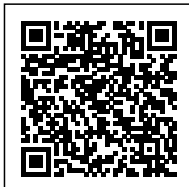


APPLICATION OF LABOUR REFORM BY THE SPANISH COURTS

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Prior to the recent Labour Law reform, all documents and procedural formalities in a mass dismissal were only of relative importance, as the objective of a staff reduction was to reach an agreement with the workers' representatives.

But now a mass dismissal must be planned from the beginning, with the expectation that it will be subject to a Labour Court review if such an agreement is not reached. This is why the consultation period, or the content of documents such as

the explanatory memorandum, technical reports and dismissal letters, are not mere bureaucratic procedures or forms, but formal requirements whose legality, which is subject to final confirmation by the Courts, will determine the validity of the mass dismissal.

It is common knowledge that prior to the Labour Law reform, a mass dismissal required the prior authorisation of the Labour Authority. In practice, however, such administrative authorisation was granted only if an agreement had been reached with the workers' representatives. If such an agreement had been reached, the documentation prepared was of no importance. If no agreement was reached, the Labour Authority usually denied the employer's application for a staff reduction.

The latest Labour Law reform has eased the requirements for a mass dismissal by eliminating the need for administrative authorisation. This important change has, in practice, altered the bargaining power of workers' representatives by allowing employers to carry out a mass dismissal and defend such a decision in court, with or without an agreement with the workers' representatives.

But the Courts are governed by the principle to protect workers. Hence, the most recent decisions are especially strict with employers with regards to compliance with each and every one of the formal requirements of a mass dismissal.

First, the workers' representatives must, from the start of the process, have all the documentation specified by law (explanatory memorandum, financial documentation, technical reports, etc) to explain and justify the existence of objective causes for the mass dismissal. Sentences such as that of the Supreme Court of Madrid of 22/06/2012 and that of the National High Court of 26/7/12 have annulled mass dismissals because the documentation was inadequate in both form and content.

Second, the Court will check whether the period of negotiation with the workers' representatives strictly conforms to the letter of the law. The content of meeting minutes take on great importance, as this would be the only documentary evidence allowed in a Court hearing to prove compliance with this formality.

The Court will verify that the debate between the parties had addressed the minimum matters set forth by law, such as the possibilities to avoid or reduce the number of dismissals and to attenuate the consequences thereof. If the parties have not made any proposals, or if there was no real discussion of these matters, the dismissal will be declared null and void (Supreme Court of Catalonia, 13/06/12).

Third, the Court will rule on a subjective matter such as the existence of good faith during the negotiation, an issue that has become the true Achilles' heel of mass dismissals. In fact, if the Court concludes that the negotiation between the parties was not based on good faith, the mass dismissal will be declared null and void (Supreme Court of Galicia, 19/07/2012, Supreme Court of Catalonia, 13/06/12).

Naturally, the fact that there was no agreement with the workers' representatives does not mean that one has not negotiated in good faith. And that is where the problem lies: first, for good faith to be present at all times in the form of either specific proposals or reasoned and reasonable rejection of such proposals; and, second, for such good faith to be reflected in the content of the meeting minutes.

In this setting, the Decision of the Supreme Court of Andalusia of 5/10/2012 is of particular relevance, not only because it is the first decision ratifying a mass dismissal in a public administration (City Council of Estepona), but because it analysed each and every one of the issues raised by the other party relating to the requirements of a mass dismissal, including good faith in the meetings with the workers' representatives.

In conclusion, the need to defend the legality of a mass dismissal in court – which would have been unthinkable before the latest reforms – requires careful preparation of documents and strategy, as well as correct execution of every phase in order to avoid the feared declaration of nullity.

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