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DIFFICULTIES IN THE APLICATION OF THE PREVENTIVE PRINCIPLE OF THE JOB POSITION BY REASON OF THE SUBJECTS IN SPAIN

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Abstract

The adaptation of the job to the worker when a series of biological circumstances or due to disability is a measure provided for in the Law on Prevention of Occupational Risks that, even though it does not have a correlation in the Statute of Workers, it must be understood as a reasonable adjustment. In this way, companies would be obliged to carry out an assessment of the health and safety risks of older workers who see their work capacity reduced, as well as an adaptation in working conditions prior to the termination of employment through an objective dismissal for ineptitude. It is, therefore, about protecting the mature worker who has special protection within our legal system, because, otherwise, a situation of discrimination based on age would arise.

Keywords

Adaptation, safety and health, reasonable adjustments, dismissal

I. The need to adapt the workplace

The preventive principle referred to in art. 15.1, d LPRL implies that the workplace must be adapted to the person and not the other way around, i.e. the person to the job. Specifically

The fact that life expectancy has increased and the structural problem of our Social Security system that, among other concerns, analyzes the need for sustainability of pensions are issues that have a special impact on senior workers, as can be read in the Explanatory Memorandum of Law 21/2021, of 28 December, guaranteeing the purchasing power of pensions and other measures to strengthen the financial

and social sustainability of the public pension system. Undoubtedly, the gradual application of the retirement age and the contribution period, regulated in art. 205 and in the Seventh Transitory Provision LGSS, have come to impose on workers to prolong their working life as long as possible, so that, each year that passes it will be a little more difficult to access the retirement pension. Although, if access to it is gradually delayed, there is no doubt that workers will have to maintain their employment to survive longer.

In this context, the European Union through the White Paper of the European Commission, Agenda for adequate, safe and sustainable pensions of the year 2012 maintained that "*to preserve and maximize a healthy and productive workforce that can prolong working life, it is important to invest in disease prevention, in the promotion of healthy and active aging and in health systems with a better cost-effectiveness. This, in turn, will contribute to reducing early retirement as a result of illness, increasing labour market participation of people over fifty-five and relieving some of the pressure on pensions*", which is, in short, what will be addressed in this paper. The need to adapt the working conditions of senior workers so that, ensuring the safety and health of the worker, they can continue to carry out their work activity.

II. The subjects included in article 25 of the Law on the Prevention of Occupational Risks

As far as this type of workers is concerned, there are three key ideas that should be taken into account and that will be analyzed in this section. The first refers to the concept of senior worker. The second, whether such a classification falls within the scope of equal treatment and non-discrimination and, finally, whether there is an interrelation with other types of situations and, therefore, discrimination.

In the first place, it would be convenient to clarify what connotation has the denomination of "senior" worker, since, beyond what we can find in relation to certain job offers in which, for example, a "senior executive" or just the opposite "a junior executive" is sought, we have to recognize that it is not a term that is excessively frequent. In fact, other terms are more often used to refer to the

same term, such as "older worker" or "older workers" or "older workers".[1] Now, whatever formula we use, the fact is that we do not have any provision that tells us what number we are referring to when we use such terms. Perhaps the legislator has not expressly pronounced in the norm for not granting a certain age a pejorative treatment or for classifying the subjects when, basically, it is a more or less number[2]. In addition, we consider that highlighting the length of life of a person is an issue mostly associated with two issues, on the one hand, with the right to employment and, on the other, with the retirement age.

Although, to place ourselves in some range, ILO Recommendation No. 162 considers that the worker is a "senior" when he has reached the age of 50. Although, on the other hand, our Employment Law for the purposes of active policies, places mature workers at 45 years. The approach adopted by the ILO seems reasonable, however, it can be said that the words that will be written in the following lines may be intended for workers over 45 years of age.

This protection against discrimination is not new, since in both primary and secondary law of the European Union, this circumstance was already guaranteed in Article 13 of the Treaty establishing the European Community (TEC) and in Article 21 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as CFREU) as an example of the existing acquis at European level on equal employment and non-discrimination[3]. Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in its art. 1 aims to establish a general framework for combating discrimination, including disability and age, the objective being the implementation of the principle of equal employment in the Member States[4].

[1] By way of example, this last meaning appears in article 6.2 LOTC to determine who will exercise the functions of President of the Court in case he and the Vice President are not present, in this sense it will be "the *oldest Magistrate in office and, in case of equal seniority, the oldest*".

[2] CABEZA PEREIRO, J: "Work of the elderly and age discrimination", International and Comparative Journal of Labour Relations and Employment Law, Vol. 10, No. 3, 2022, p. 232. The author reflects on age discrimination which he considers to be discrimination based on stereotypes.

[3] This is one of the values of the European Union, as can be seen in art. 2 TEU and art. 1 of the CFREU.

[4] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ No. 303 of 2 December 2000.

With regard to the protection of the status of senior worker, the fact is that the criterion of age as a cause of discrimination is contemplated within the open formula of Article 14 EC relating to "*any other personal or social condition or circumstance",* which has led to the Constitutional Court having to rule on numerous occasions as to whether or not such a situation [5]occurs.. In other words, the principle of equality and non-discrimination on grounds of age is implicitly provided for in the constitutional precept, but not explicitly[6]. In this way, one of the first sentences of the maximum interpreter of our supreme norm in which it was established that the list of situations included in art. 14 EC did not constitute a *numerus clausus* and that, therefore, age could constitute a ground of discrimination was STC 75/1983 of 3 August[7].

In our Workers' Statute, both in art. 4.2, c as in art. 17, all those provisions, acts, agreements, decisions, etc., that involve discrimination on grounds of age are punishable by nullity, which means that it is a characteristic of workers that falls under the umbrella of special protection. However, it is the use of age as a condition for differentiating between two comparable situations, as stated in the Directive itself, that has led to that protection being reduced in intensity. Art. 6.1 of the Directive allows Member States to be free of charge of differences of treatment on grounds of age from being regarded as discriminatory, provided that they are objectively and reasonably justified, under national law, by a legitimate aim, including legitimate employment, labour market and vocational training objectives, and whether the means to achieve this goal are adequate and necessary. In the same sense, the recent Law 15/2022, of July 12, integral for equal treatment and

[5] STC 63/2011, of 16 May, FJ3.

[6] TRIGUERO MARTÍNEZ, L.A.: Advanced age in relation to employment, retirement and social security: active aging, reintegration policy and anti-discrimination law. Revista Aranzadi Doctrinal, no. 4/2015, Ed. Aranzadi, BIB 2015/998, p. 13 of the digital version.

[7] FJ 2nd and 3rd. However, the truth is that that judgment recognised that the difference in treatment on grounds of age was justified. On the contrary, STC 37/2004, of March 11 and STC 31/1984, of March 7, FJ 11º in which the constitutionality of the difference in the minimum interprofessional wage was addressed. Likewise, the STC 79/2011, of June 6, 2011, BOE no. 158, of July 4, 2011. This resolves the question of unconstitutionality raised against art. 19.5 of the Law of the Parliament of Galicia 5/1999, of May 21, of pharmaceutical management that prevented those over sixty-five from participating in the processes of installation of new pharmacies. However, the maximum interpreter, in the FJ4ª, b, reasons that if that age is not an obstacle to continue performing the profession of titular pharmacist, neither can it be to access a new authorization.

non-discrimination that transposes to European norm, is pronounced in the same terms in articles 2.2 and 4.2. However, from my point of view, the exceptionality configured does not connect with the main idea of this work, but is designed mainly for two different moments related to working conditions. On the one hand, access to employment and, on the other, extinction, this being subdivided in relation to the inclusion of older workers in the files of employment regulation (collective dismissals) and access to retirement.

The fact that protection and exception are regulated in the norm in an ambivalent way, in addition to other circumstances that will be brought up, is what has led the Courts of Justice, whether at European or state level, to pronounce themselves in terms that we could describe as ambiguous[8]. If expressed in other terms, the fact of incorporating a permissiveness of treatment less favourable on grounds of age in relation to reasonableness and objectivity has led to this decrease in the level of protection in terms of comparison with other causes of discrimination, such as those relating to sex, racial or ethnic origin and disability[9].

On the other hand, in terms of personal condition, age is not something that defines the worker, but is rather a conditioning element[10]. It constitutes, therefore, a personal condition that cannot be interpreted in isolation, but is always associated with some element that complements it. Thus, for example, it is usually related to experience, when it comes to the older employee, or just the opposite, inexperience

[8] At the European level, some judgments in which the difference in treatment is appreciated: ECJ 28 October 2004, case T219/02 and T-337/02, Lutz Herrera case. ECJ of 17 October 2007, Case C-411/05, Palacios case, among others. It cannot be said that the highest interpreter of the Constitution has pronounced himself in favor of "senior" workers, since the practice of including in the agreements such clauses of forced retirement have been reflected in SSTC 280 and 341/2006, in which it was not considered that discrimination had been incurred. The reason was based on reasons of employment policies, since the transition to retirement of workers led to the hiring of a worker and consolidation of some positions in permanent positions. In other words, it is an exception to non-discrimination on grounds of age, unlike what happens in other aspects, such as sex. Furthermore, the STC 66/2015, declared the constitutionality of the termination agreed in the consultation period, which is indicative of the approval of the subjects entitled to negotiate the collective agreements with which these discriminatory practices count.

[9] Dominguez Morales, A.: "Igualdad, no discriminación y negociación colectiva". Ed. Cinca, 2018, p. 284.

[10] Sanguineti Raymond, W.: "The Cinderella of discrimination". The author uses an interesting term, such as "are" and "of".

when it comes to the young employee[11]. It seems that it is something consubstantial to age that the treatment that the person receives from the environment must be different because of age and on this circumstance there is a total connivance[12]. As examples, we use the collaboration, initiation, training, etc. scholarships that are usually designed for young people up to a certain age, while, in a totally opposite sense, we find early retirement regulated in collective agreements in certain sectors. We also find in the workplace practices that reward the experience of the worker, to the detriment of inexperience or lack of knowledge.

Therefore, the element of age as a personal condition is used to establish a differentiation between the subjects, so that they are grouped into different groups in which differentiated needs and concerns concur. From the point of view of labour relations, it can be used to organise work. In the case of the right to employment, age data is used to determine employment policies, as mentioned above.

In turn, age is something very personal, and I do not mean the fact of revealing the number, understanding this act as something private, but rather in terms of physical, biological or psychological condition in which a person can be found. A conditioning characteristic then appears in the worker, such as that related to health. Legal good protected in our legal system in art. 15 EC, the right to life and physical and moral integrity. It is an element that can differentiate even between two workers who are the same age. I refer with this idea to the fact that age, at the moment in which they exceed 45 years, ceases to appear as an isolated data or, where appropriate, associated with knowledge and experience, to go hand in hand with health and it is undeniable that with the passage of time we begin to experience changes, whether intellectual, physical or psychic that make us have to modify certain aspects of our lives. We speak of a "modification" because it

[11] González Ortega, S.: "Discrimination based on age". Labour Issues, No. 59/2001, p. 100.

[12] Álvarez Del Cuvillo, A.: "The comprehensive law for equal treatment and non-discrimination: a necessary regulation with a serious problem of approach". Brief of the Spanish Association of Labour and Social Security Law. https://www.aedtss.com/la-ley-integral-para-la-igualdad-de-trato-y-la-no-discriminacion-una-regulacion-necesaria-con-un-problema-grave-de-enfoque/ The author perceives a "theoretical error" in the mention of the justification of the difference in treatment contained in articles 2.2 and 4.2 of Law 15/2022, which is now reflected in indirect to direct discrimination, which constituted a situation admitted in discrimination on grounds of age only.

is possible that certain activities that were carried out without any difficulty in previous years begin to be annoying or more tedious, but not to the extreme (or at least it is not intended to reach that idea) of being impossible. This is a reality and there are certain productive sectors in which a slight decrease in work capacity can have some kind of effect on the activity performed[13].

In this sense, it cannot be understood that the difference in work will occur exclusively on the basis of age, but is also associated with health, so that it is not the objective element (the number of years) that matters, but the conditions of the person (physical, biological and mental).[14] Argument that makes more sense if we take into account that the legal employment relationship was initially established based on these and what has happened is a decrease in the ability to work. This leads us to think that in this specific context of working conditions, the age factor when added to health conditions can lead to intersectoral discrimination, which is that which occurs when a person is discriminated against at the same time for several reasons, such as those described in art. 2.1 Law 15/2022[15].

However, there is a quantitative leap between the fact that some type of discomfort in the health of the worker is glimpsed and his consideration of being incapacitated for the performance of the professional activity. In fact, for the latter to happen, remember that the maximum period of three hundred and sixty-five days (with its respective extension) of temporary disability must first be exhausted so that, subsequently, a permanent disability can be recognized. In any case, it is essential that the requirements indicated in articles 193 et seq. are met. LGSS and, in addition, that the IP is recognized in a certain degree, because remember that the partial and

[13] Judgment of the Supreme Court, of November 30, 2021, ECLI:ES:TS:2021:4362. Judgment on the termination of the contract due to forced retirement of the worker with the category of air traffic controller. The question concerns possible discrimination between workers on grounds of age, since the termination of the employment contract merely because a certain age has been reached constitutes derogatory treatment if the comparison with a younger worker is established.

[14] Cegarra Cervantes, F.: Collective dismissal and age discrimination. Net21, no. 11, 2022. https://www.net21.org/ despido-colectivo-y-discriminacion-por-razon-de-edad/

[15] Lousada Arochena, F.: "Multiple discrimination: the state of the art and some reflections", in AequAlitas, no. 41, 2017, p. 32. The author recalls that three different phenomena can occur in relation to discrimination: compound, multiple and intersectoral discrimination. The latter, instead of being based on a proportionality test, would be based on a damage test which, in Lousada's words, would lead to improved practical application of equal treatment.

even the total do not disable the provision of services.

2 of Royal Legislative Decree 1/2013 (hereinafter, LGPD) where the concept of disability appears with the following meaning, "*it is a situation that results from the interaction between people with foreseeably permanent impairments and any type of barriers that limit or prevent their full and effective participation in society, on an equal footing with others*".[16] Likewise, in art. 4 LGPD establishes that "*persons with disabilities are those who have physical, mental, intellectual or sensory deficiencies, foreseeably permanent, which, when interacting with various barriers, may prevent their full and effective participation in society, on equal terms with others*", as well as such consideration will be extended to those who have recognized a degree of disability equal to or greater than 33%, which will be related to the recognition of any of the permanent disability benefits contemplated in the LGSS or in the Passive Classes Law.

There is a notable difference between older workers and workers with disabilities and that is that, although both groups are, in general, especially protected by the provisions, the latter have a series of caveats that it seems that guardianship is at a somewhat lower level. Let me explain. Recital 17 in the preamble to Directive 2000/78 itself states that it is not the intention of the European legislature to require "to *recruit, promote, retain in employment or provide training a person who is not competent, able or available to perform the essential tasks of the post concerned or to follow a given training, without prejudice to the obligation to provide reasonable accommodation for persons with disabilities*", which, from the outset, announces a certain difference with respect to older workers. In fact, recital 25 indicates that in relation to age, certain actions that give rise to a difference in employment can be justified, although these seem to be related to employment policies, the labour market and vocational training. However, when it comes to a person with a disability, the European standard in art. 5 provides that in order to ensure observance of the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. Therefore, there are two differences in treatment, one positive for workers with disabilities and one negative for the elderly.

[16] of Royal Legislative Decree 1/2013, of 29 November, approving the Consolidated Text of the General Law on the rights of people with disabilities and their social inclusion, BOE no. 289, of 03/12/2013.

III. Different results in the obligation to adapt the work-place

Continuing with the next aspect, art. 5 of Directive 2000/78 provides that, in order to ensure equal treatment of persons with disabilities, reasonable accommodation must be carried out, consisting in the adoption of appropriate measures (according to the individual's needs) to enable access to, participation in or advancement in employment. These measures have to be taken by the company, unless it proves that they impose an excessive burden on the company, hence such adjustments are reasonable. The literature of the precept clarifies what is meant by an excessive burden and is all that which cannot be alleviated through state policies, we understand those granted through aid, subsidies or bonuses. In this line we contemplate that art. 40.2 LGPD obliges employers to adopt appropriate measures for the adaptation of the workplace and the accessibility of the company, according to the needs of each specific situation.

There is a clear difference, therefore, between disability discrimination and age discrimination within the scope of the Directive, contained in Article 6 of the European standard. In this vein, we continue to state that, although both circumstances are covered under the umbrella of the prohibition of discrimination, later one of these is left out without the European legislator obliging companies to provide reasonable accommodation for older workers. With this regulation, an order of hierarchy is being established between the different causes of discrimination[17]. Of course, we understand that the difference is in a specific aspect related to older workers, that is, the situations exposed in section 2 in relation to access or extinction.

However, the measures to be carried out during the course of the employment relationship must be governed by the applicable provisions. Therefore, based on the consideration given by the Constitutional Court to age as a condition that may give rise to a situation of discrimination, with the aforementioned legal anchorage, we consider that reasonable adjustments in relation to working conditions should be carried out within the company[18]. In fact, in our legal system we find different

[17] Sanguineti Raymond, W.: "Age: Cinderella of discrimination", in Labour and Law 59/2019, Ed. Wolters Kluwer, p. 1 of the digital version.

[18] STC 22/1981, of 2 July, STC 58/1985, SC 280/2006 and STC 341/2006, among others.

reasonable adjustments to be able to meet the needs of older workers, in an area such as the protection of the safety and health of workers, which is, in short, what matters to this group.

Therefore, in addition to other types of protections that may be applied, in this case we are interested in the one contained in the Law on Prevention of Occupational Risks (hereinafter, LPRL). Specifically, we should focus on art. 25 LPRL, which is the provision in which this question is contemplated, with greater or lesser legislative success. In this sense, the article speaks of workers especially sensitive to certain risks, these being defined by the standard as those who "*by their own personal characteristics or known biological state, including those who have recognized the situation of physical, mental or sensory disability, are especially sensitive to the risks derived from work.*". When the company has an employee who meets these characteristics, the LPRL requires the company to specifically guarantee its protection for which it must evaluate the risks and, depending on the result of the evaluation, must adopt the preventive and protective measures that are necessary. For the sake of completeness, art. 15.1, d LPRL establishes the obligation of companies to adapt the work to the worker.

It is undeniable that art. 25 LPRL acts somewhat like a "catch-all", since, in addition to including persons with disabilities in that protection, it seems to refer to another type of worker, since it expressly speaks of "workers who, by virtue of their own personal characteristics or known biological state". We understand that this reference would include older workers, since the important thing in this type of workers is not the number of years they have, but how they are physically, biologically and mentally. It is that reflection that was made at the beginning with respect to the relationship of age with health, while the first is a mere objective data that describes the person. What is relevant are the conditions that can be related to the years of life.

On the other hand, it is undeniable that, in addition to this question regarding the description of the worker that seems to remain open and in which we could frame our "senior" workers, there are another series of aspects that have not been developed in detail either. Even so, I consider that in matters of safety and health, the legislator has established a measure that must be interpreted as a reasonable

accommodation, since it would lack any sense that the legislator wanted to protect in art. 25 LPRL exclusively to workers with disabilities, since it has referred to two distinct groups. Therefore, a systematic reading must be carried out because if the specific situations had been specified in that precept, many others would surely have remained unprotected, especially taking into account the general principle on the prevention of the safety and health of workers of art. 15.1, d LRPL.[19]

The issues that we need to reflect on next in order for the reasonable accommodation to be made after the assessment are as follows. Firstly, the accreditation that this need is met and, secondly, in what measure can be specified. With regard to the first, it is considered that there would be two ways to prove that the company has a particularly sensitive worker. One would be related to the provisions of art. 22 LPRL, relating to health surveillance, and the other would concern the application by analogy of the provisions of Article 22. 26 LPRL, on maternity protection. Through the medical examination carried out by the Occupational Risk Prevention Service that will prepare the corresponding report establishing whether the worker is suitable or if, on the contrary, he is not suitable for the performance of the job, and may even be a "suitable with limitations" in which case the necessary measures for his adaptation will be reflected. It is true that, in accordance with art. 22.1 LPRL, it is imperative that the worker give his consent to perform the tests. However, in this case the workers' representatives have a very important role, while the provision itself establishes an exception to voluntariness if they have prepared the corresponding report in which they reflect that recognition is essential to "evaluate the effects of working conditions on the health of workers or to verify whether the state of health of the worker may constitute a danger to him, for other workers or for other persons connected with the company or when this is established in a legal provision in relation to the protection of specific risks and activities of special danger". In short, for the adaptation to proceed, the report of the workers' representatives must be available, in which case the worker will be compelled to carry out the corresponding tests.

The second option would be to apply the requirements set out in art. 26 LPRL in

[19] Pastor Martínez, A.: "The protection of the safety and health of older workers. The right to the adaptation of the conditions of workers as a limit to dismissal for supervening ineptitude". Labor Documentation, no. 112, 2017, vol. IV, p. 74.

relation to the risks during pregnancy and lactation on the health of the worker and the fetus or baby, depending on the case. In such cases, the options are wider than for the cases of workers with disabilities or, the one analyzed here, an elderly worker, since after the adaptation the aforementioned article allows functional mobility and, ultimately, the suspension of the employment contract. All this if you have the certificate of the Medical Services of the National Institute of Social Security or of the Mutual Societies, depending on the Entity with which the company has agreed the coverage of occupational risks, with the report of the doctor of the National Health Service who assists the worker optionally, and with the list of risk-free jobs after consultation by workers' representatives at the request of the company.

With regard to the question of adaptation, this is an obligation which is not limited to what are the material aspects relating to the workplace, such as the change of a table or keyboard for a more appropriate one, but must also be understood as encompassed in this provision the issues relating to working conditions. In art. 36.5 ET provides for the organization of work by the company taking into account art. 15.1, d LPRL to adapt the work to the person, with a special emphasis on those jobs that are monotonous or repetitive, especially for the purpose of establishing rest and work times and the rhythm of production[20]. In any event, art. 26.1 LPRL, when referring to the adaptation of the job, indicates that it may be an adaptation of the conditions or working hours of the worker concerned, whose measures include the non-performance of night work or shift work. Thus, working time could be combined in different ways, making it possible not only to reduce working hours, but also by accumulating working periods to give rise to a greater rest[21]. In terms of conditions, the alleviation of the workload could have beneficial effects, even if this leads to functional mobility, in accordance with art. 39 ET.

In this aspect is where collective bargaining would bring great value to the measures that can be undertaken, beyond the non-realization of the night shift, since it is in the rules paccionadas where the functions inherent to each of the professional categories are contemplated, as well as all issues related to the schedule, working time, distribution, etc. The most interesting element would be the possibility of reducing the working day

[20] Igartua Miró, M. T.: The right to adapt the working day for health reasons. In Labor and Law: New Journal of Current Affairs and Labour Relations, No. 58, 2019, p. 3 in the digital version.

[21] Op. Cit. Martínez Barroro, M.R.: "Protección de seguridad y salud...", p. 263.

that does not seem to have a correlate in art. 37 ET. Possibly in this regard, instead of being incorporated into the aforementioned provision, the interesting thing would be to extend the reasons why a relief contract can be concluded, within art. 12 ET, paragraph 6 of which refers to partial retirement. However, it could be a solution that incorporates this situation into the current reduction of working hours of the elderly worker, with the difference that in the case that is being described the subject has not complied with the requirements of art. 205 LGSS, but for health reasons, requires such adaptation[22].

IV. Unilateral termination of the employment relations-hip

As regards the desirability of adapting the job and adopting such a reasonable accommodation, it seems to have been outlined in the LPRL as a remote possibility instead of having enjoyed the importance it deserves, since we consider that it would be a good intermediate measure between the termination of the employment contract and the concatenation of temporary disabilities on the part of the worker[23].. Although, this support should come from the ET that only cohonest well with certain situations that can be a cause of discrimination, such as those that we consider first degree, but leaves behind many others, those of second degree as happens with age discrimination. Therefore, at this point in the discussion, we can only highlight the fact that we do not currently have an answer from the legal system to the question of adaptation, since the solution that the legislator seems to provide in this regard to companies is through extinction.

We refer, in particular, to the possibility for the employer to terminate the employment relationship, since, in the words of Directive 2000/78 itself, it is not the intention of the legislature "to oblige to recruit, promote, retain in a job or provide training a person who is not competent, able or available to perform the

[22] Op. Cit. Cabeza Pereiro, J.: "Work of the elderly and age discrimination", p. 242. The author points out that collective bargaining has moved more in the context of partial retirement in terms of the reduction of working hours, forgetting its application in other aspects.

[23] In the same vein, Martínez Barroso, María de los Reyes: "Protection of safety and health of mature workers in the face of the digital revolution", in Revista Internacional y Comparada de Relaciones Laboral y Derecho del Empleo, Vol. 10, Nº. 1, 2022, p. 259. The author believes that around 30% of "workers between 50 and 64 years of age need an adaptation in their workplace, a measure that if applied would be halfway between early retirement and disability."

essential tasks of the post in question", which automatically leads the company to be able to dismiss for objective reasons. That is, if no attempt is required to keep the older worker in his job, the termination of the legal labor relationship is expedited with the corresponding damages that this may cause in the worker.

In this sense, article 52, to ET regulates the objective dismissal "*for ineptitude of the worker known or supervening after his effective placement in the company*", leaving aside that ineptitude that becomes evident on the occasion of the development of the probationary period. Again, the concept of "ineptitude" is broad enough to fit a good number of situations. In addition, the legislator allows it to be known and also supervened. We understand that, in the first case, that of known ineptitude contemplates those permanent and non-circumstantial situations, such as those declared by the Disability Assessment Teams of the INSS, as the competent body to evaluate, qualify and review the disability and recognize the right to contributory economic benefits of Social Security for permanent disability, in its different degrees, as well as determining the contingencies causing it, in accordance with art. 1 of Royal Decree 1300/1995[24]. While, the supervening ineptitude could agglutinate the results obtained from the aforementioned medical examinations and the reports to which we have also referred in the previous chapter[25]. In the latter case, the reason for dismissal had been reduced to unjustified absences and absences for common contingencies lasting less than twenty days[26].

Fortunately, a second option has been repealed from article 52, d ET that could lead to a dismissal of workers for reasons of age (and health), with extensive experience in the business field related to objective dismissal for "*absences from work, even justified but intermittent, that reach twenty percent of the working days in two consecutive months provided that the total of absences in the twelve previous months reach five percent of the working days, or twenty-five percent in*

[24] Royal decree 1300/1995, of 21 July, by which develops, in matter of labor disabilities of the system of the Social Security, the Law 42/1994, of 30 December, of fiscal measures, administrative and of social order.

[25] Areta Martínez, M.: "The objective dismissal due to supervening ineptitude of a worker who has been declared "unfit" in the medical examination: an analysis from Spanish and French comparative law", in Revista de Jurisprudencia Laboral, no. 9/2020. In the case analyzed, it can be seen how the worker has been chaining IT benefits

[26] Judgment of the Constitutional Court No. 118/2019, of October 16 and Judgment of the Court of Justice of the European Union, of January 18, 2018, Ruiz Conejero case.

four discontinuous months within a period of twelve months", although, the precept itself in the following paragraph indicated that "absences due to illness or non-work-related accident will not be computed as absences when the leave has been agreed by the official health services and lasts more than twenty consecutive days "[27]. This reason that led to the termination of the employment contract could affect those elderly people who suffer from an ailment and who can see their health improved after a few days of rest. This is the case, for example, of low back pain common in the office cleaning sector, for example. In this way, the explanatory memorandum of Royal Decree-Law 4/2020 explains that the repealed precept could not only entail a cause of discrimination for people with disabilities directly, but that there could also be indirect discrimination on grounds of disability in people with long-term illnesses as a result of intermittent absence.

Therefore, focusing on the current cause for which the employer could terminate the employment relationship, the problem lies in the assessment of ineptitude, while it is extremely complex to assess at what point this concept could not be interpreted arbitrarily. If the legislator has provided in art. 25 LPRL the adaptation and, from the above, we have determined that the state of health of the worker could be verified, it is crystal clear that this measure should be carried out. Otherwise, it would be discrimination against the worker on grounds of his age and health conditions. To this end, we recall the provisions of art. 4.2 Law 15/2022 in which "the *difference in treatment derived from a provision, conduct, act, criterion or practice that can be objectively justified by a legitimate aim and as an adequate, necessary and proportionate means to achieve it*" is not considered discrimination, although, in this case, the fact of not carrying out the adaptation when there is no sufficient justification related to the excessive burden, may not be considered exempt from the classification of discriminatory. Then, in response to a possible question in which it was debated whether the Workers' Statute, in its art. 52, A, has put sufficient pressure on the employer to deploy all appropriate measures in the field of adaptation (and even functional mobility) prior to dismissal, the answer would be negative.

[27] Repealed by art. only of Royal Decree-Law 4/2020, of February 18 and, subsequently, by art. only of Law 1/2020, of July 15. Ref. BOE-A-2020-7937.

It is also a practice supported by the workers' representatives themselves, since, as we saw before, they are the ones who have the power to issue a report with the relevance of the adaptation. On the other hand, the Mutual Societies with which the companies have formalized the professional contingencies, after repeated leaves of temporary disability see a greater pragmaticity in the extinction of the employment contract. Especially in those cases in which adaptation is impossible, as can happen in the construction or cleaning sector.

Therefore, adaptation can be the solution, although in practice it follows that it is a problem. To solve it, there would have to be a change that was in line with the ideal of prolonging working life and would go through the norm and the Courts of Justice. The rule may constrain adaptation without serving a cursory justification that it is impossible at the level of the company, while, in the judicial field, these cases should be evaluated with greater rigidity.

V. Consideration of termination of the employment rela-tionship

As a result of the failure to incorporate art. 25 to art. 52, what we have been finding in the judgments are judicial pronouncements in which unfair dismissal is considered.

However, if, as we have been maintaining, the literature of art. 25 LPRL requires the company to carry out a reasonable accommodation, which should be transferred to the objective dismissal, if this obligation is not complied with, we could not speak of an unfair dismissal. All the more so since the legislature has provided in various passages of labour legislation, as well as Directive 2000/78, that actions involving a difference in treatment of workers on grounds of age are discriminatory.

Dismissal cannot therefore be classified in any other way than nullity[28]. Thus, it would be sufficient to apply art. 17 ET in connection with the provisions of

[28] Judgment of the Supreme Court, of July 1, 2021, ECLI:ES:TS:2021:2999, which had addressed the legal basis that protects the forced retirement by the company ENAIRE of its air traffic controllers, as well as in the Judgment of the Supreme Court, of April 14, 2021 ECLI:ES:TS:2021:1468, recalling the Chamber the previous pronouncements in which the existence of a null dismissal was found for incurring discrimination on grounds of age.

art. 4.2 Law 15/2022 to determine that the action carried out by the company to proceed with the dismissal of the person of legal age without having complied with the requirements set forth in the norm would be null, being, therefore, a direct discrimination[29]. This is due to the obligation that Directive 2000/78 itself incorporates to provide for positive action measures, which is what art. 25 LPRL.

However, this is not intended to state that it is impossible to dismiss a worker of a certain age, but that the employer must first prove that he has complied with the legal requirements to adapt the job, but that it has been materially impossible, since, due to the very structure of the company, neither this option nor functional mobility has been possible. The importance of proof, in this case the reversal of the burden of proof, cannot therefore be overlooked, as recitals 30 and 31 in the preamble to Directive 2000/78 already indicated. In other words, the burden of proof is reversed, with the obligation to justify that the reason for termination does not correspond to the age of the worker, provided that the latter has provided discriminatory evidence[30].

In addition, another consequence of the Courts of Justice declaring the dismissal as null and void is the imposition of the sanction after the corresponding sanctioning procedure, while, in art. 8.12 LISOS states that "the unilateral decision of the company that involves direct or indirect unfavourable discrimination on grounds of age or disability or unfavourable or adverse discrimination in terms of remuneration, working hours, training, promotion and other working conditions", as well as reprisals will be considered very serious infringements with the corresponding consequences established in art. 46.1 bis SMOOTH.

VI. Conclusions

First. From my point of view there is a contradiction between the ideal of prolonging the working life of workers with the obligation to establish in the company the appropriate measures for this, which mainly go through safety and

[29] Asquerino Lamparero, M. J.: Law 15/2022, of July 12, comprehensive for equal treatment and non-discrimination. Brief of the Spanish Association of Labour and Social Security Law. https://www.aedtss.com/la-ley-15-2022-de-12-de-julio-integral-para-la-igualdad-de-trato-y-la-no-discriminacion/

[30] STC 184/1993, of 31 May. The reversal of the burden of proof in relation to age discrimination.

health, since the worker does not have a *handicap* for the mere fact of adding one more year, but because of their state of health.

Second. The non-adaptation of the job to older workers can have far-reaching consequences, while these would be groups that, lacking the income derived from income from work, once the unemployment benefit has been exhausted, if they are not old enough to apply for the retirement pension could only opt for the assistance level, thus increasing the structural problem of the Social Security system.

Third. Discrimination does not seem to occur only on grounds of age, but is also associated with health, so it is not the objective element (the number of years) that matters, but the conditions of the person (physical, biological and mental). Which makes perfect sense if we take into account that the legal employment relationship was initially established based on these and what has happened is a decrease in the ability to work.

Room. Therefore, I consider that there is an intersectoral discrimination that is that which occurs when a person is discriminated against at the same time for several reasons, such as those described in art. 2.1 Law 15/2022.

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