to reimburse the wages received during the provisional execution period, keeping the right to be paid the salaries earned during the processing of the appeal and that had not been received at the date of the finality of the sentence (Article 300 LJS).

7.7.2 Execution of provisional sentences. The worker's compensation.

If the employer or employee resort to a sentence that declared a dismissal as unfounded or void, having opted for compensation of the worker, during the processing of the resource the worker will be considered in a legal situation of involuntary unemployment in accordance with arts. 111 and 112 LJS.

If the amount increases or decreases the amount of compensation, the employer in the first case, and the worker in the second, may opt for readmission in accordance with arts. 111 and 112 LJS. If the judgment appealed is confirmed, the option chosen can not be altered.

7.7.3 Final execution of final sentences of dismissal. Cases in which the final judgment declares the dismissal inadmissible and the employer opts for reinstatement.

The execution of the final dismissal sentences is regulated in Art. 278-286 LJS, regulating mainly those cases in which the company does not readmit the worker.

In sentences of unfair dismissal contain two different sentences, one referring to an obligation to do, which is the reinstatement of the worker when the company does not exercise the legal option that is granted in it, and another of payment of a specific amount, liquidity, which are the processing fees included between the date of dismissal and the notification of the sentence.

The Law regulating the Social Jurisdiction regulates the execution of the final sentences of dismissal, in art. 280 LJS. In this regard, it provides that, if the execution of the judgment is urged with regard to the sentence for reinstatement, in such case the competent judge will issue a decision ordering the execution through the non-readmission incident and the execution of other sentencing decisions will be submitted to the general rules applicable according to their nature.

In these cases, the employer must inform the worker of the date of his reinstatement in the terms established in art. 278 LJS. In case the employer does not proceed to the reinstatement, the employee may request the execution of the judgment before the Social Court, in accordance with art. 279 LJS, the judge must certify that the worker has not been reinstated, or that this has resulted in an irregular manner, and issuing a ruling that (i) will declare the employment relationship extinguished, (ii) will agree on the financial receipt to be received by the worker for compensation and wages for processing, and (iii) condemn the employer to pay wages not received since the date the dismissal was declared as unfair for the first time.

If the employer does not proceed to readmission, or does so in conditions other than those prior to the dismissal, the worker may request enforcement of the judgment, and the lawyer of the administration of justice may adopt the measures contained in art. 284 LJS, which are:

- Possibility that the worker continues to receive his salary with the same periodicity and amount as that declared in the judgment, with the increments that through collective agreement or by state rule take place until the date of readmission in due form.

Determine that the worker continues to be registered and registered with the Social Security, which will be made known to the managing entity or common service for the relevant purposes. When the employer does not proceed with the reinstatement of the worker, the latter may request the execution of the judgment before the Social Court (Article 278, LJS):

a) Within twenty days following the date indicated to proceed with the readmission, when it has not been carried out.

b) Within twenty days after the expiration of the ten days referred to in the previous article, when no date had been set for resumption of work.

c) Within twenty days following the date on which the readmission took place, when it was considered irregular.

7.8 IS IT POSSIBLE TO IMPOSE PRECAUTIONARY MEASURES DURING THE JUDGMENT?

As in the other jurisdictions, precautionary measures in the workplace are a means used to ensure the effectiveness of judicial protection. These are instrumental and provisional measures linked to a judicial procedure. As stated by the TC, all precautionary measures respond to the need to ensure a future pronouncement of the judicial body.

The art. 79.1 LJS provides for the adoption of necessary precautionary measures in the labor procedure to ensure the effective protection of what might be agreed in the judgment, in this regard, the arts. 721 to 747 LEC, adapting these norms to the particularities of the social process. For the adoption of precautionary measures, it is necessary that both the petitioner requests them and that they show that there are urgent reasons for their adoption.

In this way, in order for a request for precautionary measure in a dismissal process to be successful, attention must be given to: (i) the danger arising from the temporary lapse during the process, which responds to eventualities that could prejudice a future estimate of the worker object of the dismissal, making impossible the fulfillment of an estimatory resolution; (ii) the appearance of a good right, which means that an interim trial can be established favorable to the claim of the worker that is intended to protect with the precautionary measure.

The main precautionary measure that can be adopted during the processing of the process of claim for dismissal is the freezing of the assets of the employer, whose

purpose is to ensure compliance with a possible sentence that forced compensation to the worker.

As a particularity in the social order, the freezing order can be requested either at the request of a party (mainly by the plaintiff, although in case of counterclaim it could be required by the defendant), as agreed ex officio by the judicial organ, a state equally legitimate for its request the Wage Guarantee Fund (FOGASA) when its subsidiary liability could be derived.

Acceptance of the attachment measure is linked to the defendant performing acts that could be presumed to produce its insolvency or prevent compliance with a possible sentence of conviction.

Although in the art. 79 LJS only specifically regulates the freezing, according to art. 727.2 LEC can also adopt measures concerning the intervention or administration of the company, deposit of movable property, formation of inventory or cessation, in the labor order.

The procedure provided for the adoption of precautionary measures may be instituted at any time prior to the judgment that ends the main proceedings. The request for the adoption of precautionary measures must be accompanied by documentation proving the need for adoption of the same, and the resolution is adopted by judicial order, which may decree or dismiss it, this decision may be subject to appeal for reinstatement. These measures can be modified at the request of any party, alleging facts or circumstances that could not be taken into account at the time of their adoption.

As the provisional and accessory precautionary measures of the main proceedings, with the sentence that ends the process, the precautionary measure is also terminated. In the case of an acquittal, the protection granted by the measure ceases to make sense, thereby declaring the lifting of the measure. In case of conviction, the protection is granted with the execution of the sentence itself, because if the claim of the worker is estimated, the employer will proceed to compensate him for the dismissal, which will require the consignment for the amount of the sentence.

8 CONSEQUENCES AND EFFECTS OF A (LAWFUL ANDUNLAWFUL) DISMISSAL

In order to be able to speak of the consequences derived from the judicial qualification of the dismissal it is necessary to differentiate in the first place between disciplinary dismissals and dismissals for objective reasons (that is to say, not derived from a serious and culpable breach of the obligations arising from the contract by the affected worker).

In addition, it is necessary to differentiate between the case of declaration of the provenance or dismissal. We will see finally what are the consequences of the declaration of nullity of the dismissal.

Thus, in the case of judicial declaration of origin of the disciplinary dismissal, the Spanish legal system according to articles 55.7 and 109 of the LJS provides the following effects:

1. Validation of the business termination decision, which will occur from the date

2. The parties are released from their respective obligations, except those which, having been previously born, were pending.

3. The worker does not have the right to any compensation or processing salaries, unless otherwise agreed.

4. The affected workers will be legally unemployed, so they will be entitled to the corresponding benefits if they meet the legally required requirements. The exercise of the action against dismissal does not prevent the occurrence of the right to benefit. they can access unemployment benefits.

If the disciplinary dismissal incurs inadmissibility (because the non-compliance alleged by the employer is not proven or the latter does not review the requirements of culpability and seriousness necessary or finally when the requirements of form of article 55.1 ET have not been respected), the employer, within a period of 5 days from the notification of the judgment, you can choose between:

1. Readmit the worker under the same conditions that governed their employment relationship before the dismissal occurs, with payment of the so-called "processing salaries", meaning wages lost from the date of dismissal until the notification of the sentence that declares the inadmissibility or until he had found another job, if such placement was prior to said sentence and the employer was proven what was received, for his deduction of the processing salaries.

2. Confirm its extinctive will that will validate the termination of the contract that is understood to have occurred on the effective termination date at work (Article 56.1 ET) and pay the worker unfairly dismissed compensation equivalent to 33 days of salary per year of service, prorating for months the periods of time inferior to a year, up to a maximum of 24 monthly payments. Note that in this matter, the reform of the labor market operated by Law 3/2012, on the one hand, substantially reduced the previous compensation provided for 45 days of salary per year of service to a maximum of 42 months. The consequence is that the new reduced compensation will only be applicable to work contracts signed as of February 12, 2012. In the case of contracts signed prior to that date, the calculation of the compensation due will be based on a formula of transitory adaptation contemplated in the disp.trans.5.ª RDL 3/2012 and Law 3/2012, which will consist in that said compensation for unfair dismissal of the contracts formalized prior to the entry into force of this royal decree-law. will calculate at a rate of 45 days of salary per year of service for the time of rendering of services prior to said date of entry into force and at the rate of 33 days of salary per year of service for the time of subsequent rendering of services. The resulting compensation amount may not exceed 720 days of salary, unless the calculation of compensation for the period prior to the entry into force of this royal decree-law results in a higher number of days, in which case it will be applied as maximum indemnity amount, without this amount may exceed 42 monthly payments, in any case. On the other hand, the 2012 reform also limited the enforceability of the processing salaries to the hypothesis in which the employer opted for the reinstatement of the worker unfairly dismissed.

Note that if the employer does not opt for reinstatement or compensation, it is understood that he does so for the first one (Article 56.3 ET).

It also seems important to point out that the salary to be considered for the calculation of the compensation due is necessarily that which the worker received at the

time of the dismissal, but that which legally corresponds if the latter is superior to that (STS July 24 1989)

If the judgment declaring the dismissal unlawful is issued after more than 90 business days from the date on which the claim was filed, the employer can claim from the state the payment of the corresponding processing wages for the time exceeding said 90 days (Article 56.5 ET).In this case, the Social Security contributions corresponding to said salaries will also be paid by the State (56.5 ET).

If the disciplinary dismissal incurs nullity, the employer is obliged to the immediate reinstatement of the worker, with payment of the lost wages, from which the amounts received by the worker as unemployment benefit or in another job are deducted (art. 55.6 ET).

If the judgment declaring the nullity of the dismissal was appealed, by the employer or employee, it will be executed provisionally, so that the employer is obliged to pay the worker the same remuneration that was previously received, and the worker to continue to provide services, unless the employer prefers to make the aforementioned payment without any compensation.

9. Special categories.

9.1 Maternity

Article 55. b) ET sets the objective nullity of any dismissal to any woman in a pregnancy situation. A reinforced guarantee mechanism is established in the guardianship of pregnant workers, which has a clear constitutional relevance, from the perspective of the right to non-discrimination based on the gender (Article 14 CE) and directly linked to the right to personal and family privacy (Article 18.1 CE) and above all with the principle of non-discrimination, sanctioned by Article 9 CE, in addition to finding protection in European legislation.

Therefore, when it is proved that a business decision can cover a fundamental rights injury, such as non-discrimination, the employer must prove that the decision taken responds to reasonable grounds and unrelated to pregnancy circumstance (STC 38/1981).

For the TC, the knowledge by the company of the pregnancy situation of the worker is a necessary requirement to support the existence of a presumable discriminatory treatment in relation to the dismissal (STC 41/2002, STC 17/2003, STC 62/2007), where the absence of knowledge of it can justify the dismissal, and if not, it can support the discriminatory treatment made in the dismissal.

However, another part of the doctrine and jurisprudence maintains that the protection of pregnant women against dismissal is carried out without establishing any requirement on the need to communicate the pregnancy situation to the employer or that the employer must have knowledge of the pregnancy. The purpose is to provide the pregnant worker a stronger guardianship, exempting her from proving that the employer was aware of the pregnancy, question that belongs to the most intimate sphere of the person (STS 942/2017, STC 92/2008).

It is necessary to mention that the 55.5 also extends the protection to other assumptions in protection of fundamental rights and public freedoms of the worker, such as adoption, paternity, risk during breastfeeding, etc.

9.2 Gender violence

The public authorities can not stay away of developing policies to protect women victims of gender violence, which constitutes one of the most flagrant attacks on fundamental rights such as freedom, equality, life, security and non-discrimination proclaimed in our Constitution.

In accordance with article 9.2 of the Constitution, public authorities have the obligation to adopt positive action measures to make these rights real and effective, removing any obstacle that prevent or hinder its fullness.

In this way, the Spanish legal system grants a reinforced protection to women victims of gender violence to favor their access and permanence in employment, with the approval of the Organic Law 1/2004, of December 28, of Protection Measures against gender violence.

The law establishes social protection measures to justify absences from the workplace of victims of gender violence, enable their geographical mobility, the suspension with reservation of the job or termination of the contract if the worker demands.

Economic support measures are also regulated for the victims of gender violence as the right to the legal situation of unemployment when they voluntarily resolve or suspend their employment contract.

In addition, a specific action program will be included for victims of gender violence registered as job seekers, with measures to encourage the start of a new activity on their own.

9.3 Protection of union delegates

Article 68 of the E.T. pursues the purpose of favoring and ensuring the exercise of the functions of the legal representatives of workers against possible reprisals from the employer and recognizes a number of facilities and guarantees to protect the rights of union representatives, the same guarantees are also granted to trade union delegates, including:

- The priority of remaining in the company or in the workplace with respect to other workers in cases of suspension or termination due to technological or economic reasons.

- The right to not be dismissed or sanctioned during the exercise of their duties, if the dismissal or sanction is based on the action of the employee in the exercise of their representation function.

- Express their opinions freely in the matters concerning the sphere of their representation, being able to publish and distribute the publications of labour or social interest.

9.4 Workers on strike.

The Spanish Constitution recognizes, in its art. 28.2, the right to strike as a fundamental right, it is recognized for the defense of the workers interests.

Thus, in the event of a legitimate strike, the employer can not apply any measure that could harm the exercise of a fundamental right of the worker, the dismissal for example would be void in this case. However, it's necessary the strike to be considered legal, which should have been notified in time and to be celebrated in a peaceful manner, because the illegal strike allows the employer to impose disciplinary sanctions, including disciplinary dismissal, depending on the behavior of the workers.

The dismissals for participation in strike require of two concurrent elements: on the one hand, of an objective element, in terms of the qualification of the illegality or not of the strike, and another element of subjective type, on the evaluation of the conduct carried out by the worker. Behaviors like coercion on other workers to strike, prevent the entry or exit of the company or causing serious material damage to the company are some examples of behaviors that can lead to dismissal in the exercise of a strike, besides of listening to what the collective agreement applicable to the sector or the company provides.

9.5 Free dismissal.

Previously we have commented that the constitutional recognition of the right to work (Article 35.1 CE) implies the impossibility of establishing the ad nutum or free dismissal, the ones without any cause.

However, exceptionally, specific dismissal assumptions are admitted without any accreditation for some labour relations of a special nature, numbered in article 2 ET:

1.Will be considered as labour relations of a special nature:

a) The personnel dedicated to service in a private home.

b) The one of the convicts in the penitentiary institutions.

c) The professional sportsmen.

d) The one of the artists in public spectacles..

e) The one of the people that take part in mercantile operations in the name of one or more businessmen without assuming the risk.

f) Workers with disabilities who provide their services in special employment centers.

One of the most important assumptions in the figure of free dismissal, or without justification, is the one made in the trial period contracts, regulated by art. 14 ET.

This is the Indefinite Support Contract for Entrepreneurs (CAE), a contractual form introduced by Law 3/2012 which can only be celebrated in companies with less than 50 workers. It is a contract that provides the possibility for the employer to introduce a trial period of 1 year for workers, the employer can dismiss that worker without any justification and without any compensation while the contract keeps valid.