

Non-discrimination of older workers in the Spanish and the European Union context

La tutela del derecho a la no discriminación de los trabajadores de edad avanzada en el contexto español y de la Unión Europea

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Abstract: Age is a factor of discrimination for which, on many occasions, the affected is not even aware, probably because of the existing values in the society. Spanish Constitution does not mention expressly the age as a cause of discrimination. In the context of the European Union only in the year 2000 appeared the first Directive (Directive 2000/78/EC) aiming at the achievement of equal treatment in employment and occupation, prohibiting discrimination on grounds, among others, of age. These circumstances may have contributed to create this social perception.

Discrimination on grounds of age occurs mainly –but not only- at the beginning and ending of the employment relationship. In the first case, requiring a maximum age for access to employment. In the second, establishing criteria or preferences based on age to determine the extinction of the employment contract or, even, the exit from the labour market. Both aspects will constitute the object of this study, analyzing the issue from the perspective of the Spanish and European Union regulations, focusing not only on the study of discriminatory conducts, but also on its remedies.

Keywords: Older workers. Discrimination on grounds of age. Protection of fundamental rights. Spanish and European Union legislation

Resumen: La edad constituye un factor de discriminación respecto del que, en ocasiones, el afectado no es ni tan siquiera consciente, probablemente como consecuencia de “valores” asumidos socialmente, que hay que combatir. El hecho de que, en el caso español, la Constitución no mencione expresamente a la edad como causa de discriminación, y de que, en el ámbito de la Unión Europea, no fuese hasta el año 2000 cuando apareció la Directiva 2000/78/CE sobre igualdad de trato en el empleo y la ocupación, prohibiendo la discriminación por motivos,

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entre otros, de edad, pueden haber contribuido a generar esa percepción social. La discriminación por razón de edad en el ámbito laboral se ha venido manifestando fundamentalmente en los momentos de inicio y fin del contrato de trabajo. En el primer caso, exigiendo una edad máxima para el acceso al empleo. En el segundo, estableciendo criterios o preferencias fundados en la edad para determinar la extinción del contrato de trabajo o, incluso, la salida del mercado laboral. Ambos aspectos constituyen el objeto de este estudio que incidirá no solamente en la presentación y estudio de las conductas discriminatorias, sino también en los mecanismos su reparación.

Palabras clave: Trabajador adulto. Discriminación por razón de edad. Tutela de los derechos fundamentales. Ordenamiento español y comunitario.

1. Age as a cause for discrimination in the legal systems of Spain and the European Union

As we already know, discrimination implies differentiated treatment of people who are in equal circumstances, according to a criterion of differentiation that provokes special repudiation from the judicial system, when affecting groups that have traditionally been subject to harassment, persecution or marginalisation in the society, perpetuating differentiated treatment which is not only negative but also goes against their dignity¹. This is deeply rooted, either due to the actions of public powers or due to social practice². Specifically, the criteria used to demonstrate differentiated treatment allows us to distinguish the principle of equal treatment from the prohibition of discrimination. The former represents a manifestation of moving from the Old Regime to a Rule of Law, where one grants subjects the condition of citizens, and with this, a series of rights that limit the absolute power of the monarchy. The latter recognizes rights to the people in order to protect their dignity, limiting the actions or decisions anybody could adopt. This difference therefore implies that while prohibition of discrimination affects both individuals and public authorities –so that discrimination is not acceptable neither in legal relationships with the public administration, nor in private relationships among particular citizens-, the principle of equal treatment is applicable only to public authorities and the laws³ –hence, in particular relationships there is not the need to observe the principle of equal treatment-.

As the Judgement of the Spanish Constitutional Court 75/83, 3 August 1983, states, article 14 of the Spanish Constitution drafts the principle of equality before the Law as a subjective citizen right, avoiding discriminatory privileges and inequalities among them, provided that they are in the actual common situation where equal treatment must be applied. In these circumstances, the rule must be the same for everyone, including them in the provisions with the same concession of rights that prevents inequality. Not acting legislatively this way would therefore give rise to differentiated treatment caused by arbitrary, or at the very least unjustified conduct, of the legislative public power.

Once explained the difference between both principles, which are not always well delimited in Court⁴, we must now indicate the potential causes of discrimination that are listed in article

¹ *Sentencia del Tribunal Supremo* (STS) 17 May 2000 (appeal nº. 4500/1999)

² *Sentencia del Tribunal Constitucional* (STC) 62/2008, 26 May.

³ Including other regulations considered as law in a broad sense, thus, including not only Acts of the Parliament but also Statutory Instruments and in case of Spanish legislation the so called Statutory collective agreements (agreed following the rules foreseen in the *Estatuto de los Trabajadores* which have *erga omnes* efficacy). Collective agreements which have not that consideration are excluded, as well companies' practices (STS 11 November 2008, appeal nº. 120/2007) and individual decisions (STS 19 October 2003, appeal nº. 2869/2002).

⁴ Even rules coming from European Union do not properly distinguish between these two principles as according to them 'equal treatment' mean that there shall be no direct or indirect discrimination whatsoever on grounds of religion or belief, disability, age or sexual orientation (art. 2.1 Directive 2000/78/CE).

14 of the Spanish Constitution, where age is not a listed factor. This is a list that, despite being drafted openly (as it contemplates a final criterion related to *any other personal or social condition or circumstance*) has been interpreted in a restricted way by Spanish courts, excluding causes such as temporary professional relationships⁵ or illness⁶. Despite this circumstance, age has been listed by the Spanish judicial system as an unacceptable motive for differentiated treatment. Any unequal treatment on the grounds of age is considered discriminatory if there is no objective, reasonable and proportionate justification for it. This way, the Judgement of the Spanish Constitutional Court 22/1981, 2 July 1981, adopted a few years after the proclamation of the Spanish Constitution of 1978 and the first text (1980) of the Statute of Workers after the fall of the dictatorship, included that age could be considered as a factor which causes discriminatory treatment⁷ when evaluating the provision contained in the current fifth annex of the Statute of Workers as discriminatory, which established the maximum employment age as sixty-nine years old, without prejudice to workers being able to complete the accepted period of service before retirement.

With regards to the ruling of the European Union, Council Directive 2000/78/EC, related to the establishment of a general framework for equal treatment in employment and occupation, expressly lists age as a criterion for discriminatory differentiation. Recording the concern for protecting of older workers in discriminatory situations in a legislative instrument has come much later than the initiatives designed to combat other factors of discrimination, such as sex or nationality, given that the fight against any discrimination for these reasons was already stated in the foundational treaties of the European Communities, because there were needed to implement them⁸. Age as a discriminatory differentiating criterion is included in Primary European Union law with the reform introduced in the Constitutive Treaty of the European Community by the Treaty of Amsterdam in 1997, although the Community Charter of the Fundamental Social Rights of Workers of 1989 recognised the importance of combatting all types of discrimination, highlighting, among others, the need to adopt appropriate measures for social and economic integration of older people and people with disabilities.

On the other hand, as stated in the Commission Report of the 17 January 2014⁹, at a time when the Directive adopted the concept of discrimination on grounds of age in employment and occupation was new in many member States¹⁰ -demanding from business people a different approach to workers' age- professional discrimination against older workers acquired more and more relevance due to the demographic evolution in Europe and the tendency of these workers to remain in the labour market longer, via the deletion of forced retirement or the increase in retirement age and the dis-incentivisation for early retirement.

To conclude, it is worth pointing out that, according to the interpretation made by the European Court of Justice, the principle of non-discrimination on grounds of age must be considered

⁵ STS 17 May 2000 (appeal n°. 4500/1999).

⁶ STC 62/2008, 26 May. However, European Court of Justice (CJ) has forced to modify such an interpretation in relation to illnesses which can be equated with disability regarding antidiscrimination rules (for instance, J CJ 18 January 2016 (C-270/16, *Ruiz Conejero*).

⁷ As later on confirmed by SSTC 75/1983, 3 August, or 31/1984, 7 March (which refers that art. 17 of *Workers Statute* includes a reference to age as a discriminatory criterion).

⁸ Fighting against sex and nationality discrimination were needed in order to grant freedom of movement of European citizens and avoid social dumping. Thus, art. 7 and 48 of the ECC Treaty 1957 forbade any discrimination on grounds of nationality in relation to employment, retribution and any other working condition, and art. 119 of the same Treaty was referred to discrimination on grounds of sex (whether limited to retribution).

⁹ *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')* COM(2014) 2 final.

¹⁰ The concept of non-discrimination is closely linked by tradition and the predominant values scales in every historical moment. GARCÍA MURCIA, 2006, "Igualdad y no discriminación en las relaciones laborales" AA.VV. *La transformación del Derecho del Trabajo en el marco de la Constitución Española*. La Ley. Madrid, p. 386.

as a general principle of European Law¹¹ (JCJ 22 November 2005, C-144/04, *Mangold*, paragraph 75¹²) as Directive 2000/78 does not establish the principle of equal treatment in terms of work and occupation. Its first article merely aims “to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation, the source of the actual principle underlying the prohibition of those forms of discrimination being found” (paragraph 74)

2. Scope of the prohibition of discrimination on grounds of age (elderly workers)

2.1. Direct and indirect discrimination

The prohibition of discrimination, both for age and for other circumstances, includes both direct and indirect discrimination, the former understood as offering less favourable treatment to one person compared with others who are in the same situation due to their age, while indirect discrimination is understood as a particular situation of disadvantage can be attributed to people of a certain age via provisions, criteria or practices which are apparently neutral (article 2.2 of the Directive 2000/78/EC)

As indirect discrimination is a more complex concept than direct, the member States have faced difficulties when applying it correctly, because while the principle is enshrined in legislation, its application in practice still presents a challenge¹³, and this is highlighted in the *Report on the Implementation of the Race and General Framework Directives*¹⁴. When dealing with this matter, we must point out that cases that have been debated up until now related to age discrimination have mainly been cases of direct discrimination (either concerning access to employment¹⁵, working conditions¹⁶, or termination of employment¹⁷)¹⁸, and in many occasions age has appeared as an indirect aspect to be considered in discrimination on grounds of sex¹⁹. This situation may derive from the relative newness of age being

¹¹ What confers to this principle a general applicability that goes beyond the limits of Directive 2000/78/CE. MARTIN ROMERO, 2017. “Discriminación por edad: últimas tendencias de la jurisprudencia del TJUE” AA.VV. *Cambio laboral y políticas inclusivas*, Valencia, Universitat de València, p. 185.

¹² In the same sense, JCJ case C-447/09 (*Prigge et al*) paragraph 38.

¹³ *Joint Report on the application of Council Directive 2000/43/EC... cit.*, p. 9.

¹⁴ Equinet. European Network of Equality bodies, *Report on the Implementation of the Race and General Framework Directives*, 2013, p. 15 and 16. http://www.equineteurope.all2all.org/IMG/pdf/equinet_equality_law_in_practice_2013_report_final_covers.pdf (last access, 31-10-2019).

¹⁵ JCJ 13 November 2014 (C-416/13, *Vital Pérez*) related to a national legislation which set the maximum age for recruitment of local police officers at 30 years (about local police, see also STC 20/2012, 1 March). Regarding National Police, STS (contencioso-administrativo) 21 March 2011 (appeal n.º. 184/2008) and JCJ 12 January 2010 (C-229/08, *Wolf*) related to a national legislation which laid down an age limit of 30 for recruitment to an intermediate career post in the fire service. SSTC 75/1983, 3 August, and 37/2004, 11 March, related to legislation setting a maximum age for recruitment of certain job post in the Public Service.

¹⁶ JCJ 9 September 2015 (C-20/13, *Unland*) precluding a provision of national law under which the basic pay of a judge is determined at the time of his appointment solely according to the judge's age. Similar to that, JCJ 8 September 2011 (C-297/10, *Hennings and Mai*) precluding a measure laid down by a collective agreement which provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee's age.

¹⁷ JCJ 19 April 2016 (C-441/14, *DI*) related to a national legislation which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement. JCJ 5 July 2017 (C-190/16, *Fries*) related to the capability to act as a pilot in ferry flights to those who have attained the age of 65. JCJ 12 January 2010 (C-341/08, *Petersen*) related to a national measure setting a maximum age (68 years) for practicing as a panel dentist. JCJ 18 November 2010 (joined cases C-250/09 and C-268/09, *Georgiev*) related to a national legislation under which university professors are compulsorily retired when they reach the age of 68.

¹⁸ Quoting PÉREZ AMORÓS, employees' age is a transversal referent which affects any of the three parts which it is possible to appreciate in the vital cycle of them (“Configuración y significación de los trabajadores de edad: notas introductorias” *Documentación Laboral*, n.º 112/2017, p. 20 and 23).

¹⁹ JCJ 18 November 2010 (C-356/09, *Kleist*) Related to national rules which, in order to promote access of younger persons to employment, permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that

considered as a discriminatory factor compared to others such as sex, where discrimination tends to be more indirect than direct precisely because people are more aware of it (putting aside questions related to maternity, work-home life balance or sexual orientation)²⁰. As a result, for example, practices related to demanding that somebody accredits obtaining a diploma before a certain date are not often questioned from an age-discrimination perspective, even when this could potentially constitute indirect discrimination²¹, due to the fact that the percentage of employees excluded for age as a consequence of this requisite would be statistically relevant²², an essential factor when evaluating the existence of indirect discrimination²³, as the Judgement of the Spanish Constitutional Court 240/1999, 20 December 2019, points out, in the case of indirect discrimination we do not compare individuals but social groups whose different individual components are studied statistically.

2.2. *The possible justification of the difference in treatment according to a criterion of differentiation, such as age*

The differences in treatment due to age can be justified, just like the other differentiation criteria (already discriminatory or 'simply' suppose a violation of the principle of equal treatment) so that they do not merit the reproach of the judicial system. This way, although citizens have constitutionally been granted the subjective right to receive equal treatment²⁴ as well as the right not to be discriminated against²⁵, it is possible to introduce differences provided that there is a sufficient justification for this difference, that is founded and reasonable, according to generally accepted criteria and value judgements, and whose consequences are not in any way disproportionate²⁶.

That said, although it is true that in both cases (equal treatment and discrimination) the existence of a justification that prevents juridical reproach is acceptable, in the case of discrimination for reasons established in article 14 of the Spanish Constitution -that imposes the recognition of equality as end and generally as means²⁷- it is vital that there is an objective and reasonable justifica-

right is acquired by women at an age five years younger than the age at which it is acquired by men. STS 31 May 2017 (appeal nº. 88/2017) related to a national rule fixing a maximum age limit in order to take part in the election of a Member of the European Court of Human Rights (*Acuerdo del Consejo de Ministros de 20 de enero de 2017*. B.O.E. 31 January 2017).

²⁰ About the awareness of the criterion of differentiation as a discriminatory one and the specific disadvantage of age in relation to sex, see APARICIO TOVAR and OLMO GASCÓN, 2007, *La edad como factor de tratamientos desiguales en el trabajo*. Bomarzo Albacete, p. 43 (footnote 74).

²¹ In the same sense, it could constitute indirect discrimination, on grounds of age, the selection of employees to be affected by a collective dismissal using the criterion of seniority in the Company, then requiring an objective, reasonable and proportionate justification (STSJ Navarra 16 January 2014, appeal nº. 345/2013 used this criterion in order to protect senior employees) However, JCJ 6 July 2012 (C-132/11, *Tyrolean Airways Tiroler Luftfahrt*) does not consider that difference in treatment according to date of recruitment by the employer concerned (seniority) is not, directly or indirectly, based on age or on an event linked to age. In relation to seniority as an indirect manifestation of age, APARICIO TOVAR and OLMO GASCÓN, *La edad como factor... cit.* p. 151 ff.

²² Nevertheless, we must take into account art. 6.1 of The Directive 2000/7/EC that admits Member States to provide that certain differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim. Among these differences might be included the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment.

²³ JCJ 14 April 2015 (C-527/13, *Cachaldora Fernández*).

²⁴ Which limits public powers and demands that equal situations are treated identically in terms of juridical consequences.

²⁵ Which represents an explicit prohibition of certain deep-rooted differences that have placed sectors of the population in positions which are not only unfavourable, but which go against the dignity of the person- both due to the actions of public power and due to social practice.

²⁶ STC 66/2015, 13 April.

²⁷ In contrast to the generic principle of equality which does not postulate parity as either a means or an end, but only requires reasonability in the regulatory difference of treatment, "the prohibition on discrimination implies a judgment of unreasonableness in making the differentiation already established *ex Constitutione* which is imposed as a purpose and generally as a means of creating parity" (STC 229/1992, 14 December).

tion, in accordance with generally accepted criteria and judgement values, whose demand must be applied in relation to the purpose and effects of the considered means. For this, there must therefore be a reasonable degree of proportionality between the means used and the finality sought²⁸. Ultimately, the Spanish Constitutional Court demands greater rigour in the analysis of the justification of unequal treatment caused by a discriminatory factor, such as age, so that it can only be used exceptionally by the legislator as a criterion of legal differentiation, which implies the need to use a much stricter rule in the constitutional legitimacy hearing, as well as greater rigour in terms of the material demands of proportionality²⁹.

The possibility of finding a justification for differentiated treatment according to a discriminatory criterion is equally admitted in the European legal system. This is shown in the Directive 78/2000/EC, although we seem to deduce from the second article that this possibility is only admitted with indirect discrimination. Nevertheless, articles 2.5, 4 and 6 of the Directive expressly refers to a various justifications, applicable to any kind of discrimination, on grounds of necessity for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others (article 2.5); by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out (article 4.1); legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary (article 6).

This way, and related to different treatment on grounds of age that affects older workers, which is what we are dealing with here, justifications that have been provided to justify that differentiated treatment are been to a great extent related to the workers' decreased performance and the corresponding derived risk to the workers themselves or to third parties; or with the argument that the differentiated treatment is a consequence of an special protection for the group of older workers. There were also justifications linked to the situation of the labour market and employment policies, or the nature of the activity to be carried out. The first three were claimed in the resolution of the question about the establishment of a maximum age for a person to be employed in Spain (69 years) dictated in the Judgement of the Spanish Constitutional Court 22/1981, 2 July, and in this case, the three were rejected. It is worth pointing out that the supposed differences in treatment according to discriminatory criteria are, or should be, exceptional in the presence of the general rule, and as such, they must be admitted and interpreted in a restricted manner³⁰. In any case, establishing the boundaries between differences in treatment that should be considered as acceptable and those that are should not, becomes very complicated³¹.

2.2.1. Presumption of incapacity

In terms of the presumption of ineptitude of a person on the grounds that they have reached a certain age, the STC 22/1981, rejects its admissibility so it therefore constitutes a general presumption that would affect all activities, independent from the specific skills required for each profession,

²⁸ STC 75/1983, 3 August.

²⁹ STC 66/2015, 13 April.

³⁰ APARICIO TOVAR and OLMO GASCÓN, *La edad como factor...* cit. p. 37. However, as BALLESTER PASTOR suggests, the wide range of exceptions to the principle of non-discrimination on grounds of age contemplated in the Directive 2000/78/EC draws to a degeneration of the antidiscrimination protection in cases where age is used as a factor to introduce different treatment ("Género y edad: los dos extremos del principio antidiscriminatorio comunitario" in AA.VV., *La relevancia de la edad en la relación laboral y de seguridad social*. Thomson Reuters, Cizur Menor, 2009, p. 35).

³¹ GARCÍA MURCIA, "Igualdad y no discriminación en las relaciones laborales", cit., p. 402.

economic sector and specific role³². Also, the Constitutional Court maintains that such a presumption would not be admissible as it would only affect those employed by a company, and excludes those working in the same role but as freelancers. Finally, the Court points out that a generalised incapacity to work based on a presumption *juris et de jure* of ineptitude would lack constitutional base, as it affects the same base of the right to work understood as the freedom to work, effectively cancelling the essential content.

Concerning the loss of aptitude of the worker and the potential risk that this situation could provoke for them or a third party is alluded to in the Judgement of the Court of Justice 12 January 2010 (C-341/08, *Petersen*), related to a national provision that establishes an age limit of 68 years to practice dentistry³³. Here it is discussed that, despite this not being the intention declared by the legislator, this age limit was justified by the need to protect patients under the statutory health insurance scheme from the risks posed by older dentists whose performance is no longer optimal³⁴. This argument is rejected by the Court of Justice, but not due to the lack of validity of this presumption, as the Spanish Constitutional Court reasoned in their judgement in 1981, but because the exception regime of the rule of the Member state where the conflict came from (Germany) is so wide, allowing dentists who are older than 68 to continue working outside the concerted system, that the measure cannot be considered essential for the protection of public health as it is incoherent (paragraphs 61 and 62).

This judgement also covers the evaluation of the safeguarding of public health as a possible justifying cause for differentiated treatment, which -stands- must be analysed by a state judge, including the prevention of a serious prejudice to the financial balance of the social security system, so that this circumstance equally contributes to the attainment of an increased level of health protection (paragraph 64)³⁵.

In terms of public safety, the Judgement of the Court of Justice 11 September 2011 (C-447/09, *Prigge and Others*) related to airline pilots, indicated that *a measure such as that at issue in the main proceedings, which fixes the age limit from which pilots may no longer carry out their professional activities at 60 whereas national and international legislation fixes that age at 65, is not a measure that is necessary for public security and protection of health, within the meaning of the said Article 2(5)*. This decision, restricted to analysing the limitation of the maximum working age at 60 years old, imposed by the German judicial system, left the justification, or lack of, of the limitation at 65 years to practice this activity established in international regulations up in the air. This question is debated in the Judgement of the Court of Justice 5 July 2017 (C-190/16, *Fries*) and it was concluded that the objective of guaranteeing air traffic safety constitutes a legitimate objective and the limitation

³² In this sense STC 31/1984, 7 March 1984, related to the different minimum wage according the age of the employee (over 18 or below that age) by then regulated in the Spanish legislation.

³³ Limit affecting to panel dentists who wish to continue practicing beyond that age limit. Taking into account that 90% of the population are covered by the statutory health insurance scheme based on the panel system, the CJ states that such a limit affects the conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion within the meaning of Article 3(1)(a) of the Directive.

³⁴ According the national court, the legislature, in view of the discretion available to it, was not required to provide for an individual examination of the physical and mental capacity of every panel doctor who has reached the age of 68. On the contrary, the legislature was entitled to adopt general rules based on experience.

³⁵ According to the national court, the measure pursued several objectives (protection of the health of patients covered by the statutory health insurance scheme; second, the distribution of employment opportunities among the generations; and third, the financial balance of the German health system). In relation to the aim of preserving the financial balance of the public healthcare system, the CJ states that the measure affects a system which belongs to a sphere for which the State has financial responsibility, and by definition does not extend to the private health system. Consequently, the Court concludes that the introduction of an age limit which applies only to panel dentists, in order to control public health sector expenditure, is compatible with the objective pursued. It is important to recall art. 2.5 of the Directive stating that the Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

provided, being undeniable that these capacities decrease with age, the age limit of 65 years is only applicable in the field of commercial air transport. When considering this for the establishment of the age limit, it was considered that *the greater technical complexity of aircraft used in commercial air transport and the higher number of persons concerned in that field, concluding that such differences justify different rules being imposed in order to ensure air traffic safety for both types of transport* (paragraph 50). The measure is therefore considered proportionate, constituting an adequate method to maintain an adequate level of civil aviation safety in Europe and without implying the establishment of an imperative forced retirement regime, *as that age limit does not have the automatic effect of forcing the persons concerned to withdraw definitively from the labour market, as that limit does not establish a mandatory scheme of automatic retirement and does not necessarily entail the termination of the employment contract of an employee on the ground that s/he has reached the age of 65* (paragraph 60).

2.2.2. *Treating older workers differently because of their age by virtue of a special protection method for older workers*

This second justification for unequal treatment on the grounds of age, mentioned in section a) of article 6.1 of the Directive 2000/78/EC³⁶, was also rejected by the Spanish Constitutional Court in the aforementioned sentence of 1981. In this, the idea that forced retirement can be used as a method of protection for older workers, presented as a new conquest in the professional humanisation process, was rejected. For its rejection, the criteria established by international regulations concerning retirement were mentioned³⁷, where it is recommended that, wherever possible, measures should be taken to help the worker decide to retire voluntarily, and establish a system to allow for a progressive transition period between professional life and dedicating their lives to the activity of their choice.

This type of reasoning was also subsequently used related to other differentiating factors that lead to discrimination, such as sex. Effectively, the Judgement of the Spanish Constitutional Court 229/1992 debated the prohibition of female workers inside mines that existed in Spain until this sentence -and this time it was backed by one ILO Convention- indicating that there was no doubt that prohibiting women from working inside mines, despite having been established in the past as a protective measure, cannot be classified as a positive or supportive action or advantage that will lead to bringing about equal opportunities, because it does not favour this. In fact, it even restricts it, as women are banned from entering certain professions. This reasoning was also used by the Judgement of the Court of Justice 25 July 1991 (C-345/89, *Stoeckel*) related to prohibiting women from night work, also endorsed by the provisions of the ILO, concluding that *the concern to provide protection, by which the general prohibition of night work by women was originally inspired, no longer appears to be well founded and the maintenance of that prohibition, by reason of risks that are not peculiar to women or preoccupations unconnected with the purpose of Directive about equal treatment* (paragraph 18)

Furthermore, the Judgement of the Spanish Constitutional Court 22/1981, 2 July, did not admit differentiated treatment on grounds of age that implies forced retirement through analogy is the same as the recognition of a minimum age to access work. While the implementation of a minimum age to work has specific reasoning behind it (guaranteeing basic training, within a policy that aims to promote real and effective equality for all citizens and removing obstacles that impede

³⁶ Where is established that justified differences of treatment on grounds of age may include, among others, the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection.

³⁷ ILO Recommendation n°. 162 concerning Older Workers.

them from developing their personalities completely, both physically and psychologically) this cannot be used to justify the establishment of a maximum age.

2.2.3. Justifications linked to the situation of the labour market and work policies

The joint report on the application of Directive 2000/43/EC and Directive 2000/78/EC³⁸ reminds us that *Article 6 of the Directive provides, in certain situations, a justification for differences of treatment on grounds of age are admissible if objectively and reasonably³⁹ justified by a legitimate aim and the means of achieving the aim must be appropriate and necessary.* In this sense, the considerations surrounding the labour market and work policies have been used very frequently as a justification for differences of treatment on grounds of age. However, these considerations have not always been accepted to eliminate the reproach of unlawfulness of unequal treatment.

In this sense, the Judgement of the Spanish Constitutional Court 22/1981 considered that the establishment of a maximum age to remain in the labour market (age of forced retirement) would be constitutional provided that with this, the purpose sought by the employment policy was achieved⁴⁰. That would be the case, concerning a situation of unemployment, where there should be a guarantee that, with this limit, unemployed members of the community would be offered the chance to work, which does not suppose, under any circumstances, an amortisation of job posts. In the particular case analysed, the age of forced retirement was defended within the possible constitutionality of an unconditioned maximum working age, without subjection to any conditions or requirements.

Hence, when this conditioning has been accredited, the lawfulness of unequal treatment has been admitted, as long as this does not disproportionately damage a benefit guaranteed by the legal system. This way, a maximum age to remain in the workforce has been admitted provided that the individual sacrifice of the employee who has been forced to retire is compensated in some way. This can therefore only happen when the employee will have access to retirement funding, having worked for the required number of years to access this⁴¹.

In this same sense, the STC 66/2015, 13 April, concerning the selection criteria for workers affected by collective dismissal, indicated that age could be taken into consideration as an objective

³⁸ COM(2014) 2 final.

³⁹ Expression that according to CJ 5 March 2007 (C-388/07, *Age Concern England*) has no special relevance as *it is inconceivable that a difference in treatment could be justified by a legitimate aim, achieved by appropriate and necessary means, but that the justification would not be reasonable* (paragraph 65).

⁴⁰ In similar terms, CJ has pointed out that the prohibition on any discrimination on grounds of age must be interpreted as not precluding national legislation pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime, where

— the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and

— the means put in place to achieve that aim of public interest do not appear to be inappropriate and unnecessary for the purpose.

JCJ 16 October 2007 (C-411/05, *Palacios Villa*); 12 October 2010 (C-45/09, *Fuchs and Köhler*); and 18 November 2010 (joined cases C-250/09 and C-268/09, *Georgiev*).

⁴¹ STC 22/1981. The remaining question refers to determine whether is enough to have completed the minimum number of years worked in order to benefit from a retirement pension, regardless its amount, or it is necessary to reach a certain level of it. JCJ 16 October 2007 (C-411/05, *Palacios Villa*) stands that compulsory retirement once reached the age-limit provided for cannot be regarded as unduly prejudicing, as the measure is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, the level of which cannot be regarded as unreasonable. Thus, the question regards the *reasonability* of the retirement pension (in the case C-411/05, the minimum contemplated in the Spanish legislation) Nowadays, after the *Real Decreto-ley 28/2018* it is necessary that the employee is in conditions to get the 100% of the retirement pension in order to force him to retirement.

criterion, selecting older workers, given the low level of damage or prejudice that unemployment would suppose for people of certain ages. Nevertheless, the judgement stands that this can only be considered legitimate and proportionate if accompanied by effective measures that remediate the negative effects generated by the situation of unemployment, as the mere fact that a worker is approaching retirement age can never, under any circumstances, be considered a sufficient justification for them being selected for dismissal. It is therefore not sufficient to justify the selection of a worker for collective redundancy due to age because they will have access to a retirement pension in the short or medium term. It would be vital to arbitrate specific protection mechanisms for the period between the worker losing their job and the time that he is able to access their retirement funding⁴².

The STC 66/2015 considered the fact that the company had subscribed to the special conventions referred to in article 51.9 of the *Estatuto de los Trabajadores* in cases of collective dismissals affecting workers older than 55 years old. It also considered the fact that, during the consultation periods, they had agreed on certain voluntary improvements to the unemployment benefit for those affected by the Company decision. With this judgement, it seems that one additional requirement has been added to the doctrine of the Supreme Court settled in STS 15 June 2005 (appeal nº. 7284/2000) as this had admitted the criterion of age for the selection of workers affected by collective dismissal, understanding that this is more efficient for the company⁴³, and considering that with the selection of senior workers there is an attempt to generate as little damage as possible to all workers, and particularly those affected⁴⁴.

2.2.4. *Justifications linked to the nature of the activity*

One of the motives expressly admitted as a justification for differentiated treatment on grounds of age was the nature of the activity carried out⁴⁵. This is the case of the provision related to armed forces included in article 3.4 Directive 2000/78. According to it, Member states may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces. This possibility aims to allow Member States (who must define the scope of that derogation) to continue to safeguard the combat effectiveness of their armed forces. The fundamental difference from other possible justifications for unequal treatment is based on the evaluation of it, as in this case it could be carried out *ex ante*, incorporating exclusion of the scope of application of the Directive, so that the activities included in it would never be covered by the Directive.

⁴² SOLÁ I MONELLS, 2017, “La utilización de la edad como criterio de selección en los despidos colectivos: el obligado replanteamiento de una práctica habitual avalada por la jurisprudencia interna”, *Documentación Laboral* nº. 112/2017, p. 57.

⁴³ Otherwise, the Company would have to terminate the employment contracts of these same workers shortly after the collective dismissal –because of their retirement– assuming the added economic cost associated with the training and integration of new workers.

⁴⁴ Who lose their jobs but soon afterwards will get a retirement pension. In relation to the argument about the lower personal costs of choosing senior workers, BELTRAN DE HEREDIA points out that it does not follow the dogmatic legal foundation of the category of employees involved (senior/young employees) and the reasoning demanded from a constitutional basis. He also argues that “throwing” senior employees to retirement does not imply that the decision is less harmful, as there are many other costs to take into account, such as those affecting the employees involved and their families and to the entire society. BELTRÁN DE HEREDIA, 2015, “Despido colectivo y selección de trabajadores: ¿La «edad» es un criterio no discriminatorio? (STC 66/2015)”, en *Una mirada crítica a las relaciones laborales* [en línea] Disponible en: <https://ignasibeltran.com/2015/06/12/despido-colectivo-y-seleccion-de-trabajadores-la-edad-es-un-criterio-no-discriminatorio-stc-662015/> (last access 31-10-2019).

⁴⁵ Art. 4 of Directive 2000/78/EC stands that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 (which includes age) shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

This exclusion is present in the Spanish legal system (article 63.2 of Law 17/1999, of the 18 May, of Armed Forces Personnel Regulations) which states that candidates must not exceed the age limit for entering military training academies in the established regulatory terms. Similarly, to access as a volunteer reservist, the candidate must be over 18 years old and younger than 55 years old for the army and navy positions, and younger than 58 for Officers and Non-commissioned officers (article 170.4) without duly complying with the conditions established in the European Directive, which triggers automatic exclusion of discrimination on grounds of age in this sector.

For this motive, when doubts were raised surrounding differentiation on grounds of age affecting armed forces personnel, it was necessary to justify this unequal treatment⁴⁶. What is sure is that although when searching for the objective and reasonable justification this was not imperative because of European laws, it was necessary due to the prohibition of discrimination established in article 14 of the Spanish Constitution, as there is no similar possibility of automatic exclusion⁴⁷.

The nature of the activity to carry out as a justification for differential treatment on grounds of age, or a characteristic related to age, is expressly stated in article 4.1 of the Directive. In this article it is stated the admissibility of different treatment on grounds of age if this characteristic constitutes an essential and determining professional requirement, provided that the objective is legitimate and the requirement proportional. This justification has been used to justify differential treatment on grounds of age in professions such as airline pilots, firefighters and police officers, and different conclusions have been drawn. Therefore, in the case of firefighters, fixing the upper age limit for hiring at 30 years old has the legitimate objective of guaranteeing the operative character and good functioning of professional firefighters⁴⁸. It is argued that the average technical service of firefighters demands, for certain interventions, an exceptionally high physical capacity that only younger recruits are capable of. Considering the medically proven ageing process, firefighters who exceed 45-50 years old no longer have this high physical capacity and the aforementioned younger recruits have to attend to these more difficult interventions. Thus, a maximum recruiting age aims to guarantee that those working as firefighters can manage the missions that demand a particularly high physical capacity for a relatively long time in this career⁴⁹.

We can conclude that although a presumption of the general scope of ineptitude linked to age is rejected as a possible justification for discriminatory conduct on grounds of age, this presumption is admitted when referring to certain professions, depending on the tasks required⁵⁰. In the case of firefighters, this measure is deemed proportionate, as it could be necessary for the majority of workers in this profession to be capable of completing physically demanding tasks, and therefore, they should be younger than 45-50 years old, meaning that those older than 45 or 50 years old would be assigned less physical tasks, and that younger recruits would be needed to take on the more challenging interventions⁵¹. Therefore, complementary to the presumption of loss of

⁴⁶ STS 5 April 2017 (appeal n°. 1709/2015) regarding to the Guardia Civil. The TS has not follow a clear orientation in its decisions relating discrimination on grounds of age within security corps: STS 25 September 2017 (appeal n°. 2637/2015) and STS 24 November 2015 (appeal n°. 3269/2014).

⁴⁷ On the contrary, art. 8.2 CE says: *The basic structure of military organisation shall be regulated by an organic law in accordance with the principles of the Constitution.*

⁴⁸ JCJ 12 January 2010 (C-229/08, *Wolf*).

⁴⁹ JCJ 12 January 2010 (C-229/08, *Wolf*), paragraphs 33 and 34.

⁵⁰ This explains the rejection of proportionality when fixing a maximum age for becoming local police officers as not all capacities they must possess in order to be able to perform some of their duties (providing assistance to citizens, protecting persons and property, the arrest and custody of offenders, conducting crime prevention patrols and traffic control) are comparable to the 'exceptionally high' physical capacities which are regularly required of officials in the fire service, most notably in fighting fires that the duties of local police officers include. JCJ 13 November 2014 (C-416/13, *Vital Pérez*), paragraphs 38 and 54.

⁵¹ JCJ 12 January 2010 (C-229/08, *Wolf*) paragraph 43: *Recruitment at an older age would have the consequence that too large a number of officials could not be assigned to the most physically demanding duties. Similarly, such recruitment would not allow the officials thus recruited to be assigned to those duties for a sufficiently long period.*

aptitude once reaching a certain age, appears the need to maintain an appropriate staffing structure arises in certain professions⁵². Both aspects were considered when considering the establishment of a maximum age limit to access the Basque Autonomous Police force as proportionate. Functions in this service, unlike those attributed to local police forces, cover all public order management and public security tasks, (protection of people and property, the arrest and custody of criminals and preventative patrols) and these could require physical strength⁵³.

2.2.5. *Justifications linked to training required to perform an activity and years of service*

One justification expressly stated in article 6.1.c of the Directive 2000/78/EC⁵⁴, and repeated in its article 25, refers to professional training. This justification for the establishment of upper age limits for hiring is usually plead together with the allegation analysed in the previous point (related to the particular nature of activity to carry out) and it is related to the need to guarantee a reasonable minimum amount of time in activities that require specific training, so that investments in training can be profitable, in terms of the time that an employee would use the provided training in practice.

Thus, the previously mentioned Judgements of the Court of Justice⁵⁵ analyse the questions submitted for consideration from this perspective also. Even the Spanish Constitutional Court has also done this double approach. This is the case of STC 75/1983 (about the fixation of a maximum age to access the position of a Town Hall financial controller) which is related to the need to guarantee a reasonable period of activity prior to retirement so as not to negatively affect the efficiency of the productive organisation. This sentence argues that the age limit is established with the aim to prevent the role of financial controller from being assigned to workers who, having worked longest in their profession, have a relatively short time before retirement, therefore not giving them much time left to work on the important missions that the law requires them to work on, nor know the particular conditions of the Town Hall whose funds must control. This means that not only experience and complete skills are necessary, but it is also and particularly necessary that these skills can be exploited over a considerable period of time. However, this criterion was reinterpreted in STC 37/2004, 11 March, pointing out that is not valid when the rule is applied in an undifferentiated way to all local public civil servants.

Concerning the justification of differentiated treatment on grounds of age to protect the efficient management of productive organisation, it is important to comment the STC 66/2015, 15 April, related to the establishment of age as a selection criterion for workers affected by collective dismissal, affecting 221 workers. The company justified the criterion for two reasons. The first, which concerned the permanence of workers closest to retirement age, was more burdensome, as they had to cease their professional activity early, generating the need to hire new workers with the consequent investment in training and learning. On the other hand, the company argued that this measure was the one less harmful to the workers themselves, as those closest to retirement age could be affected by dismissal.

⁵² A *satisfactory age pyramid* (JCJ 15 November 2016, C-258/15, *Salaberría Sorondo*, paragraph 47) allowing the maintenance of the operational capacity and proper functioning of the police service.

⁵³ JCJ 15 November 2016 (C-258/15, *Salaberría Sorondo*) paragraphs 34, 40 and 41.

⁵⁴ *Such differences of treatment may include, among others... (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.*

⁵⁵ JCJ 13 November 2014 (C-416/13, *Vital Pérez*) 12 January 2010 (C-229/08, *Wolf*) 15 November 2016 (C-258/15, *Salaberría Sorondo*) Court of First Instance states that it is not the previous training which legitimates this exception but the interest of the service and the required financial balance of the European regimen of pensions (Judgement of 28 October 2004, T-219/02 and T-337/02 *Lutz Herrera/Comission*) This case was about an age requirement in order to the recruitment of European Union staff that the Commission had previously criticized and decided to abolish it gradually.

This first argument related to the greater burden of maintaining older workers is not in accordance to the proportionality test, indicates the Constitutional Court, so therefore the saving in costs of training that the company would have to assume once the affected workers retire lacks sufficient significance to justify the differential treatment on grounds of age. On the one hand, the costs of training derived from the few retired workers (four) are scarcely significant if we evaluate them within a collective dismissal procedure affecting 211 workers. On the other hand, it is equally significant that the mere saving of these future costs is an insufficient selection criterion, as it is not proportionate to the damage that unemployment would cause these affected workers.

2.2.6. *Other possible justifications for differentiated treatment on grounds of age*

As previously mentioned, Directive 2000/78/EC expressly recognises the possibility of introducing different differentiations according to discriminatory categories provided that there is a legitimate purpose for it⁵⁶. In the case of the Spanish legal system, this possibility is not expressly recognised in legislation, but the Spanish Constitutional Court has admitted the legality of differentiated treatment on grounds of age when there is an objective and reasonable justification for it.

Once reached this point, it is worth considering to which extent national legal systems, in our case, the Spanish one, are free to evaluate legitimate purposes that justify differentiated treatment on grounds of age. Concerning this question, it is worth pointing out, first of all, that the European Court of Justice stated that it is not necessary for the Member states to have a specific list of causes that, obeying a legitimate finality, justify different treatment⁵⁷. According to CJ it is not even necessary that the rule clearly specifies the objective sought and for which could be justified a differentiation on grounds of age. These legitimate objectives must, according to the Court, be deduced from the general context of the measure to make juridical control possible on the legitimacy and need of the methods used for implementation⁵⁸. These could be modified without this preventing the evaluation of the concurrence of a legitimate objective that exempts the existence of discrimination⁵⁹. In any case each State is responsible for demonstrating the legitimacy of the objective invoked as a justification to a high level of evidentiary demand⁶⁰.

However, despite this apparent freedom that Member states have to identify legitimate interests, and that could be endorsed by the literal drafting of article 6.1. of the Directive⁶¹, the Court of Justice narrows down the possible justifications for differential treatment on grounds of age, limiting them to the safeguarding of socio-political objectives, in line with what is established in the 25th whereas of the Directive⁶². This leads the Court of Justice to understand how only objectives of general interest

⁵⁶ Arts. 2.2 regarding indirect discriminations; arts. 2.5 and rt. 4 regarding any kind of discrimination (direct or indirect) on any ground; and art. 6 regarding direct or indirect discriminations on grounds of age.

⁵⁷ CJJ 5 March 2007 (C-388/07, *Age Concern England*), paragraphs 43 and 52.

⁵⁸ CJJ 16 October 2007 (C-411/05, *Palacios Villa*), paragraph 57.

⁵⁹ CJJ 6 May 2010 (joint case C-159/10 and 160/10, *Fuchs and Köler*), paragraph 41.

⁶⁰ CJJ 5 March 2007 (C-388/07, *Age Concern England*), paragraphs 65 and 67. CJJ 6 May 2010 (joint case C-159/10 and 160/10, *Fuchs and Köler*), paragraph 78. In the last one, the Court states that the Member States enjoy broad discretion in the choice of measure they consider appropriate, and they can be based on economic, social, demographic and/or budgetary considerations, which include existing and verifiable data but also forecasts which, by their nature, may prove to be inaccurate and are thus to some extent inherently uncertain. The measure in question may, moreover, be based on political considerations, which will often involve a compromise between a number of possible solutions and, again, cannot with certainty lead to the expected result (paragraph 81).

⁶¹ Art. 6.1 does not limit the possible justifications to aims of social policy, but refers to the wider concept of justifications emerging from a legitimate aim (such as legitimate employment policy, labour market and vocational training objectives).

⁶² *The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish*

are legitimate –including guaranteeing a top quality public service⁶³– and not merely individual circumstances which are unique to the affected worker, such as a reduction in costs or improved competitiveness⁶⁴ without, in spite of this, excluding that a national rule may offer workers a certain degree of flexibility to achieve these legitimate objectives⁶⁵.

The question is obviously important, considering that when identifying the groups affected to adopt collective measures (dismissals or suspensions of employment contracts for company's reasons) it is habitual that the age is used as a criterion, alluding to the best company efficiency in this decision –an argument that the Court of Justice deems worthy of rejection– as well as the lowest personal cost for the affected employees, as they are those closest to leaving the labour market upon retirement⁶⁶ –which must be duly accredited if it is to be considered a legitimate interest⁶⁷–.

3. Protection offered by the legal system in the presence of the prohibition of discrimination on grounds of age

The European Directive that develops the prohibition on grounds of age, among other factors, does not harmonise the order of sanctions and resources in case of discrimination, instead giving Member states the freedom to choose between the different appropriate solutions to achieve the objective of the Directive, depending on the different situations that could arise⁶⁸. However, the Directive states that the sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive (article 17). On the other hand, the Directive forces to Member states to ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under the Directive, are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them⁶⁹, even after the relationship in which the discrimination is alleged to have occurred has ended (art. 9).

between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

⁶³ J CJ 6 May 2010 (joint case C-159/10 and 160/10, *Fuchs and Köler*) says that *the aim of establishing an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, can constitute a legitimate aim of employment and labour market policy* (paragraphs 50 and 53).

⁶⁴ Denying the possibility of economic justification in the discrimination on grounds of age: RODRIGUEZ-PIÑERO ROYO, 1989, "La edad como impedimento para la entrada al trabajo: ¿cuándo está justificada?", *Revista Española de Derecho del Trabajo*, nº. 38/1989, p. 325-329.

⁶⁵ J CJ 5 March 2007 (C-388/07, *Age Concern England*), paragraph 46.

⁶⁶ From another point of view, this circumstance put older employees in a weaker position in cases of redundancies as a consequence of a long series of prejudices affecting them (less adaptation to technological innovations; their preference to quit the labour market instead of accepting some changes in their working conditions...) Those prejudices provoke a strong expulsive pressure that can adopt the form of a maximum age limit for keeping the employment. GONZÁLEZ ORTEGA, 2001, "La discriminación por razón de la edad" *Temas Laborales*, nº. 59/2001, p. 101.

⁶⁷ SOLÁ I MONELLS, "La utilización de la edad como criterio de selección en los despidos colectivos... *cit.*, p. 49 ff. (p. 59 in particular).

⁶⁸ In relation to discrimination on ground of sex, J CJ 11 October 2007 (C-460/06, *Paquay*), paragraph 44.

⁶⁹ Procedures that could be engaged by associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, either on behalf or in support of the complainant, with his or her approval.

3.1. *The scope of sanctions*

Regarding this question, the joint report on the application of Directive 2000/43/EC and Directive 2000/78/EC⁷⁰ highlights that the initial problems that many member states considered related to the correct transposition of these rules on sanctions⁷¹ have been resolved as sanctions anticipated by law are generally appropriate. Nevertheless, they continue to generate some doubts. In Judgement of the Court of Justice, 17 December 2015 (C-407/14, *Arjona Camacho*) the question is related to the possibility to interpret the Article 18 of Directive 2006/54, which refers to the dissuasive nature of the compensation to be awarded to a victim of discrimination (in the case, on grounds of sex) as meaning that it enables the national court to award the victim reasonable punitive damages that are truly additional⁷², provided that the amount in question is not disproportionate. The CJ concludes that Article 25 of Directive 2006/54 allows, but does not require, Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex (paragraph 40) as the Directive does not require any specific form of sanction for unlawful discrimination, granting Member States the option of adopting measures which seek to penalise discrimination on grounds of sex in the form of compensation paid to the victim. In such a case, that compensation must in any event be adequate in relation to the damage sustained, guaranteeing real and effective judicial protection and having a real deterrent effect on the employer (the penalties must be effective, proportionate and dissuasive)⁷³.

In the case of Spanish regulations, the anticipated consequences for cases of an employer's discriminatory decision consist of its radical nullity, and the judge observing this shall order the immediate cessation of the action that breaches this fundamental right or, where relevant, the prohibition to interrupt a conduct or the obligation to carry out an omitted action, when one or the other are enforceable depending on the nature of the right or liberty that has been breached⁷⁴. They shall order the reinstatement of the entirety of the claimant's right and the situation must return to how it was prior to the breach of the fundamental right. They shall also order the repair of consequences deriving from the action or omission of the responsible party, including compensation for both moral damages linked to the violation of the basic right and for any additional damages and prejudices incurred as a result of it.

Concerning compensation for damage, the Judgement of the Court of Justice 17 December 2015 (C-407/14, *Arjona Camacho*) indicates that the situation of equality cannot be deemed reinstated if the discriminated party does not get their job back or alternatively, if is not economically

⁷⁰ COM(2014) 2 final.

⁷¹ For example, incorrectly anticipating a maximum limit of compensation in cases of discrimination.

⁷² That is to say, an additional amount which, although going beyond the full reparation of the actual loss and damage suffered by the victim, serves as an example to others (in addition to the person responsible for the damage).

⁷³ This clarifies the decision adopted the 10 April 1984 (C-79/83, *Harz/Deutsche Tradax*) In this judgement the CJ states that full implementation of the directive does not require a specific form of sanction for breach of the prohibition of discrimination but it does entail that that sanction be such as to guarantee real and effective judicial protection. *Moreover, it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.* (paragraph 23).

⁷⁴ The problem arising from omitted actions which are discriminatory regards its coercibility in cases as can be when a person is not hired on discriminatory grounds. In such cases, Spanish Courts have decided it is not possible to substitute employers will by judge's decision as celebrating a contract is a personal option. As an exception, STC 173/1994 admitted it. However, this judgement refers a particular situation as it was not properly a case of denying the contract, but the extension of the existing one (which is closer to dismissal, where it is possible to force the employer to reinstate the employee) and the employer was a Public Administration (whose decisions can never be arbitrary). See ALFONSO MELLADO, 1994, "Comentario a la STC 173/1994: la protección frente a las discriminaciones en el empleo" *Poder Judicial*, nº. 35/1994 p. 379 ff.

The CJ has admitted the possibility to order to hire a person that was rejected on discrimination grounds even if that solution does not emerge from European Directives: JCJ 10 April 1984 (C-79/83, *Harz/Deutsche Tradax*) and 10 April 1984 (C-14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen*).

compensated for the prejudice suffered. This way, when pecuniary repair is the method adopted to achieve effective equality of opportunities this is considered adequate if it must integrally compensate prejudices suffered due to the discriminatory dismissal (paragraph 45). However, the sentence gives no guidelines to resolve the fundamental problem of compensation for moral damages, and what its economic value should be, leaving this to the discretion of the judges⁷⁵.

Concerning this question, Spanish courts have indicated that the quantification of damage or prejudices derived from the illegal conduct can be and must be based on the individual characteristics (severity, reiteration and other relevant factors) of the breaching conduct, admitting that the amount anticipated by the Law for Infractions and Sanctions in Social Order⁷⁶ for the breach of fundamental rights is used as a valid criteria in the evaluation of the moral damage to quantify compensation for this concept.

3.2. Preventive safeguarding in the presence of discrimination

Given that discrimination and breaches of fundamental rights are habitually covered up by actions apparently legitimate (thus, masked in an appearance of legitimacy⁷⁷) it is rather complicated to achieve adequate safeguarding from discrimination as a consequence, among other factors⁷⁸, of the difficulty of providing evidence that motivates the investment of the burden of proof. This explains that, instead of implementing 'reparatory' safeguarding, discrimination must be protected from a 'preventive' perspective', which effectively guarantee the absence of breach to the fundamental right to not be discriminated against. Exploration of this method has already begun, and can also be included concerning age as a cause for discrimination.

In this sense, the aforementioned report alongside the application of Directive 2000/43/EC and Directive 2000/78/EC echo the fact that some Member states have conducted experiments using anonymous CVs for job applications to avoid any prejudice when selecting candidates for job interviews⁷⁹. In the case of age as a discriminatory factor in selection processes, the use of these anonymous CVs ought to be promoted more, as the candidate's age, date of birth and photograph are not included. This is precisely one of the risk factors, alongside a person's sex and nationality, that a Spanish government initiative referred to in 2017, with the aim to prevent the discrimination in access to employment⁸⁰, and which was rejected by the Spanish Federation of Business organisations (CEOE)⁸¹.

Another method for preventing discrimination on grounds of age, alongside other factors, would consist in promoting the conciliation and mediation, no longer only to resolve a conflict that has already arisen, but now also for the identification and prevention of other questions that a judicial decision did not manage to consider due to the limited scope of their authority in conflict solution processes, linked to the resolution of the specific juridical conflict in question. This way,

⁷⁵ This discretionality cannot be amended in case of appeal rather than in cases the compensation is not proportionate or it is reasonable (STS 12 December 2005, appeal n.º. 59/05)

⁷⁶ *Real Decreto Legislativo 5/2000*, 4 August.

⁷⁷ LOUSADA AROCHENA, 2005, "La jurisprudencia constitucional sobre la prueba de la discriminación y de la lesión de derechos fundamentales" *Revista de Derecho Social* n.º. 30/2005, p. 36.

⁷⁸ As, for example, the mentioned difficulty for giving effective remedies in case of discrimination at the moment of hiring the employee. APARICIO TOVAR and OLMO GASCÓN, *La edad como factor de tratamientos desiguales en el trabajo*, cit. p. 51 ff.

⁷⁹ KRAUS, RINNE, & ZIMMERMANN, 2012, "Anonymous job applications in Europe", *IZA Journal of European Labor Studies* 2012, 1:5.

⁸⁰ http://www.igualdadenlaempresa.es/novedades/noticias/docs/Protocolo_cv_anonimo.pdf (last access, 31-10-2019)

⁸¹ https://www.infolibre.es/noticias/politica/2017/07/20/la_patronal_ceoe_reclama_discriminacion_laboral_porsexo_67821_1012.html (last access, 31-10-2019)

while the judgements focus on resolving a specific conflict, without investigating what caused it, with extra-judicial solution instruments this could be analysed and resolved before peoples' rights are breached even further.

Directive 2000/78 alludes to this type of measure in their ninth article, stipulating that to defend rights, the Member states must ensure that there are judicial or administrative processes and even, when this is considered necessary, conciliation procedures to demand compliance with the obligations established via this for all people who believe that they have suffered prejudices due to non-application of the principle of equal treatment, including following the conclusion of the relationship where the alleged discrimination took place. Anyway, merely allowing these procedures to exist is not sufficient, and it is necessary to promote these mechanisms as the best method of resolving conflicts that could derive from discriminatory factors, such as age.

4. Few final considerations

Despite age being incorporated into the European and Spanish legal systems as an unlawful criterion for differentiation -leading to discrimination-, it is still possible to appreciate a certain weakness in the protection of this differentiation criterion in comparison to others (specially sex).

This weakness in the protection against discrimination on grounds of age can be appreciated, first of all, in the acceptance of all presumptions -common associations that end up becoming apparently unquestionable regulatory truths⁸² that still exist within this criterion. This way, the assumption that reaching a certain age brings with it a loss of aptitude for the job has been accepted by both the Spanish and European systems. In the case of the Spanish system, provided that this is not a general assumption, it is circumscribed in a specific profession, and it affects the entire juridical ruling that covers the service in question (not only subordinated work) and admits evidence against it (STC 22/1981, 2 July). In the case of the European Union, the scope of this presumption is more complex, as it is below the level of requirements demanded by the Spanish Constitutional Court, upon admitting its entirety -accommodating the exception established in article 2.5 of Directive 2000/78/EC- for reasons of public safety (JCJ 5 July 2017, C-190/16, *Fries*, in the case of airline pilots used in the commercial air transport sector); public health (JCJ 12 January 2011, C-341/08, *Petersen*, in the case of dentists) or to prevent disputes related to the aptitude of the employee to practice their profession once they reach a certain age, argument admitted without criticism, nor protest, as another one which allows us to consider the establishment of a maximum age for working in Germany as district attorney as justified (JCJ 6 May 2010, joint case C-159/10 and 160/10, *Fuchs and Köler*).

Moreover, whenever there is proportionality, the economic efficiency criteria in the management of human resources are present in the potential justification of differentiation on grounds of age, accepting discriminations that are difficult to imagine when compared with other discriminatory differentiation, such as those based on sex. This happens, for example, with the justification related to the need for a reasonable period of activity prior to retirement, as expressly established in article 6.1.c) of Directive 2000/78/EC. In terms of this specific criteria, it must be concluded,

⁸² GONZÁLEZ ORTEGA, "La discriminación por razón de la edad" *cit.*, p. 109. GONZÁLEZ ORTEGA claims that same considerations that CJ does to discrimination on ground of sex must be applied to discrimination on grounds of age as, in relation to the last, European legislation is reproducing stereotypes rather than fighting against them (BALLESTER PASTOR, "Género y edad: los dos extremos del principio antidiscriminatorio comunitario" in AA.VV. *La relevancia de la edad en la relación laboral y de seguridad social*, *cit.*, p. 40)

with GONZÁLEZ ORTEGA⁸³ that, being an economic demand –resulting from the deliberation between the economic cost of the training given and the profitability of it- the job or promotion of it cannot be completely subordinate to this, as there are other methods to satisfy this equation such as permanence agreements, that would prevent discrimination on grounds of age.

In this same sense it is worth noting that age has been a criterion considered by employers when taking decisions, such as collective dismissals, in order to improve Company's competitiveness⁸⁴, and although it is true that this type of argument has apparently not been admitted by the Court of Justice⁸⁵, others leading to the same results have been accepted, such as the lowest prejudice that the decision adopted could suppose to this group of workers given that they are approaching the age where they will leave the labour market. This argument remains paradoxical, given that workers of a more advanced age have fewer chances of finding alternative employment in the years that remain before retirement⁸⁶. For this reason, as SOLÀ I MONELLS⁸⁷ argues, to accept the proportionality of the measure, it will be necessary not only that these workers have access to an adequate retirement pension, but also that other measures are adopted to minimise the prejudice (potential relocation or admission of exceptions in specific cases pertaining to personal or family needs) as while maintaining a certain level of income constitutes an important factor to consider, we cannot stop considering other negative effects that job loss could cause to an employee, and could have an impact on their acceptance to pass to a complete "passive situation"⁸⁸.

Ultimately, as highlighted by the British and Italian Governments in the JCY in case C-388/07 (*Age Concern England*) the scope of exceptions to the principle of non-discrimination on grounds of age is wider than the exceptions anticipated in article 2.2.b) of the Directive, so that the prohibition of discrimination on grounds of age is subject to numerous qualifications and exceptions for which there are no equivalents as regards discrimination on grounds of race or sex (paragraphs 55 and 56)⁸⁹. Adding to these considerations that the system of exceptions contains important, undetermined juridical concepts (for example *purpose*, *legitimate objective* or *adequate retirement pension*) it is almost inevitable that there will be a certain sense of loss of effective protection in terms of discrimination on grounds of age.

In this same sense, and as the Spanish juridical system refers to, it is worth pointing out how the prohibition of discrimination on grounds of age has been accepted in infra-constitutional legis-

⁸³ GONZÁLEZ ORTEGA, "La discriminación por razón de la edad" *cit.*, p. 108.

⁸⁴ Against the criterion of efficiency in the Company's management based in the rejuvenation of the plaintiff, GARCÍA MURCIA, "Igualdad y no discriminación en las relaciones laborales" *cit.*, p. 408 and 409.

⁸⁵ In Spain, The Supreme Court (TS) admitted such kind of arguments in its Judgement of 27 December 1999 (appeal nº. 1959/1999) in which it stated that competitiveness of Companies and the fact that the affected Company was dedicated to the service sector (where public image of the Company and the opinion of the customers are relevant) justifies the discriminatory treatment. Maybe this argument should be revisited in accordance with JCY 14 March 2017 (C-188/15, *Bouagnaoui*) which states that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of the European legislation.

⁸⁶ In fact, the rise of minimum age for retirement which all countries are experimenting due to the budgetary problems to keep the public pension system, in connection to the difficulties to find jobs at certain age, reveals the need to change strategy and start implementing policies to foster permanence in the job posts of elderly. In so doing, the fight against discriminations on grounds of age would be more effective, and its negative consequences (reduction of the retirement pensions) would be more easily avoided. YSÁS MOLINERO "La adaptación de las condiciones de trabajo de los trabajadores de edad más en el contexto de prolongación de la vida laboral: la Estrategia 55 y más", comunicación a la Ponencia "Jubilación y políticas de empleo", [www.iuslabor.org/jornades e seminaris](http://www.iuslabor.org/jornades_e_seminaris), p. 6.

⁸⁷ SOLÀ I MONELLS, "La utilización de la edad como criterio de selección en los despidos colectivos..." *cit.* p. 65.

⁸⁸ RODRÍGUEZ SAÑUDO, 1973, "La extinción de la relación laboral por edad del trabajador". *Revista de Política Social*, nº 97/1973, p. 28.

⁸⁹ GONZÁLEZ ORTEGA, "La discriminación por razón de la edad", *cit.* p. 104 and 105. According to him, such exceptions make the Directive to legitimate the use of age as a discriminatory criterion rather than preventing from it.

lation (articles. 4.2.c. and 17 Statute of Workers -*Estatuto de los Trabajadores*-) including some aspects that distinguish it from other discrimination prohibitions, being the only specific prohibited cause of discrimination that receives singular treatment in the legislation in terms of the fact that the cited prohibition only operates ‘*within the limits stipulated by this law*’, which implicitly admits that the *Estatuto de los Trabajadores* itself established differentiated treatment on grounds of age that, obviously, are excluded from the prohibition⁹⁰.

These gaps in protection from discrimination on grounds of age –mainly derived from generally accepted criteria and values of judgement– reinforce the need to find protection mechanisms that prevent against discrimination. However, this is not an easy task. Measures such as anonymous CVs do not guarantee that there will be no discrimination on grounds of age in the end, because it is more than likely that a candidate will have to go through an interview phase before being selected and here it will be almost impossible to hide the candidate’s true age. Nevertheless, we ought to continue moving in this direction, obliging algorithms -which are replacing human judgement more and more in staff selection processes- to not consider discriminatory criteria⁹¹. This would be possible if the data processed is strictly limited to that which is strictly necessary to accredit the candidate’s professional qualification.

On the other hand, even when discrimination is noted on grounds of age in the hiring process, it is necessary to determine the scope of the effects of this decision on the discriminated party in question, without it seeming possible – beyond the alleged hirings made by public administrations – juridically impersonating determining company consent from the beginning of the contract. In this context, the dissuading compensations in a country where the initial contracts offered to a worker when they join a company are usually temporary, review a special significance to prevent discriminations – not only for age - at the time of hiring.

In terms of discrimination when concluding a professional relationship on the grounds of age, we must reflect on the “voluntary” character of the adoption of pre-retirement pacts linked to collective dismissals, that have contributed to the rejection in these cases of the existence of discrimination on grounds of age, forgetting that the measure is often instigated by the company, for justified reasons and almost always as the only possibility for the employee, as not accepting these conditions would result in a later redundancy with less attractive conditions⁹².

In this same way, we must evaluate the reduction in human capital caused by the dismissal of these workers from companies and the loss of opportunities that this entails to facilitate a generational replacement in companies without damage to the potential derived from experience acquired over the years. One little explored area of our system, to promote the employment of groups at a disadvantage due to their age, consists in making the most of the knowledge and experience of adult workers in the integration of younger people in the labour market. The only concept that maintains a relationship with this option is the *contrato de relevo*, used to substitute the working time when a partially retired employee does not work. However, the juridical regulation of the institutes of partial retirement and *contrato de relevo*, deem them unworthy of the purpose that they were given. On the one hand, the collective to be hired via a *contrato de relevo* is not – and never was - identified due to their young age, but because of their situation of unemployment or, following Law 12/2001, of the 9 July, for their precarious work situation, because this contract of employment can be entered into by an unemployed worker or a worker who has a fixed term contract with a company

⁹⁰ MARTÍNEZ BARROSO, *Influencia de la edad en las relaciones laborales: acceso al empleo y protección social*. Cizur Menor, Aranzadi, marzo 2018.

⁹¹ DE STEFANO, 2018, “Negotiating the algorithm: Automation, artificial intelligence and labour protection”, I.L.O. Employment Policy Department. *EMPLOYMENT Working Paper* No. 246, p. 7-11.

⁹² MARTÍNEZ BARROSO, *Influencia de la edad en las relaciones laborales... cit.*

(article. 12.7.a *Estatuto de los Trabajadores*). On the other hand, the aim of taking advantage of the knowledge and experience of adult workers who facilitate the transmission of these who enter the company via a *contrato de relevo*, has been frustrated as the rules became more flexible. In fact, as the reforms of the legal regulation of this contract aimed for more flexibility in order to make them more interesting from the point of view of business organisation, it has favoured a certain disconnection between the functions of the employee hired on *contrato de relevo* and those of the partially retired employee, as well as respecting their schedule, which does not guarantee the existence of direct contact between both employees that favours the transmission of knowledge and skills⁹³. Tested methods in comparative law, such as action plans to favour employment of senior workers⁹⁴, or the so called *contrat de génération*⁹⁵, that replaced it, could contribute to the triple objective of favouring active ageing, promoting the employment of young people and facilitating the inter-generational transmission of knowledge.

⁹³ FITA ORTEGA, "Políticas de empleo y edad", en *Edad, discriminación y derechos*, Aranzadi. 2019, pp. 225 ff.

⁹⁴ A comment about the application of this measure in Brittany: "La tutoría como instrumento de solidaridad intergeneracional", PIJOAN & POILPOT-ROCABOY (translated by FITA ORTEGA) in *ARXIVUS de Sociología*, nº 26/2012, p. 73 to 83.

⁹⁵ Repealed by Ordonnance nº 2017-1387, 22 September 2017.