Collective Dismissal in the European Union

A Comparative Analysis

EDITED BY

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Collective Dismissal in the European Union

Editors

Roberto Cosio is a member of the Italian Bar, and he is qualified to practice before the Supreme Court and the High Courts. He is a practising lawyer, specializing in Labour and Social Security law, and he has filed and discussed cases before the European Court of Justice (ECJ) and the European Court of Human Rights. He is the author of many articles and publications on matters related to European Law, with a focus on the fundamental principles of the European Convention on Human Rights and of the Charter of Fundamental Rights of the European Union. He also writes extensively about Italian Labour Law, with particular regard to the transfer of undertakings and the collective dismissal procedures. He is the President of the Labour Commission of the European Lawyers' Union. He is also a Senior Lecturer at various universities in Italy and abroad.

Filippo Curcuruto became a judge in 1974, and he was first appointed as labour judge to a Court of First Instance. In 1980, he was assigned to a special office within the Italian Ministry of Justice, that drafts legislation. Here he worked for several years dealing with issues, among others, related to European Law. Later on, from 1993 to 1998, he served at the Research Division of the Italian Supreme Court (the *Ufficio del Massimario della Corte di Cassazione*). Afterwards, the Ministry of Justice appointed him the Head of the office dealing with claims brought before the labour Courts by the Ministry employees. In 2002, he was appointed as a Member Judge of the Supreme Court assigned to the Labour chamber and was also nominated as a Member of the Supreme Court's Joint Chambers in civil-law matters, where he worked until 2011. From 2011 to 2015 he served as the President of the Labour Court of Appeal of Rome. From to 2005 to 2009 he was a Senior Lecturer of Labour Law at the Postgraduate School of Law, at the University of Rome 'La Sapienza'. He is the author of several publications in the fields of civil law, civil procedure, labour law and European law. He has also been involved in the initiatives carried out by the Associations of the European labour-law judges (*European Association of Labour Court Judges – EALCJ*, within the European Union (EU), and the *European Labour Court Judges – ELCJ*, within the *International Labour Office*). He retired in 2015.

Vincenzo Di Cerbo became a judge in 1976 and in 1977 was appointed as a first instance judge. From 1993 to 1997 he served in the *'Ufficio del Massimario della Corte di Cassazione'* (the Research Division of the Court). From June 1997 to October 2004 he served as a 'legally qualified member of the Boards of Appeal' at the European Patent Office in Munich and for three years he was appointed the Chairman of the Disciplinary Committee of the Office (2001, 2002, 2003). In 2004, he was appointed as a member of the Italian Supreme Court. From 2010 to 2016, he was also a member of the Supreme Court's Joint Chambers in civil-law matters. Moreover, since 2012 he has been Director of the CED (i.e., IT documentation department of the Supreme Court). From April 2008 to May 2012 he was a member of the Supreme Court Judges Council ('Consiglio Direttivo'). He currently serves as the chairman of a board of the Supreme Court dealing with appeals concerning Labour and Social Welfare. From 2006 to 2016 he was a lecturer at the Post-Graduate School for lawyers, Università della Sapienza, Roma. He is the author of several books and essays in the field of Law (Labour Law, Civil Procedural Law, IP Law).

Giovanni Mammone became a judge in 1977 and in 1998 joined the Research Division of the Italian Supreme Court (*Ufficio del Massimario della Corte di Cassazione)*.In 2007 he was appointed as a member of the Italian Supreme Court. From 2002 to 2006 he was elected in the Italian High Council of the Judiciary (*C.S.M.*) representing the adjudicating judges. He currently serves as the President of the Italian Supreme Court on its chamber dealing with Labour and Social Welfare appeals and was also a member of the Court's Joint Chambers in civil law matters. Moreover he has been appointed as the Secretary General to the Supreme Court. As a former member of *C.S.M.* he took part in the activity of the *European Network of the Councils of Justice* (*ENCJ*) and of the *European Judicial Training Network* (*EJTN*). He is actively involved in the initiatives carried out by the Associations of the European labour-law judges (*EALCJ*, within the EU, and the *ELCJ*, within the *International Labour Office*). He has written essays and surveys on civil procedural law, labour law and the judicial system.

Contributors

Miran Blaha was born in 1951 in Ljubljana, Slovenia. After graduating from the University of Ljubljana, Faculty of Law, he was employed for a short time at the Ministry of Justice and at a construction company. From 1984 to 1994 he served a judge at the Labour and Social Court in Ljubljana. From 1994 to 2001 he was a legal adviser at the Constitutional Court of the Republic of Slovenia, and since 2001 he has been a judge of the Supreme Court of the Republic of Slovenia as a member and Deputy Chairman of the Senate for labour and social cases. He is the author of the *Comment of Constitution* of the Republic of Slovenia concerning the section relating to constitutional rights and fundamental freedoms in the field of labour law. He is also the author of a larger number of articles in the field of labour and social law, lecturer at judicial schools for judges as well as at experts' meetings on labour and social issues.

Michel Blatman is holder of a degree from the Faculty of Law and Economics of Paris. Following a career as judge in the provinces, in particular in the jurisdiction of the Court of Appeal of Riom (Auvergne), he has been a judge at the Court of Cassation (Labour Division) for almost eleven years, where he reached the position of senior divisional judge ('Doyen de section'). As editor of articles on labour law doctrine, he has intervened in numerous conferences, the last of which was held during the Franco-Hellenic Days of Thessaloniki in October 2016. Moreover, he also participated in the training sessions of both trade unionists (CGT, CGC, CFDT) and employer syndicates (CGPME), as well as of law professionals (judges, lawyers, employment advisors, labour inspectors, clerks and civil servants, heads of human resources, social security medical advisers). He also gives conferences within various Masters of Social Law in France and abroad and is co-author of a book called *The Health of the Employee – From Health Preservation to Job Protection* ('l'état de santé du salarié – De la préservation de la santé à la protection de l'emploi') at its latest edition in 2014. Mr Blatman, who participated for many years in the works of the European Labour Court Judges (EALCJ), of which he was president for one year, has also been member of the European Labour Court Judges Meeting (ELCJM) sponsored by the International Labour Organisation. He retired as a judge, but is still active as a trainer and is completing a study entrusted to him by the Defender of rights, an independent

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Mario Eylert, Ph.D., is the Chief Justice of the Fourth Senate of the German Federal Labour Court (Bundesarbeitsgericht) – the so-called Tarifsenat or Tariff Senate – since 2012. He was appointed at Germany's highest labour court in 2001 and served until his nomination of Chief Justice in the Court's Second Senate, which deals with dismissal cases ('Kündigungsrecht'). Before joining the German Federal Labour Court, Mario Eylert served at the Berlin Labour Court from 1984 to 1992, and later from 1992 to 2001 as Chief Justice on the Brandenburg Higher Labour Court. He received his Ph.D. in Law from the Free University of Berlin in 1986. At the German Federal Labour Court, Eylert also oversees the relations with foreign courts and judge organizations, and, among others, the European Labour Court judges and the German-Russian Judge Symposium. He is also a member of the Complaints Board of the European School system.

Dr Roland Gerlach studied Law at the University of Vienna from 1981 to 1986. While he was a student, he worked as a research and teaching assistant in the Department of Legal History at the University of Vienna School of Law. After completing his studies with a Ph.D. in law in 1988, he joined the law firm of Dr Georg Griesser. In 1993, he was admitted to the Austrian bar and in 1996, he co-founded the law firm Griesser Gerlach Gahleitner. In 2001, he completed a Postgraduate Program at the London School of Economics (LSE) with an LL.M. in Labour Law. In 2011, Gerlach founded the law firm Gerlach Rechtsanwälte. This boutique law firm handles the full spectrum of labour and employment issues. It is widely recognized as one of the most highly ranked firms in these fields. He is a member of the Committee of the Vienna Bar Association, as well as a member of the International Bar Association (IBA), the American Bar Association

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Paul Gonzi is a partner at Fenech & Fenech Advocates specializing in Labour Law, Data Protection and ICT Law. After graduating with a Bachelor of Laws, Diploma of Notary Public and Doctor of Laws at the University of Malta in 2006 he earned his Master of Laws (LL.M.) at Queen Mary and Westfield College, University of London. He has nine years of hands-on experience advising clients and as a litigant in various fora, including before the Courts, the Industrial Tribunal, in arbitration and also at Appeal stage in matters of employment, industrial relations, data protection and telecoms. He is also a contributor to various publications and several conferences in his areas of specialization.

Dr Tünde Handó has been the president of the National Office for the Judiciary since 1 January 2012. He is a lawyer, graduated from Eötvös Lóránd University Faculty of Law in 1986. During her studies she was a member of Hungary's first advanced legal studies college called Bibó István College. From 16 April 1986 she worked as a trainee judge at Budapest-Capital Labour Court. After she passed the bar exams in 1990 she was appointed to secretary judge. She started her career as a judge at Budapest-Capital Labour Court on 1 May 1991. Until her appointment as president of the National Office for the Judiciary, she served as the president of the Budapest-Capital Labour Court since 15 April 1999. She became titular regional court judge on 15 July 2003. From 1999 she served as a lecturer at Eötvös Lóránd University Labour Law Department and member of the Bar Exam Committee. In 2008 she became the president of the European Association of Labour Law Judges, and since then she has been a member of the Hungarian Labour Law Association.

Anthony Kerr is a graduate of the Universities of Dublin (TCD) and London (LSE), a sometime Jean Monnet Fellow at the European University Institute and is now an associate professor in the UCD Sutherland School of Law where he is also an Associate Dean for Graduate Studies and Programme Director of the Professional Diploma in Employment Law. He is recognized by the European Commission, for whom he has completed many research projects, as a Level One expert and has been a member of the European Labour Law Network since 2007. He is a member of the Executive Committee of the International Society for Labour Law and Social Security Law and a National Reporter for the International Labour Law Reports. He has extensive experience in carrying out studies, both internationally and domestically, for the purpose of supporting impact assessment, evaluation and monitoring and has wide and extensive knowledge of the implementation of DG EMPL policies, programmes and laws in Ireland.

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Pavol Kundrik is a member of the Slovak Bar Association and has been an active attorney-at-law in Slovakia since 2013. He graduated from the Faculty of Law of Comenius University in Bratislava, Slovakia in 2009. His main area of expertise is Civil and Labour Law. Based on his knowledge and experience in this area, he has been promoted to lead the Labour Law Practice Group at PETERKA & PARTNERS, where he has been working as an associate since 2015. The Labour Law Practice Group is the firm's main channel used to serve clients seeking legal advice in Employment- and HR-related legal matters. As the Head of this Practice Group, Pavol leads a team of experienced lawyers from nine PETERKA & PARTNERS offices in the CEE region, and serves its clients worldwide.

Diana Labokaite was born in 1966 in Kaunas, Lithuania. She graduated from the faculty of law at Vilnius university in 1996. From 1996 to 2003 she practiced as a lawyer, since 2003 she was appointed as a judge in Kaunas city district court. She specialized in labour cases. In 2016 she was appointed as a judge of Kaunas regional court and mainly deals with civil cases.

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He served as a judge of the Supreme Court from 1989 until his retirement in September 2013. He was also the president of the Central Electoral Board (Junta Electoral Central) of Spain during the 9th legislature of the Constitution (2008–2012). He has given courses and carried out research at the University of Tübingen (1972), at the Brussels headquarters of the Commission of the European Community (1983), at the University of Göttingen (1993) and at the University of Cologne (1998 and 1999). He has carried out periods of study and jurisdictional exchange in Erfurt, in the Bundesarbeitsgericht (Federal Supreme Labor Court) of Germany (2000), and in Paris, at the Cour de Cassation (Supreme Court) of France (2008).

Dr Valverde represented Spain as Speaker in several national and international conferences and meetings (on Labour Law, European Community Law, Jurisdictional Law and Theory of Law), in Europe and Latin America. He was a member representing Spain, from 2004 to 2014, of the 'European Meeting of Labour Law Judges'. He was a full member and vice-president of the Academia Iberoamericana de Derecho del Trabajo y de la Seguridad Social (Ibero-American Academy of Labour Law and Social Security). He was awarded the Honorary Doctorate of the University of Oviedo (2008), as well as the 'Labour Law Expert of the Year 2015' Award of the Asociación Nacional de Laboralistas (National Association of Labor Experts).

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Paula Roberto is a judge at the Criminal Section of the Court of Appeal of Guimarães, in Portugal.

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Commons, Migrant Digitalities and the Right to the City (with D. Parsanoglou and V. Tsianos), Pivot, Palgrave, 2015.

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Michela Velardo is an Italian qualified lawyer and a member of the Rome and Brussels bar. She specializes in European Social Law and in European Public Law. At present she has pleaded 150 cases before National (Italy and Belgium), European and International Courts. In the past she has been a member of the Legal Service of the European Commission and an official of the Italian Ministry of Justice. She speaks in conferences, lectures in Italian Universities and publishes articles in several prominent law journals.

Foreword

This volume is an important, indeed unique, contribution to the knowledge on the law of collective dismissals in the EU Member States. The texts presented herein, although differently structured, provide an exhaustive picture of the different national systems. This comparative analysis is particularly important in this period where restructuring and redundancies are a major reason of social concern in most European Countries.

A comprehensive knowledge of the legal and collective rules concerning collective dismissals is useful to nurture the academic and policy debate, still controversial, over the appropriate content of the employment protection legislation (EPL).

The overview of the various regulations indicates persistent diversities among the European national systems which are comprehended and allowed under the EU Directive. However, major common trends can also be traced. Indeed the regulation of collective dismissals represents one of the areas of labour law where the European Directives have been most influential in promoting the harmonization of the different national systems.

Harmonization was one of the original purposes of the European community which has been fulfilled only in part, and recently is less and less pursued.

The achievement of promoting common rules is particularly significant in the critical area of collective redundancies, being part of the wider objective of the European social policy oriented towards balancing the requirements of flexibility for employers with the need of security for workers.

As in others areas of social regulation and policies, the European Directive on this matter (one of the first to be approved in 1975), has been pre-empted by some national legislations, for example, *see* the chapter on Germany.

The Directive of 1975, subsequently amended and improved, reproduces the basic requirements present in most national systems, extending them to the rest of the community, including, in particular, countries of Eastern Europe, which adhered to the EU at a later time. In this respect, the Directive cannot be considered simply a ratification of a minimum common denominator, but as a contributor to the evolution of various national legislations.

Moreover, Chapter 29 of this volume appropriately emphasizes that the main rules introduced by the Directive and specified by most national legislators correspond to the international standards set by ILO Convention 158 of 1982, followed also by some Member States which have not ratified the convention. In fact, the European national regulation presents common traits in all the major features of collective dismissals.

First and foremost they share the principle that collective dismissals, when meeting some threshold numbers indicated by the Directive, are subject to procedural requirements whereby the employer must: provide, in good time, the information on the reasons and terms of the terminations to the workers representatives, as well as hold consultations with such representatives on the measures to mitigate the impact on the workers.

Another common indication emerging from the comparative analysis of this volume shows that the information and consultation procedures include an active role of the workers representatives, either local union branches or other representative bodies (works council and the like). These bodies are defined according to the national rules, as the forms of workers representatives are considered to be a matter of national competence by the EU.

The public authorities have always played an important role in the procedure activated by the social parties according to the principle of tripartism, which is promoted by the ILO and followed in many European countries.

Whilst in the past this role included that generally the public employment services had the power to approve the employers' decision on the collective dismissals; today the legislation of most EU countries no longer requires such public authorization (exceptions are represented by some eastern European States and the Netherlands).

The abolition of the administrative approval has left the exclusive competence to control the substantial and procedural legality of the dismissals to the courts (*see* the Spanish case). The administrative authorities remain, however, involved in the collective procedure in many ways: not only must they be notified by the parties during the various steps of the procedure under penalty of nullity or other sanctions, but they may intervene in mediation, also with a specific proposal and may assist the parties in different instances, including in the definition of the measures necessary to prevent dismissals and reduce their impact on the workers concerned.

These measures have developed substantially in the course of time. Most national legislations now commit the employers to consider other options before resorting to collective dismissals. In some countries, like in Italy and Sweden, this matter is regulated by collective agreements (national and decentralized).

The comparative analysis presents a full range of measures finalized to make dismissals an *extrema ratio*. Such measure range from: restriction of hiring, to restriction of overtime and normal hours of work, to internal transfer and mobility, to training and retraining, to early retirement of various kinds, to spreading the workforce reduction over time, or even postponing it.

In countries, such as France, a wide ranging set of measures must be put in place by the employer, particularly in larger firms, and included in an 'employment safeguard plan', to be notified and validated by the administrative authority.

Significant developments are reported by national cases also in the measures finalized to reduce the impact of employers' decisions, in the cases where preventive measures have not succeeded in avoiding or reducing collective dismissals.

The majority of European countries have traditionally defined the criteria to be taken into account in selecting the workers to be discharged; often seniority is one, and in other cases (including Italy) a combination of criteria is considered. The actual definition of the order of priority in collective dismissals is an important and controversial matter of discussion among the employers and the unions (*see* the Swedish and Italian chapters).

Another important measure adopted in many countries through legislation or collective agreements, is to recognize to those workers who have been made redundant, not only a monetary compensation of different amounts, but also a certain priority (for a definite period of time) in the future hiring by the same employer.

More recently, active labour policies have been introduced in quite a few countries in order to facilitate the redeployment or the outplacement of the employees made redundant in other occupations. In this respect, various measures are provided by public and private employment offices, and often directly by the employers, through a 'social plan' usually agreed with the unions. These measures include not only training and retraining, but also personalized assistance in the job search combined with financial support (such as the reemployment bonus recently introduced in Italy), as well as even active assistance to search for a buyer in the case of a planned closure of an establishment (*see* the French case).

Apart from these important common trends, the European national legislations present also some differences, beginning with the concept of dismissal and that of collective dismissal. As mentioned in the introduction, the absence of an explicit statement in the EU Directive concerning this concept, has left wide discretion to the national legislators, and ultimately has emphasized the role of the ECJ in filling the gaps.

The comparative analysis of this volume underlines national differences in two other important matters: the forms and steps of the procedures, as well as the sanctions and remedies in case of violations of the legal and collective rules.

The complexity of procedures has been often denounced (also in Italy) as excessive; and some attempts of simplification have been made, but with uneven results.

The sanction of nullity or invalidity tends to be applied in the most serious cases of violation: such as the lack of notice to the public authorities, and the absolute absence of measures to prevent dismissals (*see* the French and German cases).

Monetary sanctions (damages, fines) are most commonly adopted by national legislators, subject to the requirement of the ECJ that they be effectively 'dissuasive'.