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Labour-legal aspects of gerontological care in Spain

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Abstract

Gerontological care, like any professional activity, involves situations of conflict common to any employment relationship, which ultimately refer to the problems experienced by the care sector for the elderly in order to offer quality and sufficiently paid jobs. In this case, the focus is on three aspects that are considered of interest for these purposes: on the one hand, the workers' struggle for a fair salary; on the other, the legal conflict generated around the collective agreement applicable to multi-service companies operating in this sector; finally, the legal debate on the functions that are typical of the gerocultores. Being grateful for the intervention of the Supreme Court in the resolution of the last two issues mentioned, the dynamics of this sector allows us to conclude that there is still a long way to go to place it at the threshold of what can be considered as decent work Being grateful for the intervention of the Supreme Court in the resolution of the last two issues mentioned, the dynamics of this sector allows us to conclude that there is still a long way to go to place it at the threshold of what can be considered as decent work. In this sense, the improvement of labour standards in the sector seems to clearly have to go through, regardless of specific judicial resolutions, through a dynamic negotiation that sheds light on working conditions that are more in line with the aforementioned standard, especially in terms of salary.

Keywords

Labour relations, collective bargaining in the dependency sector, remuneration regime, functions of the geroculturers.

Summary: I. Introduction. II. On the conventional regime of workers in private residences for the elderly and the home help service and the struggle for a fair wage. III. Two conflicting issues: The collective agreement to be applied to multiservice companies and the functions to be exercised by geriatricians. 1. The collective agreement to be applied in multiservice companies. 2. The functions to be exercised by the geriatricians. IV. Epilogue: On the impact of the most recent legislative action, and in particular the 2021 labor reform, on the issues analyzed. V. Conclusions. Bibliography.

I. Introduction

On the occasion of the ILO centenary initiative (2019), this UN agency published at the time the report entitled "Care work and care workers for a decent work future", as a [1]significant contribution to the initiative for the centenary of this international institution from the perspective of the role of women at work. In that report, it was already pointed out that: "Care work is a 'social good' that benefits societies, economies and individuals alike. The State should have the primary responsibility for defining the benefits and quality of care services, acting as a direct provider, legal and fundamental entity of financing and regulator of the market".[2] The report, ultimately, is possibly the most relevant contribution in recent times of the United Nations in relation to the protection of the situation of dependency of the elderly, and non-discrimination based on age, among whose milestones are also known as the "United Nations Principles for Older Persons"[3], Resolution of 1991 in which the General Assembly called upon Governments not only to work for the independence of older persons, but also to provide them with the appropriate care; also the creation of the "Open-ended Working Group on Ageing", [4]and that since its constitution by UN Resolution of 2010 has been working in favor of the strengthening of human rights in the case of older persons.

In any case, the protection of the situation of dependency of the elderly is an issue that has not only occupied and concerned the United Nations, as is known. Not surprisingly, and with regard to the European level, it should be recalled that the Charter of Fundamental Rights of the European Union, in force since December 2009, on the occasion of the entry into force of the Treaty of Lisbon, and connecting with what is a long European tradition of recognition of what are the "indivisible and universal values of the dignity of the human being, of freedom, equality and

[1] International Labour Office, (2019), Care work and care workers for a decent work future, ILO, Geneva, available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_737394.pdf

[2] International Labour Office, (2019), *Care work...,* op. cit., p. 290.

[3] Adopted by UN General Assembly Resolution 46/91 on 16 December 1991, and available at: https://www.un.org/development/desa/ageing/resources/international-year-of-older-persons-1999/principles/los-principios-de-las-naciones-unidas-en-favor-de-las-personas-de-edad.html

[4] Whose works can be consulted at: https://social.un.org/ageing-working-group/

solidarity", he acknowledges in his art. 34.1, as a fundamental right, "the right of access to social security benefits and social services that guarantee protection in cases such as (...) old age...". The recognition of this fundamental right – supported by the consideration of art. 6.1 of the Treaty on European Union of the Charter of Fundamental Rights as a legal instrument "having the same value as the Treaties" - is in turn linked to the prohibition of discrimination on grounds of age, as well as to the recognition and full respect by the EU of the "right of older persons to a dignified and independent existence" – Articles 20 and 21 - [5].

Likewise, and with regard to the reception in the Spanish case of the aforementioned Charter of Fundamental Rights, it should be borne in mind that our Constitution (1978) considers human dignity and the free development of personality as one of the bases of our social and democratic State of Law (art. 10.1 CE), while entrusting the public authorities with the promotion of the conditions "so that freedom and freedom equality of the individual and of the groups in which they are integrated are real and effective", removing the obstacles that prevent or hinder their fullness (art. 9.2 CE), and all this in a constitutional framework that recognizes rights such as the right to life and physical and moral integrity (art. 15 CE), or the right to health protection (art. 43.1 CE). Particularly significant in any case, also, precepts such as art. 50 EC, which contains a mandate to the public authorities to guarantee through adequate and regularly updated pensions the economic sufficiency of senior citizens, while urging them to promote their well-being "through a system of social services that will attend to their specific problems of health, housing, culture and leisure". Or art. 49 EC, in which the public authorities are urged to carry out "a policy of provision, treatment, rehabilitation and integration of the physical, sensory and mentally handicapped to whom they will provide the specialized attention they require and will protect them especially for the enjoyment of the rights that this Title grants to all citizens".

Precisely, the Spanish Constitutional Court (TC) has considered the two guiding principles of social and economic policy contained in articles 49 and 50 EC as the substrate that supports the entire legal architecture on which the current System

[5] Silveiro de Barros, M. (2017), "Social protection for dependency in Portugal. Un estudio de derecho comparado, comunitario europeo e internacional", *Revista de Derecho de la Seguridad Social*, no. 12, p. 204.

of Autonomy and Care for Dependency (SAAD) is based, with which Spain was endowed after the approval of Law 39/2006, of December 14, Promotion of Personal Autonomy and Care for people in situations of dependency[6]. In some way, these laws can well be considered as the cornerstone of the regime that has made it possible to make effective in our country, although with obvious shortcomings,[7] what has been identified as the fundamental right of older persons to care[8].

More recently, and aware that the SAAD needs a boost and strengthening, on May 31, 2022 the Government of Spain approved the Strategic Project for the Recovery and Transformation of the Economic (PERTE) of the Social Economy and the Care Economy – which coexists in time with the initiative already launched of an upcoming reform of Law 39/2006 -, document in which a complete plan is formulated for the reactivation of the Social Economy and the Care Economy of this country, and which contemplates for this purpose an investment of 800 million euros of Next Generation Community funds. In the presentation of the plan to the press, it was stated that one of the objectives of this planning was the Government's will to modernize care for the elderly in our country, as well as to deepen the professionalization of the actors involved in the care sector, through the modernization of the services provided.

[6] BOE no. 299, of 15 December 2006.Thus, for example, the STC 27/2017, of February 16 (F.J. 3º) has defined the SAAD as "a public and universal system of economic benefits and services to make effective the subjective right of every citizen, based on articles 49 and 50 EC".

[7] Without wishing to delve into the subject, as it is not the subject of this article, I would like to recall that during these years the SAAD has suffered different vicissitudes, mainly as a result of the economic crisis of 2008, which led the Government of the day to promote a set of regulatory reforms that basically determined a degradation of the capacities of said system. In this regard, and among others, see Durán Bernardino, M., (2015) "The decline of dependence in favor of budgetary stability and the promotion of competitiveness", *Zerbituan (Journal of social services),* no. 58, p. 27 ff. Likewise, it is advisable to consult the evaluation of the SAAD contained in the report of the Economic and Social Council of Spain (CES), and which saw the light in 2020 (CES, (2020), *The system for the promotion of personal autonomy and care for people in situations of dependency,* Report 03, and which can be consulted at: https://www.ces.es/documents/10180/5226728/Inf0320.pdf) Thus, for example, the STC 27/2017, of February 16 (F.J. 3º) has defined the SAAD as "a public and universal system of economic benefits and services to make effective the subjective right of every citizen, based on articles 49 and 50 EC".

[8] On this issue, the consultation of Marrades, A., (2016), "The new social rights: the right to care as the foundation of the constitutional pact", *Revista de Derecho Político,* no. 97, p. 209 et seq. may be of interest. Thus, for example, the STC 27/2017, of February 16 (F.J. 3º) has defined the SAAD as "a public and universal system of economic benefits and services to make effective the subjective right of every citizen, based on articles 49 and 50 EC".

Taking into account the considerations made, if I have to say from the outset that it is not intended at this time to carry out a detailed study of the SAAD and its evolution, or of the most recent government project, whose execution will still take some time, but on the contrary to make an approximation to some of the deficiencies and problems that in particular the professional practice of gerontological care, As a professional activity integrated into the broader concept of care for the elderly, it registers in our country[9]. In this sense, this analysis aims to focus attention on two aspects that, in my opinion, attract the interest of professionals in the sector, and legal operators: a) on the one hand, the conventional regime of said professional activity, with special attention to the way in which it has been configured, and the debate on the remuneration to be received by its professionals; (b) on the other hand, the litigation in relation to those professionals, the most recent and significant exponent of which are two judgments of the Supreme Court of considerable relevance: first, relating to the collective agreement to be applied to multi-service companies operating in the field of care of the elderly in residences, the second referring to the functions that are specific to geriatricians.

Ultimately, the two aspects addressed refer to a professional field that, despite having grown significantly in recent years, also carries certain problems, such as those presented here. Some of them, as will be verified, are on their way to being channeled with the appreciable contribution of the Supreme Court, others will depend above all on the fact that in the medium term employers and unions are able to establish consensus of a broader spectrum than those reached so far, and that they improve the quality of employment,[10] in a sector that has proven key in the current Covid-19 pandemic to serve a group as vulnerable as that of the

[9] As established in the VII State Framework Collective Agreement for Care Services for Dependent Persons and Development of the Promotion of Personal Autonomy, of September 21, 2018 (art.17), "Gerocultor" is the "personnel who, under the dependence of the direction of the center or person to be determined, has as its main function to assist and care for users in activities of daily living that they can not perform by themselves and carry out those professional achievements aimed at their personal attention and their environment".

[10] To deepen the quality in employment, the consultation of: Rodríguez Castedo, A. and Jiménez Lara, A., (2010), *La atención a la dependencia y el empleo*, Fundación Alternativas, Madrid, no. 159, may be useful. Likewise, Escudero Rodríguez, R., (2018), "Proposals for reform of the social protection system of dependency in favor of a higher quality of care and employment. Proposals for reform concerning employment in the dependency sector", *Labour Relations Law,* No. 3, p. 277 ff.

our elders. Undoubtedly, the investment of Community funds in this sector can contribute to improving the conditions in which these professionals can carry out their work, but as the reader will see, the nature of the problems that he realizes in this article require decision-making that goes beyond economic investments, which are always welcome.

To carry out this analysis, a methodology has been chosen that combines the management of both the conventional regime that governs the work of these professionals, and the legislation that orders their professional practice. Likewise, attention will be paid to the recent labor reform, in order to determine to what extent it may have an impact, and with what scope, on the labor reality analyzed.

II – The contractual regime for workers in private homes for the elderly and the home help service and the fight for a fair wage

The conventional regulation of gerontological care, in the case of private residences for the elderly, and home help, is regulated, today, by the VII State Framework Collective Agreement for Care Services for Dependent People and Development of the Promotion of Personal Autonomy (private residences for the elderly and home help service) – Official State Gazette (BOE) No. 229, of 21 September 2018 -[11]. This collective agreement was signed at the time by the employers' organizations FED, AESTE, and LARES, while on the trade union side it was signed only by the trade union CC.OO.

It is a collective agreement of normative effectiveness, of general application therefore to all workers located within the scope of the agreement, which as identified in its art. 1 is constituted by "companies and establishments that exercise their activity in the sector of care for dependent people and / or development of the promotion of personal autonomy: residences for the elderly, day centers, night centers, sheltered housing, home help service and telecare [...] with the sole

[11] In relation to the negotiating practice prior to this collective agreement, see Aragón Medina, J., Cruces Aguilera, J., and Rocha Sánchez, F., (2007), *Sector de la atención a la dependencia y negociación colectiva*, Ministerio de Trabajo y Asuntos Sociales, Madrid.

exception of those companies whose management and ownership correspond to the public administration". Likewise, the aforementioned agreement also applies to "divisions, lines of business, sections or other autonomous productive units dedicated to the provision of the service of the functional scope, even when the main activity of the company in which they are integrated is different or has more than one activity belonging to different productive sectors". However, "companies that carry out specific health care as a fundamental activity, understanding this exclusion, without prejudice to health care for residents and users, as a result of the problems of their age and / or dependence" are excluded.

With regard to its temporary validity, art. 4 establishes that it will enter into force on January 1, 2015, and will be valid until December 31, 2018, except "in those matters where something different is established". For those who are not familiar with collective bargaining processes, the establishment of a period of validity such as the one set in this case can be somewhat surprising. However, it is not – it will not be the first sector or company where a clause of this type is agreed. And this is because the introduction of this type of conventional clauses, as in the present case, where the ordinary validity barely exceeds two months (November and December 2018), and yet the retroaction of effects up to three and a half years is agreed, has its explanation, fundamentally, in the agreements reached in terms of salary.

Indeed, to the extent that wage increases are agreed with this retroactive character, what is ultimately being done is to recognize them once the passage of time has confirmed the situation of the sector. This implies in itself a cautious attitude towards what are possible wage improvements for workers, since they are not recognized a priori. In fact, and with this we connect with the question of the way in which consensus is being built in this sector, the UGT union refused to sign this collective agreement, precisely alleging that the collective agreement signed degraded the working conditions of workers and, in terms of wages, did not incorporate improvements. This refusal by the UGT trade union has not had a practical impact on the legal effectiveness of the collective agreement, since the CC.OO. It has sufficient representativeness to ensure the regulatory effectiveness of the agreement signed in relation to the entire sector, but it does show a deep union division in terms of the objectives to be achieved in negotiations with employers.

In any case, and returning to the salary issue, it is appropriate to relate two circumstances that will undoubtedly allow the reader to make a self-composition of the remuneration reality of this sector:

1. Thus, and in the first place, the UGT union not only showed at the time its discrepancy with the agreements reached within the framework of this agreement, considering that it did not guarantee the increase of the CPI in 2018, but also argued that, with the entry into force of the VII collective agreement, the automatic review clause provided for in the previous collective agreement was prevented from taking effect. the VI, in the event that it enters a situation of ultraactivity – which occurs when the VI Convention ends its ordinary validity but there is no agreement that replaces it -, and whose application was contemplated "in the event that, at the time of being applied, the GDP published by the INE or another public or private body, has experienced an annual increase of more than 2%" (Final Provision of the Sixth Convention).
2. Secondly, as established by art. 8 of the VII Agreement, "the remuneration concepts will be increased annually, in the month of January, in the same amount as the real consumer price index (CPI) of the previous year, all without prejudice to the provisions of the final provision of this agreement". The application of this clause has determined that both in 2020, as now in 2021, the salary of the workers affected by this collective agreement will not be increased. What is the reason for this wage freeze?: that the CPI has been negative in both 2019 and 2020.

Curiously, after the negotiation of the Seventh Convention, the beginning of the negotiation of the VIII Convention was taken for granted. However, the fact is that today there is still no agreement on the latter, which has led to the extension, under ultra-active regime, of the aforementioned Seventh Convention.

Likewise, it is an agreement whose application coexists in time with others of lower scope, as is the case, with regard to the province of Seville, for example, of the V Provincial Collective Agreement of Home Help – Official Gazette of the Province (BOP) of Seville, no. 81, of April 10, 2018 -. As its name indicates, this is a provincial collective agreement that regulates the working and employment conditions of professionals who provide home help, and that also in this case only the CC.OO union signs. with the employers ASADE, ASAD and AESAD, guaranteeing again its general regulatory effectiveness for all workers in the sector

in the province, since said union has sufficient representativeness, according to the law, for this. Likewise, having been negotiated in 2018, its validity, however, is established from January 1, 2016 to December 31, 2020, opting once again for the retroactive application of its contents, among which are the salary regime. As in the case of the aforementioned State agreement, this one is in force in a situation of ultraactivity, a circumstance that constitutes evidence of the chronic difficulties in this sector to renew collective agreements once they end their ordinary validity.

Again, I return to the remuneration system. In the first place, to record the way in which the VII State Framework Collective Agreement, which also applies to home help professionals, and this V Provincial Collective Agreement are conventionally connected. Thus, art. 6 of the VII State Convention establishes that the regulation contained in this agreement in matters such as the remuneration structure or salaries, "will have the character of minimum right necessary with respect to the regulation that on these same matters could be contained in other collective agreements of smaller scope". With this, the state agreement is configured as a kind of wage floor susceptible to improvement by other agreements of lower scope. In such a way that it is with respect to this conventional framework established at the state level that the provincial collective agreement of Seville establishes a salary regime and remuneration structure in Chapter Seven (articles 35 to 42) thereof.

In relation to the latter collective agreement, I draw attention to two contractual provisions of the agreement which complement the above: (a) on the one hand, art. 6 of the Fifth Provincial Convention establishes that "for all those matters not expressly regulated in this agreement, the State Framework Collective Agreement for Care Services for Dependent Persons and Development of the Promotion of Personal Autonomy will be applied on a supplementary basis", a conventional provision that abounds in the idea of the VII State Convention as a norm that acts as a minimum legal basis and support for the working and employment conditions of the professionals in this sector; (b) On the other hand, art. 5 of the said provincial agreement provides that "until agreement is reached on the new [agreement], it shall be understood that the agreement is provisionally extended until express agreement is reached, increasing annually, in January, the basic salary by the percentage established by the State Framework Collective Agreement for Care Services for Dependent Persons and Development of the Promotion of Personal

Autonomy". The point is that, as I have already pointed out, the dependent care sector has not known salary increases in these years – in 2019 and 2020 it has already been commented-.

But, secondly, I would like to take this opportunity to record, within the framework of this brief account of collective bargaining and the struggle for a fair wage, the conflictive dynamics that have taken place in recent times in relation to the remuneration of home help professionals in Andalusia. More specifically, we must begin by referring to the announcement of the Minister of Equality, Social Policies and Conciliation of the Junta de Andalucía, who, at the end of 2020, at the headquarters of the Andalusian Parliament, stated that, for the purposes of the Budget of the Junta de Andalucía for 2021, it was the will of the Andalusian Government to provide 61 million euros for the item destined to cover the home help service, which would allow to increase, after ten years frozen, the salary of these professionals, resulting in the improvement of the quality of care and working conditions of the workers of the dependency.

This announcement meant in practice that finally the price / hour of the home help service - offered by the Local Administrations - would move from 14.60 euros, estimating that the salary increase offered in parliament would imply a salary increase of 12.3%. [12] However, that announcement gave rise to a manifestation of dissatisfaction from the most representative trade unions, CC.OO. and UGT in the following weeks, who this time yes, jointly, considered the increase offered insufficient, proposing for their part the signing of a collective agreement containing a three-year plan, which contemplates a gradual increase in the price / hour that, starting from 16 euros / hour for 2021 reaches 18 euros / hour in 2023. Additionally, these organizations recalled, not least, by the way, that the salary increase proposed by the Andalusian Government was hardly going to affect the pockets of professionals as long as it was not reflected in the collective agreement applicable to these professionals [13].

[12] According to data provided by the Ministry of Equality, Social Policies and Conciliation, in February 2021, at the headquarters of the Parliament of Andalusia (Equality Commission), in the period 2007 – 2017, while the accumulated Consumer Price Index (CPI) was 16.59%, the increase in the price / hour of home help was 0%, Data that gives an idea of the quality of salary conditions in this activity.

[13] In relation to the increase in the price/hour of the home help service, which came into force on March 1, 2021, in February 2022 the Ministry of Equality, Social Policies and Conciliation of the Junta de Andalucía reported that to date it was already applied in 75% of the municipalities of Andalusia. With being a significant fact, possibly what

In any case, the debate on the improvement of the remuneration system has brought new chapters, as we will have the opportunity to verify in subsequent pages, not only on the occasion of the successive and notable increases in the Minimum Interprofessional Wage (SMI) decreed by the Government of the Nation, in general – and that has meant going in four years from € 736 / month (2017) to € 1,000 / month (2022) -, but also as a consequence of the judicial resolution of certain disputes related to the wage regime of workers in the sector, and particularly with the recognition of salary increases agreed at the time – I refer to the recent judgment of the Social Chamber of the National Court, of June 20, 2022, which I will comment on at the end of this study -.

III. Two conflicting issues: The collective agreement to be applied to multi-service companies and the functions to be exercised by geriatricians

1. The collective agreement to be applied in multi-service companies

Regarding the judicial chronicle in relation to professionals in the dependency and home help sector, I think it is also important to record two significant judgments issued in 2020, both from the Supreme Court. The first is judgment No. 438/2020, issued by the Fourth Chamber (of the Social), of June 11, 2020, in relation to the collective agreement applicable to the workers of the company SERUNIÓN S.A. who, with the categories of cook, kitchen assistant, waiter, and waiter's assistant, have been providing services in the work centers located in the residences that the Autonomous Body attached to the Ministry of Social Welfare of the Principality of Asturias "Residential Establishments for the Elderly of Asturias" (ERA) has in Pola de Siero (CPR Valdés Palacio) and in Sotrondio (CPR Santa Bárbara). This judgment, which resolves a collective dispute raised by the CC.OO. Asturias, dismisses the appeal filed by the company against the judgment of the Superior Court of Justice of Asturias (Social Chamber), of October 23, 2018, which is confirmed in its terms by the Spanish High Court.

Basically, the list of proven facts states that the collective agreement on care services

is most striking is that a year after the aforementioned increase came into force, still 25% of the municipalities of the Autonomous Community would not have reflected any salary improvement in the workers of this service.

for dependent persons and development of the promotion of personal autonomy was being applied to the workers affected by the collective dispute by the company, an agreement that was also applied to them by the previous company awarded the service in the aforementioned residential centres. Likewise, that the company SERUNIÓN S.A. was awarded since May 2017 of the food, dining and cafeteria services of the residential centers of Pola de Siero and Sotrondio, for which it was subrogated in the provision of services that until then the company ARAMARK provided. In the list of administrative clauses that governed the provision of services of SERUNIÓN S.A. it was stated that they included both food services – which included the management of purchases related to food raw materials and elements necessary for their execution, the control of warehouses and the daily preparation of menus in the facilities affected by the activity, as well as kitchen and dining material -, such as dining service - and which includes the distribution of menus to diners and the cleaning of the facilities affected by said activity -. For its part, the list of proven facts also states that it is the workers of this company who in the kitchen of these residential centres prepare daily menus for breakfasts, lunches, snacks and dinners for the users of those residences and their staff; that the menus they prepare are established by SERUNIÓN S.A., which also facilitates the food that is brought to the residences by suppliers; and that it is these same workers who distribute the menus to the diners in the dining room or corresponding space enabled by the ERA for it, and those who then collect, clean and scrub. However, the trade union CC.OO. considers that, in view of the activity carried out by those workers, the collective agreement to be applied to them is not the one that has been applied to them in recent years, but the State Collective Agreement of the Collective Catering Labour Sector.

It goes ahead that the High Court of Justice of Asturias, in the aforementioned judgment, considered that, taking into account the activity carried out by these professionals, the collective agreement applicable in this case was that of collective catering and not that of dependency. And that the Supreme Court confirms this sentence, so it finally ends up giving the reason to the CC.OO union. Now, what are the legal arguments of the Spanish High Court?

It should be noted at the outset that the appellant company argued that it is a multi-service company that carries out various activities and, therefore, for the determination of the applicable collective agreement, since it did not have its

own agreement, it is necessary to be the preponderant real activity, in a criterion established at the time by the Supreme Court itself (Fourth Chamber – of the Social Court) in its judgment of March 17, 2015 (rec. no. 1464/2014), That in this case it is the care of the elderly, which is why the application of the Collective Agreement of Care Services for Dependent People and Development of the Promotion of Personal Autonomy corresponds. However, the Supreme Court does not share this view, for the following reasons:

a). Although the corporate purpose of the company in its constitutive deed contemplates "various activities among which are included, according to its bylaws, the provision of hotel and food services to public and private entities, and the care, promotion, assistance, rehabilitation, social insertion and all types of treatment of the elderly, or any others suffering from illnesses, physical or mental disabilities or economic deprivation; through the management of residences under ownership or through any other type of contracts or agreements with public or private entities, with express extension to home care", the truth is that, in the case of the residences of Pola de Siero and Sotondrio, the only activity carried out is that of food and dining in the terms that have been referred to above..

b). Art. 2 of the State Collective Agreement for Collective Catering is clear when establishing its objective scope: "In accordance with the provisions of article 59.1 of the State Hospitality Labor Agreement, the functional scope of application will be that of companies and workers in the Collective Catering sector. A collective catering service is understood to be one carried out by a company interposed between the main company (client) and the diner, provides a hotel service and proceeds to prepare and transform the food through its own system and organization, in the facilities of the same "client" or in its own, always serving later, said food in the spaces enabled for that purpose by the customers and receiving a consideration for it. Likewise, hotel services provided under administrative concessions by companies belonging to the collective catering subsector are included within the scope of this chapter. Expressly excluded from the scope of application are air catering activities, as well as traditional hospitality that is provided in spaces intended for transport (airports, bus stations, railway stations, etc.). Likewise, the collective agreement refers to the fact that collective catering companies are "companies that, through a contract or an administrative concession, serve food and / or drinks to private contingents and not to the general public. As well as the various annexed management units open to the public that the contract, concession or provision contract includes if they were auxiliary to

it (ancillary services in the so-called "captive customer")". On the other hand, included in this functional area are "auxiliary activities such as advice and management in dietetics, the supply of raw materials to the main customer and any auxiliary activities that complement the catering service", and "the "catering" of events carried out by the companies framed in this scope of application", as well as "companies and work centers whose main activity is those of the collective catering sector. Therefore, it will apply to the companies of the business group, when they develop other complementary or related activities. And when they provide their services mainly in the physical space in which the main company deploys its activity".

c). The Court's invoked doctrine established in its judgment of 17 March 2015, and relied on by the appellant, does not apply. This is because, on that occasion, the defendant undertaking had been awarded the performance of various services in the client undertaking which, materially, could be included in different collective agreements, so that, since it was a question of defining the collective agreement applicable to all the workers of the undertaking providing the services, "the criterion of the activity carried out was discarded in favor of that of the preponderant real activity in the company". [14] On this occasion, however, "the multiservice company has only contracted an activity in the client company that, materially, is only governed by the same collective agreement and, unlike the previous case, here the dilemma is not to decide between agreement of the activity developed by the worker or agreement of the preponderant activity carried out by the multiservice company. In this case the dilemma is between the sectoral agreement that governs the activity carried out by the workers or the

[14] As pointed out by Cavas Martínez, F., (2018), "The determination of the collective agreement applicable to multiservice companies", in Balaguer López, M*., (Coord.): Productive decentralization and transformation* of Labor Law, Tirant lo Blanch, Valencia, pp. 136 – 137, the Spanish doctrine (in this case with citation from Esteve Segarra, A., (2016), *Labor outsourcing in multiservice companies and networks of auxiliary* service companies, Valencia, Tirant lo Blanch, p. 155) has been quite critical of this judgment, since it seems that the Supreme Court has projected in this case a doctrine designed to solve legal problems of application of the collective agreement in the case of companies with several activities, which is a business phenomenon different from what is known as multiservice companies, For this reason, it has been considered that on this occasion the Court did the most to resolve a specific problem – related to a group of workers whose activity was not within the scope of application of any sectoral collective agreement – but in no case to illuminate a kind of doctrine of a general nature. In fact, it has often been warned that the generalization of the principle of unity of enterprise and the collective agreement corresponding to the main activity could ultimately be detrimental to workers in certain situations (see Muñoz Ruiz, A. B., (2016), "The collective agreement applicable to multiservice companies: possible situations and judicial criteria for its resolution", *Labour and Law*, No. 13, pp. 86-88).

> sectoral agreement applicable in the client company". And for the Supreme Court it is clear that the applicable collective agreement is that of the activity carried out by the workers – collective catering -.

On the doctrine established in this judgment, it has been pointed out, correctly, that the Chamber is going to consecrate a kind of realistic subjective criterion, which "attends to the activity actually carried out by the workers, for the determination of the collective agreement that is applicable to them". [15] This criterion, as the Supreme Court itself has emphasized, constitutes a legal solution that avoids practices of unfair competition, through the precariousness of working conditions, since with its application "the same unitary regulation is established for all workers who perform the same work, regardless of the legal configuration of the employer subject, that is, whether it is a company specialized in the provision of a single service or a multi-service ".

The point is that we must be aware that, despite the importance of the doctrine established by the High Court, it does not necessarily constitute a legal criterion that can give a satisfactory answer to all situations where a possible conventional concurrence is appreciated, and the debate arises of what should be the applicable collective agreement. Indeed, as has already been noted in some cases, the [16]criterion of applying the collective agreement specific to the activity carried out by the workers does not operate when the multiservice undertaking itself has its own collective agreement, an agreement which will generally establish conditions lower than those provided for in sectoral agreements. for this is precisely its raison d'être. Likewise, it cannot be used when, for example, the multiservice company has established as preponderant one of the activities undertaken by its workers. In fact, the judgment of the Supreme Court of March 17, 2015, mentioned above, establishes as doctrine that, when the company identifies an activity as preponderant, the criterion to be handled must be that of being to the collective agreement that regulates said activity[17].

[15] Miñarro Yanini, M., (2020), "Determination of the agreement applicable to the personnel of multiservice companies without their own agreement: (finally) reality surpasses fiction. Commentary on Supreme Court Judgment 438/2020, of June 11, "*Financial Studies. Review of Labor and Social Security: comments, case studies, human resources,* no. 451, p. 236.

[16] Miñarro Yanini, M., (2020), "Determination of the applicable agreement...", op. cit., p. 237.

[17] In any case, and regardless of the fact that the application of this criterion may have questionable consequences, it happens that this judicial criterion, as in some cases has already been explained,

But it is also that the application of the aforementioned criterion – the collective agreement of the activity carried out by the workers – can generate unwanted situations of inequality in certain cases, as is the case that, for example, in a residence there are workers hired by the main company and those who belong to a multiservice company performing the same jobs, In this case, both would see their working conditions regulated by different agreements – the one applicable to each company – when they perform the same work as indicated. A situation in which experience also indicates that the workers of the multiservice company will almost certainly register more disadvantageous working conditions, since in Spain this type of companies have grown exponentially in recent years under the legislation that allows the establishment of company collective agreements that are at the thresholds of social [18]dumping. In fact, this growth is related to the absence of a rule, as in the case of temporary employment agencies, that recognizes the right of workers who provide services for another to enjoy "the essential conditions of work and employment that would correspond to them if they had been hired directly by the user enterprise to occupy the same position", and which identifies as essential the following conditions: remuneration, length of the working day, overtime, rest periods,

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can "lead to a strategic selection by the companies of the collective agreement to be applied" (Esteve Segarra, M.A., (2015), "The selection of the agreement in multiservice companies. Regarding the STS of March 17, 2015, RCUD. 1464/2014", *Revista de Información Laboral*, no. 6, p. 174). On the other hand, and as pointed out by Cavas Martínez, F., (2018), "The determination of the collective agreement ...", op. cit, p. 137, if it happens that the activity identified as preponderant by the company does not have a sectoral agreement, it seems difficult to avoid generating a regulatory vacuum, only salvageable, I understand, if anything, by the application to the other activities carried out by workers of the company of the agreements that regulate, If they exist, this situation would finally lead to a coexistence, possibly not ideal, of different collective agreements within the company.

[18] As pointed out by Nieto Rojas, P., (2018), "The protection of workers in multiservice companies. Legal, conventional and judicial proposals", *International and Comparative Journal of Labour Relations and Employment Law*, vol. 6, no. 2, p. 12, in the field of multi-service companies, it is very common to sign collective agreements of companies, usually with non-unionized workers' representations, which facilitate the implementation of company strategies characterized by a drastic reduction in wages and other conditions of employment. labour, and which in practice excludes the application of possible sectoral collective agreements that could be applicable to its workers. In fact, in the labor reform of 2012 we find the origin of a legal regime that has favored the collective agreements of multiservice companies have generalized the Minimum Interprofessional Wage as the base salary of all categories and jobs of the professional groups of workers of these companies (Vivero Serrano, J.B., (2018), "The regulation of the salary in the collective agreements of the multiservice companies between the fraud of law, the abuse of the right and the accommodation to the annual increase of the minimum interprofessional wage", *Work and Law,* num. 46, p. 126).

night work, holidays and public holidays – art. 11.1 of Law 14/1994, which regulates temporary employment agencies -.

For this reason, the doctrine has debated in this time on the most opportune criterion to solve the problem that frequently arises, on the collective agreement to be applied. In some cases it has been argued, for example, that the criterion of the activity actually carried out by the workers should be that of priority application to resolve the conflicting cases of conventional application. However, and as we have pointed out, it is a criterion whose application is not possible in all cases, when it is not advisable because it gives rise to situations of inequality. That is why it has been advocated, for example, the application on certain occasions of the principles of more favourable rule and equity in combination with the former,[19] although the use of these to establish the applicable collective agreement does not seem peaceful to us either. On other occasions, it has also been defended, for example, the application of the principles of enterprise unity and specificity, in a complementary way, as a solution of a general nature more respectful of what should be the achievement of decent working conditions[20].

In any event, it should be noted that sectoral collective bargaining itself has attempted to provide certain responses that are intended to be consistent with the desire to combat the aforementioned risk of social dumping, by establishing what have been identified as "inclusion clauses" of multi-service enterprises in the corresponding sectoral collective agreements. When a sort of "extension clauses" has not been agreed, which establish the application to workers of multiservice companies of certain working conditions and / or remuneration agreed for workers in the sector[21]. However, these are specific conventional formulations that have only been proposed in certain sectors of activity.

[19] Miñarro Yanini, M., (2020), "Determination of the applicable agreement...", op. cit., pp. 238-239.

[20] In this regard, see Cabeza Pereiro, J., (2020), "Multiservice companies and collective bargaining: balance in times of change", *Revista de Derecho Social*, no. 90, p. 218 ff,

[21] Miñarro Yanini, M., (2019), "Selection of the applicable agreement in multiservice companies: another pending legal and jurisprudential subject", *Revista de Trabajo y Seguridad Social. CEF*, No. 439, pp. 174-175. On the question of how collective bargaining has been resolving in these years the concurrence and priority application, where appropriate, of the collective agreements of companies of multiservice companies, the consultation of Álvarez Cuesta, H., (2020), "Collective bargaining and multiservice companies", in Fernández Domínguez, J.J. (Dir.), *New scenarios and new contents of collective bargaining*, may be useful, MTSS, Madrid, p. 280 ff.

2. The functions to be exercised by geriatricians

As for the second judgment to which I will refer, it is the one handed down by the Social Chamber of the Supreme Court of 24 November 2020 (No. 1024/2020), in relation to the appeal in cassation filed by the UGT trade union against the judgment of the Social Chamber of the National High Court, of 2 January 2019 (No. 1/2019), [22] which dismissed the challenge, on grounds of illegality, to Article 17 of the VII State Framework Collective Agreement for Care Services for Dependent Persons and Development of the Promotion of Personal Autonomy, and which has its origin in the corresponding claim filed at the time by said trade union in which it was expressed that the aforementioned agreement contravened the legislation in

[22] The judgment of the National High Court, in addition to legally validating the regulation of the professional classification and functions of geriatricians made in the VII Collective Agreement, stands out for the assessment, and defense, that makes the role of collective bargaining as a source of the employment relationship. In this sense, the plaintiff alleged that, by including the agreement in this case "among the functions of the geriatrician," without in any case involving the replacement of personnel hired specifically for regular cleaning, he may carry out the cleaning and hygiene of utensils, clothes and rooms when there are circumstances in the service that require it. " / " carry out the cleaning and maintenance of the users' belongings, collaborate in keeping the rooms tidy, collect the clothes, take them to the laundry, take care of the personal clothes of the users and make the beds according to the needs of each user according to the established quality criteria, with clean linen, absence of wrinkles and moisture, in the appropriate position, with special attention to body folds and other areas of special risk, respecting the privacy of the user", it would violate articles 39.1 and 22 of the ET and articles 14 and 35 EC, since the limits of functional mobility are exceeded. Additionally, the challenger considered that "article 22.4 ET only allows that by agreement between the worker and thethe functional versatility or the performance of functions specific to more than one group is established,determining the assignment to the professional group with the temporal criterion of the functions they performfor a longer period of time, the worker's right to choose a profession or trade is infringed in the terms recognised in Article 35 EC and, moreover, that lower mobility permitted by the contested agreement is discriminatory because other categories of occupational group 4 are not required to perform cleaning and hygiene functions as assigned to geriatricians". The National High Court maintains that "collective bargaining, insofar as it refers to the regulation of the professional classification and the functions of the geriatrician, cannot be corseted or restricted in the way that is intended, since, by constitutional imperative, collective bargaining, as a means of self-regulation, is possible to the extent that it does not violate a minimum standard of legality. Collective bargaining should not be conceived, according to a constitutional canon, as a marginal or insignificant possibility, since the exercise of the powers of the public authorities, to the extent that they restrict the possibility of negotiation, can only be understood as subsidiary - guardian of the minimum standard established. Therefore, the Chamber understands that the negotiating parties have not acted in violation of any legal or constitutional precept since it is clear that collective bargaining is recognized in the Constitution. In short, the Chamber does not find that the negotiating parties were operating outside their jurisdictional powers; unless an extremely restrictive interpretation is made, distorting what should be the content of collective bargaining. Restrictive thesis that the Chamber, therefore, cannot share or assume."

force, when contemplating as functions of the gerocultores tasks of the cleaning, washing and ironing staff. Precisely, another of the arguments put forward by the UGT union for not signing the VII Collective Agreement was that it contemplates that geriatricians – remember that this is a widely feminized profession – perform cleaning tasks, in addition to performing the tasks of care of dependents, typical of their profession.

The Supreme Court upholds the judgment of the Audiencia Nacional and does not find that the contested collective agreement is unlawful on the following grounds:

1. The passage of the collective agreement that is discussed is the one that refers that a gerocultor "without in any case supposing the substitution of the personnel hired specifically for the usual cleaning, will be able to carry out the cleaning and hygiene of utensils, clothes and rooms, when in the service there are circumstances that require it". However, the collective agreement itself states in the aforementioned art. 17 that the main function of these professionals is to "assist and care for users in activities of daily living that they cannot perform by themselves and carry out those professional achievements aimed at their personal care and their environment". Assuming that the function at issue is accidental and minimal, but in any case related to the main function of geriatricians, it must be concluded that it "cannot be considered a function that must be annulled from that conventional precept because it "invades" functions of the category of "cleaning and laundry/ironing staff" of Group 5".
2. That geriatricians must occasionally assume the function discussed does not mean "in certain specific cases a company may unduly replace in general that cleaning and laundry staff by that of Geroculture (even if it was not economically profitable), but such action would not imply the nullity of the conventional norm ".
3. The contested collective agreement itself warns that the occupation of a lower-level job is only possible "for technical or organizational reasons and exceptional circumstances that justify it and for the essential time", which in the opinion of the High Court "constitutes an interpretative canon of maximum relevance to confirm that the negotiators have not wanted to underestimate the work of Geroculture from any point of view" – in short, they must perform the functions discussed but when the indicated circumstances concur -.
4. There is no violation of the right to free choice of profession or trade (art. 35.1 of the Constitution), as claimed by the appellant, since the function at issue in

> the case of the Geroculture collective "is not the only one, but one of the many listed and, of course, in this area of examination of the collective agreement in no way can it be presumed to be the preponderant, without prejudice to the fact that if in any specific case this happens it remains to act against such anomaly, which would not derive from the tenor of the content of the agreement but from irregular conduct".

What can be said about this judgment? As has already been pointed out on occasion, we should begin by highlighting that the judicial doctrine established by the Supreme Court in this case has the virtue of supporting the approaches that, for some years, defend the passage of what until not long ago was considered the classic residential care model, characterized by the strict delimitation of functions of caregivers – what has been identified as the institutional health model -, to a model organized around coexistence units that, focused on the elderly, assumes that the functions to be exercised by caregivers must have a personalized, flexible and adaptable character[23]. In this sense, in some way the Spanish High Court assumes the argumentation formulated by the Public Prosecutor's Office on the occasion of its appearance before the National Court, and that ultimately came to indicate, according to the Supreme Court itself in its judgment, that "a rigid distribution of functions would leave empty of content much of the attention that the Gerocultor must provide and that the person attended demands", being evident that "the functional flexibility of the working groups is the competence of collective bargaining without this entailing any discrimination based on gender" – which incidentally came to be raised because it is a highly feminized profession -, and be supported by the regulations that regulate the accreditation of geriatric personnel an attribution of functions such as the one discussed.

It should be recalled in this regard that, in relation to the professional practice of geriatricians, Royal Decree 1379/2008, of August 1, establishes the requirements that must meet the certificate of professionalism of those who provide socio-health care to dependent people in social institutions[24]. Well, in said regulatory

[23] Poyatos Chacón, M.F., (2021), "The content and scope of care tasks in residential care centers. Its consolidation after Judgment 1024/2020, of November 24, of the social chamber of the Supreme Court", *Journal of Labor and Social Security Legal Studies,* no. 3, p. 269.

[24] Published in BOE no. 218, of 9 September 2008, p. 36676 et seq., subsequently amended by Royal Decree

standard – Annex II, Code SSCS0208 – it is provided that the general competence of these professionals includes: "Caring for dependent people in the socio-sanitary field in the institution where their action is developed, applying the strategies designed by the competent interdisciplinary team and the procedures to maintain and improve their personal autonomy and their relationships in the environment", identifying itself as one of the units of competence that make up the certificate of professionalism UC1016_2: "Prepare and support the interventions of attention to people and their environment in the institutional environment indicated by the interdisciplinary team". The aforementioned regulatory norm what it comes to establish is that the gerocultores have as a professional task entrusted to maintain, and where appropriate improve, the personal autonomy and relations with the environment of the elderly in the social and health field of an institution, applying for this the strategies and procedures designed by the interdisciplinary team that guides the work with these people [25].

From this last perspective, and as the Supreme Court itself assumes, no accusation of illegality must be made with respect to the long list of functions attributed to the aforementioned professionals by art. 17 of the State Convention, in such a way that, when circumstances so require, if the care of the dependent person so requires, they may – and will have to carry out – cleaning and hygiene work on utensils, clothes and rooms of these users, in line with the flexible and adaptable nature of the functions of these professionals to the needs of dependent persons that today constitutes the model of care that is mainly based on Western Europe. In fact, art. Article 17 of the Collective Agreement at a given time provides that the manager "shall perform the functions detailed below, as well as those that are requested and that are related to them and / or to their degree, qualification or professional competence in accordance with the established protocols". However, this final closing clause, which expands on the specific list of functions identified in the conventional norm itself, should not be considered a kind of carte blanche in terms of the tasks to be assumed by geriatricians. Not coincidentally, art. 24 of the State collective agreement, when dealing with the performance of work of higher and lower category, establishes the prohibition of "assigning staff to occupy

721/2011, of 20 May, and Royal Decree 625/2013, of 2 August.

25 Poyatos Chacón, M.F., (2021), "The content and scope of care tasks ...", op. cit., p. 264.

a job corresponding to a lower group, except for technical or organizational reasons and exceptional circumstances that justify it and for the time necessary for their attention, according to the professional classification established in article 14", although, in any case, "the employer must communicate his decision and the reasons for it to the workers' representatives, in accordance with article 39.2 of the Workers' Statute".

Ultimately, this 2020 judgment continues with the line of interpretation initiated by the Supreme Court in 2010 – specifically the judgment of July 12, 2010, of the Social Chamber (No. 4802/2010) -, in favor of a flexible and adaptable interpretation of the functions to be exercised by geriatricians to the needs of dependent persons, and that at the time it resolved an appeal in cassation, also filed by the UGT trade union, in relation to whether or not geriatricians could perform glucose tests, administer insulin and heparin to users under the supervision of medical or nursing staff, and in the absence of an ATS/DUE (Health Technical Assistant) to carry out such actions. Well, in that case the Spanish High Court warned that "not all administration of medication by parental route is identical, nor does it entail the same knowledge requirements for its application", in such a way that "the administration of insulin or heparin subcutaneously for many years and increasingly easier in the way they are administered, It can be carried out by the patient himself, and in fact self-application techniques are enhanced for a higher quality of life and less medical dependence on patients, who in this way become the administrators of their own nursing care". However, he considered that, "when this cannot be done, when the patient cannot take care of himself at this end and apply these drugs directly subcutaneously, it will be the geriatrician who will make up for that lack of personal capacity to help the patient who cannot do it by himself, to administer it, taking into account that although the subcutaneous is a way of administering medications through the parent, it does not have the complexity and risks of the intravenous or intramuscular route at all" - for the Court it was relevant in this case that, in Spain, "the geriatrician receives specific training to perform these functions" -. Of course, in this case the High Court demanded, given the implications of the administration of any medication, that the intervention of the

geriatricians in this case occurs under medical supervision in the absence of an ATS / DUE that performs such administration[26].

IV. Epilogue: On the impact of the most recent legislative action, and in particular of the 2021 labor reform, on the issues analyzed

The picture described so far would not be complete without consideration of the impact that certain legislative decisions of a general nature may have had on the evolution of the sector where geriatricians operate. I begin in this sense by returning to an aspect only slightly pointed out in previous pages: the notable rise in the SMI, which has taken it from € 736 / month, in 2017, to € 1,000 / month in 2022.

The point is that the Government when it established the increases of the SMI for 2017 (8%) and 2018 (4%) considered it appropriate to adopt certain measures to limit the impact that these increases could have on companies with their own collective agreements that followed a *low cost* [27] wage policy. Basically, therefore,

[26] The judgment is also interesting because at a certain time it addresses the character that should be granted to standards such as Organic Law 5/2002, of June 19, on Qualifications and Vocational Training – today repealed, and replaced by Organic Law 3/2022, of March 31, on the organization and integration of Vocational Training -, or Royal Decree 1368/2007, of 19 October, which complements the National Catalogue of Professional Qualifications, through the establishment of six professional qualifications of the professional family sociocultural services and the community. The question arises from the doubts that existed about whether the administration of insulin or heparin did not imply an invasion of competences and functions of the Diplomas in Nursing (ATS / DUE), in view of the content with which these standards were endowed to the nursing profession. Well, the Supreme Court is clear in considering that: "They are rules that do not intend the regulation of any professional practice, as expressly and literally said in the RD, since it is limited to specifying and detailing certain knowledge without attribution of functions, nor any precision on the competences of the Diplomas in nursing. It is therefore a formative and merely educational norm and since it does not intend the regulation of any professional practice, it is clear that it does not invade or affect the competences and functions of the Diplomas in nursing. Without forgetting "... that there is no rule in our legal system that prohibits the acquisition of certain knowledge even if it coincides in part with the studies established for the exercise of the profession of Diplomas in Nursing, or with those of any other profession" (STS, 3ª of 16-10-2008, rec. 108/2005, cited above and dictated regarding the challenge that was made of Royal Decree 1087/2005, of 16 September, which establishes new professional qualifications, which are included in the National Catalogue of Professional Qualifications, as well as their corresponding training modules, which are incorporated into the Modular Catalogue of Vocational Training, and update certain professional qualifications of those established by Royal Decree 295/2004, of 20 February".

[27] First Transitory Provision of Royal Decree 742/2016, of 29 December, fixing the minimum interprofessional wage for 2017 (BOE no. 316, of 31 December 2016, page 91797 et seq.); First Transitory Provision of Royal

the idea was that these increases did not necessarily have a direct effect on the wages received by the workers affected by such agreements, constituting the typical reference in this case multiservice companies, which as indicated above tend to practice low cost wage policies. To this end, the Royal Decrees establishing the SMI for both years contemplated transitional provisions that allowed companies to continue using theoretical base salaries below those foreseen in 2017 and 2018, being able to benefit from the SMI of the year of approval of the collective agreement[28]. This governmental decision, however, has not had a continuity in time, in such a way that the subsequent Royal Decrees, adopted in this case to fix the SMI of the following years have not harbored provisions in this regard, so that the increases in the SMI of those years have had a direct impact on collective agreements that practice low cost wage policies, This has led to an unresolved debate on the extent to which these increases have negatively affected job creation, and ultimately whether or not they have contributed to job destruction[29].

Secondly, some comment also deserves, from the perspective analyzed here, the labor reform practiced by the Government under Royal Decree-Law 32/2021, of December 28, on urgent measures for labor reform, the guarantee of stability in employment and the transformation of the labor [30]market. I think it is important to highlight two aspects of this reform that I believe will have an impact on the dynamics of the care sector for dependent people.

Decree 1077/2017, of December 29, which sets the minimum interprofessional wage for 2018 (BOE no. 317, of December 30, 2017, page 130800 and ss.).

[28] Vivero Serrano, J.B., (2018), "The regulation of wages in collective agreements...", op. cit., p. 128 ff. On this matter, and more recently, the consultation of Vivero Serrano, J.B., (2021), "The increase in the minimum interprofessional wage. The impact on collective bargaining and business management of remuneration", *Revista de Trabajo y Seguridad Social. CEF*, no. 464, pp. 49 – 88.

[29] While for the trade unions and the Government the measure has been positive, since it has allowed a recovery of the purchasing power of workers, very punished in recent years, having practically no negative impact on employment (see CC.OO., (2022), "Analysis of the impact of the increase in the Minimum Interprofessional Wage to 1,000 euros", Madrid, and which can be consulted at: https://www.ccoo.es/2b2998cf5dd74f1c3ab7648 10a0f7cce000001.pdf), studies by the Bank of Spain suggest that such increases may have an adverse impact on employment of older groups, and on the flow of job creation for young people (see AA.VV., (2021), "The effects of the minimum interprofessional wage on employment: new evidence for Spain", Occasional Documents (Bank of Spain), No. 2113, available at: https://www.bde.es/f/webbde/SES/Secciones/Publicaciones/PublicacionesSeriadas/ DocumentosOcasionales/21/Fich/do2113.pdf).

[30] BOE no. 313, of 30 December 2021, p. 166882 et seq.

The first aspect has to do with the modification of article 84 paragraph 2 of the Workers' Statute (ET). [31] In the version prior to the 2021 labor reform, the ET recognized in this precept the application preference of company collective agreements over state, regional or lower sectoral collective agreements, in relation to a set of matters identified in the precept itself, negotiation that could also take place "at any time during the validity of collective agreements of higher scope" [32]. Among these matters was the "amount of the basic salary and salary supplements, including those linked to the situation and results of the company", which is at the origin of the remuneration devaluation that multiservice companies have systematically practiced – which have generally provided themselves with their own company agreement, especially for this reason, because finally they paid salaries lower than what could be considered the reference remuneration in the sector -, and that explains their rapid expansion in Spain, a reality to which the sector in question has not been alien, to the detriment of other models of workforce management, such as that offered by temporary employment agencies (ETT). As I pointed out, at the end of 2021 the legal text has undergone a significant modification since that legal reference, which allowed the establishment of remuneration that can well be identified as low-cost, has been eliminated [33]. Logically, this legislative decision is not accidental, and aims to put an end to certain wage practices that are at the origin, as I have already pointed out, of the proliferation of these companies.

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[31] Royal Legislative Decree 2/2015, of 23 October, approving the revised text of the Law on the Workers' Statute (BOE no. 255, of 24 October 2015, p. 100224 et seq.).

As a precedent for this legal amendment, it is necessary to mention the one operated at the time, in the field of the public sector, on the occasion of the approval of Law 9/2017, of November 8, on Public Sector Contracts, which transposes into the Spanish legal system the Directives of the European Parliament and of the Council 2014/23 / EU, and 2014/24/EU, of 26 February 2014 (BOE no. 272, of 9 November 2017, p. 107714 et seq.), and which privileged sectoral collective bargaining in that sector over business in *peius* in remuneration matters.

[32] Likewise, art. 84.2 ET establishes that: "Collective agreements for a group of companies or a plurality of companies linked for organizational or productive reasons shall have equal priority in these matters."

[33] With this, Spain retraces a path that it entered into the labor reform of 2012 and that distanced us from the legislative practices of the European level in those years. At the same time, European also adopted legislative reforms that promoted the decentralization of collective bargaining by enhancing the effectiveness of the enterprise collective agreement; however, remuneration was usually legally preserved, trying to prevent remuneration from being subject to devaluation in the field of company collective bargaining (in this sense, Ballester Pastor, M.A., (2022), *La reforma laboral de 2021. Más allá de la crónica*, Ministerio de Trabajo y Economía Social, Madrid, p. 163).

Since, as has been seen, the performance of multiservice companies in the field of dependent care is significant, this legal reform is expected to induce changes in the remuneration regime of workers belonging to them, improving wage levels [34].

In any case, and in what must be considered as a necessary complement to this legal reform, it is also worth noting the introduction in article 42 ET of a new section 6, which as in the case of the new wording of article 84.2 ET, tries to combat "the gradual replacement of directly hired personnel by another hired indirectly, particularly through the so-called multiservice companies", [35]establishing for the first time the legal criterion – a question resolved until then exclusively by the courts [36] -, as a general criterion, that the agreement of the sector of the activity developed by the contractor or subcontractor will be applicable, regardless of its corporate purpose or legal form, to the contracting and subcontracting [37]companies.– establishing the

[34] As in some cases has been pointed out, the absolute preference of the remuneration conditions of the company agreement, following a current sector collective agreement, generated in the period between 2013 and 2015, and compared to the period 2008 - 2012 – the legal reform that made it possible is from 2012 -, a considerable decrease in the average amounts of company agreements, ranging from -8% at the skilled technical level, to -7.3% at the non-technical skilled level, or at -3.1% at the unskilled level (see Gimeno Díaz de Atuari, P., (2018), "Determination of salary and structure of negotiation", in Goerlich Peset, J.M. (Dir.), *Evolution of the economic contents of collective bargaining in Spain*, Ministry of Labour, Migration and Social Security, Madrid, p. 162). In this regard, and in relation to sectoral collective agreements, in the same period a slight decrease in remuneration was detected in sectoral collective agreements, which has been attributed to an attempt by the latter to avoid the flight towards company collective agreements that set lower remuneration. (see Muñoz Ruiz, A.B., (2018), "The wage review: Trend lines during the crisis and economic recovery", in Goerlich Peset, J.M., *Evolución de los contenidos económicas de la negociación colectiva en España*, Ministerio de Trabajo, Migraciones y Seguridad Social, Madrid, p. 174 et seq.).

[35] Poyatos Matas, G., (2017), "Outsourcing in the hospitality sector and gender impact: "The Kellys' versus multiservice companies", *Estudios Financieros. Revisa de Trabajo y Seguridad Social: comentarios , case studies, human resources*, no. 409, p. 141.

[36] The referent of this legal criterion is the judgment of the Supreme Court (Social Chamber) of June 11, 2020 (rec. 9/2019) – previously the judgment of the Supreme Court (Social Chamber) of February 22, 2019 (Rec. 237/2019) -, which in relation to it (criterion of the activity carried out by the contractor or subcontractor) highlighted that, In this way, "competition in the labour market is not affected, since the same unitary regulation is established for all workers who perform the same work, regardless of the legal configuration of the employer; that is, whether it is a company specialized in the provision of a single service or a multiservice company".

[37] In any case, the "activity developed in the contract" is a concept whose determination in some cases can be difficult to grasp (I refer to the reflections in this sense of Ballester Pastor, M.A., (2022), *The labor reform of 2021...*, op.cit., p. 165 ff.). However, this criterion is not applicable to determine the collective agreement applicable in the case of special employment centers – as established by Additional Provision 27 ET -, and this is explained by the special

proviso that if the contractor or subcontractor had its own (company) agreement, this would only be applicable if this were possible within the framework of the rules of conventional concurrence that, in general, are established in art. 84 ET -.

Finally, the second aspect has to do with the so-called ultra-activity of the collective agreement, an issue traditionally regulated by article 86 of the ET. Again, in relation to this article, reference must be made to the tenor of the norm existing prior to the reform of the end of 2021, more specifically to the text of the norm established on the occasion of the labor reform of 2012, and which came to order that: "After one year has elapsed since the denunciation of the collective agreement without a new agreement having been agreed or an arbitration award issued, the latter shall cease, unless otherwise agreed, in force and shall apply, if any, the collective agreement of higher scope that was applicable". This criterion, as is known, gave rise to various problems, which culminated in the establishment by the Supreme Court, in the absence in specific cases of an applicable higher-level collective agreement, of the much-criticized doctrine of the contraction at origin of the working conditions of the agreement whose validity expired [38]. Therefore, in 2021 it is finally decided to put "an end to a legal technique that has generated important alterations in the correlation of forces, rebalancing the position of the parties at the negotiating tables, clearly unbalanced with the 2012 reform". [39] Therefore, from now on, the indefinite ultra-active validity of the collective agreement is reaffirmed, unless the parties agree otherwise, pending a new collective agreement. In the case of the VII State Framework Collective Agreement that regulates the care of dependent persons, and given the problems that have traditionally registered the negotiation of the agreement – as I reflected at the beginning of this analysis, for example, today we are still waiting for the signing of a new agreement after the one agreed in 2018 – the legal criterion reinstated, As it was the one that existed prior to the

characteristics of these workplaces, which operate with a different logic.

[38] See in this regard Beltrán de Heredia Ruiz, I., (2016), "Two comments on ultraactivity: delimitation of "applicable superior agreement" (TS 27/11/15) and the concept "pact to the contrary" ex art. 86.3 ET (TS 17/11/15), at https://ignasibeltran.com/2016/01/19/dos-comentarios-sobre-ultraactividad-delimitacion-de-convenio-superior-aplicable-ts-271115-y-delimitacion-del-concepto-pacto-en-contrario-ex-art-86-3-et-ts-171115/.

[39] Merino Segovia, A., (2022), "The legal system of collective bargaining after RD-L 32/2021. New orientations in the bargaining structure, determination of the applicable collective agreement and restitution of its ultraactive validity", *Journal of the Ministry of Labour and Social Economy*, No. 152, p. 153.

2012 reform, it guarantees that social agents will not be forced into the vertigo of a situation of total absence of conventional regulation.

V – Conclusions

On occasion it has been recalled that the notion of decent work advocated by the ILO, and which constitutes a significant element of the 2030 Agenda for Sustainable Development, "aims to encompass in a common framework legal and economic perspectives, the quantity and quality of employment, job security and decent income", in such a way that "there is a threshold, but not a decent work ceiling." [40] From the perspective of gerontological activity, and ultimately, and in general, the work of caring for dependent people, no one escapes that the reality of this sector, despite its strategic nature, given the evident aging of the population, can well be summarized with the headline "a lot of work and little salary" [41]. Therefore, it is not surprising that the ILO has focused in recent years on care work, and on the importance of its evolution towards standards identifiable with decent work, promoting, among other aspects, both the reduction of certain painful forms of care work, as well as representation, social dialogue and collective bargaining of care workers[42].

In any case, and in the case of Spain, the analysis carried out above allows us to

[40] Gil Gil, J.L., (2020), "Decent work as a goal of sustainable development", *Lex Social. Legal Review of Social Rights,* Vol. 10, No. 1, p. 174.

[41] Razavi, S. and Staab, S., (2010), "A lot of work and little salary. International Perspective of Care Workers", *International Labour Review,* Vol. 129, No. 4, p. 449.

[42] To this end, it should be noted that the ILO report entitled "Care Work and Care Workers for a Future of Decent Work" established at the time a set of recommendations and policy measures, which have been identified as the five R's: (a) Recognition of the value of unpaid care work; (b) Reduction of certain arduous forms of care work; (c) Redistribution of care responsibilities between women and men, and between households and the State; (d) Adequately reward care work; (e) Representation, social dialogue and collective bargaining of care workers. This set of Recommendations, in turn, are part of the set of actions that are considered strategic for the achievement of UN Sustainable Development Goal 5, which aims to achieve gender equality and empower all women and girls, since it is estimated that gender equality at work will not be achieved if it is not with substantial progress in the care work in the five dimensions indicated (in this sense Molero Marañón, M.L., (2020), "Care workers: for a future of decent work", *Revista de Derecho Social*, no. 89, p. 44, who precisely reflects in this work on the problems registered by care work both from its unpaid perspective – in its aspect especially of family care, usually performed by women - as paid).

conclude that from the labour perspective, care work still has an important way to go to achieve recognizable standards of decent work in all its areas. Valuing the important contribution of the Spanish courts to the resolution of significant problems in this sector, such as the establishment of criteria for the determination of the applicable collective agreement, as we have had the opportunity to verify, or the consolidation of a flexible vision of the functions to be developed by geriatricians, which places the needs of dependent people at the center of the care model, The truth is that the sector continues to suffer from the problems arising from the poor functioning of its industrial relations system, and particularly its collective bargaining.

As we have had the opportunity to verify, the recent labour reform of 2021 – also the significant increase in the SMI in recent years – will somehow be able to contribute to an improvement in the scenario in which the VIII State Framework Agreement will have to be implemented at some point, by inducing a rebalancing of the representative capacity of trade union organizations – contains the threat that company agreements may establish lower wages. on a preferential basis, as well as curbing the possibility that at some point a conventional regulatory vacuum may occur -, and facilitate a kind of legal dam that contains the reduction of labor costs via a decrease in workers' remuneration. But this does not seem to be enough, since the evolution of labour relations in this sector speaks to us of a historical disagreement between the majority trade union organizations that has determined that, while the CC.OO. in these years it has been the one who on the social side has signed the successive state sectoral agreements, the UGT union has registered an intense judicial activity in defense of the interests of the workers of this sector, with different results. Nor have the negotiations traditionally been easy, and proof of this are the more than two years that the social partners have been talking to try to reach a new national agreement that does not finish arriving, a situation that should not be surprising since the negotiation of the collective agreement currently in force – and whose legal effectiveness has been in a situation of extension for years (ultraactivity) – was also complicated.

Therefore, it would be interesting if at some point the trade union organizations managed to unify positions against a historically stubborn employer, especially when it comes to agreeing and recognizing remuneration rights. In any case, it should not be ignored that this is a sector very dependent on public funding, and in

this sense the improvement above all of the remuneration conditions would require an increase in the resources that finance the sector.

I do not want, however, to end this analysis without making two final considerations of interest. The first has to do with some of the assessments made by the Economic and Social Council (ESC), in 2020, in its report on the system for the promotion of personal autonomy and care for people in situations of dependency. Specifically, the report describes as "overwhelming" the presence of women in the professional exercise of this sector, close to 90% of the workforce in 2018, "which is practically double its weight in the whole occupation and is also above the health sector, one of the most feminized ". [43] It also emphasizes that this group has clearly entered "maturity, with an average age of around 45 years, in line with that of the health sector and similar to that of the total number of employed people (43 years)". [44] Therefore, future policies in relation to it, and the working and employment conditions agreed in future collective agreements, should take into account these two variables: gender and middle age. In the case of the exercise of functions by these workers – rather workers – more and more attention should be paid to the form and means available to them to exercise these functions, since they often have to assume jobs that have an important physical component. It is all very well that progress is being made towards a flexible conception of the work carried out, especially in certain areas of the care sector, such as geriatricians, but this should be accompanied by greater attention to the means available to carry out these functions, especially in view of the measured age of these workers.

Likewise, the "very high feminization of personnel in these activities (...) forces us to reflect on the effects of the deployment of the dependency care system from a gender perspective", as the CES itself has recommended [45]. It would therefore be necessary to go beyond what is the negotiation and formulation of equality plans – a legal obligation established in our labor legislation for companies with more than 50 workers – so that future collective agreements in the sector are agreed taking into account the overwhelming feminization, using in this case the words of the CES itself, of this sector. And from this perspective it seems clear that one of the

[43] CES, (2020), *The system for the promotion of personal autonomy...*, op. cit., p. 212.
[44] CES, (2020), *The system for the promotion of personal autonomy...*, op. cit., p. 212.
[45] CES, (2020), *The system for the promotion of personal autonomy...*, op. cit., p. 214.

aspects that should be reviewed is the wage policy that these workers have been suffering so far, and to which I have referred in previous pages. In this regard, I would like to recall that the report in question also includes the existence of a "not inconsiderable percentage of people employed in the sector who are looking for another job for salary reasons", which has led to the existence of significant flows of women workers in the sector who seek to jump into the health sector in search of better conditions. As the CES itself has pointed out, "these are professionals with equivalent profiles and dependent on the same level of the Administration" on many occasions, [46]so there is a long task of salary equalization ahead that saves clearly unjustified situations.

The second consideration has to do with the recent judgment of the National Court that constitutes the last known chapter of the long struggle of the workers of the sector for the improvement of their remuneration conditions [47]. As I pointed out at the beginning of this analysis, the judgment gives a positive response to the demand raised by the CC.OO union, to which the one presented by the UGT union was joined, in relation to the recognition of the increase in wages agreed at the time in the VII State Framework Collective Agreement for Care Services for Dependent Persons, and that the employers of the sector refused to recognize. The lawsuit has its origin in that, unlike the years 2019 and 2020, where the CPI was negative, and as I have pointed out there was no wage increase, in 2021 the increase in the CPI was 6.5%, and yet the employer refused to act accordingly when updating the salaries of workers in the sector. More specifically, the applicant requested recognition of the right of workers falling within the scope of the agreement "to the application of the automatic wage review clause contained in Article 8 of the Convention in question and, consequently, to increase their remuneration concepts for the financial year 2022 by the amount corresponding to the percentage of the real consumer price index (CPI) for the year 2021, This is at 6.5, per 100." For the National High Court, the literalness of art. Article 8 of the Convention leaves no doubt as to the right of the claimants, and has consequently ruled in favour of them. Recognizing that the wage increase in this case is significant, and that possibly no one years ago could have anticipated a rise in the CPI of this caliber, the truth is that this litigation tells

[46] CES, (2020), *The system for the promotion of personal autonomy...*, op. cit., p. 213.

[47] Decision No. 95/2022, of the Social Chamber of the National High Court, of June 20, 2022.

us again about the difficulties that in this sector register the social agents to solve autonomously the discrepancies around the ordinary management of the issues of the labor order. There is therefore also a significant way to go in this area, in line with the proposal made by the ILO in relation to care work, and which I referred to earlier: the promotion of representation, social dialogue and collective bargaining of care workers. Years go by, and yet social dialogue and collective bargaining in the sector are not exactly as fluid as they should be to lay the foundations for a sector with decent and decent working and employment conditions. Therefore, new dynamics of relationship between the different actors involved should also be sought in this area.

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