

# ANALYSIS

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Employment

## A complete U-turn on ‘technological strikebreaking’

The Constitutional Court reinstates established doctrine and rejects the possibility for employers to resort to non-routine technical (or human) resources during a strike, where such resources involve minimising, reducing or limiting the effects of the industrial action in keeping the company running.

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1. In the absence of an act of Parliament on strikes, Royal Decree-law 17/1977, of 4 March (Official Journal of Spain, 9 March), on Industrial Relations continues to be used as a regulatory reference, in that which has not been held unconstitutional by the Constitutional Court. Its doctrine is decisive, and here it is all the more so because it ‘channels’ a pre-constitutional rule. And, as almost five decades have passed, it is only natural that disputes arise and even that the court itself should modify its own doctrine over time. This is what

would have performed, and that the employer’s action constitutes an abuse when, objectively speaking, the replacement renders the right to strike meaningless because it neutralises or diminishes the pressure associated with the strike; this prohibition is intended to guarantee the effectiveness of the fundamental right (Constitutional Court judgment nos. 123/1992, 5<sup>th</sup> point of law, and 33/2011, 4<sup>th</sup> point of law). The aforementioned court has also held that the prohibition on external replacement of striking workers may be interpreted

*a contrario* to permit internal replacement. It is sufficient that, objectively speaking, the replacement of workers results in the neutralisation or reduction of the pressure associated with the exercise of the right to strike, or in the erosion of its substance,

for it to be understood that the fundamental right is infringed.

## *There is no provision prohibiting an employer, during a strike, from using the technical resources available within the company to keep running*

has occurred in the recent Judgment of the Constitutional Court of 12 March 2026 (app. no. 4382-2024) in which the court ‘adjusts’, following a process of ‘internal reflection’, its position on strikebreaking (the replacement of striking workers), in this case, in its ‘technological’ form, because, in accordance with Article 6(5) of the aforementioned Royal Decree-law 17/1977, “for the duration of the strike, the employer may not replace the strikers with workers who were not employed by the company at the time the strike was notified, except in the event of a breach of the obligations contained in subarticle seven of this article”.

The Constitutional Court has affirmed that the employer’s managerial powers do not extend to replacing the work that the strikers

However, when ruling on the use of technical and technological resources to maintain productive activity and replace the service no longer provided by workers participating in the strike — a phenomenon known as ‘*technological strikebreaking*’ — the difficulty arose of determining whether such corporate action could be considered an abusive practice. It concluded that “the appearance of normal service prevented the externalisation and impact of the strike’s effects and deprived its exercise of its potential as a means of pressure”, thus emphasising that the effectiveness of the strike as an instrument of pressure represents an essential element of its exercise. This remained the case until Constitution-

al Court judgment no. 17/2017 held that resorting to technical resources available within the company but not normally used was lawful, on the grounds that there is no provision prohibiting an employer, during a strike, from using the technical resources available within the company to continue to run. The employer is under no obligation to reduce their business activity beyond what is a logical consequence of the workers' participation in the strike.

2. This conclusion is radically altered in the recent Constitutional Court judgment of 12 March 2026, which resolves a constitutional appeal lodged by a trade union against the decision of the company (transport sector), which decided to increase the number of passenger seats on trains remaining in service during the strike by deploying double trains instead of the single trains originally planned. The trade union argues that the appeal is of particular constitutional significance because, amongst other reasons, it raises a novel issue regarding the fundamental right to strike and so-called '*technological strikebreaking*', which will enable the court to clarify its doctrine and define the scope of the employer's *ius variandi* with respect to the use of material resources available within the company, as well as defining the concept of '*routine technological resources*' to distinguish between those normally used by the company in the course of its business activities and those employed to neutralise the effects of a strike through the direct or indirect replacement of workers exercising their right.

Setting this aside, the fact remains that the court takes the opportunity to state that the ban on strikebreaking contained in the

pre-constitutional legislation has become obsolete in light of technological changes and the incorporation of sophisticated automation methods into production systems. It also points out that "the aspects of the employer's managerial authority are envisaged for ordinary or exceptional situations, including as emergency measures, but always within a context of normality with a peaceful development of the employer-employee relationship, free from any conflict" (Constitutional Court judgments no. 123/1992, 3<sup>rd</sup> and 5<sup>th</sup> points of law, and 33/2011, 4<sup>th</sup> point of law). This does not mean that the employer cannot make use, with regard to workers who do not support the strike, of the managerial power regulated in Article 20 of the Workers' Statute Act, since what is prohibited is the exercise of that power as a means of rendering the strike ineffective and rendering the right meaningless.

Consequently, "we have emphasised the abusive nature of the exercise of managerial authority when, in the context of a dispute, it is directed at achieving aims other than those provided for in the legal system, that is, when it is used 'not as a measure objectively necessary for the smooth running of the company, but to defuse the pressure caused by the work stoppage' (Constitutional Court judgments no. 123/1992, 4<sup>th</sup> point of law, and 18/2007, 3<sup>rd</sup> point of law), insofar as it breaches the obligation not to interfere with the legitimate exercise of the fundamental right to strike" (Constitutional Court judgment of 12 March 2026, 3<sup>rd</sup> point of law). In the context of the present case, the court notes that the employer's managerial powers cannot "extend to replacing the work that the strikers would have performed" and that the employer's conduct constitutes

an abuse when, objectively speaking, the replacement renders the right to strike meaningless because it neutralises or diminishes the pressure associated with the strike, a prohibition intended to guarantee the effectiveness of the fundamental right (Constitutional Courts judgments no. 123/1992, 5<sup>th</sup> point of law, and 33/2011, 4<sup>th</sup> point of law).

It notes the various decisions on strike-breaking handed down since Constitutional Court judgment no. 123/1992, focusing on judgment no. 17/2017 of the same court, relied upon in this dispute, which explicitly addresses whether the use of technical resources available to the company, but not normally employed, may constitute a violation of the fundamental right to strike. As the strike unfolded in the media sector, the company (a regional radio and television broadcaster) decided to broadcast a Champions League football match at the scheduled time using workers who had not joined the strike and employing non-routine technical resources. The judgment argues that constitutional doctrine had previously regarded the internal replacement of striking workers with others who were not participating in the strike as an abuse of the employer's *ius variandi*, but that, in this case, it constituted the exercise of the power to organise the means of production available to the company. Thus, Constitutional Court judgment no. 17/2017 established a different legal treatment compared to the previous doctrine regarding employers' powers to manage the means of production —technical, mechanical, automated or technological— in the context of a strike, thereby allowing it to exclude the analogous application of the prohibition in Article 6(5) of Royal Decree-law 17/1977 provided that the means

or resources in question were those routinely used by the company.

However, although the Constitutional Court acknowledges that the company had employed a technical resource at its disposal to respond in exceptional cases — the broadcast was made via the backup line, as all shift workers supported the strike — and that it had followed a procedure different from that normally envisaged for displaying the company's logo, the judgment concludes that, whilst "the employer's freedom, with regard to their powers of organisation and management of workers, is restricted by the exercise of the right to strike, [...] there is no provision whatsoever which, during its exercise, prohibits the employer from using the technical resources available to it within the company to continue to run" (Constitutional Court judgment no. 17/2017, 7<sup>th</sup> point of law). This is because the employer is under no obligation to reduce their business activity beyond what is the logical consequence of the workers' participation in the strike, expressly rejecting the notion that the effective exercise of the right means that the employer cannot use the technical resources at their disposal, whilst refraining from carrying out productive activity that might compromise the achievement of the strike's objectives.

**3. And now the court has clarified its doctrine. It does so to state (4<sup>th</sup> point of law) the following:**

- a) That, within the framework of the current and constantly evolving production model, the growing functional autonomy of the technical and technological resources integrated into the business organisation may lead

to the blurring of the boundary between tasks traditionally performed by workers and those that were specific to the material means of production.

- b) That, in this scenario, the company's ability to adjust the technological, mechanical or automated resources at its disposal and to adapt its routine production and service provision proce-

company's resources, reinforced by the introduction of information and communication technologies and algorithmic staff management that objectively interfere with the legitimate exercise of the right.

- d) And that the inadequacy and obsolescence of the regulatory framework governing the fundamental right to

strike encourages a certain tendency to argue on the basis of ordinary law and, in so doing, to blur the fundamental right to strike when balancing it against other constitutional rights, such as the freedom of enterprise or the right to work of non-strikers. This risk is heightened if no account is taken

of the interdependence and mutual connection between the human resources to which the rule refers and the material, technical and technological resources, and the impact that the employer's extraordinary deployment of these resources has on the effectiveness of the fundamental right to strike.

dures with the aim of maintaining the company's activity during the period in which the strike takes place has a direct impact on the effective exercise of the fundamental right and produces the same result of minimising the consequences of the strike as was previously achieved by the physical replacement of striking workers, which formed the basis for the prohibition of external and internal strikebreaking.

- c) That the cessation of workers' performance of their contractually owed duties due to participation in the strike becomes futile if its purpose cannot be achieved because it is prevented by the employer's conduct, in the exercise of their ordinary private power to manage and organise the

This discrepancy necessitates a return to established case law (Constitutional Court judgments no. 123/1992, 18/2007 and 33/2011) to argue that the very same rationale for prohibiting external and internal strikebreaking applies in these other forms of strikebreaking, now known as *technological* and *organisational strikebreaking*. For, ultimately, any substitution of the service that striking workers cease to provide

## *A strike becomes pointless if its objective cannot be achieved because of the introduction of technologies and algorithmic staff management that interfere with the legitimate employee right*

to the production process with other available resources — be they human, technical or technological — whenever this serves to minimise, reduce or limit the effects of the industrial action and maintain the company’s activities, constitutes a violation of a fundamental right. Indeed, it is not without reason that the company resorts to these specific technical procedures “to address the disruption caused by the strike, and therefore in a manner differ-

use constituted an extraordinary measure to counter the reduction in service volume that the strike would cause.

Thus, the company arranged for every worker, including those assigned to minimum services, to operate a train with double the capacity of one that would have run had that period not been affected by the strike call. In this way, the foreseeable increase in passenger pressure on trains

and platforms caused by the strike of the staff who would have operated the cancelled single trains was mitigated by increasing the number of seats on the trains that continued to run as minimum services. “The measure was intended to compensate

## *Resorting to technical resources ensures, in conditions of industrial peace, the normalisation of a service affected by the strike*

ent from the routine one, with the effect of continuing productive activity and neutralising the consequences of the work stoppage” (Constitutional Court judgment of 12 March 2026, 4<sup>th</sup> point of law).

And, in this specific case, the company altered the composition of the single trains that had been scheduled prior to the strike call and replaced them with double trains. Double trains are technical resources available to the company to respond to an increase in passenger numbers resulting from specific events (public holidays, mass gatherings) and whose purpose is to avoid overcrowding and, in such situations, provide a better service to passengers, but they are not intended to restrict the right to strike, given that, on the days the strike was called, no special circumstances of the kind described arose that would justify the use of these double trains. Their

sate for the work not carried out by the striking workers and to provide users with a service as close as possible to the normal operation of the intercity transport service. In short [...] it resorted to a technical resource at its disposal to ensure, under conditions of industrial peace, an adequate provision of the transport service in the face of foreseeable circumstances of increased demand, which it exploited, by making abusive use of its organisational powers, to normalise the provision of the service affected by the strike” (Constitutional Court judgment of 12 March 2026, 5<sup>th</sup> point of law).

4. The U-turn in doctrine seems clear. Perhaps less so is the expression of the “internal reflection” to which the court refers in order to modify its most recent doctrine, which is not adequately explained. For, whilst the recourse to technological

strikebreaking was initially ruled out on the grounds that it rendered the right to strike meaningless, the now 'clarified', 'nuanced' or 'refined' judgment (Constitutional Court judgment no. 7/2017) reversed that view and allowed the company to resort to non-routine technical resources. Moreover, it argued that there was no provision prohibiting the employer from using the technical resources available to the company to continue to run, and emphasised that the employer is under no obligation to reduce their business activity, expressly rejecting the notion that the employer must refrain from carrying out productive activity that might compromise the achievement of the strike's objectives. But now the court does recognise such a prohibition. And the use of a resource available within the company, but intended for exceptional circumstances other than a strike, invalidates the employer's decision.

It is true that the use of technological resources to replace striking workers constitutes a form of strikebreaking that undermines the right to strike. But it is also true that the use of technological resources in itself involves the replacement of workers in the production process, which, if not directly, then indirectly, also means a relativisation of the right to strike. Finding the balance is the responsibility of the legislator or the judge. And the key probably lies in whether the use of technological resources is routine or exceptional. However, preventing an employer from resorting to internal technical resources to keep their production process running on the grounds that such common use constitutes a limitation on the exercise of the right to strike could run counter to the very technological progress inherent in the enterprise, for which pre-constitutional rules are surely no longer adequate.