

EMPLOYMENT SPECIAL REPORT 2014: DO IT YOURSELF?

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Employment lawyers say they are doing less collective dismissal-related work, but does this mean the economy is recovering or are clients simply more inclined to handle employment matters in-house?

With lawyers in Portugal and Spain reporting that collective dismissals are on the decrease, there is reason to feel some encouragement regarding the economic situation in Iberia. However, the situation may be slightly more complex and nuanced than that. There is also a view that, in fact, collective redundancies may actually be on the increase, especially in Portugal. The difference is that law firms are receiving less collective dismissal work because clients are preferring to let in-house teams handle such matters.

The impact of the 2012 Labour Reform in Spain is becoming increasingly apparent. Trade unions now have a significant opportunity to take such matters to court by claiming procedural breaches have

taken place. Some observers fear that such legal uncertainty is dampening the appetite of investors who fear that they may be forced to reinstate employees if cases go to court. Meanwhile, with employment matters increasingly having an international dimension, lawyers argue that a presence in foreign jurisdictions is becoming increasingly important.

Vicente Calle, partner at Garrigues, says the impact of the 2012 Labour Reform on collective issues is that even successful negotiations are ending in litigation, so the minutes of negotiations are lengthy. "It means negotiations have changed," he adds.

Juan Calvente, counsel at Clifford Chance, says that before the 2012 reforms, collective dismissals could only be implemented through agreement. Litigation was possible in agreed collective dismissals but these claims were generally not successful. He adds that the reform brought more flexibility and reduced the cost of collective dismissals. However, Calvente says that unions know that they have a "big chance to go to proceedings" by claiming a breach of procedure.

Pérez-Llorca partner Fernando Ruiz said that the perception was that the 2012 reform would be a big opportunity for companies to undergo restructuring processes but it is also true that now the trade unions have more chances to declare the procedure null and void. Baker & McKenzie partner David Díaz says there were effectively two reforms: the labour reform and case law, which was a test for collective dismissal. He adds that there has been a 40 per cent reduction in collective dismissals. "Generally speaking, employers have made the reductions they need."

Calle points out that if trade unions ask for information [during a collective dismissal procedure], they are hoping the response will be 'no' so they can get a "declaration of nullity". Uría Menéndez partner Mario Barros says that, a few of the first collective dismissals following the 2012 Labour Reform were not handled in a very professional manner, causing them to be nullified by the courts. This experience has shown that collective dismissals may require expert advice and this is creating opportunities for law firms. But Ruiz adds that there is a "lack of a general concept of how to conduct collective dismissal procedures within a group of companies – it's not clear how to do it well".

Worried investors

Freshfields partner Raquel Flórez says that when it applies to a group of companies, the jurisdictional borders are not clear. Ruiz says that the issue can be: "Do you take into account all the companies in the group or only the company where the problem is?" DLA Piper partner Pilar

Menor says that when negotiations are taking place, it is important to also think about potential litigation. She adds: "You have to reach agreement and protect your client." Díaz agrees that employment lawyers have to ensure they have enough information and ask themselves whether they need more to "be on the safe side". He adds that it is important to educate clients about the need to seek external legal advice.

Barros says that one of the impacts of the uncertainty regarding the outcome of collective dismissals is that it is making international clients more reluctant to invest in Spain because of the risk of having to reinstate employees. "If companies in Spain don't comply with all the formalities [in a collective dismissal case], they have to reinstate employees, which means international clients have to be persuaded to invest more," he says.

One partner says that as part of the fee arrangement with a client for handling a collective dismissal case, he would receive a bonus in the event the procedure was not declared "null and void". Flórez says that in collective dismissal procedures the employer has to make a contribution to the state if a certain percentage of the people are of a certain age – this payment is a contribution to unemployment benefits and it substantially increases the cost of the redundancies for the employer. But Flórez adds that, if the economy improves, it will become more difficult for employers to make changes to their workforce, with employees more likely to challenge those changes.

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David Díaz
Baker & McKenzie



Calle says that companies that are labour intensive are hiring lawyers to deal with collective dismissal procedures internally. "We [law firms] are becoming ultra-specialist – clients only go to law firms for high value work" he adds. Ruiz agrees: "In the past, our work was ongoing legal advice but that has changed." Another issue, according to Calle, is that some general counsel's bonuses depend on them reducing legal costs.

Díaz adds that one of the issues is motivating medium level lawyers at firms. "There are partners working, and highly skilled junior people, but the challenge is lawyers at the medium level, how do you keep them busy?" Calvente says that in the "crisis environment" clients have frequently tended to expect partners work at the price of a junior lawyer.

Not everyone wants partnership

Díaz says there is a need for younger lawyers, who are three to four-years' qualified, to do commoditised work. But Flórez argues that some younger lawyers may not be as accomplished at handling due diligence as you would want as there has been a shortage of transactions in recent years.

Díaz says his firm has hired a paralegal to help with proposals and visa/work permits for executives. "This is way of not having profitability eroded," he adds. But Calle says that while his firm hires a small number of paralegals, it is a strategy that is fraught with challenges. "People hired as paralegals won't have the same type of career. You have to consider a different place of work and you have to roadmap processes in order to ensure quality," he says. Díaz argues that it is important to manage paralegals' expectations from the beginning. "Not everyone wants to be a partner," he adds. But Menor says it is difficult for paralegals at the start of their careers to know whether they want to be a partner because they are too young.

Menor says that there is an increase in "cross-border proposals" and that clients are looking for a single service provider in such instances. Díaz says clients now see the difference between "best friends" and an international firm. "Employment issues are now global and there are also global compliance issues," he says.

Calle says that, if the economy picks up, revenue will too. "I don't know about an increase in the volume of work, but fees will increase." Menor says work for employment lawyers tends to flow steadily: "We always have work, in crisis there are restructurings, but when the economy picks up there is work on M&A deals."

How has the market changed? "Labour-related work in connection with M&A transactions declined in recent years, but now the M&A market is very active," says Barros. "Fees have become a more relevant driver when choosing legal advice". One partner puts it like this: "Clients have also lost any shame about talking about money." Calvente says: "We will have more of a margin on fees, but we won't reach pre-crisis levels." According to Flórez, the market is becoming more competitive with smaller law firms beginning to provide employment law advice and offering clients "attractive proposals".

Allen & Overy counsel Moira Guitart says the recovering economy means clients are involved in projects with an international dimension, which requires global teams with a high level of expertise and a proactive approach. Araoz & Rueda partner Pilar Albert argues innovation and fees are the biggest challenges: "Law firms need to differentiate in something more than technical knowledge which is no more than a commodity."



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Leave it to the experts

Diana Rodríguez, director of the employment department at Ashurst, says that, while the economic crisis meant clients tried to use in-house lawyers for employment matters, it is important they realise that specialist lawyers are needed "not only to help with sophisticated

work but also prevent and avoid potential risks and help improve their workforce structure". BDO employment department manager Raquel De La Viña Rodriguez says clients are now more focused on fixed fees and are rejecting hourly rates. Alfredo Aspra, partner at CMS Albiñana & Suárez de Lezo, argues employment lawyers now have to achieve a balance between providing the highest quality legal service while "understanding each client's issues and the sector in which they operate".

Cuatrecasas, Gonçalves Pereira partner Rubén Agote Eguizábal says clients are demanding more "integrated legal advice in their general human resources strategy", which means legal counsel need a clearer understanding of economic and social consequences. Fernando Bazán, partner at Deloitte Abogados, states that clients now want a legal partner rather than a mere technical adviser. "In-depth knowledge of the business is required – risk analysis is no longer sufficient."

Meanwhile, Juan Alonso, senior associate at Dentons, says company restructurings and the negotiation of collective bargaining agreements are currently some of the most promising areas for law firms. Raúl García, partner at EY Abogados, argues the internationalisation of Spanish companies means, with regard to employment law and social security issues, they now require international capabilities from law firms.

Gómez-Acebo & Pombo partner Ignacio Campos says the continuous flow of new employment regulations means clients are in a "continuous state of alarm", consequently it is "more important to generate trust and a special empathy with the client and make them feel really listened to and not just heard". Herbert Smith Freehills partner Eduardo Gómez de Enterría says clients are increasingly recruiting personnel for their legal and human resources departments who have a greater technical knowledge of employment issues. "In that scenario, clients' demands focus on very high quality technical advice, requiring advisers to have huge experience in specific subject matter." Jones Day associate Jesus Gimeno says that after two years of restructuring largely focused on dismissals, clients are now looking to take different measures such as changing employment conditions, flexible working and "flexible salaries".

Carlos Gil Iglesias, partner at King & Wood Mallesons, says that due to the recovering economy, there is a "new rebalancing between dismissals and recruitment - we can say at the moment it is almost 50-50". Carmen Galán, associate at Lener, says clients now want "added value advice, and a more broad view on their business, near consultancy, participating in their roadmap, strategies and decision making". Naiara Rodríguez-Escudero, counsel at Linklaters, cites "pricing and competition from small boutiques" as the biggest challenges for law firms. Ramon y Cajal partner Nazaret Clemente argues that the globalisation of the economy means there are more "international issues" relating to employment with the result that law firms have to develop their network of international contacts.

Gema Garcia Aragón, head of the employment department at Rivero & Gustafson, says since the beginning of the crisis, companies want their legal advisers to "solve all the problems that have appeared in their company because of the economic situation in Spain". Alex Santacana I Folgueroles, partner at Roca Junyent, says competition in the market for employment legal services is intense: "Law firms have rushed to create their employment department or otherwise bolster their existing departments." AC&G Asesores Legales partner Ignacio Aizpuru says: "We must learn from tips and advice that we ourselves offer to our clients, and apply them not only while adjusting legal fees, but also when it comes to the size of our teams, to share the human resources and create interdepartmental synergies."

Portugal: Staff cuts continue

"There has been a lot of changes in the labour code," says CMS Rui Pena & Arnaut partner Susana Afonso Costa. "More flexible rules have been implemented and clients are trying to work out where things stand." Afonso Costa adds that there are now new ways of terminating employment with reduced remuneration packages.

ABBC partner Benjamim Mendes says that, while there has been a reduction in collective dismissals,

they have not stopped altogether. "There are still a lot of staff reductions, so many are still not feeling an economic improvement – clients are still looking to reduce costs." Maria da Glória Leitão, partner at Cuatrecasas, says that downsizing is still common. Another concern among clients refers to costs. "Clients are trying to find innovative ways to reduce pay packages," she adds. Da Glória Leitão says there is more M&A related work, while litigation is also increasing. "If an individual is dismissed the employee will go to court because this is a requirement to have access to unemployment subsidy, but in a collective dismissal scenario, people are more likely to take the compensation." PLMJ partner Tiago Cortes argues employment lawyers' work is changing. "Collective dismissals used to be an easy way for lawyers to earn money but now there are new M&A challenges."

However, Luís Miguel Monteiro, partner at Morais Leitão, Galvão Teles, Soares da Silva & Associados, argues that, according to information from public authorities, collective dismissals increased in 2014, but law firms are not receiving as many instructions relating to this type of issue. "Companies are more used to the process of collective dismissals so they are not as reliant on law firms because in-house legal teams now know how to conduct dismissals," he says.

Banks making cuts

Lawyers say the financial sector has experienced many redundancies in recent times. "Some banks are involved in 'right-sizing'," says Filipe Fraústo da Silva, partner at Uría Menéndez. "Some banks are only accepting high net worth private and corporate clients, while new online banking tools are becoming more and more effective and available and are being adopted as an alternative to "going-to-the-bank", so banks are reducing in size and turning to law firms to help them." Fraústo da Silva says around 80 per cent of collective dismissals are small in scale – that is, involving around 10 to 20 employees. He adds the mood of employees' representatives regarding job losses has changed. "Now people understand the need to terminate employment contracts."

Meanwhile, Linklaters managing associate Marta Afonso Pereira, head of employment in the Lisbon office, says there is a lot of work concerning the dismissal of directors and managers. Da Glória Leitão says companies avoid a "big fight" with their top managers as they do not want bad publicity. This scenario can lead to complex legal situations, she adds. "For example, are they employees or members of the board? Is Portuguese law the applicable law?" Miguel Monteiro says that companies, particularly foreign companies, do not trust the judicial system. "Foreign companies try to avoid court," he adds. Why? "The financial risk is too high, there is also the reinstatement risk." Mendes says litigation relating to collective dismissals is increasing. He adds: "Attempts to pay the legal minimum compensation creates litigation." Miguel Monteiro says: "We have the law and legal solutions, but in most cases clients do not explore them."

Unions 'out-of-date'

Mendes says that there is a blockage in collective negotiation. "Many negotiations end without agreement, this leads to expiry of the CLAs [collective labour agreements]," he says. Da Glória Leitão says: "Our constitution entrusts collective negotiation to unions but unions have not modernised. They have the same, out-of-date political agenda" she says. Fraústo da Silva says that most unions are still negotiating for higher salaries rather than more jobs. "There used to be a discussion about negotiating at a multi-national level but whereas in Italy unions were already prepared to accept trading-off salaries for jobs, in Portugal this was simply unimaginable." Miguel Monteiro says that there is a strong connection between unions and political parties. "This means they may take decisions for political reasons rather than strictly employees' interests, but there is the risk that a collective agreement with a works council will not be a balanced agreement where the works council is closer to the employer."

Fraústo da Silva argues the Constitution has to change. "The Constitution is not adapted to modern times – the Labour Constitution is not adapted to times of crisis, this is not a conjunctural situation," he says. But Da Glória Leitão says the situation will not necessarily improve by changing the law. "It's

not a matter of conjunction, we need to change the paradigm of employment – we need a change in employment relations, we need to adapt to a different world, the unions still have the same, out-of-date political agenda, we need stability, we need to know what the law is.” Mendes says: “When looking at rules to protect employees, we need to balance the collective interest versus the individual interest.”

The changing trends in employment law have altered law firm practices, according to Afonso Costa. “We’ve needed to create a sub-group for restructuring and we’ve had to more than double our number of lawyers – we now have a team that works only on collective dismissals,” she says. “We now have 12 lawyers in our employment department, and 15 lawyers we share with other departments.” Meanwhile, Sousa Machado says her employment team works more closely with the tax and M&A departments. Fraústo da Silva says that, six years ago, the majority of work done by the employment department at his firm was for internal clients, which is “litigation coming from other department’s clients and due diligence work required for M&A transactions”. But now, as a result of the crisis, the department has had to find its own clients in order to keep its budget.

Clients doing more in-house

Afonso Pereira adds that while stand alone employment work [rather than that referred from other internal departments] has increased, companies will use their new experiences in employment law to increase

the necessary expertise in their in-house teams. She says: “Will the type of work we do be the same? Companies will create in-house teams to do this work in future.” However, Sousa Machado says only a few large companies have internal lawyers. “Most companies prefer to go outside for legal advice, and this makes even more sense with regard to employment matters as there are no personal relationships with affected employees” she says.

Afonso Costa says clients are worried about fees and want personal service. “Clients want to feel their lawyers are part of the company and some lawyers feel as if they are,” she says. “Clients are concerned with fees and they want a fixed fee or a cap.” Cortes says that when it comes to court cases, he prefers success fees. Fraústo da Silva says it is difficult to make clients realise they should use external lawyers to structure their employment procedures at the outset, rather than using external counsel as “firefighters”. He adds: “This is also an internal job for law firms – our colleagues need to market our employment services to their own clients.” Miguel Monteiro agrees that the challenge is to make clients realise the value of employment legal advice from the beginning. He adds that greater specialisation is another trend among employment lawyers, for example in the area of social security. Sousa Machado argues that the key challenge is to keep clients happy. “We need to be creative to find solutions, clients are less loyal and the challenge is to be innovative and maintain the same level of service,” she adds.

Cortes says law firms cannot be simple legal advisors. “They have to be legal consultants with a wider range of knowledge that enables relevant and impactful solutions”. Afonso Costa says it is important for employment lawyers to have a high level of expertise, for example in the area of social security.

Meanwhile, AAA Advogados principal associate Leonor Francisco says it is challenging to manage clients’ sometimes “unrealistic expectations” because they have an urgent commercial need to take a certain course of action. Caiado Guerreiro partner Ricardo Rodrigues Lopes says one of the main concerns for employment lawyers is defending clients’ interests while ensuring employees are fairly treated. “We always have some moral dilemmas,” he adds. According to CCA Ontier partner José Maria Castelo Branco, innovation, responsiveness and availability are three of the main qualities clients now demand from lawyers. João Paulo Teixeira de Matos, partner at Garrigues, says it is difficult for law firms to find lawyers with a “high level of specialisation and expertise” in the field of

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Lawyer lay-offs?

AVM managing partner Antonio Vicente Marques says law firms will possibly have to lay off lawyers to reduce costs. But he adds: “In Portugal, working lawyers are usually specialised in more than one field, and where

there is reduced work in one area, lawyers can be used in other areas, so it is a matter of shifting not sacking.” AAMM Law Firm partner Filipe Azoia says an increasing number of lawyers are doing employment law in recent years and this has led to “greater competition in terms of rates and service”. According to Barrocas senior associate Ricardo Grilo, a key challenge for firms is ensuring clients receive the information in a swift, practical and cost-efficient manner. Pedro Pinto, Bessa Monteiro, Reis, Branco, Alexandre Jardim & Associados (PBBR) partner Inês Reis says it is difficult for lawyers to see the clients’ perspective. “Lawyers at universities are not trained to be business people.”

Raposo Bernardo partner Ana Cláudia Rangel says a big challenge is making clients understand the best way to avoid future problems is through prevention, though this can be “evangelistic work”. Carlos Aguiar, Ferreira de Lima & Associados, Sociedade de Advogados partner Maria Roquette Valdez believes clients want more transparency on fees and want to know the cost in advance. Mariana Caldeira Sarávia, partner at SRS Advogados, says corporate restructuring work is slowing down and advice is increasingly sought in relation to the “redefinition and reduction of salary costs and remuneration packages”, for example. Luís Almeida Carneiro, managing associate at Espanha e Associados, says clients are changing and are willing to undertake radical solutions and take more risks to solve a problem immediately. “This is due to the decrease in labour costs and the increase in labour force availability”.

Alexandra Almeida Mota, senior associate at F. Castelo Branco & Associados, says clients often request an initial free assessment and free human resources training before deciding whether to use a law firm. Meanwhile, Pares Advogados associate Madalena Moreira Dos Santos says law firms face the challenge of keeping up to date with the legal and Constitutional Court decisions impacting on employment and how they will impact on clients.

While the upturn in M&A work has fostered a more optimistic outlook in Iberia, there are a number of important issues facing employment lawyers. With clients increasing handling more day-to-day employment issues in-house, the onus is on law firms to convince clients of the need to choose their firm for more complex matters in what is a highly competitive market.