ESSENTIALS OF THE CONTRACT OF EMPLOYMENT

(fixation of working conditions, limits to employer managerial power and extinction for contract of employment)

Fernando Fita Ortega
Profesor Titular Universidad de València

INTRODUCTION

These materials deal with the fixation and modification of working conditions as well as the managerial prerogatives of the employer and its limits, and are intended to be students' materials for preparing the lessons.

Throughout these lessons it is possible to guess the influence of the *flexicurity* policy -much more flexibility than security- in the ruling of the different institutions regarding contract of employment. Besides the flexibility in the recruitment -contracts of employment, temporary agency work, outsourcing- which is not object of these materials, the impact of flexibility on the determination and variation of the most relevant working conditions -functions, salary, working time, place of work- and the increase of employer's power before the employees can be detected in all topics studied. Nevertheless, it is also possible to appreciate the relevance of information and consultation to workers' representatives due to the European legislation.

These materials try to be more than a simple enumeration of the rules -what the law says-, but they also make reference to the political ideologies to which these rules come from. Employment law is aimed to solve the conflict of interests between employer and employee, imposing some limits to the employers' preeminent position when establishing working conditions, but also protecting companies' productivity and efficiency. Hence, the need to decide what is prevalent in any case becomes crucial.

The teaching activity will be complemented with exercises at the lectures that will allow to appreciate the problems emerging from the interpretation of the employment rules studied, and to learn the different instruments used for that interpretation.

I would like to thank Ms. Alicia Cervera Calatayud for her help in elaborating these materials.

SYLLABUS

LESSON 1: OCCUPATIONAL CLASSIFICATION & WORKPLACE

1. **OCCUPATIONAL CLASSIFICATION SYSTEM**
    a. **Professional group**
    b. **Non discrimination**
2. **EMPLOYEES' CLASSIFICATION**
3. **WORKPLACE**

LESSON 2: WORKING TIME

1. **INTERESTS PROTECTED**
2. **ORDINARY WORKING TIME**
    a. **Duration of working time**
    b. **Minimum resting time**
3. **SPECIAL WORKING TIME**
4. **REDUCTION OF WORKING TIME**
5. **EXTRAORDINARY HOURS**
6. **REGISTRATION OF WORKING HOURS**
7. **SHIFT WORK AND NIGHT WORK**
8. **SPECIAL RULES FOR UNDERAGE EMPLOYEES**
9. **WORKING CALENDAR, PUBLIC HOLIDAYS, AND ANNUAL HOLIDAYS**

LESSON 3: RETRIBUTIONS

1. **SALARY / NON-SALARY COMPENSATION**
2. **SALARY STRUCTURE**
3. **SALARY DETERMINATION**
4. **NEUTRALISATION OF SALARY INCREASE (*ABSORCIÓN* AND *COMPENSACIÓN*)**
5. **PAYMENT**
6. **SALARY PROTECTION**
    a. **Before employee's debtors**
    b. **Before employer's debtors**
    c. **Before insolvency of the enterprise**

LESSON 4: VARIATIONS OF WORKING CONDITIONS

1. **AUTOMATIC VARIATION AND VARIATION AGREEMENT**
2. **UNILATERAL VARIATION BY THE EMPLOYER**
    a. **Disciplinary measures**
    b. ***ius variandi* (exercise of managerial power) Ordinary or Extraordinary**
        i) Functional mobility
        ii) Geographical mobility

iii) Relevant changes of working conditions

3. **UNILATERAL VARIATION BY THE EMPLOYEE**
    a. **Promotion**
    b. **Family reunification**
    c. **Objective reasons**

LESSON 5: OTHER EMPLOYEES' RIGHTS AND DUTIES

1. **DUTIES**
    a. **Performance**
    b. **Good faith**
2. **RIGHTS**
    a. **Protection of professional capacity**
    b. **Health protection**
    c. **Employee's rights as a citizen: fundamental rights**

LESSON 6: MANAGERIAL PREROGATIVES

1. **POWER TO ORGANISE: DUTY OF OBEDIENCE**
2. **FACULTY OF CONTROL**
3. **DISCIPLINARY POWER: INFRACTIONS AND SANCTIONS**
    a. **Judicial review**
    b. **Prescription**

LESSON 7: EXTINCTION OF THE CONTRACT OF EMPLOYMENT

1. **EXTINCTION BY THE EMPLOYEE**
    a. **Without justified cause**
    b. **With justified cause**
2. **EXTINCTION BY THE EMPLOYER**
    a. **Without justified cause**
    b. **With justified cause**
        i. Subjective reasons (Disciplinary dismissal)
        ii. Objective reasons
3. **Extinction caused by THE DISAPPEARANCE OF ANY PARTY of THE CONTRACT OF EMPLOYMENT**
    a. **Disappearance of the employee**
    b. **Disappearance of the employer**
4. **EXTINCTION BY BILATERAL AGREEMENT**
5. **EXTINCTION BY RESOLUTORY CONDITION**
6. **TEMPORARY CONTRACTS**

LESSON 1: OCCUPATIONAL CLASSIFICATION & THE WORKPLACE

1. **THE OCCUPATIONAL CLASSIFICATION SYSTEM**
    a. **Professional group**
    b. **Non-discrimination**
2. **EMPLOYEE CLASSIFICATION**
3. **THE WORKPLACE**

---

1. THE OCCUPATIONAL CLASSIFICATION SYSTEM (Art. 22 ET)

1.1. The purpose of occupational classification. The object of any contract must be lawful (art. 1271 Civil Code), possible (art. 1272 Civil Code), and ascertainable (art. 1273 Civil Code). Occupational classification is the main tool for ascertaining the object of the employment contract since it is used to define the tasks that will be performed by the employees (WHAT?) and, indirectly, the salary that will be paid by the employer (IN EXCHANGE FOR WHAT?). Both issues are essential for the employment contract since they may have a major influence on the employee's decision to engage in the employment relationship.

1.2. How occupational classification is set. The system for the professional classification of employees is established by collective agreement or by agreement between the company and employees' representatives in accordance with professional groups and the principle of non-discrimination.

a) Professional group. Since the 2010 reform, classification has been set by professional group (art. 22.1 ET) rather than by professional category. This change is important because it reinforces the employer's managerial power and gives them greater flexibility. Both concepts (professional group and professional category) are used to define the general content of the services to be provided by employees. However, 'Professional Group' is a wider concept than 'Professional Category' (since groups can include various categories). The ability of employers to modify their employees' tasks has therefore increased since there is now the obligation to establish classification by professional group rather than by professional category.

According to art. 22 ET, a professional group refers to a unit comprising professional abilities, qualifications and the general content of services and may include tasks, functions, professional specializations or responsibilities assigned to the employee.

However, establishing the professional classification makes it easy to determine not only the main features of the activity that is the object of the employment contract but also the salary.

First example:

I. TECHNICALLY QUALIFIED STAFF

a) University Graduates: Personnel with a university degree recognized by the Spanish Ministry of Education and Science who permanently carry out and are directly responsible for functions related to their profession.

b) Vocational Training Graduates: Personnel with a vocational training certificate that is recognized by the Ministry of Education and Science or incorporated by law who carry out functions related to their profession or are recognized by their function as being in a position of responsibility within the company.

c) Qualified Technical Assistants: Personnel who have an academic qualification that is recognized by the Ministry of Education and Science or incorporated by law who carry out functions related to their qualification.

II. NON-QUALIFIED TECHNICAL STAFF

a) Directors or Managers: Personnel who, under the direction of the company and contributing to the creation of company policies, manage, coordinate and are responsible for the managerial activities under their responsibility.

b) Warehouse Managers: Personnel who manage the warehouse and are responsible for replacing, receiving, storing and labelling goods, registering the arrival and departure of goods, distributing goods to other departments and branches, meeting orders, etc. They also manage all warehouse personnel and are authorized to introduce regulations to improve the organization and distribution of work, which they supervise, as well as to grant permissions and propose sanctions.

c) Sales Managers: Personnel who manage and supervise all sales operations within the company as well as determine company guidelines or outline criteria according to which those guidelines should be established.

d) Sales Assistants: Personnel who work under the Sales Manager (or technical personnel who assume this role within the company) and carry out administrative functions or other tasks within the sales department.

e) Interpreters: Personnel with knowledge of two or more foreign languages who carry out sales, administration or management within their specific role.

Group I. Technically Qualified Staff		**Group II. Non-qualified Technical Staff**	
University Graduates.	1,800€	General Managers	1,800€
Vocational Training Graduates	1,400€	Warehouse Managers	1,400€
Qualified Technical Assistants	1,100€	Sales Managers	1,600€
		Sales Assistants	1,200€
		Interpreters	1,100€

Second example: *Resolución de 6 de octubre de 2017, de la Dirección General de Empleo, por la que se registra y publica el convenio colectivo estatal de estaciones de servicio.*

Grupo	Funciones	Salario base mes – Euros
	Área Técnico-Administrativa	
Grupo Técnico.	Titulado.	1.442,92
	Técnico.	1.343,41
Grupo Administrativo.	Jefe Administrativo.	1.090,11
	Oficial Administrativo 1.ª.	1.032,84
	Oficial Administrativo 2.ª.	974,33
	Auxiliar Administrativo.	943,75
	Aspirante a Administrativo.	739,31
	Área de Operaciones	
Encargado General.	Encargado General.	1.191,95

Grupo	Funciones	Salario base mes – Euros
Vendedor	Encargado de Turno.	974,33
	Expendedor-Vendedor, Expendedor, Engrasador, Mecánico especialista, Lavador, Conductor, Montador de neumáticos.	922,06
Subalterno	Ordenanza..	900,88
	Guarda..	917,08
	Personal de limpieza.	900,88

Within the limits outlined in the lesson on functional mobility, an employer may order a *Subalterno* to carry out all functions involving *Ordenanza, Guarda* and *Personal de Limpieza*, which, before the 2010 reform, were termed 'professional categories'.

> The problem arises when collective agreements establish – within the same professional group – tasks, functions, professional specializations or responsibilities assigned to an employee that do not respect the concept of the professional group (similar professional abilities, qualifications and general content of services). Sometimes agreements establish a unique professional group that recognizes an employer's extraordinary prerogatives to introduce functional mobility. Such provisions may be declared null and void, as in the case of *RESOLUCIÓN de 25 de octubre de 2002, de la Dirección General de Trabajo, por la que se dispone la inscripción en el registro y publicación del I Convenio colectivo de la compañía «La Casera, Sociedad Anónima»*:
>
> *Artículo 8. Movilidad funcional….3. A estos efectos, y hasta que no se acuerde un nuevo sistema de clasificación profesional basado en grupos profesionales, se*

establece un único grupo profesional que aglutina todas las categorías profesionales contempladas por el presente Convenio Colectivo, considerándose todas ellas equivalentes, a efectos de movilidad funcional (...).

b) Non-discrimination. Sex discrimination remains one of the main unfair working conditions in industrial relations systems. Several provisions deal with this problem, one of which is art. 22.3 ET. This article, which was amended by Royal Decree 6/2019, stipulates that the definition of professional groups will adapt to criteria and systems (based on a correlational analysis between gender biases, jobs, classification criteria and remuneration) that promote the absence of any direct or indirect form of discrimination between men and women (gender-neutral classification system).

This means, firstly, that feminized or masculinized professional groups should be avoided. Professional groups are usually defined in masculine terms. However, in cases of feminized activities (*limpiadoras, costureras, enfermeras, camareras de piso…*), lower salaries are established than those for similar groups where males predominate (*camareros*). It also means avoiding an apparently gender-neutral classification system that leads to discrimination on the grounds of sex (see lesson 3).

To understand what is established by art. 22.3 ET, we need to know:

a) the difference between discrimination and the obligation of equal treatment, and
b) the difference between direct and indirect discrimination.

To complete our knowledge on this topic, we also need to know:

a) whether there is any justification for differential treatment on the grounds of sex, and
b) what 'affirmative action' (positive action) is.

If you have any doubts about these concepts, please read:

- Art. 14 of the Spanish Constitution: *Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.*
- <u>If you speak Spanish</u>:
  - *STC 62/2008, de 26 de mayo de 2008 (fundamento jurídico 5º).* For further clarification, see:
  - *Tribunal Supremo (Sala de lo Social) Sentencia de 29 enero 2001 recud. 1566/2000*

If you do not speak Spanish, or are still unsure, read pages 23 and 24 of The Concepts of Equality and Non-Discrimination in Europe: A practical approach (available from the *aula virtual*) (only those sections that deal with the Spanish Constitutional Court, which begin in the final paragraph on page 23).

- Art. 2 a) and b) of DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
- Art. 3 of DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

2. EMPLOYEE CLASSIFICATION

Once the occupational system is established, an employee is ascribed to a professional group through an agreement between the employee and the employer (art. 22.4 ET). However, as the employment contract is a kind of contract of adhesion, when employees have few options for bargaining their working conditions, the ascription of that employee to a specific professional group is decided by the employer and the employee accepts their ascription when they sign the contract.

With this form of ascription, it is possible to decide whether the employee will perform all activities included in the professional group or just some of them (which would reduce the employer's managerial prerogatives for ordering tasks other than those specified).

Another possibility is to agree to carry out activities from more than one professional group (this is known as polyvalence or multi-tasking). In such cases, the problem is how to determine the salary to be paid to the employee. From the available possibilities (basically, paying the salary reserved for the higher group or the salary reserved for the group whose functions are performed for longer hours), the ET chooses the second, i.e. the salary is paid in accordance with the functions that are performed for a longer time. However, the collective agreement or employment contract may establish otherwise and offer employees more rights.

3. THE WORKPLACE

Other important aspects regarding employee obligations emerging from the employment contract are time, i.e. the working hours (FOR HOW LONG?), the schedule (WHEN?), and the place where the activity is to be conducted (WHERE?). See lesson 3 for information on working time. This section deals with the importance of determining the workplace in the employment contract.

It is also important for employees to know where the activity will be conducted when deciding whether to engage in an employment contract since they may be interested in accepting a job even if it is not so well paid or is unrelated to their training and skills if it is to be conducted in the city where they live. If accepting a job means moving to another city, the other working conditions (e.g. salary, matching one's specialization, etc.) may not have such a strong influence on their decision.

Establishing the place of work in an employment contract may affect the employer's prerogatives for ordering a transfer or geographical mobility (transfer to another workplace), since the ET contemplates specific procedures and requirements for this. In some cases it may also affect some employees' rights (e.g. when the decision involves an employee's need to move and change residence). These matters will be discussed in lesson 4.

Below are two questions for you to consider:

Do you think it is legally possible in the employment contract to agree that the job location should be decided by an employer according to his or her needs and to change it at any time?

Do you think that it is legally possible for the employer to impose an obligation to live in the same city where the job location is established?

LESSON 2: WORKING TIME

1. **INTERESTS PROTECTED**
2. **ORDINARY WORKING TIME**
    a. **Duration of working time**
    b. **Minimum resting time**
3. **SPECIAL WORKING TIME**
4. **REDUCTION OF WORKING TIME**
5. **EXTRAORDINARY HOURS**
6. **RECORDING WORKING HOURS**
7. **SHIFT WORK AND NIGHT WORK**
8. **SPECIAL RULES FOR UNDERAGE EMPLOYEES**
9. **WORK CALENDAR, PUBLIC HOLIDAYS, AND ANNUAL HOLIDAYS**

---

1. INTERESTS PROTECTED

To analyse the regulations on working time, we need to know the four interests that are protected by these regulations. These are:

1) Health protection. This is the historical origin for working time provisions that were established to prevent employees being obliged to work when unwell to do so.
2) Flexibility and adaptability of the workforce to changes in the company. This aspect has become increasingly important since the financial crisis of the 1970s. In the 1990s, many provisions of the *Estatuto de los Trabajadores* were modified to introduce flexibility in working time regulations.
3) Sharing existing work. Limiting employee working time can help to increase the employment rate if companies whose activity increases engage new employees once their existing employees have reached the limits of their working time. However, despite the structural unemployment and the severity of the situation in which Spain has found itself since the 2008 financial crisis, not every ET initiative has been introduced.
4) Work-life balance. Attention to this aspect has increased in recent years, not only because the Spanish Constitutional Court considers it a fundamental right but also because some aspects of the work-life balance relate to indirect discrimination on the grounds of gender. Some elements of the working time regulations on flexibility for protecting work-life balance are mentioned in Lesson 4 (on changes to working conditions requested by the employee). Concern at the European level on this question has also increased. See, for example, DIRECTIVE (EU) 2019/1158 on work-life

balance for parents and carers (which repeals Council Directive 2010/18/EU), which asserts that work-life balance policies should help to achieve gender equality by promoting the participation of women in the labour market and the equal sharing of caring responsibilities between men and women, and by closing the gender gaps in earnings and pay (6th point under "Whereas").

In the same sense, and not only linked to the aim of protection of work-life balance but also to ensure employees` health, the *Ley Orgánica* 3/2018 of Personal Data Protection and Digital Rights Guarantee foresee the right to digital disconnection in the workplace. A right that has been claimed all around the world as the technology has increased the possibility of been available anytime.

The concern to such an overuse of managerial prerogatives led to the legislature to set few rules about digital disconnection in the workplace. Thus, art. 88 of *Ley Orgánica* 3/2018 recognizes to employees and civil servants the right to digital disconnection, when out of their duties, in order to guarantee the respect for their rest time, permits and vacations, as well as their personal and family privacy.

However, the legislation is rather poor as the modalities for exercising this right are to be regulated by the collective bargaining or, in its defect, agreed between the company and the representatives of the workers. The regulation says nothing in case such modalities are not established in any of those ways. It only says that these modalities shall take into account the nature and purpose of the employment relationship, and must strengthen the right to conciliation of work activity and personal and family life.

The art. 88 concludes with an obligation for the employers. This obligation consist in developing, after hearing the representatives of the workers, an internal policy aimed at employees, including those in managerial positions, in which they will define the modalities for exercising the right to disconnection and the training and awareness actions of the personnel on a reasonable use of the technological tools that avoid the risk of computer fatigue. In particular -it finishes- the right to digital disconnection must be preserved in cases of total or partial realization of remote work and in cases of work in the domicile of the employee linked to the use of technological tools.

Once more the legislature seems to provide protection when, in fact, it does not contemplate measures to render it effective (rules applicable in defect of agreed regulation or sanctions when the employer does not fulfil his/her obligations).

In any case, throughout the presentation of working time regulations, it is important to consider how the legislation protects these various interests and how it deals with conflicts arising from them since they may require contradictory actions (for example, limiting the opportunity to do extraordinary hours can help to share employment but it also affects a company's need for flexibility).

2. ORDINARY WORKING TIME

a. Duration of working time

01. Weekly (art. 34.1 and 34.2 ET)

According to art. 34 ET:

"1. The duration of the working day will be that agreed in the collective bargaining agreements or work contracts.

The maximum duration of the ordinary working day will be forty hours a week of actual work on average in the yearly computation.

2. Irregular distribution of the working day throughout the year may be established through collective bargaining or, in its absence, through agreement between the company and workers' representatives. In the absence of an agreement, the company will be able to distribute unevenly 10 per cent of the working day throughout the year.

This distribution must, in any case, respect the minimum periods of daily and weekly rest provided for in this law. The worker must be informed of his or her work schedule with a minimum notice period of five days."

Some of the main ideas from these regulations are:

- The regulations allow for flexibility since forty hours per week is an average number of hours rather than a strict limit (so it is possible to work 60 hours one week if the extra 20 hours are compensated for later on).
- Flexibility (the irregular distribution of working time during the year) can also be achieved by collective agreement.
- Workers' representatives cannot prevent the irregular distribution requested by the employer because if there is no agreement, the employer may establish up to 10% of irregular working time. The employer must inform the employee within five days and respect all rest time established by law (art. 34.2 ET).
- The limit to working time established by law refers to "effective work". Article 34.5 ET defines this concept: *The working time shall be calculated in such a way that, both at the beginning and at the end of the daily working day, the employee is at his/her work post.* This means that the time during which the worker must be available but not

present at the workplace does not count as “effective work” unless the employee is required at the workplace within an abusive time limit. For example, stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as “working time” (ECJ Case C‑518/15).

02. Daily (art. 34.3 ET)

The number of ordinary hours of effective work may not exceed nine hours a day unless a collective agreement or an agreement between the company and the employees’ representatives establishes a different distribution of daily working time. In all cases, the compulsory resting period between working days must be respected.

From these regulations we highlight two ideas: flexibility (the nine-hour limit is not rigid because it can be extended) and the concept of “effective work” (as previously explained).

Is it possible to work 24 hours a day 7 days a week?

B. MINIMUM RESTING TIME (34.3 and 37.1 ET)

The regulations on the duration of working time do not protect the health of employees because flexibility has been the priority since the legal reforms of 1994 and 2012. What really protects employee health is the minimum resting time regulated by Law, which – generally speaking – cannot be reduced.

01. Daily (art. 34.3 ET)

The aim of daily resting time is to protect employee health. At least 12 hours must elapse between the end of one working day and the beginning of the next (as we will see later, a specific provision applies to underage employees).

Although this limit must be respected as a general rule in every case, a few exceptions exist in special circumstances – for example, when changing shifts in cases of shift work (RD 1561/1995).

02. Weekly (art.37.1 ET)

The aim of weekly resting time is to protect employee health and give employees leisure time to strengthen their social and family lives.

All employees (though special rules apply to underage employees and certain other cases) are entitled to a minimum weekly rest period, cumulative by periods of fourteen days, of one and a half continuous days, which, as a general rule, must include Saturday afternoon or Monday morning, and all of Sunday. This resting period is retributed.

According to the regulations, an employee may work continuously for eleven days and rest for the following three. The company can decide for itself how to distribute the weekly rest period, while workers' representatives can oppose the decision only if the collective agreement allows them to.

Questions arising from this regulation:

- As it refers to Sunday as the ***preferable*** day of rest, it is not mandatory to rest on Sundays.

  Why does the legislation prefer Sunday as the rest day? Is it due to the influence of the Catholic religion? If so, could it be considered discriminatory on the grounds of religion?

  These questions are important because followers of religions other than Catholicism may ask to have their weekly rest day on a different day without being discriminated against.

  On this issue, two court decisions are important:

  - The Court of Justice (EU) in Case C-84/94, where former Council Directive 93/104/EC on working time considered that this European legislation lays down the minimum health and safety requirements for the organization of working time. The above Directive imposed a minimum weekly resting period that, in principle, had to include Sundays. This reference was due to be eliminated because in its decision the Court could not understand why resting on Sundays is more closely connected with worker health and safety than any other day of the week.
  - The decision of the Spanish Constitutional Court 19/1985, which stated that employees cannot impose their working conditions on their employer on the grounds of religious beliefs (art. 16 CE). For example, an employee who became a Seventh-Day Adventist was unable to demand to be able to rest on Saturdays rather than on Sundays as required by her religion (art. 38 CE). The conflict between art. 16 CE (freedom of religion) and art. 38 CE (freedom of enterprise) that arose from this case was resolved in favour of the latter by the Spanish Constitutional Court.

    This decision also asserts that although the origin of Sundays as the preferable day of rest derives from Catholicism, this is not a religious-based right and can therefore not be used to allege discrimination on religious grounds.

    Finally, the decision also considers Sunday to be the most suitable day for establishing work-life balance, which justifies its preference for resting on that day (however, the judgement of the Court of Justice in case C-84(94) does not consider this issue).

    Today, the Constitutional Court would probably take a different decision, since the applicant argued that it was easy to reconcile her religious obligations with the company's organization – an aspect that was not considered by the Constitutional Court. Some judgements of this Court with regard to work-life balance have established the

need to give organizational reasons for rejecting an employee's decision to modify their working schedule to care for a child under twelve, even though the only right considered by the ET is that of reducing daily working time (STC 3/2007).

We conclude that the refusal by the Company in such cases must never be unreasonable.

- Is this resting period respected if a person finishes work on Saturday at 8 pm and is required to begin work again on Monday at 8 am?
- Is it possible to substitute this rest period for financial compensation?
- Is this rest period the same for part-time employees?

3. SPECIAL WORKING TIME

Articles 34.7 ET, 37.1 ET and RD 1561/95 consider various working time rules since a wide range of situations can exist when the general provisions do not match the company's needs or the need to protect employees.

Article 34.7 ET

At the request of the Ministry of Employment and Social Security, and after consulting the most representative Trade Unions and Employer Associations, the government may extend or limit the arrangement and length of a working schedule and its rest periods in sectors and jobs whose characteristics require it.

Article 37.1 ET

The provisions established in Article 34.7 apply to weekly rest periods with regard to extensions and reductions and determine alternative rest periods for specific activities.

These two articles were developed in RD 1561/95 and modified by RD 311/2016.

The aim of the special regulations on working time is to meet the productive needs of companies or to protect employee health.

- To protect the productive needs of companies, these special regulations allow for greater flexibility (in, for example, agriculture, commerce, the hospitality industry, maritime work, transport and shift work, etc.). For example, in maritime work, the minimum daily rest period is eight hours in the merchant navy and six hours in fishery (art. 17 RD 1561/1995).

- To protect employee health, these special regulations establish a reduction in working time and/or an increase in resting time (e.g. for jobs with environmental hazards, agricultural work in difficult conditions, working in underground mines, building sector work, work in industrial freezers, night work, etc.). For example, employees working underground have the right to a weekly rest period of two days (art. 27 RD 1561/1995).

4. REDUCTION IN WORKING TIME

Spanish regulations establish a reduction in working time for various reasons. Sometimes this reduction will be retributed as it may be counted as effective work but sometimes it will not.

01. Health and safety reasons

Retributed reductions in the working day that compute as working hours are set for health and safety reasons.

- Art. 19 ET: **training in safety**. Employers must provide all hired employees with adequate practical training in safety and hygiene. The time invested by the employee on this training will be computed as working time.

- Art. 7 RD 664/1997 and art. 6 RD 665/1997: **hygiene**. These two specific regulations govern specific risks. An employee has the right to ten minutes before and after for hygiene reasons. This is counted as working time.

- Art. 23.3 ET: **professional training.** Employees with at least one year of seniority in the company have the right to a leave of 20 hours per year for professional training purposes (for more information, see lesson 5).

02. Work-life balance

Reductions in working time to protect work-life balance have existed since at least the first version of the *Estatuto de los Trabajadores* (1980). Since then, these rights have increased in number and duration (there are more of them and they cover more situations). These rights are:

- **Care of new-born babies**

  The new regulations avoid talking about fathers and mothers or men and women in order to bring legislation closer to the reality of heterogeneous family types.

- Art. 37.4 ET: **breastfeeding.** Employees are entitled to a one-hour leave or half-hour reduction in order to breastfeed a baby up to nine months old. This applies to any new-born baby the employee is in charge of, whether by birth or through adoption.

  One-hour leave consists of an absence for one hour at any time of the working day provided that the employee is at their job at the beginning and end of the working day.

  The half-hour reduction means entering the workplace 30 minutes after the working day begins or leaving the workplace 30 minutes after it ends.

  Both members of the couple are entitled to this reduction provided that they are both employees (subordinated workers), although just one of them is entitled to make use of it. If just one of them is considered an employee, it is he or she who holds this right.

  A new provision was introduced by Royal Decree 6/2019 in an attempt to promote the sharing of family responsibilities:

  > *When both parents or adopters... exercise this right with the same duration and regime, the period of enjoyment may be extended until the infant reaches twelve months, with a proportional reduction in salary since the child is older than nine months.*

  As this is an individual right, both employees in a couple will hold the right but there will be no possibility to transfer one's right to the other. For example, in the case of a couple who share a child, both employees will be entitled to this right. However, if two employees in the same company generate this right in relation to the same child, the employer may limit the ***simultaneous exercise*** of the right ***for justified reasons*** related to the company's operation and these reasons must be notified in writing.

  This means that the employer can limit the right subject to the following principles:

  - Only the rights of employees who work for the same company can be limited.
  - Only the rights of employees who generate this right from the same subject (e.g. not twins) can be limited.

- Successive exercise of this right cannot be limited. For example, one member of the couple can reduce their working time for five months and the other can do so for four months.
- This right can only be limited with justified reasons notified in writing.

■ Art. 37.5: **premature babies.** An employee whose baby is born prematurely and requires hospitalization after birth is entitled to two different rights:

➔ To leave the company for one hour. This leave will be retributed.

➔ To reduce their working schedule by up to two hours, with a proportional reduction in salary.

○ **The care of family members**: art. 37.6 ET

If employees need to take care of a family member who cannot take care of him or herself, they can exercise the following rights concerning reductions in their working day:

1. For the direct care of any minor under 12 years of age or a person with a physical, mental or other disability who does not carry out any remunerated activity, employees are entitled to a reduced working timetable with a corresponding reduction in salary of a minimum of 1/8 and a maximum of 1/2 the length of their working schedule. The holder of this right must be the legal guardian.

2. For the direct care of a relative up to the second degree of blood ties or affinity who, due to old age, accident or illness is dependant and does not perform any remunerated activity, the same conditions as those above will be applied.

As this is an individual right, in a couple both employees are the right holders. For example, in the case of a couple who share a child, both employees will be entitled to this right. However, if two or more workers (for example three brothers) in the same company were to generate this right in relation to the same subject (for example, their father), the employer may limit the ***simultaneous exercise*** of that right ***for justified reasons*** related to the company's operation.

This means that the employer can limit the right subject to the following principles:

- Only the right of employees who work for the same company can be limited.

- Only the right of employees who generate this right from the same subject can be limited.
- The successive exercise of this right cannot be limited. For example, the above three brothers will be able to reduce their working time in successive periods of four months in the year, one after another.
- This right may be limited only with justified reasons.

○ We should remark the amendment to art. 34.8 introduced by Royal Decree 6/2019 that has reinforced the right to work-life balance, since previously this article established only a hypothetical right in relation to an employee's work-life balance (since the right could be recognised only in the terms established in the collective agreement or agreement reached individually with the employer, i.e. no agreement, no right). However, the TC defines work-life balance as a fundamental right (STS 3/2007) and requires companies to provide a justified reasoning when denying the work-life balance measures requested by their employees.

Royal Decree 6/2019 introduced this jurisprudence into the legal regulations, thus reinforcing this legal right.

○ **For gender-based violence and terrorism**: art. 37.8 ET

Employees are entitled to introduce changes to their working time in order to protect their lives and physical integrity.

To obtain protection or the right to full social assistance, employees who are considered victims of gender violence or terrorism (as defined in the 14th final disposition of the ET) are entitled to reduce their working schedule, with a proportional reduction in salary, or to rearrange their working hours by adjusting their schedule according to a flexible working schedule or other working arrangement used by the company.

This is a real right since if an agreement cannot be reached, the employee can decide the specifications of the measures to be taken, subject to the limitations outlined in art. 37.7 ET.

a. Common question: who decides the new working conditions?

Establishing the new working conditions once one has decided to exercise the above rights has become one of the most controversial matters in this area, since the company does not wish to lose flexibility and its managerial prerogatives in

relation to working time and employees wish to adapt the new working conditions to their own interest.

Art. 37.7 E.T. deals with this problem. The first rule stipulates that it is up to employees to specify the timetable and period of enjoyment of the rights provided for in Sections 4, 5 and 6 of this article in their ordinary working day. However, collective agreements may establish criteria for the specific time of the reduction in working hours referred to in section 6 (and only those) in response to the employee's work-life balance rights and the company's productive and organizational needs.

Except in cases of *force majeure*, employees must give their employer prior notice (two weeks or as stipulated in the applicable collective agreement) specifying the date on which the breastfeeding permit or reduction in working hours will begin and end.

Any discrepancies that arise between the employer and the employee in relation to timetable specifications or the establishment of periods set forth in Sections 4, 5 and 6 of article 37 will be resolved by the competent jurisdiction through the procedure established in Article 139 of the *Ley Regulador de la Jurisdicción Social*.

5. EXTRAORDINARY HOURS (OVERTIME) (art. 35 ET)

Concept: Any working hours provided outside the maximum term of an ordinary working schedule are considered extraordinary (extra) hours.

Despite this definition, and by dint of existing flexibility in limits to the ordinary working day, some uncertainty exists regarding which hours are considered extraordinary. This may occur when an employer applies the flexible distribution of working hours in accordance with art. 34.2 ET.

Types: There are two types of extra hours depending on the aim of the extended period of time required of employees:

a. **For productive reasons.** Generally, extra hours are required for productive reasons, e.g. because the company needs greater employee activity to satisfy demand for production. Overtime for such a reason is normally voluntary, requires an agreement between the employer and the employee, and can therefore never be imposed (art. 34.4 ET).

    Extra hours are voluntary for both employer and employee.

The potential agreement does not require any justifying cause (though justification will obviously exist).

However, employees can surrender this voluntary nature, thus making overtime compulsory. This can be done through worker's representatives (in a collective agreement) or by the employees themselves (via an agreement in the employment contract). In both cases, the regulations on compensation and legal limits are the same.

Compensation. Since 1994 the value of an overtime hour has not necessarily been higher than that of an ordinary hour. This measure was adopted supposedly to promote job sharing (it was said that a higher value was an incentive for employees to do overtime). In reality, however, the decision was probably taken to increase company flexibility (by reducing the cost of overtime). Today, the ET stipulates that the cost of an overtime hour can never be lower than the cost of an ordinary hour.

Compensation can consist of money or rest time, as agreed in the collective agreement or employment contract. In the absence of an agreement, it is understood that any extra hours worked must be compensated with rest periods taken in the subsequent four months.

Legal limits. There are several legal limits:

1) The number of extra hours for productive reasons may not exceed 80 in one year. For part-time employees, the limit must be reduced in proportion to their working schedule on a yearly basis.

This limit became more flexible in 1994 as any extra hours compensated with resting periods within the following four months are no longer taken into account when calculating the 80-hour limit. The result is the possibility of a more flexible management of working time, thus affording the employer new measures for adjusting the workforce to the needs of the company.

To calculate the number of extra hours, a daily record must be kept and totalled within the period established for the payment of remuneration. A copy of the summary must be delivered to each employee in his or her pay slip (Art. 35.5).

Employment inspectors try to control the extraordinary hours worked in companies because it is obvious that employees do much more overtime than is legally permitted. The daily records are not very useful in this regard since they only describe the number of overtime hours worked. Inspectors therefore force companies to keep a daily record of working hours and employees have

to be recorded as soon as they start their working day. The *Audiencia Nacional* confirmed this decision but it was rejected by the *Tribunal Supremo*, thus making effective control more difficult (STS 23-3-2017 appeal n. 81/2016) However the matter reached the European Court of Justice (ECJ), which, in its ruling C-55/18, declared that Member States are required to set up a system that enables the length of time worked each day by each worker to be measured. Accordingly, Royal Decree 8/2019 has expressly introduced this obligation (art. 34.9 ET).

2) Another legal limit concerns categories of employees such as miners (RD 1561/95), underage workers (6.3 ET) and night workers (36.1 ET).

3) To increase job opportunities available to employees, legislation allows the Government to remove or reduce the maximum number of extra hours for a specific length of time either in general or for certain branches of activity or regions. However, the Government has never taken such measures, even during the financial crisis of 2008 when the unemployment rate reached 27%.

b. For non-productive reasons (*force majeure*). These are extra hours worked to prevent or repair accidents or other extraordinary and urgent damage. These are mandatory. When calculating the maximum number of extra hours permitted, these hours are not taken into account (without prejudice to their compensation as extra hours).

6. RECORDING OF WORKING HOURS

Following ECJ case 55/18 (CCOO), a new Section has been added to art. 34 (34.9 ET), according to which companies have to guarantee the daily recording of working hours, which must include the employee's specific start and end time of their working day, *without prejudice to the flexibility of working time established in this article.*

This article establishes that this obligation must be implemented through collective bargaining, a company agreement or, if neither of these procedures is successful, by decision of the employer after consultation with workers' representatives.

It also asserts that the company is obliged to keep these records for four years during which time they must be accessible to employees, their representatives and employment inspectors.

Numerous problems have arisen regarding the enforceability of this obligation since in some employments relationships it may be not so easy to keep such control. There is also a great deal of opposition from companies, probably because they are requiring their employees to do overtime while ignoring the regulations. Some claim that only effective working time should be counted (e.g. time spent in the lavatories or smoking cigarettes should not be considered part of the working schedule since it is not *effective work*) (see above).

7. SHIFT WORK AND NIGHT WORK

The legislation envisages several measures to protect the health of employees in these categories. Some of these are effective while others are simply programmatic. This is because here the ET does not fulfil its duty to provide specific measures to comply with the more general idea of protection provided for in EU Directive 2003/88 CE.

A. Shift work. According to the above directive, 'shift work' means any method of organising work in shifts, whereby workers replace each other at the same work stations according to a certain pattern. This pattern may be rotational, be continuous or discontinuous, and involve the need for workers to work at different times over a given period of days or weeks.

Effective rights for shift workers. These employees must at all times enjoy a level of health and safety protection that conforms to the nature of their work and includes suitable protection and prevention services that are equivalent to those of other workers in the company. This is an effective right since it is developed in the *Ley de Prevención de Riesgos Laborales* (art. 16).

Programmatic rights (art. 36.5 ET). On the one hand, the EU Directive establishes that member states shall take the measures necessary to ensure that an employer who intends to organise work according to a certain pattern takes account of (i) the general principle of adapting work to the worker, with a view in particular to alleviating monotonous and repetitive work (depending on the type of activity), and (ii) of safety and health requirements, especially as regards breaks during working time.

On the other hand, the ET establishes that an employer who arranges work in the company according to a certain rhythm must take into account the general principle of individual adjustment to work, particularly in order to mitigate a monotonous and repetitive task according to the type of activity and requirements in employee safety

and health matters. These requirements are particularly taken into account when determining the rest periods enjoyed during the working schedule.

As we can see, the ET does not adopt any provision for satisfying the requirements of the EU Directive. The ET simply repeats what Directive 2003/88 says without providing any specific protection measure. We must remember that European Directives establish objectives to be fulfilled by member states, which are obliged to adopt specific measures to do so. With regard to art. 36.5 ET, none of this is achieved since it only repeats the general goal.

B. Night work/night worker. Distinguishing between 'night work' and 'night worker' is important because the focus of the protection was shifted in 1994 from 'night work' to 'night worker' in order to introduce a certain flexibility in the regulation of night work.

- Night work. According to art. 36.1 ET, 'night work' refers to any work done between 10 p.m. and 6 a.m. Nowadays, the only limitation to night work is the obligation for any employer who regularly demands employees to do night work to inform the labour authority.
  Retribution: According to art. 36.2 ET, night work involves specific remuneration that is determined in a collective agreement unless the salary is established based on the fact that its very nature implies that the work is to be done at night.
  It can be retributed through rest periods, though one hour of night work cannot be compensated with just one hour of rest time. This means that night work retribution must be higher than ordinary retribution.

- Night worker. According to both the EU Directive and art. 36 ET, 'night worker' means:

  (a) any worker, who, at night, works at least three hours of his or her daily working time as a normal course, e.g. an employee who works from 5 p.m. to 1 a.m.
  (b) any worker who is likely during night time to work at least one third of his or her annual working schedule, e.g. employees who work in a rotating pattern of morning, afternoon and night shifts. All these workers are considered night workers even if by the end of the year they have actually performed just 1/3 of their work schedule during night work time.

Measures to protect night workers. Most protective measures concern night workers since these are the employees who are most affected by night work:

1) Night workers shall not work extraordinary hours. This limitation was in force before 1994. Nowadays it is possible for some employees to do overtime during night work, but only those who are not classed as night workers.
2) The work schedule may not exceed an average of 8 hours per day over a two-week period. The limitation concerning daily working time is therefore more rigid for night workers (though there is still a certain degree of flexibility).
3) Those who have health problems due to their night work are entitled to be assigned to a daytime work post available in the company for which they are professionally qualified. The change of work post is carried out in accordance with the provisions established in Articles 39 and 41 ET.

8. SPECIAL RULES FOR UNDERAGE EMPLOYEES

Underage employees have more legal limitations in their working time because they require more free time to develop their personality and academic and professional skills. These limits affect:

- The Ordinary Working Day: up to a maximum of 8 daily hours regardless of the number of employers for whom the work is provided. For example, if they have a contract of employment for 6 hours with one employer, they cannot engage in another contract of employment for more than 2 hours (3rd paragraph, art. 34.3).
- Overtime: this is not permitted (art. 6.3 ET) except when due to *force majeure.*
- Night work: this is not permitted (art. 6.2 ET).
- Dangerous work: this is not permitted. (art. 6.2 ET). The royal decree of 26 July 1957 develops this prohibition and establishes a list of forbidden activities, e.g. any kind of work carried out at a height of over four metres and any kind of activity that may be dangerous to health due to excess physical effort.
- Weekly rest: this is at least two consecutive days per week, which are non-accumulative (art. 37.1 ET).
- Special scheme for the continuous working day. Generally, employees have the right to a break of 15 minutes every 6 hours. However, underage employees have the right to a half-an-hour break every four and a half hours (art. 34.4 ET).
- Royal decree 1561/95 (art. 1.3 RD) on extensions of working time does not apply.

9. WORK CALENDAR, PUBLIC HOLIDAYS, AND ANNUAL HOLIDAYS

A. **Work calendar (34.6 ET & Disp. Ad. III of RD 1561/1995).** Each year, the company draws up a work calendar after consulting with workers' representatives and receiving their report, and exhibits a copy of the calendar in a visible place at each work centre. This general calendar applies to the whole undertaking, which includes holidays, shifts, the working schedule, etc. An employee's personal calendar is agreed directly with the employer.

B. **Public Holidays (37.2 ET).** The aim of public holidays is not to protect health but to commemorate certain socially important civil events, such as 1st May and 12th October. These days are remunerated and are not recoverable. The total number of public holidays is 14 days, 12 of which are established jointly by the Central Government and the Autonomous Communities, and 2 of which are established by the City Halls.

   Work done on public holidays must have a higher retribution.

   Spain signed a concordat with the Holy See (1979) by which the State agrees to respect certain religious festivities such as 8th and 25th December and 1st November. Other religions should conclude agreements with employers' representatives (as has occurred for activities with a broad presence of immigrants from Muslim countries, e.g. agriculture and the building sector).

   In my opinion, this may lead to discrimination on the grounds of religious beliefs since only Christianity is entitled to this recognition. So far, the Court of Justice of the European Union (CJEU) has affirmed that the only direct discrimination on the grounds of religion refers to national legislation where, firstly, Good Friday is a public holiday only for employees who are members of certain Christian churches and, secondly, only those employees are entitled (if they are required to work on that public holiday) to a payment in addition to their regular salary for work done on that day (case C-193/17, *Cresco Investigation*).

C. **8.3. Annual Holidays**

   Aim. The aim of these holidays is to protect employee health and strengthen personal relationships.

   Duration. The minimum duration is 30 natural days per year or a proportion of those days if work is conducted by an employee for less than one year. Certain periods of time, such as maternity leave and sick leave, are computed as period of services when calculating annual holidays.

Guarantees. Certain legal provisions are in place to ensure the protection of annual holidays:

- They are not financially replaceable, except when a contract of employment is terminated before an employee can enjoy those days.
- They must be enjoyed within the natural year, i.e. they cannot be accumulated.
- The privation of holidays cannot be used as a sanction (58.3 ET).
- Employees have the right to know the dates of annual holidays at least two months in advance in order to organize their time (38.3 ET).
- When annual holidays coincide with a provisional disability derived from pregnancy, birth or natural breast-feeding, or with a period of suspension of an employment contract related to maternity or paternity (see art. 48.4 ET), the employee is entitled to enjoy his or her annual holidays at a time outside the provisional disability or permit granted, at the end of the suspension period, even if the natural year has ended (38.3 ET). This is to differentiate between the aim of annual holidays (i.e. to recover from physical and psychological wear caused by work and strengthen personal relationships) and the aim of maternity leave or another permit granted for reasons explained earlier.
- When annual holidays coincide with sick leave, the employee is entitled to enjoy the holidays at the end of the leave, even if the natural year has ended, provided that no more than 18 months have elapsed since the end of that natural year.
- Are annual holidays a right or an obligation for the employee? The Constitutional Court determined that they are a right not an obligation. However, as the employment relationship is still in force during the period of annual holidays, employees cannot incur in unfair competition (STC 192/2003).

Establishing annual holidays. Annual holidays are established by mutual agreement between the employer and the employee while observing the provisions provided for in collective agreements. The employee cannot go on holiday without the employer's prior consent. On the other hand, if an employer wishes to impose the dates of annual leave or refuses to consent to it, the employee may file a lawsuit before the courts:

- within twenty days since notification of the dates determined by the employer (if the latter has imposed the dates), and
- within two months before the date the employee wishes to go on holiday (if no dates have been determined).

LESSON 3: RETRIBUTIONS

1. **SALARY / NON-SALARY COMPENSATION**
2. **SALARY STRUCTURE**
3. **SALARY DETERMINATION**
4. **NEUTRALISATION OF SALARY INCREASE (*ABSORCIÓN* AND *COMPENSACIÓN*)**
5. **PAYMENT**
6. **SALARY PROTECTION**
    a. **Against creditors of the employee**
    b. **Against creditors of the employer**
    c. **Against company insolvency**

1. SALARY / NON-SALARY COMPENSATION

Not all retribution paid to employees is considered salary. The first question to consider is therefore whether the remuneration is salary or non-salary.

This difference is important because when fixing employment rules ET often refers only to salary remunerations, e.g. art. 42 ET on outsourcing; art. 33 ET on the *Fondo de Garantía Salarial* (FOGASA); and when calculating compensation for terminating a contract.

According to art. 26.1 ET, ***salary*** refers to all economic payments made to employees, in money or in kind, for the professional provision of employment services. Salary remunerates effective work, regardless of the form of remuneration, as well as rest periods considered work time (annual holidays, weekends, etc).

However, the article ends with a legal limitation: in no event may in-kind salary exceed 30% of the employee's salary payments

Non-salary compensation is not defined in the ET. This form of compensation refers to any other retribution that cannot be considered salary since it does not recompense effective work or rest periods that are considered work time. We can conclude that non-salary retributions recompense non-ordinary costs incurred by the employee when performing his or her job. For instance (art. 26.2 ET):

- All economic compensations perceived by the employee as a consequence of non-ordinary expenses arising from the exercise of his or her job (e.g. if he or she is transferred to a different city for one week).

- The so-called *Seguridad Social Complementaria*, i.e. the benefit the employer incurs for their employees to increase the protection afforded by the welfare system.
- Compensations to which employees are entitled in cases of transfer, suspension or dismissal.

The disciplines that refer to salary are Employment Law, Social Security Law, and Tax Law.

- Tax Law began to define salary more strictly, widening the concept to include retributions that were not previously included or, at least, there was no single criterion about them (benefits offered by companies to their employees, including free tickets in the case of transport companies or water or energy supply in the case of electric, water or gas companies). This meant that taxable income was increasing.
- The same tendency is observed in Social Security, where more and more retributions are taken into account to calculate how much must be paid as social contributions to the social security scheme.
- Employment Law shows no clear tendency: in Employment Law, a wider concept of salary compensation would benefit the employee, e.g. FOGASA responsibility (art. 33); responsibility in outsourcing (art. 42); or when calculating compensations in cases of dismissal. Many court decisions have been taken on this subject, which shows that this matter is rather controversial. See STS 5-7-2016 appeal 2294/2014 on *plus transporte y vestuario.*

The question, then, is what type of remuneration (salary or non-salary) is:

- expenditure by employers on retirement programmes,
- expenditure by employers on health care or health insurance,
- free or subsidised housing,
- the use of a company vehicle or mobile phone, etc., and
- meal vouchers/restaurant tickets, etc.

2. SALARY STRUCTURE

Salary structure refers to the various concepts that are included in salary retribution. All concepts included in this salary structure are therefore salary remunerations.

According to art. 26.3 ET, salary structure is determined by collective agreement or by the employment contract.

A. Elements of salary structure

1) Basic Salary (26.3 ET): The salary structure must include basic salary. This is the amount paid to an employee before any extras are added or subtracted. Art. 26.3 defines basic salary as the remuneration established per unit of time (€/hour) or work (€/piece), e.g. a painter may get paid 10 € per hour or 10 € for each m^2 painted.

   Basic salary refers to remuneration in money (which cannot be reduced by payment of salary in kind).

2) Salary Supplements (26.3 ET): Payment for additional aspects of the work carried out, e.g. for greater responsibility on the part of an employee or greater inconvenience involved in the work (night work, shift work, being leader of a team, etc.). Salary supplements are always connected with task performance. There are three types of supplements:

   - **Those related to work.** This kind of supplementary payment concerns under WHAT CIRCUMSTANCES the employee works (night work, responsibility, shift work, etc.) and the QUALITY of the work (employee productivity, etc.).

   - **Company profits.** This kind of supplementary payment aims to encourage employee involvement and therefore increase company productivity. They reward employees when the company achieves a certain level of profit (without taking into account an employee's individual contribution). Company profits differ from productivity supplements because they do not take into account individual productivity.
     Collective agreements often include company profit, payment for which is made periodically (once or twice a year), regardless of whether there is any profit. Strictly speaking, in such circumstances these so called "supplementary payments" should really be considered extraordinary payments (see below).

   - **Personal characteristics and worker skills.** In this case, the retribution recompenses an employee's personal characteristics or skills that are not required by the collective agreement or professional group (e.g. seniority, certificates, diplomas, languages, etc.).
     Seniority:
     - Seniority is regulated in art. 25 ET.

- Seniority implies an increase in monthly retribution after the employee has completed a certain period of service for the company (e.g. three or five years). Seniority therefore implies an automatic increase in pay for the employee for the length of time he or she has served at the company. Until this period has been completed, the employee does not hold any right of seniority (i.e. the proportionality rule does not apply).
- Until 1994 this was a compulsory supplementary payment. Since then, however, it has no longer been compulsory (it depends on the collective agreement or employment contract). In fact, this supplementary payment goes against the modern philosophy of supporting the company's productivity and flexibility (performance-related salary) since it does not recompense any effort or productivity on the part of the employee.

- **Consolidation** (26.3 ET). Consolidation is important for determining the retribution of an employee whose working conditions are modified. For example, what retribution is paid to a night-worker who is transferred to a day job? Does he or she have the right to still be paid as a night-worker?

  Rules on the consolidation of supplementary payments make it important to differentiate between these kinds of payments, since art. 26.3 says that the consolidation of supplementary payments will only occur for payments related to an employee's personal characteristic and skills unless otherwise stated in the collective agreement or employment contract.
  For example:
  - A night worker who is transferred to a morning shift will lose his or her supplementary payment for night work.
  - Employees whose language skills are not required for their position but may be useful for it will continue to receive their supplementary payments even if they get moved to another position in which they will never use those skills.

3) <u>Extraordinary payments</u> (31 ET): Employees are entitled to two extraordinary payments per year.
   - **Receipt** depends on the stipulations of the collective or individual agreement. However, one payment must be paid at Christmas, while the other is normally paid at

the end of June. Extraordinary payments can also be distributed proportionally across the twelve months of the year if the collective agreement permits.

- The **amount** received depends on the collective agreement.

3. SALARY DETERMINATION

The specific retribution to be paid to an employee is established in his or her employment contract. However, as the relationship between an employer and an employee is typically a relationship between a bearer of power and one who is not a bearer of power, the ET envisages limitations that must be considered when establishing the retributions (and other working conditions).

a) Interprofessional Minimum Wage. Art. 27 ET stipulates that the Inter-professional Minimum Wage (IMW), i.e. the minimum wage any full-time employee is entitled to receive as his or her basic salary, is to be regulated annually. The establishment of an IMW is the recognition of an employee's constitutional right to receive sufficient remuneration in order to satisfy their needs or those of their family (art. 35 CE). Whether the IWM achieves that aim or not is open to discussion.

The Government is in charge of determining the IMW annually after consultations with the most representative employers' associations and trade unions.
The IMW is fixed in accordance with several criteria:

- The CPI (Consumer Price Index)
- The general economic situation in the country
- The average national productivity achieved
- The increase in the contribution of work to the national income

As the actual CPI may be different to the estimated CPI, the minimum wage may be reconsidered after 6 months.

Because salary does not increase automatically when the CPI increases, many collective agreements used to include an automatic salary revision to adapt to the cost of living as expressed by the IPC. However, the 2008 financial crisis and a political aim to avoid this indexation have reduced the number of collective agreements that still link salary to the IPC.

As the IMW refers only to salary paid in money, salary paid in kind cannot be taken into account to determine whether this minimum amount has been reached.

There is no European minimum wage and some European Union countries do not have a national minimum wage. This is an important aspect for the European Union to take into account since there are huge differences between the minimum wages among European countries (the highest is roughly ten times as much as the lowest), which could increase *social dumping* (the different costs of living and freedom to provide services, which guarantee the mobility of business, must also be taken into account). The debate on whether to establish a European minimum wage has therefore begun.

Some economists object to the idea of establishing minimum wages, asserting that they may undermine an economy's competitiveness. Others argue that fixing a minimum wage helps the national economy to grow because it reinforces consumption. Countries such as Germany have recently introduced a national minimum wage and a discussion is under way to do the same across Europe despite the disparities between the economies of European countries that make it difficult to reach a consensus in this area.

***b) Professional Minimum Wage*:** This refers to the wages agreed in the collective agreement. These must at least be equivalent to the IMW and must be respected by the contracts of employment when the employees' retribution is fixed.

In relation to the professional minimum wage, we should stress that the tendency to reinforce collective bargaining at the company level (rather than at the branch level) has led to a reduction in professional minimum wages.

Industrial relations policy in the European Union (and therefore in Spain) has focused on reinforcing collective bargaining at the company level. The argument is that at the company level it is easier for the employer to bargain according to the company's needs and therefore to adapt working conditions to the company's specific situation, thus enabling it to adapt to the market requirements. When this is the case, in small and medium-sized companies (which represent the vast majority of companies in countries such as Spain), the power of the employee is much weaker than that of the company, which can use its managerial power (e.g. by threatening dismissal) to impose the working conditions it wants, thus reinforcing its authority. This tendency has led to the lowering of professional minimum wages, which in turn has contributed – through non-standard forms of employment and the abuse of temporary

employment contracts – to an increase in what is known as in-work-poverty (i.e. being unable to make a living despite having a job).
If you would like to know more about in-work poverty, read the Eurofound Research Report *In-work poverty in the EU*, which is available at:
https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1725en.pdf

c) Equal remuneration for both sexes, Discrimination is forbidden in art. 14 CE and art. 17 ET, which refer to discrimination on the grounds of sex. A clear malfunctioning of labour markets means that women are paid less than men, as is observed in Spain in the Wage Structure Survey of the Spanish *Instituto Nacional de Estadistica*. The gender pay gap is a reality throughout the European Union, where women still earn on average 16.2 % less than men for each hour worked (Eurostat 2011) despite their significant progress in terms of educational achievements and work experience. This gender pay gap has so far been reduced only very slowly.

For this reason, the principle of equal remuneration for both sexes is referred to in art. 28 ET. This does not imply, of course, that discrimination in remuneration for any other reason is acceptable either.

Art. 28 ET affirms the prohibition of discrimination in retribution on the grounds of sex. This is a consequence of European Directive 2006/54/CE, which states that, for work to which equal value is attributed, the employer must pay the same retribution, whatever its nature, and eliminate any discrimination on the grounds of sex in all aspects and conditions of remuneration.

Today one rarely finds direct pay discrimination for the same work because pressure in the system combats this form of discrimination. However, the legal framework has been less effective in ensuring the implementation of the principle of equal pay for work of equal value. This discrimination is much more difficult to combat for several reasons, including a lack of awareness on the part of the victim, the difficulty in proving discrimination since the burden of proof has shifted to the employer, obscure pay structures, and a lack of available information about the pay levels of employees who perform the same work or work of equal value.

To fight sex discrimination, therefore, it is essential to determine what must be considered work of equal value. Clearly, this concept is wider than the statement *same retribution for the same work*, as it can apply to different work provided that the value of the work is the same.

Royal decree 6/2019 introduced an amendment to art. 28 ET in an attempt to make the prohibition of discrimination on the grounds of sex more effective. The first measure was to introduce a concept of *work of equal value*, in accordance with the Commission Recommendation of 7 March 2014, *on strengthening the principle of equal pay between men and women through transparency,* which recommends member states to clarify the concept of 'work of equal value' in their legislation. This Recommendation provides several clues for determining when two different works are of equal value: *The value of work should be assessed and compared based on objective criteria, such as educational, professional and training requirements, skills, effort and responsibility, work undertaken and the nature of tasks involved.*

Accordingly, art. 28 ET states that a work will be of the same value when the nature of the functions or tasks effectively entrusted, the educational, professional or training conditions required for its exercise, the factors strictly related to its performance, and the working conditions in which these activities are carried out are equivalent.

What must be considered, therefore, is whether any circumstance (responsibility, effort, ability, knowledge, etc.) renders the value of one work higher than that of the other. For information about gender-neutral job evaluation and classification systems, please read Commission staff working document (SWD/2013/0512 final).

We should also stress that, on many occasions, employers refer to physical effort to justify a different value. The Court of Justice of the European Union and the Spanish Constitutional Court admit that physical effort can be used to give a different value to work but they claim that this criterion is liable to be discriminatory and must be analysed strictly.

The recommendation to provide a definition for work of equal value is not the only proposal that has been echoed by Spanish legislation. The Commission Recommendation of 7 March 2014 also refers to different measures of wage transparency, which have been introduced into art. 28 ET:

- The first measure is the employer's obligation to keep a register of the average values of wages, salary supplements and extra-salary payments paid to its workforce, disaggregated by sex and distributed by professional groups, professional categories or comparable jobs.
- The second measure is the right of employees to access their company's salary register (through the legal workers' representatives in the company).

- The third measure is to justify the differences in wages between male and female employees and to give reasons that show that the differences are for aspects that are not related to gender. This obligation applies to companies with at least fifty workers when the average remuneration for employees of one gender exceeds that of the other by at least twenty-five percent (taking the whole of the salary mass, or the average of payments done).

Since the majority of companies in Spain have fewer than 50 employees and many of these do not have workers' representatives, supervision of the gender pay gap in such companies should be done by employment inspectors.

4. NEUTRALIZATION OF SALARY INCREASE (*ABSORCIÓN* AND *COMPENSACIÓN*)

According to art. 26.5 of the ET, a neutralization of salary increase will apply when the salaries that are actually paid, as a whole and as a yearly amount, are more favourable to the employees than those established in the regulations or collective agreement.

As art. 27 ET stipulates in relation to the interprofessional minimum wage, adjusting this minimum legal salary will not affect the structure or amount of any professional salaries that, as a whole and as a yearly amount, exceed this minimum legal salary. In such cases, the increases in IMW are absorbed by the more favourable prior economic conditions.

In summary, in an attempt to clarify as much as possible without over-simplifying the reality, imagine the following case:
A person was hired in 2017.
The collective agreement recognized a global retribution of 28,000 euros per year for 2017 (2,000 euros per month plus two extraordinary payments).
The contract of employment signed in 2017 recognized a global retribution of 30,800 euros per year (2,200 euros per month).
The new collective agreement for 2018 recognizes a salary of 29,400 euros per year, i.e. a rise of 100€ per month.
In this case, employees would not be affected by the increase in retributions agreed in the collective agreement as they would be recompensed by their previous better remuneration.

The most complex question in this area concerns what can be compared in order to apply the retribution. The *Tribunal Supremo* requires homogeneity between the concepts to be

compensated and introduces an indeterminate legal concept (homogeneity) that allows for different approaches (see STS 13-7-2017 recud (appeal) 2198/2015).

5. PAYMENT (ART. 29 ET)

Payment of salary is one of the main employer obligations emerging from the employment contract. Important questions concerning the payment of salaries, such as where, when and how to pay, are dealt with in art. 29 ET.

a) ***Place*** (art. 29.1 ET) The salary is to be paid at the place agreed or according to custom.

In accordance with ILO Convention 95/1949, the payment of wages in taverns or similar establishments or in shops and stores for the retail sale of merchandise or in places of amusement is prohibited (so as to prevent abuse) except to people who are employed there (art. 12).

ILO Convention 117/1969 recalls this prohibition and asserts that payment of wages shall not be made in taverns or stores except to workers who are employed there (Art. 11).

This limitation, which is understandable considering the age in which it was agreed, represents an example of paternalism in the regulation of labour relations, since it attempts to protect employees from vices, improve employees' quality of life, and ensure that the workforce is present at the company the day after pay day (read more about paternalism in industrial relations in Spanish on pages 11-26 below: http://www.cervantesvirtual.com/s3/BVMC_OBRAS/003/dc8/b68/2b2/11d/fac/c70/021/85c/e60/64/mimes/003dc8b6-82b2-11df-acc7-002185ce6064.pdf)

b) ***Time*** (arts. 4.2.f and 29.1 ET). As employees need their salary to live, they need to receive their retribution promptly (and with a degree of certainty about when they will receive it) and regularly (at intervals that will reduce the likelihood that wage earners will become indebted).

Although the employer becomes a debtor as soon as the employee starts working, the law establishes certain limitations in order to guarantee the rights of the employee. Article 12 of ILO Convention 95/1949 states that wages are to be paid regularly, while art. 29 ET states that the period of time for payment of periodic and regular remuneration may not exceed one month. The maximum period of time the employee can legally work without receiving his or her salary is therefore one month. However,

specific rules apply for salary on commission (art. 29.2 ET), which should be paid at the end of the year unless otherwise agreed.

- Do employees have the right to payments in advance? We need to differentiate between two possibilities:
    - Advanced payment for work already done. In this case, the rule is clear since art. 29.1 says that the worker (or his or her legal representatives, if so authorised) are entitled to receive advanced payments on account of work already done before the payment deadline.
    - Advanced payment for work to be done. Article 12 of ILO Convention 117/1962 obliges States to set maximum amounts, arrange the manner in which the advanced payment of wages will be repaid, and limit the number of advanced payments that can be made to a worker in consideration of his or her taking up employment.

      Those provisions are developed in Decree 3084/1974 (the 117 ILO Convention was ratified by Spain in 1973). This Decree, which is still in force, establishes two rules:
        - Advanced payment for work to be done cannot exceed three months of basic salary. Any advance in excess of this amount is legally irrecoverable.
        - Reimbursement for such advanced payments cannot exceed one sixth of the employee's monthly basic salary.

- There are two main effects of a delay in the payment of salaries:
    - An employer must agree to a 10% interest rate for the delay. This interest must be calculated proportionally, i.e. 10% will be applied only when the delay reaches one year.
    - If the delay in payment is considered a grave infringement of an employer's obligation (art. 50 ET), the employee is entitled to terminate the employment contract and be awarded the same compensation as for unfair dismissal (33 days per year of service). This issue will be discussed in lesson seven.

c) ***Form.*** Salary can be paid in money or in kind (art. 26.1). However, there is a limit on salary in kind (in the form of goods and/or services provided by the employer), since art. 26.1 stipulates that salary in kind cannot exceed 30% of the total salary.

Remember that salary in kind is not considered when determining whether the Interprofessional Minimum Wage is respected.

- Salary in money. Since employers are obliged to pay a certain amount of money rather than a certain value, an increase in CPI (the Consumer Price Index) affects the employees' purchasing power. To make up for this loss, collective agreements used to establish automatic re-evaluation of salaries if the predicted change in CPI reached a certain level. However, since the 2008 financial crisis this protection has been attacked by international and European political and financial institutions, especially in countries hardest hit by the crisis, in order to gain economic competitiveness by devaluating the price of work.

  ILO Convention 95/1949 states (art. 3) that wages payable in money are to be paid only in legal tender and accepts the payment of wages by bank cheque, postal cheque or money order in certain cases (e.g. where payment in this manner is customary, or necessary due to special circumstances, where a collective agreement or arbitration award provides for it, or where it is not provided for but the worker concerned has consented to it).

  However, according to art. 29.4 ET, the salary may be paid in legal currency or by cheque or similar form of payment through a credit entity (any other form of payment, such as promissory notes, vouchers or coupons are prohibited) after the employees' representatives have been informed. This means that it is up to the employer to decide how to pay the salary from all these forms of payment provided the workers' representatives are informed. However, if it is decided to pay into a bank account (which is a socially accepted form of payment; STS 5-11-2001 recud n. 4752/2000), the employer cannot impose the entity in which to render the payment (STSJ Cataluña 2-6-2005, sentencia n. 5107/2005).

- Salary in kind (in the form of goods and/or services provided by the employer) is permitted but with certain limitations in order to avoid abuse of the so-called *truck system.*

  You can find an example of the consequences of the truck system at: https://www.heritage.nf.ca/articles/economy/truck-system.php

  <u>Limits to salary in kind:</u>

  - Art. 26.1 limits salary in kind to a maximum of 30% of the employee's salary.

- Royal Decree 1077/2017 states that the IMW refers only to salary in money, so salary in kind cannot be taken into account to determine whether this minimum amount has been reached (art. 1).
- Following the paternalist pattern described above, ILO Convention 117/1969 prohibits the substitution of alcohol or other spirituous beverages for all or any part of wages for services performed by a worker.

d) ***Documentation*** (art. 29.1 ET) Payment of salary is to be documented in the documents (receipts) agreed or established by custom.
Collective agreements normally regulate these documents. In any case, there is an official itemised pay statement (Orden ESS/2098/2014) that itemizes the various concepts (payments and deductions) involved.

Empresa: Domicilio: CIF: CCC:	Trabajador: NIF: Núm. Afil. Seguridad Social: Grupo profesional: Grupo de Cotización:

Periodo de liquidación: del ..... de ..... al ..... de .....de 20..... Total días ☐

I. DEVENGOS	IMPORTE	TOTALES
1. Percepciones salariales		
Salario base	_____	
Complementos salariales		
_____	_____	
_____	_____	
_____	_____	
Horas extraordinarias	_____	
Horas complementarias (contratos a tiempo parcial)		
Gratificaciones extraordinarias	_____	
Salario en especie	_____	
2. Percepciones no salariales		
Indemnizaciones o suplidos		
_____	_____	
Prestaciones e indemnizaciones de la Seguridad Social		
_____	_____	
Indemnizaciones por traslados, suspensiones o despidos		
_____	_____	
Otras percepciones no salariales		
_____	_____	
A. TOTAL DEVENGADO		_____
I. DEDUCCIONES		
1. Aportación del trabajador a las cotizaciones a la Seguridad Social y conceptos de recaudación conjunta		
%		
Contingencias comunes	_____	
Desempleo	_____	
Formación Profesional	_____	
Horas extraordinarias	_____	
TOTAL APORTACIONES	_____	_____
2. Impuesto sobre la renta de las personas físicas	_____	
3. Anticipos	_____	_____
4. Valor de los productos recibidos en especie	_____	
5. Otras deducciones	_____	
B. TOTAL A DEDUCIR		_____
LÍQUIDO TOTAL A PERCIBIR (A – B)		_____

..... de ..... de 20.....

Firma y sello de la empresa RECIBÍ

With regard to taxes and employee social security payments, note that art. 26.4 ET states that employees have to pay all their own tax and social security obligations and that any agreement to the contrary will be declared null and void.

6. SALARY PROTECTION

As salary is the employee's main – if not only – source of income, it must be protected from circumstances that could affect payment of it and, therefore, the employee's livelihood.

This threat to payment of the employee's salary could come from:

- creditors of the employee,
- creditors of the employer, or
- company insolvency.

a) Salary protection against creditors of the employee: protection from attachment.

Attachment of wages obliges the employer to pay part of the employee's wages not to him or her but to the employee's creditor.

National and international rules restrict the liability of wages to attachment:

- Art. 10 of ILO Convention 95/1949 states that wages may be attached or assigned only in a manner and within limits prescribed by national laws or regulations. The same article establishes that wages are to be protected against attachment or assignment to the extent deemed necessary to maintain the worker and his or her family.
- In Spanish legislation, this protection is regulated in art. 27.2 of the ET and articles 607 and 608 of the *Ley Enjuiciamiento Civil*, which provide certain protected wage rates up to which the wage is exempt from attachment:
    - The IMW is exempt from attachment.
    - If remuneration exceeds the IMW, the amount in excess is also exempt from attachment to certain degree.
- For the first additional income above the IMW and up to 2 times the IMW, only 30% is liable to attachment.
- For the second additional income above the IMW and up to 3 times the IMW, only 50% is liable to attachment.
- For the third additional income above the IMW and up to 4 times the IMW, 60% is liable to attachment.
- For the fourth additional income above the IMW and up to 5 times the IMW, 60% is liable to attachment.
- For the fifth additional income above the IMW and up to 6 times the IMW, 75% is liable to attachment.
- For any additional income, 90% is liable to attachment.

In some cases, these percentages can be lowered depending on the employee's situation (art. 106.4 LEC) and are not applicable when the employee has been sentenced to pay alimony (art. 608 LEC). In such cases, the Court will decide the amount that is liable to attachment.

The amount to be considered to determine the wage liable to attachment must include extraordinary payments. When the extraordinary payments are paid, the amount liable

to attachment that month will be determined by applying the above scale (Consulta Vinculante V0613-18, de 7 marzo de 2018 de la Subdireccion General de Tributos):

http://diariolaley.laley.es/Content/DocumentoRelacionado.aspx?params=H4sIAAAAAAAEAMtMSbF1DjYAAUtzIwNTtbLUouLM_DzbsMz01LySVBA_M63SJT85pLIg1TYtMac4VS05JzWxyCWxJNU5MSc1LyWxyDakqDQVAEGS5aVLAAAAWKE

b) **Salary protection against creditors of the employer.** Employment Law protects salary against creditors of the employer and provides certain guarantees in art. 32 ET. Note that after Law 22/2003, of 9th of July (on bankruptcy), the protection envisaged in art. 32 ET is only applicable if the Company has not been legally declared bankrupt. Otherwise the rules of Law 22/2003 will apply.

This is important as it means lowering salary protection. Both provisions are intended to organize payment to the employer's creditors as these can be various and highly heterogeneous (banks, customers, suppliers of goods, services or energy, public administrations (for taxes and social security contributions, etc.). However, art. 32 ET contemplates a regime that is more favourable to employees than Law 22/2003 does. Art. 32 ET contemplates three protection levels:

- Salary credits for the last thirty days' work. These credits have the strongest level of protection and enjoy preference over any other credit even if they are secured by means of a pledge or mortgage. This privilege has two limitations:
    - It applies to salary credits from the previous 30 days.
    - It is limited in amount since it only protects salary that does not exceed twice the amount of the IMW.
- Salary credits related to objects manufactured by employees enjoy preference over any other credit. The aim is to give preference to those who have contributed to create the object, so that they will be paid first with income obtained from the sale of those objects. This privilege also has certain limitations:
    - It applies only to objects manufactured by employees (it does not affect immovable property).
    - It applies only to objects that remain company property or are in the hands of the employer (even if the employer no longer owns them).
- Any other salary credits (or credits for indemnification for dismissal) have a 'relative privilege' that does not affect credits secured by means of a pledge or mortgage. This privilege also has a limitation:

- It only affects the amount that results from multiplying the IMW three times by the number of days in which the salary is not paid.

c) Salary protection against insolvency of the company (FOGASA). This protection is also regulated at the European level since DIRECTIVE 2008/94/EC establishes the protection of employees against the insolvency of their employer. In Spain, this protection is regulated in art. 33 ET on the *Fondo de Garantía Salarial* (FOGASA).

- ***What is FOGASA?***. FOGASA is an autonomous body belonging to the *Ministerio de Trabajo*. Its funds derive from the contribution all employers have to make for each employee they employ (art. 33.5 ET). FOGASA socializes the employer's risk of becoming insolvent. The relationship between FOGASA, the employer and the employee is therefore similar to that created by an insurance policy, i.e. FOGASA is the insurer; the employer is the insured, and the employee is the beneficiary.
- ***When does FOGASA guarantee employees' retributions?*** There are two cases when FOGASA is responsible for paying (at least some of) the retributions owed to an employee:
  - In cases of insolvency. Insolvency occurs whenever, further to enforcement proceedings regulated in the Labour Procedure Act (*Ley Reguladora de la Jurisdicción Social*), employment credits are not satisfied (art. 33.6 ET). In such cases, FOGASA guarantees:
    - Salaries. For the purpose of this article, salary is considered to be:

      - the retributions that have the nature of a salary according to art. 26.1 and are recognised to the employee in the conciliation act or court decision.

      - the so-called *salarios de tramitación* (*lucrum cessans* as a result of an unfair dismissal; see lesson 7) when they are legally payable.

      Art. 33.1 limits the amount of money FOGASA must guarantee for those concepts.

    - Certain compensations due to the employee as recognized by court resolution (*sentencia* or *auto*), in-court conciliation act, or administrative resolution. Note that not all compensations regulated in ET are protected (only those specified in art. 33.2 are):

- Compensations as a result of disciplinary dismissal.
- Compensations as a result of contractual termination by the employee as a consequence of a severe infringement of an employer's obligations (art. 50 ET).
- Compensations as a result of objective circumstances expressed in articles 51 and 52 ET.
- Compensations as a result of contractual termination according to article 64 Law 22/2003.
- Compensations in cases of termination of temporary and fixed-term contracts of employment.

However, JCJ in Case C‑57/17 (*Checa Honrado*) affected this regulation since it considered that the protection offered by FOGASA must include compensation in the case of termination of the contract on objective grounds (in the above case, termination was decided by the employee after the employer ordered his transfer to another workplace) .

Finally, note that art. 33.2 limits the amount of money FOGASA must guarantee for these concepts.

- In cases of termination of the employment contract due to *force majeure*. *Force majeure* are unforeseeable (unpredictable or unavoidable circumstances) that prevent someone from fulfilling a contract. In such cases, the compensation to which the employee is entitled to perceive due to the termination of his or her contract of employment is guarantee by FOGASA.

  In these cases, the labour authority that verifies the *force majeure* may agree that all or part of the compensation should be paid by FOGASA, notwithstanding the right of FOGASA to be reimbursed by the employer.

LESSON 4: VARIATIONS IN WORKING CONDITIONS

1) **Automatic variation and variation by agreement**
2) **Unilateral variation by the employer**
    - **Disciplinary measures**
    - ***Ius variandi* (exercise of managerial power) Ordinary or Extraordinary**
        (1) **Functional mobility**
        (2) **Geographical mobility**
        (3) **Major changes to working conditions**
3) **Unilateral variation by the employee**

a) **Promotion**
b) **Family reunification**
c) **Objective reasons**

---

1) Automatic variation and variation by agreement

Automatic variation occurs when there is a change in legislation, e.g. a change in IMW

Variation by agreement is always possible if:

- the agreement is valid in terms of consent (no vices of consent) and objective (it respects the law and workers' rights are not relinquished), and
- the effects are as determined in the agreement.

2) Unilateral variation by the employer

I. Disciplinary reasons

In response to a lack of fulfilment of an employee's duties, an employer can adopt disciplinary measures such as making modifications to the employment contract, e.g. changing the employee's functions, transferring an employee to another site, etc.

Employers can only choose sanctions that are established in the collective agreement.

Effects: these are fixed in the collective agreement.

Limitations: constructive dismissal, which occurs when an employer creates a hostile work environment to force the employee to resign, is not permitted. Resignation is not truly voluntary in such cases.

For example, when an employer orders an employee to transfer to another site without offering compensation, thus putting the employee at a financial disadvantage.

II. *Ius variandi* (managerial power)

The difference between ordinary and extraordinary variations is explained below:

Ordinary variations are decisions by the employer that do not have a great impact on the employee's working conditions, e.g. changing the colour of his or her uniform. The limits to these variations are good faith and a respect for fundamental rights.

Extraordinary variations are decisions by the employer that have an important impact on the employee's working conditions.

Legislation establishes certain limits to extraordinary variations (e.g. functional mobility, geographical mobility, and important changes in working conditions) in addition to good faith and fundamental rights.

A) Functional mobility (39 ET)

From the employer's perspective, changes to an employee's functions can be introduced in three different situations:

→ Functional variation within the professional group (ordinary variations)
→ Functional variation outside the professional group (extraordinary variations), which can be
- temporary, or
- permanent

In cases of functional mobility, the professional group differentiates between ordinary and extraordinary variations; extraordinary variations depend on whether they are temporary or permanent.

→ Functional variation within the professional group (ordinary variations)

General limits:

- **Titles** (39.1 ET): Professional titles must be respected not only when the employee is recruited but also in functional variations; e.g. in security and surveillance companies, the professional group of security guards normally includes van drivers and guards. If a guard does not have a driving license, the employer cannot ask him or her to drive a van.

- **Dignity** (39.1 ET): This does not mean that employers may not ask employees to perform lower tasks, e.g. a sales manager can be asked to perform the duties of a shop assistant. An employee's dignity is affected, however, when an employer's decision diminishes his or her image in front of colleagues or clients; e.g. a bank wants the manager to take retirement (which is a right not an obligation) but the manager does not want to, so in retaliation the employer orders him to carry out the functions of a cashier.

- **Good faith** (7.1 CC): For example, an employer orders a change in an employee's functions so as to avoid promoting him or her.

- **Non-discrimination** (14 CE): See lesson 1.

- **Economic rights** (39.3 ET): See "Temporary functional variation outside the professional group".

*The employment contract or collective agreement can add more specific limitations.

→ Temporary functional variation outside the professional group (extraordinary variation)

Limitations 39.2 and 3.
In addition to the general limitations reported above, article 39 establishes:

- **Causal limitation**: technical or organisational reasons must exist.

- **Temporal limitation**: the variation must be effective only for the time that is strictly necessary.
- **Procedure**: the employer must notify the worker's representative of its decision and the reasons for that decision.

Effects:

- **Downward mobility** (39.3 ET) (to a lower professional group): The salary earned while performing these functions stays the same. This applies to basic salary only, while supplementary payments will be paid according to the rules on consolidation (see lesson 3).

- **Upward mobility** (39.3 ET):
    - The salary earned while performing these functions is that which is recognised for the higher professional group. This applies to basic salary only, while supplementary payments will be paid according to the rules on consolidation.
    - The right to be promoted. Requirements:
        - A vacancy must exist
        - There is a minimum duration for performing the functions (6 months in 1 year or 8 months in 2 years) unless the collective agreement establishes a shorter period of time.
        - In covering the vacancy, the company's rules on promotion must be respected.

Common effects:
Employees who are unable to properly carry out their new functions cannot be fired for that reason but can be transferred back to their former position.

→ Permanent functional variation outside the professional group (extraordinary variation)

This situation, which is regulated in art. 41 ET (substantial modification), involves more limitations than temporary functional variations outside the professional group.
This, and all other substantial modifications, will be analysed later.

B) Geographical mobility (40 ET)

Art. 40 ET deals with geographical mobility (but only mobility that involves extraordinary variations).
How can we distinguish between ordinary variations and extraordinary variations in geographical mobility?

The key element is whether the geographical mobility affects the employee's need to change residence, either temporarily *(desplazamientos)* or permanently *(traslados)*:

a) Geographical mobility that does not involve the need for the employee to change residence, e.g. changing to another company site in the same city (e.g. from C/ Colón to Avenida Pio XII, both of which are in Valencia). The only limitations for this type of mobility are good faith and no discrimination.

b) Geographical mobility that involves a temporary need for the employee to change residence, i.e. *desplazamiento* (temporary transfer): Art. 40.6 ET.

c) Geographical mobility that involves a permanent need for the employee to change residence, i.e. *traslado* (permanent transfer): Arts. 40.1, 40.2 and 40.3 ET.

A) Permanent transfer (*traslado*)

a) Concept

In this case, employees have to change residence permanently. This includes transfers of 1 year in a 3-year term) but does not apply if the worker is hired to perform functions in various places.

For example, a company responsible for maintaining power lines has two types of employees: those working in the company's administration and those sent to conduct the maintenance. If the former are sent to a different place than usual, their situation will be considered one of transfer.

b) Causes can be economic, technical, organizational or productive.

These causes therefore relate to competitiveness, productivity, the technical organization of the company's activity, and the contracts related to that activity.

These circumstances enable the employer to adopt measures involving transfer, substantial modifications (41 ET) or dismissals (52.c and 51 ET). The seriousness of the circumstances required for adopting these measures is not the same in every case and the decision should be in proportion to the negative consequences for the employee. The financial reason for dismissal is not the same as the financial reason for transfer.

The company must prove that the transfer will improve the company's market situation, strengthen its competitive position, or better satisfy demand for its products or services.

c) Procedure

- Procedure: Depending on how many employees are affected, there will be more or fewer requirements. We therefore need to differentiate between individual transfers and collective transfers.
    - With collective transfers:
        - the entire work centre is affected (provided more than 5 workers are employed).
        - if the entire work centre is not affected, at least the following number of employees are affected in a ninety-day term: a) ten, for companies that employ fewer than 100 workers; b) 10% of the company's employees, for companies that employ between 100 and 300 workers; and c) thirty, for companies that employ more than 300 employees.

          For transfers made in successive periods of 90 days, to avoid the 'collective' category, new transfers that imply exceeding the legal thresholds will be considered null and void. E.g. in a company with fewer than 100 employees, only the transfer of the tenth employee (and subsequent employees) in successive periods of 90 days, will be null and void.
    - Individual transfers are those that cannot be considered collective.

- Procedure for individual transfers: The transfer decision must be notified by the employer to the employee and his or her legal representative at least 30 days before the effective date of the transfer.

- Procedure for collective transfers: The transfer decision must be preceded by a consultation period with the workers' representatives lasting at most 15 days. As this obligation is to consult rather than to reach an agreement, if an agreement is not reached, the employer can impose the transfer.

  Nevertheless, this consultation procedure is important provided that it is a **real** consultation conducted under the principle of good faith and aims to reach an agreement.

  The consultations discuss the causes that led to the employer's decision, possibilities for avoiding or reducing the effects of that decision (e.g. instead of it affecting 50 employees, it will affect only 35), and the measures needed to mitigate its consequences for the affected employees (e.g. they will be given extra holidays as a form of compensation).

  When the consultation period is over, the employer must notify the employees and their legal representatives of their decision to transfer at least 30 days before the effective date of the transfer.

d) Effects

The effects of the employer's decision depend on the employee's chosen option, of which there are THREE:

- Acceptance: Employees have the right to receive financial compensation for all expenses incurred by them and the relatives under their care due to the transfer in the terms established in the collective agreement or those agreed individually.
- Compliance and claim (*solve et repete*): An employee may challenge the employer's decision before the competent courts. The court will declare whether the transfer is justified or unjustified and, if it is unjustified, will recognise the worker's right to be reinstated at his or her original work centre at the employer's expense.
- Termination of the contract of employment: The employee is entitled to a compensation of 20 days' salary per year of service, with a monthly prorating for periods of less than 1 year and up to a maximum of 12 monthly payments.

B) Temporary transfer (***desplazamiento***)

a) Concept

In this case, employees are subject to temporary geographical mobility that requires a change of residence.

*Remember that transfers of 1 year in a 3-year term are considered permanent transfers.

b) **Causes** may be economic, technical, structural or productive. See the explanation for this in the section on 'permanent transfer'.

c) Procedure

There is no distinction between individual transfer and collective transfer. In all cases, the employer needs to give the employee sufficient advance notice, which cannot be less than 5 working days for a transfer of more than 3 months.

d) Effects

The effects of the employer's decision depend on the employee's chosen option, of which there are TWO :

- Acceptance: The employee has the right to financial compensation for travelling expenses and allowances other than salary. If the transfer lasts for more than 3 months, the employee has the right to a leave of 4 working days for every 3 months. The employer is responsible for paying the travelling expenses. These leaves can be accumulated.
- Compliance and claim (*solve et repete*): An employee may challenge the employer's decision before the competent courts. The court will declare whether the transfer is justified or unjustified and, if it is unjustified, will recognise the worker's right to be reinstated at his or her original work centre at the employer's expense.

C) Major modifications of working conditions (41 and 82.3 ET)

Two regulations of major modifications of working conditions exist. To determine which regulation applies, we need to consider where the working conditions to be modified are established.

1) Conditions established in collective agreements of the Spanish Workers' Statute (82.3 ET)

**Estatutario* collective agreements are negotiated under the requirements established in articles 87 and 88 of the ET.

a) Major modification

This is an extraordinary variation that can only affect certain working conditions, i.e. those envisaged in article 82.3 ET, which basically concerns work time, salary and functions.

The list envisaged in article 82.3 ET is closed. It is therefore not possible to modify any other working condition using this procedure.

Note that, for this procedure, the company's efficiency has priority over the effectiveness of the agreements reached through collective bargaining.

b) Causal requirement

Legislation requires economic, technical, organizational or productive reasons.

Economic reasons are 'negative' financial results, i.e. current or predicted losses and a persistent decrease in profits or sales. Objective criteria for identifying this negative situation

establish that the situation is ‘persistent’ when the decline lasts for at least two consecutive terms and the results are lower than for the same two terms in the previous year.

Technical reasons: modifications in tools or means of production.

Organizational reasons: modifications in working systems and methods.

Productive reasons: modifications in demand for the goods or services provided by the company.

c) Procedure

The modification must be preceded by a consultation period with the workers’ representatives of at most 15 days. This obligation is to reach an agreement not just to consult, so if an agreement is not reached, the disagreement will be solved by arbitration.
The consultation procedure is important and should always respect the principle of good faith. Consultations relate to the causes that led to the employer’s decision, the possibilities for avoiding or reducing the effects of that decision, and the measures needed to mitigate its consequences for the affected employees.

2) Conditions not established in collective agreements of the Spanish Workers’ Statute (41 ET)

a) Concept

Article 41 ET deals with major modifications to working conditions (i.e. extraordinary variations). Non-major modifications of working conditions are beyond the scope of article 41 ET, so only affected by the general limits applicable to ordinary modifications (good faith and non-discrimination)

How do we distinguish between major and non-major modifications to working conditions?

- The list of issues contained in article 41 ET is open, so some substantial modifications may not be included in this list, e.g. a change from working while seated to working while standing.

- Not all modifications related to issues included in this list are considered substantial, e.g. a ten-minute change in daily working time for a few days is not.

- According to case law, the criteria for considering whether a modification is major are the importance of the working condition itself, the continuity of the modification over time, and the absence of compensation.

b) Causal requirement

Legislation requires economic, technical, organizational or productive reasons.

As with permanent transfers, these causes relate to competitiveness, productivity, the technical organization of the company's activity, and the contracts related to that activity.

c) Procedure

Depending on how many employees are affected, there will be more or fewer requirements. We therefore need to differentiate between individual modifications and collective modifications.

- Collective modifications:
  - affect at least the following number of employees within a ninety-day term: a) ten, for companies that employ fewer than 100 workers; b) 10% of the company's employees, for companies that employ between 100 and 300 workers. c) thirty, for companies that employ more than 300 workers.
    For modifications made in successive periods of 90 days, to avoid the 'collective' category, new modifications that imply exceeding the legal thresholds will be considered null and void.

- Individual modifications are those that cannot be considered collective.

- Procedure for individual modifications: the modification decision must be notified by the employer to the employee and his or her legal representative at least 15 days before the effective date of the modification.

- Procedure for collective modifications: the modification decision must be preceded by a consultation period with the workers' representatives of at most 15 days. This obligation is to consult rather than not reach an agreement, so if an agreement is not reached, the employer can impose the modification.

  Nevertheless, the consultation procedure is important provided that it is a **real** consultation, conducted under the principle of good faith, that aims to reach an agreement.

  The consultations discuss the causes that led to the employer's decision, the possibility for avoiding or reducing the effects of that decision, and the measures needed to mitigate its consequences for the affected employees.

  When the consultation period is over, the employees must notify the employees of their decision to modify at least 7 days before the effective date of the modification.

d) Effects

The effects of the employer's decision depend on the employee's chosen option, of which there are THREE:

- **Acceptance**

- **Compliance and claim (*solve et repete*)**: An employee may challenge the employer's decision before the competent courts. The court will declare whether the modification is justified or unjustified and, if it is unjustified, will recognise the worker's right to be reinstated under his or her original working conditions.

- **Termination of the contract of employment.** There are two possibilities:

    - Article 50 ET states that an employee whose dignity is damaged as a consequence of the modification to their working conditions is entitled to a compensation of 33 days' salary per year of service, with a monthly prorating for periods of less than 1 year and up to a maximum of 24 monthly payments.

    - Article 41.3 ET
      There are two requirements, one of which concerns the working condition affected and the other concerns the damage caused to the employee.
        - With regard to the first, the contract can only be extinguished if the working condition affected relates to sections a, b, c, d, and f of this article, i.e. work schedule, working hours, shift work, the remuneration system, and functions.

        - With regard to the second, the courts require objective damage to the employee, which we could say is related to certain rights protected by employment law (work-life balance, training, moonlighting, etc).

      The employee is entitled to a compensation of 20 days' salary per year of service, with a monthly prorating for periods of less than 1 year and up to a maximum of 9 monthly payments.

3) Unilateral variation by the employee

Not only employers but also employees can introduce modifications in working conditions.

a) Promotion (24 ET)

Rules on promotion must be stipulated in the collective agreement. However, article 24 ET prohibits any form of gender discrimination and establishes criteria (merits, seniority, training and organizational needs) for reducing the arbitrary nature of an employer's decision.

If the promotion envisages a probationary period and the employee does not successfully satisfy his or her new obligations, the contract of employment will not be terminated but the employee will return to his or her previous position.

b) Family reunification (40.3 ET)

If a spouse changes his or her residence due to a transfer and the other spouse is an employee of the same company, he or she is entitled to be transferred to the same city if a position is available.

The aim of this employee right is family reunification so, despite this categorical definition, Spanish employment courts recognise it even if the vacancy appears in a nearby city rather than the same one and even if the status of the couple is a domestic partnership rather than a marriage (*parejas de hecho*).

c) Objective reasons

There are three objective reasons:

i. Protection of working capacity

When an employee permanently loses his capacity to work, two situations may arise:

1) Termination of the employment contract after an administrative declaration of the incapacity:
- Major disability: when an employee is unable to carry out his or her normal day-to-day activities and requires the assistance of another person.
- Absolute incapacity: when an employee is unable to carry out any kind of work.
- Total permanent incapacity: when an employee is unable to continue to do his or her job.

2) Declaration of partial permanent incapacity:

When the employee suffers a disability equivalent or superior to 33%.

According to article 52.a ET, an employer may begin dismissal procedure for objective reasons. However, royal decree 1451/1983 recognises various measures to protect employees in this situation, including the right to occupy a position suitable to his or her remaining capacity.

To solve this legal conflict, Spanish employment courts generally refer to the hierarchy of rules that sets the prevalence of a Law over a Royal Decree so that the employee can claim this right only if the collective agreement establishes a similar one.

ii. Protection of health

1. Pregnancy and breastfeeding: art. 26 LPRL

According to the regulations on health and safety at work (article 26 LPRL), when there is a risk for a pregnant woman, a foetus or a breastfed baby, the risk must be avoided by:
- adapting the employee's working conditions or work time,
- changing the employee's position or functions within the professional group,
- changing the employee's functions outside the professional group, or
- suspending the contract.

2. Night workers: 36.4 ET

Night workers who suffer from health problems that are recognised as being related to their night work are transferred whenever possible to a day position for which they are suited.

3. Handicapped

- Change of workplace (40.5 ET)

Any handicapped employee requiring treatment for a disability in a different location to where he or she was providing services has a preferential right to occupy another position within the same professional group that is vacant in the company at another site.

iii. Protection of physical integrity

1) Victims of gender violence: LO 1/2004 (art. 21).

Since the publication of LO 1/2004, several measures for protecting victims of gender violence have been approved besides suspension (art. 45.1.n and 48.10 ET) or termination of the contract (49.1.m ET).

- Work time (37.8 ET)

Employees are entitled to protection, full social assistance, a reduction in their work schedule (with a proportional reduction in salary), or an adjustment in their working hours through rearrangement of their schedule by, for example, incorporating flexibility.

- Workplace (40.4 ET)

To obtain effective protection or safeguard their right to full social assistance, employees who are victims of gender violence and are obliged to abandon their position in the city in which they were providing their services will have preference to occupy another position in the same professional group that is vacant at another company site.

2) Victims of terrorism

- Work time (37.8 ET)

Employees are entitled to protection, full social assistance, a reduction in their work schedule (with a proportional reduction in salary), or an adjustment in their working hours through rearrangement of their schedule by, for example, incorporating flexibility.

- Workplace (40.4 ET)

To obtain effective protection or safeguard their right to full social assistance, employees who are victims of terrorism and are obliged to abandon their position in the city in which they were providing their services will have preference to occupy another position in the same professional group that is vacant in the company at another site.

Priority in the exercise of these rights

Disabled workers, victims of gender violence, and victims of terrorism are the only employees whose priority for the exercise of these rights is recognised. Thus, they have a priority right before other employees with a right to occupy a vacancy (promotion, family reunification, night workers…)

Nevertheless, there is no rule regulating conflicts that could emerge among them if there is one vacancy and two or three employees with a priority right to occupy it.

LESSON 5: OTHER EMPLOYEE RIGHTS AND DUTIES

Duties

- **Performance**
- **Good faith**

Rights

- **Protection of professional capacity**
- **Health protection**
- **Rights of employees as citizens: fundamental rights**

In this lesson we analyse other rights and responsibilities (other than spending a certain number of hours at work and earning a salary) related to a contract of employment.

1. DUTIES

1.1 PERFORMANCE (5.a and 20.2 ET)

Employees are not only obliged to work a certain number of hours but also to perform their duties properly and reach a certain level of productivity.

Either indirectly through collective agreements or directly through the employer, a level of productivity can be set. Setting a specific level of performance in this way is important to be able to:

- reward employees who exceed the average level of performance, and
- sanction employees who do not reach this level.

1.2 GOOD FAITH (5.a + 21 ET)

a) Duty of non-competition

In accordance with the common principles of contractual law, both parties to any contract must exercise their rights and duties in accordance with the principle of good faith. In this lesson, we will deal with this obligation from the employee's point of view.

The ET refers to these obligations specifically in articles 5.a and 21. The latter article contains a specific example of good faith applicable to employees in relation to unfair competition.

The prohibition of unfair competition is implicit in all contracts of employment as a consequence of good faith in the exercise of one's rights and responsibilities. No extra clauses on unfair competition therefore need to be included in the contract. Unfair competition therefore acts as a limit to article 35 of the Spanish Constitution, which recognises the right to pluriactivity.

Unfair competition means conducting an activity that may clash with an employer's industrial interest, thus causing harm to that employer. This harm often involves an employer losing his or her clients.
Spanish labour courts have considered a wide range of issues on unfair competition, including:

a) the relevant fact that determines unfair competition:
    - Is it the statutory activity of the company the employee is working for? (e.g. an employee also working for another technology company).
    - Is it the employee's position? (e.g. a programmer)

Questions to consider are therefore:

- is a person who works as a clerk for a technology company involved in unfair competition if he or she begins working in the same position for another technology company without informing his or her first employer?
- is a person who works as computer specialist for a company that produces screws involved in unfair competition if he or she begins working as a specialist for a company that produces clothes without informing his or her first employer?

b) Is it possible to observe unfair competition ***in every case*** in which a person begins working in a company with the same statutory activity and doing exactly the same functions without previously informing his or her employer and without opposition from his or her employer?
    - e.g. would a person who works as a waiter in a bar be involved in unfair competition if he or she begins working as a waiter for a different bar?

To answer these questions we need to consider the extent to which there exists a real possibility of affecting the first employer's clients (which is not always taken into account in a labour court's decision).

The case of someone working as a waiter in a small town with a shortage of waiters (so without them the new bar could not serve its customers properly) is not the same as that of someone working during their holidays in a large town 500 km away from the bar where they normally work.

Finally, jurisprudence asserts that the concurrent activity does not need to have begun and that being involved in preparatory tasks for that activity is also considered unfair competition (e.g. contacting another company to ask for a job or starting the process to set up one's own company are also considered unfair competition).

2. Other duties related to non-competition

Other duties related to non-competition do not emerge implicitly from the contract of employment but arise from specific clauses agreed by both parties.

According to the ET, these clauses must satisfy certain requirements if they are to respect the prohibition of withdrawal of rights by the employee (3.5 ET):

a) Full-time commitment (pacto de plena dedicación) (21.3 ET)

- ***Aim***: This clause enables the employer to have the full commitment of the employee, who is not permitted to work for another company or for him or herself whether or not the activity may harm the employer's interests.

- ***Requirements***: As a limitation of the right recognized in art. 35 CE, agreement to set full time commitment will be valid only if the employer pays the employee financial

compensation, otherwise it will constitute a relinquishment that is forbidden by art. 3.5 ET.

- ***Time Limit:*** Even if there is no legal time limit for this agreement, the employer and employee may establish one in that agreement. If there is no time limit, either party may terminate the agreement. The employer may use his or her managerial prerogative to modify working conditions (41 ET), while the employee may notify his or her intention in writing with a minimum of 30 days' notice. In the latter case, the employee must return any compensation he or she has received (21.3 ET).

b) Non-competition after the expiration of the contract of employment (prohibición de concurrencia post-contractual) (21.2 ET)

- **Aim:** This clause aims to preserve the company's interest so that employees do not use the knowledge they have acquired during their period of employment at another company or for their own interest once the contract has finished, thus reducing the possibility of legal concurrence. In such cases it would be impossible to determine unfair competition because the contract of employment would be extinguished.

- **Requirements:** This agreement will be valid only if the employer pays the employee financial compensation and has an effective industrial or commercial interest. The compensation must be enough to make up for the employee's sacrifice and the commercial or industrial interest must effectively exist. If there is no effective interest, the agreement will be null and void.

- **Time limit:** The time limit on this prohibition is 2 years for technicians and 6 months for other employees.

c) Minimum stay (pacto de permanencia) (21.4 ET)

- **Aim:** This clause aims to protect an employer's interest in being able to trust an employee who is required to complete a task, a job, research, etc. that is essential for carrying out a project or who has received specific training paid for by the company as an investment.

- **Requirements:** Employees are entitled to receive compensation for this limitation to their freedom to work. The company must have effective organizational or productive interests. If any of these requirements does not exist, the agreement will be null and void.

- **Time limit**: The time limit on this provision is no more than two years. Any employee who quits their job before the established time limit must compensate their employer for damages.

2. RIGHTS

2.1 Protection of professional capacity

The following rights are linked to the idea of security within the 'flexicurity' policy. They aim to protect the security of employees in the labour market by strengthening their abilities and competences.

a) Right to effective and adequate occupation (4.2.a and art. 30 ET)
Work is not only a responsibility but also a right that derives from the contract of employment (4.2.a ET). By working, an employee continues to improve his or her professional skills. Any employer who fails to provide an employee with effective occupation is committing a serious breach of the contract of employment.

However, an employer does not meet this obligation just by providing employees with employment. The tasks the employees are to carry out must correspond to those agreed in their employment contracts in relation to employee classification, otherwise their professional capacities may be affected (e.g. if a person is hired to work as an interpreter but they spend their time just translating documents, they will eventually lose their interpreting skills).

Consequences of not respecting this right:

- According to article 30 ET, if an employee is unable to provide their services once the contract is in force because the employer delays providing them with work for reasons not attributable to the employee, they will still be entitled to their salary and any salary lost may not be offset by performing other tasks at another time.
- According to article 50 ET, an employee may even extinguish his or her employment contract and claim compensation.

b) Right to professional training and education (23 ET)
Art. 23 ET envisages certain rights related to an employee's professional training and education. These include:

1) The right to obtain leave in order to sit exams for certain professional or academic qualifications. According to Spanish labour courts, this right applies only to final exams. The qualifications do not necessarily have to be related to the job carried out by the employee in the company.

2) The right to preference in choosing a work rota when the employee is taking a course to obtain a professional or academic qualification. These qualifications do not necessarily have to be related to the job carried out by the employee in the company.

3) The right to adapt his or her ordinary work schedule in order to attend professional training courses.

4) The right to obtain leave in order to take professional training courses. Article 23.3 ET provides employees who have at least one year of seniority with paid leave of 20 hours per year.

5) The right to receive specific training when major modifications are made to the job position (art. 23.1.d). In accordance with article 52.b ET, an employer may extinguish an employee's contract of employment if, after they have been given specific training to adapt to these major modifications, they have been unable to adapt to them.

Collective agreements should determine the specific conditions and limitations to these rights (e.g. whether the leave is compensated for financially). However, the Spanish courts have established certain criteria, e.g. the right to obtain leave in order to sit exams includes not only the time of the exam but also sufficient time for the employee to sit the exam in the best psychological conditions.

c) Right to professional certification

As a general rule, employers are not obliged to certify an employee's skills and activities. However, one situation exists in which an employee has the right to obtain this certificate – the *contrato de prácticas*. This contract aims to offer professional experience to those with theoretical knowledge so that they can satisfy the market requirements for entering the labour market. The legislation governing this contract establishes the employer's obligation to certify certain aspects related to the competences acquired by an employee during his or her traineeship (art. 4 Royal Decree 488/1998, of 27th March).

2.2. Right to health protection

One essential employee's right (and an employer's responsibility) arises from the employment contract – the right to health and safety at work.

This legal right, which aims to protect an employee's physical integrity, is regulated in the *Ley de Prevención de Riesgos Laborales* (LPRL), which implements, among other directives, COUNCIL DIRECTIVE 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work.

According to the provisions of this Directive, the main principles of prevention are as follows:

a) Prevention means avoiding risks, evaluating the risks that cannot be avoided, combating risks at source, and replacing the dangerous by the non-dangerous or the less dangerous.
b) Prevention is a dynamic obligation: employers are obliged to keep informed of the latest advances in technology and scientific findings on workplace design.
c) Prevention is an employer's expense.
d) Employees and their representatives must be informed of the risks to their safety and health and of the measures required to reduce or eliminate those risks.
e) Prevention is the obligation to provide means (not achieve results): an employer must implement the measures required to ensure their employees' safety and protect their health. This includes preventing occupational risks, providing information and training, and ensuring the necessary organization and means.

Two aspects of this regulation should be highlighted:

- Regular health surveillance should be provided. Health surveillance is optional for the employee but it often becomes compulsory – for example, when:

- surveillance is essential to assess the effects of working conditions on an employee's health,
- the employee's health status may constitute a danger to him or herself, to other employees, or to other persons, and
- it is established in a legal provision related to protection against specific risks and activities involving special danger.

- In accordance with COUNCIL DIRECTIVE 92/85 /EEC on the introduction of measures to encourage improvements in the health and safety at work of pregnant employees or employees who have recently given birth or are breastfeeding, art. 26 LRRL establishes the following protocol to be followed in case of risk:
    - first: avoid exposure to the risk (by adapting the affected employee's working conditions or work time, e.g. exempting her from night work or shift work when necessary),
    - second: if the previous step is impossible, move the employee to a compatible job position or function within her professional group,
    - third: if the two previous steps are impossible, move the employee to a compatible job position or function outside her professional group (in this case she will receive the full salary corresponding to her original professional group), or
    - if none of the above measures is possible, the employee can take leave on the grounds of risk during pregnancy.

These measures will also apply during the period of breastfeeding, if necessary.

2.3 Rights of employees as citizens: fundamental rights

Civil rights do not disappear when a contract of employment is signed. However, they can be affected by a contract of employment. A contract of employment implies the subordination of an employee to an employer who, under art. 38 CE, has recognized the principle of freedom of enterprise. Freedom of enterprise allows an employer to give orders to employees, establish measures to control an employee's activities, sanction an employee's behaviour, etc. In doing so, an employer can affect an employee's civil rights (e.g. by imposing a dress code in the company, installing cameras on company premises, or ordering an employee not to express his or her ideas at work).

A conflict between freedom of enterprise (art. 38 CE) and civil rights (e.g. privacy, free speech, the freedom of thought and expression, dignity, religious freedom, etc.) is more likely to occur in an employment relationship. The question is therefore how to solve this conflict, considering that it is not possible to deny either the employer's right to organize his or her business, or the employee's civil rights. Besides, it is necessary to take into account the existence of "ideologized companies", that is to say, companies that answer to a certain ideology (trade unions, political parties, catholic schools, NGO's, news papers…) which can enlarge the limits to employees' fundamental rights.

However, any abusive exercise of an employer's powers is controlled by labour and constitutional courts using the so-called principle of proportionality, which, more than a principle, is a test for ascertaining whether an employer's decision is reasonable or not.

This test comprises three steps, named 'test of suitability'; 'test of necessity' and 'test of proportionality in a strict sense'. The 'test of suitability' analyses whether the restrictive measure is appropriate for achieving the intended aim. The 'test of necessity' analyses whether the adopted measure exceeds what is necessary for achieving the intended aim and whether a less restrictive measure exists. The 'test of proportionality in a strict sense' analyses whether the disadvantages caused by the measure outweigh the advantages that would justify the measure.

On the other hand, in cases of "ideologized companies" the Spanish Constitutional Court has affirm that despite such characteristic of the Company can affect the employees' fundamental rights (such as the freedom of expression) it does not affect all employees in the same way. STC 106/1996 introduces the distinction between *neutral* employee (nurse in a catholic hospital) and *non-neutral* employee, where the former has not so strong limits to his fundamental rights than the latter. Basically can be concluded that *non-neutral* employees are those who have agreed to respect and follow a conduct which does not oppose to the Company's ideology (as it happens with professors of religion).

New problems regarding fundamental rights have arisen with the spread of technology within the Companies, as the violation of employees' privacy can happen easily. The use of employers' equipment for private purposes puts the questions whether the employer can check this private use of the Company's equipment or the employee has the right to privacy when using them for personal purposes.

Arts. 87 of *Ley Orgánica* 3/2018 of Personal Data Protection and Digital Rights Guarantee deals with the right to privacy and use of digital devices in the workplace. According to it:

- Employees and civil servants have the right to the protection of their privacy in the use of digital devices made available by their employer.
- The employer may access the contents derived from the use of digital media provided to employees for the sole purpose of monitoring compliance with labor or statutory obligations and guaranteeing the integrity of such devices.
- Employers must establish criteria for the use of digital devices in all cases respecting the minimum standards of protection of their privacy in accordance with the social uses and rights constitutionally and legally recognized. The representatives of the workers must participate in its elaboration. Employees must be informed such criteria.
- The access by the employer to the content of digital devices for which he has admitted its use for private purposes will require that the authorized uses be precisely specified and the employees informed about them. It is also required to establish guarantees min order to preserve the privacy of the workers, such as, where appropriate, the determination of the periods in which the devices may be used for private purposes.

LESSON 6: MANAGERIAL PREROGATIVES

1. **Power to organise: duty of obedience**
2. **Faculty of control**
3. **Disciplinary power: infractions and sanctions**
    a. **Judicial review**
    b. **Prescription**

All the managerial powers of an employer derive from article 38 ET. These are the power to organise (the power to give orders to employees), the power to control (that the orders given are being complied with), and disciplinary power (the power to sanction employees who do not comply with the orders). In this lesson, we will study both the regulations and the limitations to the exercise of these entrepreneurial powers.

1. Power to organise: duty of obedience

Foundation

- Legal: articles 38 CE, 5.a and 5.c ET, and 20.1 ET.
- Material: In any company, there must always be someone in charge of decision-taking.

Limits

- Objective

  The objective limit to the power of organisation is established in article 5.c ET, which refers to an employee's duty of obedience "to fulfil the business owner's orders and instructions in the ordinary exercise of his or her management duties". The important issue in this article is to determine the meaning of "ordinary exercise". As a general rule, employers can only give orders related to the contractual obligations accepted by their employees. For example, an employer will never be able to give orders concerning the privacy of an employee.

- Subjective

  The subjective limit to the power of organization is established in article 20.1 ET, which states that: "An employee shall be obliged to carry out the work agreed under the management of the employer or a person empowered by the employer". The important issue in this article is that it is not just the employer who can give orders to the employee but any person empowered by the employer.

  This can be problematic when no specific empowerment is in place and a third party gives orders to the employees. The power of organization must be clearly delegated and both the employer and the employee must respect the principle of good faith.

Effects: possibility of sanction

An employee who disobeys an employer's orders can be sanctioned even if the employee argues that the order is unfair according to law, i.e. *ius resistentiae* cannot apply. However, in

extreme situations, for example when fundamental rights are harmed, sanctions are not acceptable.

2. Faculty of control

Foundation

- Legal: art. 38 CE and 20.3 ET.
- Material: control over fulfilment of orders given in order to guarantee the effectiveness of managerial decisions.

Limits

- ***Objective***

  The objective limit to the power of organization emerges from article 20.3 ET. Although this article refers only to dignity, we should understand that it also refers to respect of fundamental rights, including the fundamental right to data protection given that the Spanish Constitutional Court has recognized it as a fundamental right (STC 94/1998) autonomous and differentiated from the fundamental right to privacy (STC 292/2000).

  Ley Orgánica 3/2018 has added a new provision in the E.T. (art. 20 bis) regarding the employer's power of control. This new article appears in response to Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. It also has constitutional support in art. 18.4 CE: *The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights*.

  According art. 20.bis ET, employees have the right to privacy in the use of digital devices made available by the employer, to digital disconnection and privacy against the use of video surveillance and geolocation devices in the terms established in current legislation on protection of personal data and digital rights guarantee.

  Arts. 89 and 90 of *Ley Orgánica* 3/2018 content the current legislation on protection of personal data. According to art. 89 (Right to privacy against the use of video surveillance and sound recording devices in the workplace):

  1. Employers may process images obtained through systems of cameras or camcorders for the exercise of control functions of workers or civil servants provided, respectively, in Article 20.3 of the Statute of Workers and in the legislation of public employees, provided that these functions are exercised within its legal framework and with the limits inherent therein. Employers must inform, in an express, clear and concise manner, the workers or public employees and, where appropriate, their representatives, about this measure.

  In the event that the flagrant commission of an unlawful act has been captured by workers or public employees, it shall be understood fulfilled the duty to inform when

there was at least an information device placed in a sufficiently visible location. It must identify, at least, the existence of the treatment of data, the identity of the person responsible and the possibility of exercising the rights provided for in articles 15 to 22 of Regulation (EU) 2016/679.

2. In no case shall the installation of sound recording, or video surveillance systems, be admitted in places intended for the rest or recreation of workers or public employees, such as changing rooms, toilets, dining rooms and the like.

3. The use of systems similar to those referred to in the previous sections for the recording of sounds in the workplace shall be admitted only when the risks to the safety of the facilities, goods and persons derived from the activity carried out in the workplace are relevant. In its implementation must always be respected the proportionality principle and the principle of minimum intervention as well as the guarantees provided in the previous sections.

The suppression of the sounds conserved by these recording systems has to be done within a maximum period of one month from its collection, except when they were to be kept to prove the commission of acts that threaten the integrity of people, goods or facilities. In this case, the images must be made available to the competent authority within a maximum period of seventy-two hours after the existence of the recording was known.

Art. 90 of *Ley Orgánica* 3/2018 provides some rules for a rather quite new problem related to new technologies. In this article, entitled “Right to privacy when using geolocation systems in the workplace” it is established:

1. Employers may process the data obtained through geolocation systems for the exercise of the functions of control of workers or public employees provided, respectively, in Article 20.3 of the Statute of Workers and in public service legislation , provided that these functions are exercised within its legal framework and with the limits inherent therein.

2. In advance, employers must expressly, clearly and unequivocally inform public workers or employees and, where appropriate, their representatives, about the existence and characteristics of these devices. They must also inform them about the possible exercise of the rights of access, rectification, limitation of treatment and deletion.

Finally, art. 91 expressly includes the possibility for collective agreements to establish additional guarantees for the rights and freedoms related to the processing of employees' personal data and the safeguarding of digital rights at the workplace. However, such a provision is redundant as the Spanish labour rules foresee the freedom of collective agreements for setting their content –with the obvious limit to respect the law- (art. 85 ET).

- ***Subjective limit: Entitlement***

  The subjective limit to the power of organization is established in article 20.3 ET. Although this article refers only to the power of the employer, we should understand that it also refers to any person empowered by the employer.

- Formal

  According to article 64.5.f ET, workers' representatives have the right to issue a report before an employer executes any decisions on the implementation or review of working arrangements and control systems.

There are three specific control measures

➔ Searches (18 ET)
- ◆ Aim: To protect the company's and workers' assets.
- ◆ How: An employer may search their employees, including their lockers and their personal belongings provided this is done on company premises (e.g. the search of an employee's car if it is parked in the company's car park).
- ◆ Limits:
  - The dignity and privacy of employees must always be respected (e.g. to preserve the dignity of employees, searches must not be carried out in front of customers).
  - Searches must be conducted in the presence of workers representatives or, if no representative is available, in the presence of another employee. This is to ensure that an impartial third party acts as a witness during the search.

➔ Health control (20.4 ET)
- ◆ Aim: Collective agreements sometimes envisage a supplementary payment by the employer when the employee is on sick leave. This underlies the employer's right to verify that the employee really is unable to work.
- ◆ Limits: An employee cannot be obliged to go for a health check-up that has been ordered by the employer if he or she has already been for one and has an official medical report.
- ◆ Effects: Any employee who refuses to go for a medical check-up that has been ordered by their employer will lose (and this is the only consequence) the right to any supplementary payment.

➔ Health surveillance (art. 22 *Ley de Prevención de Riesgos Laborales*)
- ◆ Aim: To ensure that workers receive health surveillance appropriate to their health and the safety risks they incur at work.
- ◆ How: Before starting work in a company, employees should go for a medical check-up to ensure that their health condition is compatible with the position to which they have been assigned.
- ◆ Limits: Initially, this check-up is voluntary and cannot be imposed on employees. This article establishes that it will become compulsory when the health of the employer, other employees, or other people is at risk.

- Effects: Any employee who refuses to comply with this health surveillance may be sanctioned.

3. Disciplinary Power: infractions and sanctions

Foundation

- ➔ Legal: articles 38 CE and 58 ET.
- ➔ Material: The possibility to sanction to ensure compliance with obligations deriving from an employer's managerial power.

Limits

- ➔ What can be sanctioned

Employers can only sanction an employee's lack of compliance with their contractual duties. No circumstance related to an employee's private life can therefore be subject to sanction.
The link between an employee's actions to be sanctioned and his or her working obligations must always be proven. This link can be proven only if the action has been conducted during working hours or has a direct or indirect connection with the employee's contractual obligations, e.g. insulting one's employer in a football-related argument during working hours would be a sanctionable action. Writing negative comments about the company on social networks (not necessarily during working hours) can also be sanctioned.

- ➔ The principles governing disciplinary power are:
  - Definition (*tipicidad*): This principle, which is extremely important in tort law, is also important in employment law when referring to sanctions. It means that an employer can only apply sanctions that are specifically established in a collective agreement. It does not apply when defining misconduct because the sanctionable actions do not have to be specifically described and only a broad interpretation of the guidelines is required for, for example, breaches of the contractual duty of good faith.

  - Legality: This principle does not exist in relation to descriptions of sanctions or infractions, i.e. definitions of infractions and rules on sanctions are not necessarily established by law because they can be regulated in collective agreements. With regard to sanctions, the principle of legality means that some sanctions, e.g. fines and breaches of an employee's right to rest, are not legal.

  - Proportionality: There must be proportionality between the seriousness of the action and the punishment. To satisfy this principle, collective agreements divide infringements and sanctions into three categories: minor, severe and very severe.

Procedure

Employment law establishes different procedures depending on the severity of the infraction and the person to be sanctioned.

- ➔ Severity of the infraction:

- very severe (*muy graves*): written notice of the sanction must be given both to the employee and to workers' representatives (64.1.7 ET).
- severe (*graves*): written notice of the sanction must be given to the employee (58.2 ET).
- minor (*leves*): no formal requirement established by law (role of collective bargaining).

*Written notification to the employee regarding the infraction and the sanction is extremely important as it preserves an employee's right to defend him or herself. This written notification requires an accurate description of the facts and the timing of the events.

➔ Persons to be sanctioned:
- Members of a trade union (10.3.3 LO de Libertad Sindical) have the right to a trade union representative being present at a hearing.
- When workers' representatives (68.a ET, 10.3 LOLS 37.1 LPRL) are to be sanctioned, other members of the organization (*delegados de personal o comités de empresa*) must be heard in accordance with a specific procedure.

*Here, the specific procedure aims to protect employees against discrimination for participating in union-related activities.

Judicial review

➔ Immediate effect of the sanction

The employee has the right to appeal before the courts against disciplinary measures taken by an employer. If an appeal is lodged, the effect of the sanction will not be suspended.

➔ Presumption of innocence

Presumption of innocence (24 CE) does not apply in relation to the employers' disciplinary power since it derives from a private contract not from the execution of the disciplinary power of the State.

➔ Possible judge's decisions (114 + 115 *Ley Reguladora de la Jurisdicción Social*)
- Confirmation: if the infringement exists, the sanction is proportional, and the procedure has been followed, the judge will confirm the sanction.

- Revocation: The sanction will be completely revoked if the infringement does not exist. The sanction will be partially revoked if the infringement exists but the sanction is not proportional. The employer may then apply another sanction that satisfies the principle of proportionality but only if the judge declares that the infringement is less severe than the employer appreciates (otherwise, if the fault could be considered more severe than appreciated by the employer, he/she could not impose a more severe sanction)

- ◆ Nullity: This will be ruled in cases of discrimination, defencelessness of the employee, or infringement of any other requirements established by law, the contract or the collective agreement.

➔ No possibility of appeal

- ◆ An employee can appeal against a ruling only when it confirms a very severe sanction. This is a case of differential treatment between employer and employee in procedural law not being considered contrary to the principle of equal treatment by the Spanish Constitutional Court.

Prescription

60.2 ET: This article contains two prescription terms:

- Short prescription term: depending on its seriousness (minor, less severe, and severe), 10, 20, or 60 days since the employer's awareness of the infraction.

- Long prescription term: 6 months since the infraction was committed.

All infractions prescribe 6 months after they were committed, regardless of when the employer became aware of the infraction.

One exception to this is when an employee holds a position that allows him or her to cover up the infraction, e.g. a company accountant who falsifies the company's annual accounts in order to conceal the withdrawal of money.

Prescription is interrupted by the opening of an investigation or audit.

LESSON 7: TERMINATION OF THE CONTRACT OF EMPLOYMENT

1. **Termination by the employee**
    a. **Without just cause**
    b. **With just cause**
2. **Termination by the employer**
    a. **Without just cause**
    b. **With just cause**
        I. **Subjective reasons (Disciplinary dismissal)**
        II. **Objective reasons**
3. **Termination due to the disappearance of any party of the contract of employment**
    a. **Disappearance of the employee**
    b. **Disappearance of the employer**
4. **Termination by bilateral agreement**
5. **Termination by resolving condition**
6. **Temporary contracts**

---

1. TERMINATION BY THE EMPLOYEE

An employer cannot fire without a reason but an employee can resign without one.

a. WITHOUT JUST CAUSE (not based on the employer's conduct)

Resignation (49.1.d ET) is the clear manifestation of an employee's will to terminate his or her contract of employment.

Requirements:

- **There must be no doubt about the employee's intention to resign.** To evaluate this aspect, courts prefer a written document rather than oral notification since a written

document implies that more careful thought has been put into the decision and so the nature of the decision is less doubtful. More doubts may arise in case of resignation via apps as Whatsapp or Telegram. In these cases, despite the fact we are before a written decision, its immediacy and (until few time ago) the impossibility to delete the text, makes this way of communication closer to oral one rather than to written. However, courts are admitting the validity of resignation done using these apps.

Anyway, it is important to consider the context in which notification is given to exclude any vice in consent. Notifying the resignation after a work dispute, where employer and employee may disagree in some important aspects, must be considered differently when it is done in a calm and relax context.

- **A period of notice** is required by law but the term is not specified (the law refers to collective agreements). In the case that neither the collective agreement nor custom establishes this term, the courts will apply the two weeks referred to in art. 49.1.c ET.

Effects:

- During the period of notice, the contract of employment is still in force and both the employer and the employee will carry on with their contractual obligations. Any infraction of these obligations will have the consequences discussed in previous lessons (e.g. dismissal, termination by the employee with just cause, etc.).
- No compensation is paid to the employee.
- An employer may be entitled to compensation from an employee for days missed if he or she does not respect the period of notice or if a pact of permanence is breached.
- Because the termination of the contract is due to employee's decision, he/she will not be in situation for claiming unemployment benefits.

During the period of notice, employees have the right to retract their decision to resign but only if the employer has not already hired someone to replace them.

Abandonment (49.1.d ET): Abandonment means that an employee has resigned without notifying the employer in any way, i.e. the employee simply disappears from work.

The effects of abandonment are the same as those for resignation but in this case the employer will always be entitled to receive compensation.

b. WITH JUST CAUSE (based on the employer's conduct)

Termination by the employee with just cause falls into three main groups: decisions made by the employer for organizational reasons (geographical mobility/transfer (art.40 ET) or substantial modifications to working conditions (art.41 ET)); female victims of gender violence; and severe lack of fulfilment of contractual obligations by the employer.

In all three situations, the employee is legally unemployed (so they could claim for unemployment benefits, provided that all other requirements for that are fulfilled). In the first situation, although it is the employee who decides to terminate the contract, they do so because of a managerial decision that has a negative impact on them. In the second situation, the aim is to protect an employee who is a victim of gender violence. The legal order for protecting such victims – as established in article 49.1.m ET (we have already studied certain measures, including changes to working time (37.8 ET) and transfer (40.4 ET)) – establishes that being a victim of gender violence is just cause for terminating a contract. The aim here is to enable victims to terminate their contract so that they may distance themselves from their aggressor without suffering too much damage from this voluntary termination. In the third situation, an employee terminates their contract of employment because their employer has failed to fulfil his or her contractual obligations.

Only in the first and third situations will the employee receive financial compensation (not in the second case because the employer is not the aggressor).

Termination of employment contract due to severe lack of fulfilment of contractual obligations by the employer (art. 50 ET)

1) Legal nature of the termination

There is a contradiction between art. 49.1.j ET and art. 50 ET regarding who terminates the contract of employment.

Article 49. Termination of a contract. 1. An employment contract may be terminated: j) at the worker's request, based on an employer's contractual breach.

Article 50. Termination at the will of the employee. 1. The following are fair reasons for an employee to request the termination of his or her contract...

In art. 49.1.j ET, the employee terminates his or her contract of employment. In art. 50 ET, the employee only asks (to the judge) to terminate his or her contract of employment. This difference has important consequences. In the first case, the employee's contractual obligations are terminated the moment the employee takes the decision. In the second case, his or her obligations continue until the judge confirms termination of the contract. Spanish labour courts understand that it is the judge who terminates the employment contract . Therefore termination of the contract of employment according art. 50 ET has a judicial nature. Thus, until judicial decision extinguishing the contract of employment, this shall operate all its legal consequences.

The consequence of the fact that it is the judge – not the employee – who terminates the contract of employment is that between when the employee asks for the termination and when the judge decides on it, the contract is still in force and both the employee and the employer carry on with their contractual obligations.

Exception: In some cases, such as harassment and non-payment of salary for several months while the employee has a family to keep, the employee's absence from work during this period is justified.

2) Requirements

The employer's lack of fulfilment of contractual obligations must be severe. The question here is whether the lack of fulfilment needs to be culpable. The answer is no: culpability may be required only in cases outlined in art. 50.1.c ET that refer to *force majeure*.

3) Causes

a) *A substantial modification to working conditions, without respecting art. 41 ET, that is detrimental to the employee's dignity.* Remember that a modification of employee's functions into those corresponding a lower professional group does not necessarily affect his/her dignity. Dignity is affected when the employer's decision diminishes the employee's image before other employees or clients. Before the 2012 reform, modifications in detriment to an employee's professional training were also included in this article. Nowadays, this reference has been removed from art. 50. However, as one of right of any employee is that of effective occupation (art. 4.2.a ET) and occupational training at work (art. 4.2.b ET) it can be argued that affecting professional training can constitute a reason for executing the action regulated in art 50 ET.

b) *Non-payment or continued delay in payment of the agreed salary*. This relates to the obligation for prompt payment of salary established in art. 29 ET but does not include non-salary payments. Remember that non-payment or delay in payment is cause for the employee to terminate his or her employment contract only in severe cases. The TS considers that:

- Non-payment for three months and an extraordinary payment (STS 25/9/1995 Recud 756/1995) is not severe enough.

- A continued delay (45 days as average) for almost two years is severe enough. STS 19 March 2014 (recud. 141/2013)

c) *Any other serious breach of an employer's obligations (except in the event of force majeure), including an employer's refusal to reinstate the worker under his or her previous working conditions in the terms foreseen in Articles 40 and 41 when a court decision has declared them unjustified*. This is an open reason for an employee's termination of the contract of employment that includes several possible contractual infringements by an employer. Art. 50.1.c ET provides an example, i.e. an employer's refusal to reinstate an employee into his/her previous working conditions in the terms envisaged in Articles 40 (transfers) and 41 (substantial modifications to working conditions) when a court decision has declared employer's decisions unjustified.

For example, if an employer has decided on a transfer without a cause or without following the legal procedure, the judge will consider this an unjustified measure. The employee then has the right to return to his or her previous workplace. If the employer still refuses to accept the judge's decision, the only option left to the employee is to terminate their contract.

According to art. 50 ET, *force majeure* excludes the cause for termination by the employee. For example, non-payment of non-salary retributions is included in this section rather than in section "b" above. However, if this non-payment is due to *force majeure*, the cause will not be admitted.

4) Effects

The employee will be entitled to compensation for unfair dismissal. This is 33 days' salary per year of service, with monthly prorating of any periods of less than one year up to a maximum of 24 monthly payments.

Observation: transitory provision 11 of the ET establishes special rules for calculating compensations for the unfair dismissal of employees hired before the 2012 reform.

2. TERMINATION BY THE EMPLOYER

According to law, the termination of a contract by an employer requires a cause. This cause may be subjective (e.g. a lack of fulfilment of the employee's duties) or objective.

a. WITHOUT JUST CAUSE

Although, according to employment legislation, employers are not supposed to dismiss their employees without reason, in practice they can do so if they pay them compensation. This is a consequence of the qualification of dismissals as *despido improcedente* (unfair/wrongful dismissal).

b. WITH JUST CAUSE

I. SUBJECTIVE REASONS

Subjective reasons refer to misconduct by an employee. Dismissals for subjective reasons (disciplinary dismissal) are related to an employer's disciplinary power.

Requirements for a disciplinary dismissal (58 ET)

I. Breach of contract

The action to be sanctioned by dismissal must involve a breach of contract. Proof of a link between the action and the obligations deriving from the employment contract must exist (actions conducted during working hours or inside the company, or actions conducted outside the company but related to an employee's general duties as expressed in the employment contract, e.g. good faith).

Examples are an employee who insults a customer during a coffee break or a security guard who uses the company's equipment to commit a robbery.

In any case, the employee's private life must be respected. Only when the employee private behaviour could affect his/her contractual duties, there could exist a reason for dismissal (been drunk and participating in vandalism during his/her time out of work but wearing the company's uniform, so that its image could be negatively affected)

(b) Serious and culpable conduct

- Serious

Dismissal is the most severe sanction employers can impose on their employees. Therefore, only very severe infractions can lead to disciplinary dismissal (in accordance with the principle of proportionality).

To evaluate the seriousness of the infraction, we must take into account the objective circumstances surrounding the events (principle of gradualism). For example, smoking at the workplace cannot be sanctioned in the same way if it occurs in an office as when it occurs at a petrol station.

- Culpable

The action to be sanctioned must always contain the culpable element, whether the misconduct is wilful (*dolo*) or due to negligence.

To evaluate the seriousness of the infraction, the subjective circumstances surrounding the events must be taken into account, including any mitigating or aggravating circumstances and the reasons for excluding imputability. This is because despite the difference between the punitive powers of the State (Criminal Law) and the employer (Employment Law), Spanish labour courts use similar criteria when analysing misconduct.

Facts that may be taken into account to evaluate conduct include the repercussion of the misconduct on the public or customers, the employee's 'infringements record', an assessment of the employer-employee relationship based on factors such as company size or employee seniority.

(c) Employer tolerance

An employer's tolerance regarding certain actions or circumstances will never give an employee the right but it will affect the employer's disciplinary power: an employer cannot suddenly sanction an employee without prior warning.

For example, an employer has been tolerating his employees arriving late for work for over seven years. If he now wants his employees to stop arriving late, he will not be able to sanction them without giving them prior warning.

Causes (54 ET)

The list of causes is established in article 54 of the ET. As this list is closed, it is not possible to add any other conduct as an infraction leading to dismissal. Neither can the list be extended by collective agreements since its only function is to specify such conduct.

On the other hand, the content of the causes is open. For example, the breach of contractual good faith contains a wide range of actions that are not specifically described (e.g. unfair competition, simulating illness so as to take sick leave, not notifying about the malfunctioning of company machinery, etc).

<u>List of causes</u>

a) Repeated and unjustified absenteeism or unpunctuality at work. Collective agreements establish objective criteria for deciding when these infractions should be considered very severe, severe or minor.

b) Insubordination or disobedience at work. Insubordination means disregarding company rules, whereas disobedience means ignoring an employer's specific order.

c) Verbal or physical abuse against the employer, other people who work in the company or cohabiting relatives of those who work in the company. Even if the description of the conduct does not include verbal or physical abuse to customers, severe and wilful misconduct of this kind will obviously also be sanctionable with dismissal (even if it was justified on the grounds of a breach of contractual good faith).

d) A breach of contractual good faith or an abuse of trust when working. Breach of contractual good faith is a broad concept that encompasses many types of conduct, including unfair competition, not warning the employer about the malfunctioning of company machinery, or working while on sick leave.

Abuse of trust is a qualified breach of contractual good faith by an employee due to their position, e.g. an employee who is given the keys to the workplace and is responsible for closing at the end of the day or an employee who has access to sensitive company information thanks to their position may abuse their trust.

Spanish labour courts have established that in cases of abuse of trust there is no possibility of applying the principle of graduality. This means that an employer's trust of his or her employee must either be granted or not granted, i.e. there is no intermediate stage. If an employee has stolen company property, what is important is the fact that they have stolen it, not the value of the stolen assets.

e) A continued and voluntary decrease in the normal or agreed work performance. An employee may reach the level of performance required but not want to continue doing so over a long period of time. For example, employees who are upset with their boss may lower their work performance on purpose, while one who constantly goes out at night may not maintain the required level of work performance due to lack of sleep.

f) Habitual drunkenness or drug addiction if they have a negative effect on an employee's work. This is a highly controversial cause of disciplinary dismissal for two reasons:

- Habitual drunkenness and drug addictions are illnesses, and illnesses are considered reasons for suspending a contract of employment. Here, however, they are reasons for disciplinary dismissal.
- Habitual drunkenness and drug addiction are reasons for disciplinary dismissal only if they have a negative effect on an employee's work, e.g. arriving late, quarrelling with other employees or customers, or falling asleep on the job. As such negative behaviours constitute other reasons for disciplinary dismissal, this type of dismissal may be considered redundant.

g) Harassment on the grounds of racial or ethnic origin, religion or other beliefs, disability, age or sexual preference, and sexual or sex-based harassment against the employer or other employees of the company.

Procedure (55 ET)

The employee must be notified of his or her dismissal in a written document that indicates all the facts for justifying the dismissal and specifies the date the dismissal becomes effective. This requirement is important because it ensures that the employee can defend him or herself. Clarity and concision are therefore essential when drafting this document. It will not be possible later to refer to any facts that are not indicated in the letter of dismissal.

A collective agreement may establish other formal requirements for dismissal.

There are two specific procedures:

- If the employee is a workers' legal representative or trade union representative, contradictory proceedings will begin at which the interested party and any other representatives of the body to whom he or she belongs will be heard.
- If the worker belongs to a trade union and the employer is aware of this, the trade union representatives of the relevant trade union section must be heard first.

Legal action (59.3 ET)

An employee may always challenge any dismissal before the courts (58.2 ET). The term for bringing an action against dismissal or the termination of temporary contracts will expire 20 days after the date of the dismissal. These days will be working days and the term of expiry will be valid for all purposes. The term of expiry will be interrupted by an application for conciliation filed before the public body in charge of mediation, arbitration and conciliation, in accordance with art. 65 LRJS.

Effects arising from the classification of the disciplinary dismissal by the judge

The disciplinary dismissal may be classified as fair, unfair/wrongful, or null and void.

FAIR (*procedente*): According to art. 55.4 ET, dismissal is considered fair whenever the breach and its severity alleged by the employer in its notification are accredited and when the procedure has been correctly followed. The effect is that the employees will be considered in a situation of involuntary unemployment, which is required for them to obtain unemployment benefit.

UNFAIR (*improcedente*): According to art. 56 ET, dismissal is unfair in all other cases or when the form of dismissal does not satisfy the provisions established for fair dismissal. The effect is that the employer will generally have to choose between reinstating the employee and paying backpay (*salarios de tramitación*), and paying a compensation of 33 days' salary per year of service, with a monthly prorating of any periods of less than one year up to a maximum of 24 monthly payments. This option is available to an employee who is a workers' representative or whose collective agreement gives him or her this right.

Observation: Transitory provision 11 of the ET establishes special rules for calculating compensations for the unfair dismissal of employees hired before the 2012 reform.

NULL AND VOID (*nulo*): According to art. 55.5 ET, a dismissal will be null and void in two cases:

- If it is based on any of the discrimination events forbidden by the Spanish Constitution or by law or is the result of a breach of the worker's basic human rights and public freedoms.
- if it affects a certain category of employees (those exercising rights related to maternity or paternity, pregnant women, or victims of gender violence who are exercising their rights as recognised in the *Estatuto de los Trabajadores*) unless the dismissal is declared to be fair.

Effects: Reinstatement and payment of backpay (*salario de tramitacióni*) are compulsory. To ensure reinstatement, the LRJS provides certain measures, e.g. the employer will continue to pay the employee's salary and national insurance contributions (*cotizaciones a la Seguridad Social*). Also, if the employee is a workers' representative, the employer must allow them to continue performing their representative activities.

However, since 2011, reinstatement has not been compulsory in two cases (286 LRJS): when the dismissal is declared null and void due to cases of harassment (sexual, because of sex or working harassment) or gender violence. In such cases, the employee can choose to terminate the employment contract and receive compensation for unfair dismissal, plus an additional compensation of 15 days' salary per year of service up to a maximum of 12 monthly payments.

II. OBJECTIVE REASONS

Objective reasons refer to the need to protect the company's efficiency, regardless of the employee's conduct. For this reason, there is compensation for the fair dismissal.

There are three main causes of objective dismissal: contractual termination for objective reasons (52 ET), collective dismissal (51 ET), and *force majeure* (51.12 ET).

Causes of dismissal for objective reasons (52 ET): There are five objective reasons for contractual termination.

a) Ineptitude (52.a ET), which refers to a lack of the physical, mental or legal ability required to perform the tasks needed for the job. This is what differentiates this form of dismissal from disciplinary dismissal, where the employee has the ability but does not wish to carry out his or her duties correctly.

    - Aim: to preserve the company's productivity and efficiency, which may be damaged if the employee is unable to reach a certain level of performance.

    - Requirements: Ineptitude must appear unexpectedly after the employment contract has been signed, so any ineptitude displayed during the employee's probationary period cannot be alleged as an objective reason once that period has expired.

b) A lack of adaptation to technological modifications (52.b ET). This cause of termination is a form of ineptitude in which the employee's lack of ability is due to the introduction of new technology into the workplace. It is therefore the consequence of a previous managerial decision.

    - Aim: To keep employees up to date with new technologies and protect the performance of the company.

    - Requirements: The technological changes must be reasonable. This means that:

        - The functions performed by the employee must be the same. If the new technology implies a change in their functions, this cause of contract termination will not be applicable. Remember that art. 39.3 ET establishes that it is not possible to allege causes for objective dismissal based on art. 52.a and 52.b ET if tasks that are different from the usual ones are carried out as a result of functional mobility.

- The employer must allow an adaptation period of at least two months, beginning immediately after the training course referred to below.

- The employer must offer the employee a readjustment or professional recycling course in order to qualify him or her for the adjustment. There is a reference to this course in art. 23.1.d ET. During the course the worker will be paid an amount equivalent to the average salary.

c) Objective dismissal due to economic, technical, organizational, or productive reasons (52.c ET) for fewer employees than the limits established in art. 51 ET. In cases of termination, workers' representatives will have the priority to remain in the company.

    - Aim: To allow the company to adapt its plaintiff to the economic, technical, organizational or productive circumstances it is facing. As these causes are the same as those referred to in art. 51, we will discuss them when we study that article.

    - Requirements: The number of employees affected by the dismissal must be less than the thresholds established in art. 51.1 ET.

d) Absenteeism (52.d ET) enables the employer to terminate an employment contract due to non-attendance at work, even though this may be justified and intermittent, when the employee's absences reach a certain threshold.

    - Aim: To off-load employees who, due to various circumstances, are intermittently absent. The problems this situation can create for the company's management justifies this cause of dismissal (though this aim was clearer before the 2012 reform when the general impact of absenteeism on the company was taken into account).

    - Requirements: The employee's absences must reach:

        - 20% of working days over two consecutive months, provided that the total number of absences in the previous 12 months accounts for 5% of the working days, or

        - 25% of the working days over four non-consecutive months within a period of 12 months.

    - This article contains many situations for which absenteeism is not considered a cause for dismissal. Basically, the aim of the article is to tackle short absences that are due to non-professional sick leave (less than 20 days) not caused by

the same illness. This mechanism is used to prevent the abuse of sick leave, which has a negative impact on a company's productivity.

e) A specific cause of the termination of a contract of employment for objective reasons applies to non-profit entities (52.e ET). This cause applies to open-ended contracts of employment in such entities when they are conducting specific projects through external funding (from public administrations) when this funding has been lost.

    - Aim: This cause attempts to solve the problem that may emerge when the project is so long that it is impossible to hire an employee under a fixed-term contract of employment (*contrato de obra o servicio*) and there are no more funds available to carry out the activity.

    - Requirements: The number of employees affected by the dismissal must be lower than that established in article 51.1 ET, otherwise the procedure envisaged in art. 51 will be followed.

Procedure for objective dismissal (53 ET)

a) Essential requirements:

    - Written notification indicating the cause of dismissal must be sent to the employee.

    - Compensation will be 20 days per year of service, with a monthly prorating of any periods of less than a year and up to a maximum of 12 monthly payments. This must be paid simultaneously to the notification of dismissal. An exception to this simultaneity is the decision to terminate based on art. 52.c ET, where an economic cause is alleged and the employer is not solvent enough to pay the employee at the time of termination. Payment will be due after a period of two weeks, as referred to below.

    - Notification to workers' representatives (only when alleging art. 52.c ET).

b) Non-essential requirements: (non-essential they can be replaced by an equivalent financial compensation).

    - Notice period. The employer must give the employee two weeks' notice of his or her termination.

    - Time off. The employer will allow the employee six hours a week to find a new job without losing remuneration.

Effects arising from the classification of the objective dismissal by the judge

Objective dismissal may be classified as fair, unfair/wrongful, or null and void.

FAIR (*procedente*): (53.4 ET) Objective dismissal is considered fair when the reason alleged in the employer's notification is accredited and the procedure has been correctly followed. Effect: The employee consolidates the compensation and is considered to be in a situation of involuntary unemployment, which is required for him or her to obtain unemployment benefit.

UNFAIR/WRONGFUL (*improcedente*): (53.4 ET) Dismissal is unfair when the reason alleged is not accredited or when one of the essential formal requirements has not been fulfilled (written notification, compensation, or notification to workers' representatives). Effect: The employer will generally have to choose between reinstating the employee and paying backpay (*salarios de tramitación*) on the one hand, and, on the other, paying a compensation of 33 days' salary per year of service, with a monthly prorating of any periods of less than one year up to a maximum of 24 monthly payments. This option is available to an employee who is a workers' representative or whose collective agreement gives him or her this right.

Observation: Transitory provision 11 of the ET establishes special rules for calculating compensations for the unfair dismissal of employees hired before the 2012 reform.

Since the employee has already received compensation for 20 days, when the dismissal has been declared unfair and the employer has chosen to reinstate, the employee must give back this compensation. On the other hand, an employer who chooses to pay the compensation will only have to pay the difference (of 13 days).

NULL AND VOID (*nulo*): According to art. 53.4 ET, an objective dismissal will be null and void in the same two cases as for disciplinary dismissal:

- If it is based on any of the discrimination events forbidden by the Spanish Constitution or by law or is the result of a breach of the worker's basic human rights and public freedoms.
- If it affects a certain category of employees (those exercising rights related to maternity or paternity, pregnant women, or victims of gender violence who are exercising their rights as recognised in the *Estatuto de los Trabajadores*) unless the dismissal is declared to be fair.

Objective dismissal on the grounds of art. 52.c ET will also be null and void when, in successive 90-day periods, the company terminates fewer employment contracts than the thresholds indicated in art. 51 ET with no new reason for justifying this conduct. These new terminations will be deemed in fraud of law and will be rendered null and void.

Effects: Reinstatement and payment of backpay (*salario de tramitación*) are compulsory. To ensure reinstatement, the LRJS provides certain measures, e.g. the employer will continue to pay the employee's salary and national insurance contributions (*cotizaciones a la Seguridad Social*). Also, if the employee is a workers' representative, the employer must allow them to continue performing their representative activities.

As previously said, since 2011, reinstatement has not been compulsory in two cases (286 LRJS): due to cases of harassment (sexual, because of sex or working harassment) or gender violence. In such cases, the employee can choose to terminate the employment contract and receive the compensation for unfair dismissal, plus an additional compensation of 15 days' salary per year of service up to a maximum of 12 monthly payments.

Collective dismissal (51 ET)

Collective dismissal is objective dismissal due to economic, technical, organizational or productive reasons (the same reasons as in art. 52.c ET). In case of termination, workers' representatives will have the priority to remain in the company.

Aim: To allow the company to adapt its plaintiff to the economic, technical, organizational, or productive circumstances it is facing.

Requirements: The number of employees affected by the dismissal must reach the thresholds established in art. 51.1 ET:

- In a 90-day period the number of employees affected are at least:
  a) 10 in companies employing fewer than 100 workers.
  b) 10% of the company's employees if the company employs between 100 and 300 workers.
  c) 30 employees in companies employing more than 300 workers.

Collective dismissals will also cover the termination of employment contracts that affects all the company's staff provided the number of workers affected exceeds five and the dismissal arises from total cessation of the company's activity also based on the above reasons.

Causal requirement: The legislation requires economic, technical, organizational or productive reasons. Economic reasons means 'negative' economic results, e.g. current and predicted losses, a persistent decrease in sales or profits, etc.. To provide objective criteria for identifying a negative situation, the legislation states that the situation will be considered 'persistent' if the decline lasts for at least three consecutive terms and the results are lower than for the same three trimesters in the previous year. Technical reasons refer to modifications in tools or the means of production, organizational reasons refer to modifications in working systems and methods, and productive reasons refer to modifications in the demand for the goods or services provided by the company.

Procedure: Collective dismissal will be preceded by a consultation period with the workers' representatives of a maximum of 30 days (15 days for companies with fewer than 50 employees). A copy of the written notification that opens the consultation period must be sent to the administrative authority. This authority oversees any agreement and may provide support to ensure the effectiveness of the consultation period, make recommendations, give warnings, provide assistance, participate as mediator, or send the agreement to the courts for a possible declaration of nullity if there is evidence of fraud, wilful intent, undue influence or *ultra vires* conduct in reaching the agreement or if the entity in charge of awarding unemployment benefits reports that the aim of the agreement may be to enable affected workers to unduly obtain benefits when there are no reasons for legal unemployment.

As the obligation is to consult not to reach an agreement, if it is impossible to reach an agreement, the employer can impose the dismissal. Nevertheless, the consultation procedure is important provided that the consultations are **real**, conducted under the principle of good faith, and aim to reach an agreement. Consultations refer to the causes that led to the employer's decision, the possibilities for avoiding or reducing the effects of that decision (e.g. instead of it affecting 50 employees, it will affect only 35), and the measures needed to mitigate its consequences for the affected employees (the company may agree to offer a training course to increase the dismissed employees' chances of finding a new job). Also during this consultation period, preferences for not being dismissed may be agreed on the grounds of age, disability or family responsibilities.

Royal Decree 1483/2010 regulates the information that must be given to workers' representatives, the number of meetings that must be held, and the time between meetings during the consultation period. The aim of this RD is to provide legal security to the procedure for collective dismissals.

When the consultation period is over, the employer must notify the employees of their decision at least 30 days before the effective date of dismissal. According to the *Tribunal Supremo*, the workers' legal representatives do not need to be notified since they have been involved in the negotiations.

How to select the employees to be dismissed: The legislation only establishes a preference for not dismissing workers' representatives. Collective agreements, on the other hand, may establish other preferences (51.5 ET). There must exist a justified link between the cause of dismissal and the employees dismissed.

Bringing the decision to court (art. 124 LRJS)

An employer's decision can be brought before the courts by:

- The workers' representatives (for the following reasons):
    - the alleged reason does not exist,
    - the consultation period (in which all legally required information must be provided) was not fully respected,
    - there is evidence of fraud, wilful intent, undue influence or *ultra vires* conduct in reaching the agreement, or
    - fundamental rights or public freedoms have been violated.

  In such cases, the employer's decision may be considered as being:

    - according to the law, when the procedure (consultation period) has been respected and the cause exists,
    - not according to the law, when the alleged reason is not proven, or
    - null and void, when the consultation procedure has not been respected or when a violation of fundamental rights or public freedoms has occurred. In this case, the reinstatement of all affected employees is compulsory.

- The administrative authority, when there is evidence of fraud, wilful intent, undue influence or *ultra vires* conduct in reaching the agreement, or when the entity in charge of unemployment benefits reports that the aim of the agreement may be to enable affected workers to unduly obtain benefits when there are no reasons for legal unemployment. In such cases, the dismissal may be considered according to the law or null and void (art. 51.6 ET).

- The employer, if neither the workers' representatives nor the administrative authority have done so. In this case, the employer may be interested in having his or her decision recognized by the courts as being according to the law (this judgment will be opposable as *res judicata* to further individual claims by employees who are affected by the decision).

- The employee affected by the decision if they believe that the alleged cause does not exist or that the procedure has not been respected and no claim has been presented by the workers' representatives. Otherwise, affected employees can only claim for individual reasons that have not been dealt with in the collective claim, such as non-observance of the preferences for not being dismissed.
    - The dismissal will be considered fair whenever the reason alleged by the employer in its notification is accredited, the procedure has been correctly followed, and the criteria of preference for not being dismissed have been respected. Effect: The employee has the right to a compensation of 20 days' salary per year of service, with a monthly prorating of any periods of less than a year and up to a maximum of 12 monthly payments. The employee will be considered to be in a situation of involuntary unemployment, which is required for him or her to obtain unemployment benefit.
    - If no action has been taken by the workers' representatives, dismissal will be considered null and void when:
        - It is based on any of the discrimination events forbidden by the Spanish Constitution or by law or is the result of a breach of the worker's fundamental rights and public freedoms.
        - It affects a certain category of employees (those exercising rights related to maternity or paternity, pregnant women, or victims of gender violence who are exercising their rights as recognised in the *Estatuto de los Trabajadores*) unless the dismissal is declared to be fair.
        - The consultation period has not taken place at all or has taken place but not in accordance with the rules of good faith. This means providing workers' representatives with all the information they need to determine the company's real situation.
        - The preferences for not being dismissed established by law, in a collective agreement or during the consultation period have not been respected.
    - If action has been taken by the workers' representatives, dismissal will be considered null and void only if the preferences for not being dismissed

established by law, in a collective agreement, or during the consultation period have not been respected (questions related to other causes of nullity are discussed in the section on action taken by workers' representatives).

Collective dismissal due to *force majeure* (51.7 ET)

This means objective dismissal due to unforeseen facts which, being unforeseen, cannot be avoided.

Requirements:

The *force majeure* must permanently impede the continuity of the company's activity. If it is not permanent, the consequence will be suspension of the employment contract. Examples of *force majeure* are floods, fires, and heavy snowstorms.

The reason for discontinuing the company's activity must be unintentional.

Procedure:

The administrative authority must verify the existence of *force majeure* within five days of the application and, in doing so, authorise the termination of the contracts of employment. The procedure to follow is that established for collective dismissals in art. 51. ET (on the consultation period with workers' representatives).

Employers can notify their employees, the workers' representatives and the administrative authority of the dismissal once *force majeure* has been verified by the administrative authority. Dismissals will take effect from the date on which the circumstances that generated the *force majeure* appeared.

Effects:

Employees have the right to receive a compensation of 20 days' salary per year of service, with a monthly prorating of any periods of less than one year and up to a maximum of 12 monthly payments. The employees are considered to be in a situation of involuntary unemployment, which is required for them to obtain unemployment benefit.

The administrative authority can decide whether FOGASA should pay all or part of the compensation in advance.

TERMINATION CAUSED BY THE DISAPPEARANCE OF ANY PARTY TO THE CONTRACT OF EMPLOYMENT

A) EMPLOYEE

An employee may disappear from the employment relationship due to death, retirement or disability.

DEATH

The personal nature (*intuitu personae*) of the contract of employment means that it cannot be inherited after an employee's death.

Decree 2-2-1944 recognises a compensation of 15 days' salary for the deceased's widow, descendants who are minors or unable to work, orphan who are minors, brothers or sisters who were under the deceased's care, and ascendants who are poor, or over sixty or unable to work.

RETIREMENT

As a general rule, retirement is a right, not an obligation, while setting an age for retirement is considered discriminatory on the grounds of age. However, both the Constitutional Court and the ECJ have accepted the legality of forced retirement as a way to foster employment.

DISABILITY

Unless it is anticipated that the employee will recover within two years (art. 48.2 ET), in which case the consequence would be suspension of the employment contract, *gran invalidez, incapacidad permanente absoluta* and *incapacidad permanente total* allow an employer to terminate a contract of employment.

B) EMPLOYER

We differentiate between the employer as a physical person and the employer as a legal person.

THE EMPLOYER AS A PHYSICAL PERSON

If the employer is a physical person, he or she may disappear from the employment relationship due to death, retirement or disability. In all three cases, the company's activity must come to an end, since otherwise art. 44 ET would apply and the situation would be considered a transfer of undertaking.

Common effects:

Employees are entitled to compensation of one month's salary (Art.49.1.g ET).

DEATH

If the owner dies, his or her heirs can decide whether to accept the company as inheritance. Even if they accept the company as inheritance, they may decide not to continue with the company's activity (freedom of enterprise, art.35 CE), in which case the employment contracts will be terminated.

The heirs do not have to take this decision immediately and have a reasonable time to do so.

RETIREMENT

In the case of retirement, former employers must have stopped performing any activities related to the company.

Employers will have a period of time to end their activities in the company.

DISABILITY

Disability does not need to be accredited by a judge. Factual disability as opposed to legal disability is sufficient.

THE EMPLOYER AS A LEGAL PERSON

Extinction of the legal person is another reason for the termination of an employment contract. The procedure outlined in art. 51 ET will apply in this case and the compensation will be 20 days' salary per year of service, with a monthly prorating of any periods of less than a year and up to a maximum of 12 monthly payments.

3. TERMINATION BY BILATERAL AGREEMENT Art. 49.1.a ET

Requirements:

- There must be no vice of consent.

  Instead of firing employees who have committed a serious breach of their contractual obligations, employers can offer them a bilateral agreement to terminate their employment contract. Spanish labour courts consider that this does not constitute a vice of consent.

Effects:

- Compensation is payable only if it is established by agreement.
- As this does not constitute a legal unemployment situation, employees will not be entitled to receive unemployment benefits.

3. TERMINATION BY RESOLUTORY AGREEMENT (Art.49.1.b ET)

Requirements

- The conditions must be established in the employment contract.
- The agreement must be valid, i.e.:
    - It must not be contrary to fundamental rights (e.g. in employment contracts for professional sportswomen, it is common to include a clause on terminating the contract if they get pregnant).
    - It must not constitute an abuse or replace the legal regulations for another cause of termination envisaged in the ET (e.g. to establish that the company experiencing losses for just one month is a justification for terminating the contract).

Effects:

- Compensation is payable only if it is established by agreement.
- This does not constitute a legal unemployment situation, so employees will not be entitled to receive unemployment benefits.

4. TEMPORARY CONTRACTS (Art 49.1.c ET)

In this case, termination is due either to expiration of the agreed term or completion of the work or services covered in the contract. At the end of the contract, except in the case of a interim contract, incorporation contract ("*contrato de inserción*") and training contracts, the employee has the right to a compensation.

Requirement:

Period of notice: If the employment contract is for a specific term of more than a year, the party wishing to terminate the contract is obliged to notify the other party of the termination at least two weeks in advance.

This notification has no formal requirements established by Law but requirements may be established in collective agreements.

Effects:

Employees are entitled to receive compensation equivalent to the proportion of the amount that would result from receiving 12 days' salary per year of service or as established in specific applicable regulations.

However, according to the European Court of Justice, this compensation is illegal. The ECJ considers that the termination of temporary contracts constitutes an objective reason, for which compensation is 20 days' salary. Since discrimination based on the temporary or permanent character of the employment contract is not permitted, the compensation payable should therefore be 20 days' salary per year of service.