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Occupational Health and Safety and Older Workers: Are They in Need of a Special Legal Framework?

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1. Historical Framework of Occupational Health and Safety Law

Occupational Health and Safety Law was born out of the need to improve working conditions and the working environment in the mid-nineteenth century. The advent of industrialization¹ brought the acknowledgment of poor labour conditions for many workers, who frequently found themselves and their families in circumstances best described as miserable. Consequently, the resulting recognition of the need to effectively regulate working conditions in order to avoid the depletion of the workforce, essential for the economic development, became widespread². It was thus essential to ensure the survival of victims of occupational contingencies. This problem was encompassed in the context of social security by

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¹ On this subject, we will follow ours *Is “Legal Globalization” the Solution for the Disorientation of Health and Safety at the Workplace Law?*, *Católica Graduate Legal Research Conference 2014 – Conference Proceedings*, available at <http://www.fd.lisboa.ucp.pt/resources/documents/Centro/CGLRC%202014%20Conference%20Proceedings.pdf>, 200-218.

² M. M. ROXO, *Direito da segurança e saúde no trabalho. Da prescrição do seguro à definição do desempenho, uma transição na regulação*, Almedina, Coimbra, 2011, p. 15.

Bismarck's 1884 Social Insurance Law, which came to cover eventualities such as the loss of earning capacity triggered by work-related accidents and occupational diseases.

The issue has been stressed by the International Labour Organization (ILO) since its inception, by approving several Conventions on the matter. Among them, the 1981 Convention nr. 155, demanding that signing States implement a national policy of Occupational Health and Safety, stands out as one of its most important documents³. Besides the Conventions and Recommendations, the ILO also publishes several Codes of Best practices and action plans.

Regarding European Union (EU) Law, the historical evolution of Occupational Health and Safety Law would be developed in stages: in four stages, for some legal doctrine⁴, with others defining its development in two or three phases⁵.

Firstly the EU legislation mentioned the protection of Occupational Health and Safety only as an instrumental goal, since its priority was to promote economic integration. At this stage, the only activities pursued by the EU consisted of a gathering of research and statistics. The juridical instruments were reduced to recommendations on a list of occupational diseases, on the conditions for compensation of occupational diseases' victims and on the medical surveillance of workers exposed to particular risks⁶.

Politicians decided that social progress was not possible based solely on economic integration, and so the second phase began. A social action program was created to improve working conditions and to encourage progressive abolition of physical and psychological constrictions of jobs.

³ On the importance of ILO's Conventions to the theme of Occupational Health and Safety, see A. OJEDA AVILÉS, *Derecho Transnacional del Trabajo*, Tirant lo Blanch, Valencia, 2013, p. 128.

⁴ AAVV, *Lecciones de Derecho Social de la Unión Europea*, coord. Magdalena Nogueira Guastavino, Olga Fotinopoulou Basurko, José María Miranda Boto, Tirant lo Blanch, Valencia, 2012, p. 366.

⁵ The two phases would be one until the Framework Directive came into force, although some legal doctrine considers the ending of the first phase as occurring in 1987, with the entry into force of the Single European Act. see *Manual de Derecho Social de la Unión Europea*, coord. Antonio Costa Reyes, Tecnos, 2011, p. 365. The scholars that define three phases divide them into the periods of 1971 until 1978 (first phase), 1978 until 1984 (second phase), and from this year on (third phase). B. CARUSO; S. SCIARRA; *Il lavoro subordinato*, G. Giappichelli Editore, Turin, 2009, pp. 78-82.

⁶ AAVV, *Lecciones de Derecho Social...*, *cit.*, p. 367.

At that time, Directives on specific issues, such as chemical, physical and biological agents, among others, were approved, and institutions such as the European Foundation for the Improvement of Living and Working Conditions were created. It was then that the first Action Program of the European Communities on safety and health at work was created, for the period of 1978-1982, whereas the second program ('84-'88) reaffirmed the same goals⁷. Meanwhile, the idea that the social partners should be involved in these matters was encouraged.

The third phase began with the 1986 Single European Act, which brought into force the article (art.) 118-A, now art. 153 on the Treaty on the Functioning of EU (TFEU), currently stating that “*With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (...) (i) equality between men and women with regard to labour market opportunities and treatment at work; (...) 2. To this end, the European Parliament and the Council: (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States; (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. (...)*”. The new writing of this provision seemed to allow flexibility in the decision-making procedure. The unanimity rule was abandoned and a qualified majority became enough to legislate on this subject⁸.

The goal was to define common minimum requirements that all Member States should attain. Thus, the third social action program harmonized various areas such as safety and ergonomics in the workplace, managers and workers' training, among others. Several Resolutions of the European Parliament were approved, in which the Commission was invited to create specific Directives on these matters.

Finally, consolidation of legal rules and stimulation of social agents and collective bargaining characterized the fourth phase.

⁷ *Ibidem*, p. 367. We will follow these authors in the next few paragraphs, corresponding to pp. 367- 375.

⁸ A. OJEDA AVILÉS, *op. cit.*, p. 202.

We recall that the art. 156 of the TFEU states that, in order to achieve the goals prescribed by the art. 151 of the TFEU, the Commission shall have a strengthened role and shall encourage consultation with social partners and adopt all necessary dialogue between them, enforcing cooperation between Member States and coordination of their actions⁹.

At this point, Directive nr. 89/391/CEE (hereinafter only referred to as Framework Directive) was approved, setting the minimum standards that should be followed by the Member States¹⁰ as well as the general principles and rules that have to be incorporated on each national legislation and practices. Hence, universality of application and harmonization of national legislation were the cornerstones of the Framework Directive¹¹.

The Framework Directive was followed by its specific directives, which would regulate the workplace, working equipment and individual protection equipment, specific risks, specific activities, and specific groups of workers (young people, pregnant women, workers in temporary working companies, among others).

Simultaneously, the issue of the Community Charter of Fundamental Social Rights (1989) would boost European social policy and was an important element in the development of European soft law on this subject¹².

The General Framework for action of the European Community in the field of safety, hygiene and health protection at work for the period of 1994-2000 was developed, training was encouraged and priority was given to small and medium enterprises (SMEs).

Another community program was approved for the period between 1996-2000, which besides recognizing the special needs of SMEs, stressed the

⁹ V. LAFUENTE PASTOR; R. VALLEJO DACOSTA, *Marco jurídico de la seguridad y salud en el trabajo*, Pressas Universitarias de Zaragoza, Zaragoza, 2010, p. 65.

¹⁰ S. GONZÁLEZ ORTEGA stresses that the Framework Directive leaves such a broad margin to the Member States that one can hardly advocate that it has direct effect. «La aplicación en España de las Directivas Comunitarias en materia de salud laboral», *Temas Laborales*, nr. 27, 1993, p. 18.

¹¹ As states B. BERCUSSON, “*the provision of the Framework Directive (...) demonstrate how health and safety law has been «Europeanised» by EU Law*” - *European Labour Law*, Cambridge University Press, Cambridge, 2009, p. 346. In fact, this “comunitarization” of the national systems in the field of Occupational Health and Safety is based on the convergence that is intended by the EU legislation. Cf. AAVV, *Manual de Derecho Social de la Unión Europea*, *op. cit.*, p. 369.

¹² This idea is developed by S. BRIMO, *L'État et la protection de la santé des travailleurs*, Lextenso Éditions, Paris, 2012, pp. 160-163.

recognition of new health and safety risks and established investigation standards “*on the incidence and control of violence in the workplace (...), the influence of excessive stress and personal behaviour on the incidence of work accidents, occupational diseases and work-related diseases, (...) the implications for health and safety of new technologies, production techniques, the introduction of modern telecommunications and the resulting increase in homeworking (...), and the need for specific measures for women or young persons (...)*”, among other measures, such as the creation of the SAFE (Safety Action for Europe) Program.

Concerning the specific matter we will address, it should be stressed that Council Directive 2000/78/EC, of 27-11, established a general framework for equal treatment in employment and occupation which materialized the principle of non-discrimination on grounds of age, among others, already proclaimed on art. 21 of the Charter of Fundamental Rights of the EU.

Active ageing has been promoted since the Nice European Council, in 2000, and has been reinforced by several European instruments since then¹³. In March 2001, the Stockholm European Council established the goal of raising the average employment rate in the EU for the 55-64 age-group to 50% by 2010, and asked the Council and the Commission to report on how to increase labour force participation and promote active ageing. A year later, in March 2002, the Barcelona European Council concluded that a significant increase in the average effective age at which people stop working in the EU should be achieved. Later on, the Council Decision 2003/578/EC, of 22-07, on the guidelines for the employment policies of the Member States¹⁴ recalled the need to increase the employment rate for older workers. Moreover, the Council Recommendation 2003/579/EC, of 22-07, on the implementation of Member States’ employment policies¹⁵, identified certain actions to be taken with regard to the labour supply and active ageing.

In addition, the Europe 2020 Strategy¹⁶ recognized the low employment rate of older workers and thus, the need to promote active ageing, through Member States’ actions on new forms of work-life balance and

¹³ L. LÓPEZ CUMBRE, *La discriminación por razón de edad en la jubilación forzosa: el caso Palacios de la Villa*, *Revista del Ministerio de Empleo y Seguridad Social*, nr. 102, 2013, p. 339.

¹⁴ *Official Journal* L 197, of 05-08-2003, p. 13.

¹⁵ *Ibidem*, p. 22.

¹⁶ Communication from the Commission Europe 2020, *A strategy for smart, sustainable and inclusive growth*, dated 03-03-2010, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>, accessed 20-09-2015.

active ageing policies, within the Flagship Initiative “*An Agenda for new skills and jobs*”.

Furthermore, the Council’s Decision of 21-10-2010 on the guidelines for employment policies has determined that the Member States shall promote active ageing, removing barriers to labour market participation of older workers and increasing their employability¹⁷.

Consequently, in 2011, the European Parliament and the Council elected 2012 as the European Year for active ageing. However, some legal scholars recognise that active ageing policies were difficult to implement, due to the economic crisis and high unemployment rates, especially among young people¹⁸.

Regarding occupational health and safety in particular, the Community Strategy on Health and Safety at Work 2002-2006 was subsequently issued, establishing goals of physical, moral and social well-being at work, supporting best practices, social dialogue and corporate social responsibility. The idea that well-being should not only be achieved by the absence of accidents or illnesses, but also through complementary measures such as reducing and preventing them, taking into account the ageing population and the protection of young people at work, considering new forms of work organization and meeting the particular problems of SMEs, was enhanced. It was then determined that Community law was necessary for the improvement of working conditions, hence guidelines for the application of the Directives were created. This was the first time that older workers were taken into account in an Occupational Health and Safety Strategy, by stating that “*older workers (50 years plus) tend to have more serious industrial accidents leading to higher mortality, as they tend to be over-represented in the more dangerous manual occupations*”.

¹⁷ Legal opinion suggests, as measures to promote employment among older workers financial incentives to maintain them in the labour market (or hampering access to early retirements), promoting good conditions of Occupational Health and Safety, flexible working time arrangements, continuous access to education, among others. *Vd.*, on some of these, M. F. FLORES MALLO, *Envejecimiento demográfico y mercado de trabajo: análisis de los determinantes de la participación laboral de los trabajadores mayores en España*, *Revista universitaria de ciencias del trabajo*, n.º 9, 2008, 95-119.

¹⁸ See A. NUMHAUSER-HENNING, *The EU ban on age-discrimination and older workers: potentials and pitfalls*, *The International Journal of Comparative Labour Law and Industrial Relations*, 29, n.º 4, 2013, p. 413.

Later came the Community Strategy on health and safety at work for 2007-2012¹⁹, posing as a challenge the insufficient reduction of occupational risks, identifying categories of workers who were overexposed to them, such as young, insecure, older and migrant workers. This came as a breakthrough, for older workers were now considered as a special group. The need to promote active ageing through wellbeing at work and avoiding early withdrawal from the labour market was stressed²⁰; and the relationship between health at the workplace and general health of the population was emphasized.

The Community Strategy for the period of 2007-2012 aimed at improving the quality and productivity of work, intending to reduce accidents and supporting the idea that health at work improves public health in general, increases the viability of social security systems, as it decreases work accidents and occupational diseases, while reducing costs by improving enterprises' productivity and competitiveness²¹. It brought forward six key issues: creating modern and effective legislation adapted to the evolution of the labour market; creating national strategies and coordinating occupational health policies with public health policies; promoting behaviour changes through training and encouraging companies by reducing contributions or insurance payments; considering the emerging risks, such as depression, promoting health at work, preventing violence, moral harassment and stress; collecting statistical data; and, finally, promoting safety and health at the international level by strengthening cooperation with third countries and international organizations.

With the end of the program of the Community Strategy for 2007-2012 on health and safety at work, the European Commission presented the

¹⁹ European Parliament Resolution of 15-01-2008 on the Community strategy 2007-2012 on health and safety at work (2007/2146 (INI)), published in the *Official Journal C* 41E/03, of 19-02-2009.

²⁰ Proposing some age management practices, such as job recruitment; learning, training and lifelong learning; career development; flexible working time practices; health protection and promotion, and workplace design; re-employment; employment exit and the transition to retirement; comprehensive approaches, cf. the report from European Foundation for the Improvement of Living and working conditions, *A guide to good practice in age management*, Office for Official Publications of the European Communities, Luxembourg, 2006, VIII.

²¹ M. DEL M. ALARCÓN CASTELLANOS, *Marco general de la estrategia comunitaria de salud y seguridad en el trabajo (2007-2012) y su protección en España*, *Cuestiones actuales sobre Derecho Social Comunitario*, Ediciones Laborum, Murcia, 2009, p. 301. On the costs of occupational health standards and damages to the countries' economies, cf. JEAN-MICHEL SERVAIS, *International Labour Law*, Wolters Kluwer, Alphen aan den Rijn, 2011, pp. 219 and 220.

report on the Evaluation of the European Strategy, mentioning a review prepared for the European Parliament's Committee on Employment and Social Affairs on the vulnerable groups of workers, among which women, migrant, younger and older workers²² were included.

Finally, the EU Strategic Framework on Health and Safety at Work 2014-2020 was approved. Its main focus was placed on the economic and financial crisis. Portugal has one of the highest rates within the EU member states of expectations of major or some deterioration of health and safety, along with Latvia, Slovenia, Greece, Estonia and Sweden²³.

With its approval in June 2014, the fear of a throwback that dominated legal scholars' minds was confirmed as the paradigm of the adaptation of the work to the worker²⁴ seems to be changing into the worker's adaptation to the work. The approach is now enshrined in art. 145 of the TFEU, as the workforce must adapt to the companies' needs. The Occupational Health and Safety policies were at first diluted in the Strategy of Lisbon and its goals of growth and competitiveness of companies²⁵ and later on positioned as secondary due to the implementation of the Europe 2020 Strategy, which was given priority.

Nevertheless, the EU Strategic Framework presented on June 2014 concentrates on the concept of "healthy and safe working environment" and defines the following goals: further consolidate the national strategies; to facilitate compliance with occupational safety and health legislation, particularly by micro and small enterprises; to encourage better enforcement of occupational safety and health legislation by Member

²² Cf. the Commission Staff Working Document, *Evaluation of the European Strategy 2007-2012 on health and safety at work*, Brussels, 31-05-2013, available at file:///C:/Users/Tina/Downloads/SWD_2013_202_STAFF_WORKING_PAPER_EN.pdf, accessed 20-09-2015.

²³ Cf. «Workers' health and safety exposed to crisis», available at http://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CFgQFjAF&url=http%3A%2F%2Fwww.etui.org%2Fcontent%2Fdownload%2F13835%2F113961%2Ffile%2FChapter%2B6%2BBenchmarking%2B2014.pdf&ei=w6z7U5j3EOzy7Ab74oH4DA&usq=AFQjCNGZarGsS_5KlhISZk-MdYa42sj5lg&sig2=chX7Pa1GRk0zFcqBRNV-Jw&bvm=bv.73612305,d.bGQ&cad=rja, accessed 25-08-2014.

²⁴ According to M. BABIN, the logic underneath the principles of Occupational Health and Safety is the adaptation of the work to the worker, understood as the protection of the health in the centre of the work organization. *Santé et sécurité au travail*, Éditions Lamy, Rueil-Malmaison Cedex, 2011, p. 31.

²⁵ Cf. P. TULLINI, *La sicurezza sul lavoro tra diritto comunitario e diritto interno*, in AAVV, *Diritto privato comunitario*, coordinators Pietro Perlingieri e Lucia Ruggeri, vol. II, Edizioni Scientifiche Italiane, Napoli, 2008, p. 242.

States; to simplify existing legislation; to address the ageing of the workforce and emerging new risks; to prevent work-related and occupational diseases; to improve statistical data collection and develop the information database; and to better coordinate EU and international efforts to address occupational safety and health and engage with international organizations.

Concerning workforce ageing, the EU Strategic Framework recognized demographic changes as one of its biggest challenges, replaced the concept of “active ageing” by the one of “active and healthy ageing” and acknowledged older workers as a special category of workers who should deserve further investigation and funding.

Due to the principle of subsidiarity, there are shared powers between the Member States and the EU and it is up to Member States to implement certain goals, whereas it is up to the EU to intervene when the previous action by the Member States presents shortcomings. However, the diversity of social systems and the fear of Member States to give up on their sovereignty on social matters have hindered the development of this field. The European Parliament and the European Council intervene, therefore, on a normative level, side-by-side with non-legally binding instruments, aimed at cooperation, development of information and best practices’ exchanges, research, statistics, initiatives for guidance and directions.

In any case, at a local level, until the 1990s Portuguese legislation excluded significant parts of the population (civil servants, agricultural workers, seafarers, craft work or independent workers) and was aimed at certain sectors or certain specific risk factors. Moreover, not all risks were identified, the differences between individuals were not considered (sex, age, physiological or psychosocial characteristics), the interactions between different risk factors were not recognized; and emerging risk factors were not foreseen²⁶.

The regulation of occupational contingencies focused on responding to workplace induced illness, and it was only later on that prevention and elimination or reduction of risk factors began to be considered, influenced by international legal instruments.

Nowadays, the issue of occupational health and safety in Portugal is regulated in a dispersed manner and struggles to keep up with the pace of EU legislative production. Neither new legislative projects are foreseen nor the non-binding instruments are implemented by the national

²⁶ M. M. ROXO, *op. cit.*, p. 37.

authorities or signed by national collective entities such as employers' associations and trade unions.

An Elderly Protection Strategy has recently been approved by the Portuguese Government but no measures related to employment have been determined²⁷. Moreover, the National Strategy for health and safety has been approved by the Ministers' Council Resolution nr. 77/2015, of 18-09, and does not establish any instruments or goals especially related to older workers. The only repercussion of the EU Strategic Framework on Health and Safety at Work 2014-2020 as far as health and safety of older workers is concerned is their inclusion in the specific groups which shall be subject to preventing actions.

2. The Recognition of Special Categories of People to be Protected

Occupational Health and Safety law recognises the need of certain categories of workers to be protected with special measures.

In fact, international and national legislation recognizes the specificities of particularly vulnerable workers, providing for a special treatment of those who are sensitive, such as pregnant women, those with complications after birth and lactating women, minors and disabled workers.

In any case, the list is not closed²⁸, as other concepts may be included on the so-called "special risk groups". Art. 15 of the Framework Directive stipulates that "*Particularly sensitive risk groups must be protected against the dangers which specifically affect them*", directing towards a collective notion rather than on the individual. Thus, European legislation seems to focus on objective factors rather than subjective ones, or on the workers deemed to be particularly sensitive²⁹. But even though European Law seems to be more restrictive, mentioning groups and not individuals, the national laws have adopted different – wider – concepts³⁰.

Not all "sensitiveness" are protected, but only particular sensitiveness, which means only the most vulnerable workers, those most at risk and not

²⁷ Strategy of Protection of the Elderly, Minister's Council Resolution nr. 63/2015, of 25-08.

²⁸ J. F. BLASCO LAHOZ; J. L. LÓPEZ GANDÍA; *Curso de Prevención de Riesgos Laborales*, 16ª ed., Tirant Lo Blanch, Valencia, 2015, p. 225.

²⁹ BLASCO LAHOZ; LÓPEZ GANDÍA, *op. cit.*, p. 226.

³⁰ A. MORENO SOLANA, *La Prevención de Riesgos Laborales de los Trabajadores Especialmente Sensibles*, Tirant to Blanch, Valencia, 2010, p. 38. In fact, the author stresses that the subjective factor is the one that matters in this field, as the objective risks are considered within this subject as risks that may affect vulnerable workers. *Op. cit.*, pp. 44-49.

merely those currently designated as sensitive deserve protection³¹. This vulnerability is defined as the ability to react strongly to some external sensation, but in occupational health and safety it is perceived as a personal condition that occurs in response to the working risks that the worker is subject to³², encompassing not only specific but also the general risks³³. Some tasks may not bring any risk to most of the workers but may put one of them at risk. It is up to the employer to detect this particular sensitivity prior to an employee's arrival or as soon it becomes apparent³⁴. For instance, if some windows in the workplace are closed for lighting purposes, a claustrophobic worker may reveal a particular sensitivity in such a context³⁵.

However, the reasons for such protection are not only due to their personal characteristics or biological state³⁶ (such as their youth or maternity as well as their physical, sensorial^{37/38} or psychic ability³⁹), but also due to specific risks or to the type of contract concluded with the worker⁴⁰. Besides that, different flexible work conditions, such as temporary working, flexible working time, overtime work, part-time work⁴¹, night work, shift work⁴², among others, may also determine this regime's enforcement.

³¹ J. E. LÓPEZ AHUMADA, *Los Trabajadores Sensibles a los Riesgos Laborales. Protección Jurídico-Laboral*, Marcial Pons, 2010, p. 29.

³² A. MORENO SOLANA, *op. cit.*, p. 32.

³³ A. MORENO SOLANA, however, stresses that the risks that matter are specific risks and the general risks that bring connected to the particularly vulnerable worker. *Op. cit.*, p. 56.

³⁴ J. E. LÓPEZ AHUMADA, *op. cit.*, p. 30.

³⁵ *Ibidem*, p. 34.

³⁶ Which does not need to have been previously recognised by a court to be considered – *Ibidem*, p. 33.

³⁷ Which does not need to have been previously recognised by official health authorities to be considered – *Ibidem*, p. 32.

³⁸ That is not sufficient to be considered as a working incapacity, but is enough to have influence in the work performance. *Ibidem*, p. 29.

³⁹ A. MORENO SOLANA, *op. cit.*, p. 52.

⁴⁰ BLASCO LAHOZ; LÓPEZ GANDÍA, *op. cit.*, pp. 225 e 226.

⁴¹ J. E. LÓPEZ AHUMADA, *op. cit.*, p. 27.

⁴² These workers benefit from special protection in what concerns working time and from specific provisions concerning the prevention of Occupational Health and Safety. J. E. LÓPEZ AHUMADA, *op. cit.*, p. 35. Recognising the hazards of some flexible working time schemes for workers' health, cf. J. A. RIBEIRO DE OLIVEIRA SILVA, *A flexibilização da jornada de trabalho e seus reflexos na saúde do trabalhador*, *Revista do Tribunal Regional do Trabalho da 15ª Região*, n.º 42, 2013, pp. 137-144.

Thus, the above-mentioned provision of the Framework Directive shall be regarded along with the Council Directive 91/383, of 25-06, on the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, the Council Directive 92/85, of 19-10, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, and the Council Directive 94/33/EC, of 22-06, on the protection of young people at work.

In any case, the situation of particular sensitiveness might be pre-existent at the moment of the conclusion of the contract, it might occur during the contract enforcement, as a consequence of accidents or diseases occurred after hiring, or related to particular personal or biological condition the worker suffers, or it might be temporary, occurring during a particular period if the worker is subject to a certain circumstance or treatment⁴³, such as if the worker is subject to strong medication, if he or she is under the influence of drugs or alcohol or prone to psychological risks⁴⁴. In this case, the situation must be obvious and apparent to the employer, or reported to him by the worker⁴⁵.

The particular sensitiveness of the worker might be detected by the employer when evaluating the worker's health, but can also occur if the employer is informed by another worker, or by the worker himself, as both of them have the duty to report any risks to the health and safety of workers (art. 13(2), subparagraph. d) of the Framework Directive). The employer's obligations are only due if he is aware of the worker's situation, as he is not obliged to evaluate the worker's subjective risks if he is unaware of any worker's particular sensitiveness⁴⁶.

The protection granted to these workers usually concerns health surveillance, risk evaluation, adjustment of the workstation, interdiction of certain activities or of certain methods of work organization or working time arrangements (such as night and shift work, among others). But these measures must be different than the regular standards for prevention and protection of health and safety, as they must surpass them⁴⁷.

⁴³ BLASCO LAHOZ; LÓPEZ GANDÍA, *op. cit.*, p. 246.

⁴⁴ LÓPEZ AHUMADA, *op. cit.*, p. 30.

⁴⁵ *Ibidem*, p. 33.

⁴⁶ *Ibidem*, p. 40.

⁴⁷ MORENO SOLANA, *op. cit.*, p. 35.

3. The Need for a Special Legal Framework on Older Workers

According to Eurostat's statistics, "The share of older people in the total population is expected to increase significantly over the coming decades. According to Eurostat, people aged 65 and older will make up 30% of the European Union population by 2060 – almost double the 2012 figure of 17%. At the same time, the working age population (currently characterised as people aged 15–64 years) which peaked at 67% in 2010 is predicted to decline steadily to 59% by 2060"⁴⁸.

Following the increasing ageing population, the growth in the average life expectancy, the increase of the age when completing education, and the decrease of the birth rate⁴⁹, according to Eurostat studies, the employment rate of older workers, which is calculated by dividing the number of persons in employment and aged 55 to 64 by the total population of the same age group, from a rate of 39.9% in 2003 to a rate of 51.8% in 2014. In Portugal, this rate has actually decreased from 51.7% to 47.8%, which is not a common tendency throughout the rest of the EU⁵⁰. But this is a recent trend, possibly related to a period of economic crisis that encouraged the early retirements⁵¹. The fact is that in 2007, in Portugal the workers aged between 45 and 64 years had an employment rate of 69.6% and those older than 65 years of 18%⁵².

Recently, the recognition of the difficulties of sustainability and of social security in countries such as Portugal has led to the increase in the retirement age, hence the ageing of the workforce, which means that workers remain in their jobs until they are significantly older.

⁴⁸ As stated in <https://www.eurofound.europa.eu/print/news/spotlight-on/older-people/overview-work-care-and-inclusion-of-older-people>, accessed 08-09-2015.

⁴⁹ On some of these data, *vd.M. T. QUÍLEZ FÉLEZ, Reflexiones en torno a las medidas para favorecer la continuidad de la vida laboral de los trabajadores de mayor edad y promover el envejecimiento activo, Revista del Ministerio de Empleo y Seguridad Social, n.º 109, 2014, 209-228.*

⁵⁰ See, <http://ec.europa.eu/eurostat/tgm/download.do?tab=table&plugin=1&language=en&pcode=tesem050>, accessed 08-09-2015.

⁵¹ Recognising that in times of recession early retirements are a frequent tool used by employers and employees to adjust the labour market, see the EUROFOUND study «Impact of the recession on age management policies», available at http://www.eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2011/75/en/4/EF1175EN.pdf, accessed 12-09-2015.

⁵² See «Employment and labour market policies for an ageing workforce and initiatives at the workplace. National overview report: Portugal», available at http://www.eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2007/0522/en/1/ef070522en.pdf, accessed 12-09-2015.

In fact, the Europe 2020 Strategy proposes that by 2020 the employment rate of workers aged 20-64 shall be of 75%, which “*includes getting more older people into work*”⁵³.

The truth is that the former policies of encouraging early retirements⁵⁴ to stimulate the employment of younger workers are increasingly being replaced by ‘rhythm deceleration’ policies, including reduction and flexibility of working time, gradual retirement and financial and fiscal incentives to the maintenance or return to the labour market⁵⁵. In the United Kingdom there was a suggestion to increase the retirement age to 70 years old, creating the “*«decade of retirement» during which workers may reduce their working hours*”⁵⁶.

Another study concluded that although workplace accidents tend to decrease with the workers’ rising age (accidents occur most often on the youngest age groups, and among the older age groups the percentage of accidents remains fairly stable in women, whereas for men the percentage decreases steadily with increasing age), the work-related health problems that put workers off work for long periods of time tend to increase in a

⁵³ See «Overview: work, care and inclusion of older people», available at <http://www.eurofound.europa.eu/news/spotlight-on/older-people/overview-work-care-and-inclusion-of-older-people>, accessed 12-09-2015.

⁵⁴ About the compulsory retirements and other restrictions as age discrimination, see D. SCHIEK, *Age discrimination before the ECJ – conceptual and theoretical issues*, *Common Market Law Review*, 48, 2011, 777-799, especially pp. 786-790.

⁵⁵ «Impact of the recession on age management policies», cit..

⁵⁶ See H. J. DESMOND, *Older and greyer – third age workers and the labour market*, *The International Journal of Comparative Labour Law and Industrial Relations*, 16, nr. 3, 2000, p. 247.

significant manner⁵⁷, which happens for instance with musculoskeletal diseases in the neck and back⁵⁸.

Thus, even though older workers are a guarantee of the maintenance of expertise, of “*institutional memory and productivity, especially in specific skilled areas*”, they are usually better in customer service and customer retention⁵⁹, are more efficient in the use of resources⁶⁰, and although age is not a declining condition⁶¹, and work has been associated to positive health consequences in older workers⁶², the truth is that they are particularly exposed to work-related accidents and occupational diseases, as they are particularly vulnerable, and their health is increasingly diminished, as their

⁵⁷ See «8.6% of workers in the EU experienced work-related health problems Results from the Labour Force Survey 2007 ad hoc module on accidents at work and work-related health problems», available at <http://ec.europa.eu/eurostat/documents/3433488/5283817/KS-SF-09-063-EN.PDF/10b62d3b-e4dd-403f-b337-af6ffd3de8de>, accessed 08-09-2015.

Injuries tend to be more severe and are more likely to be fatal, even though they have a lesser risk of non-fatal accidents, due to their greater skills and experience, as explained in the report on *Occupational Health and safety risks for the most vulnerable workers*, Brussels, 2011, requested by the European Parliament's Committee on Employment and Social Affairs, available at <http://www.europarl.europa.eu/document/activities/cont/201108/20110829ATT25418/20110829ATT25418EN.pdf>, accessed 20-09-2015, p. 10, P. BOHLE; C. PITTS; M. QUINLAN, *Time to call it quits? The safety and health of older workers*, *International Journal of Health Services*, vol. 40, n.º 1, p. 26.

⁵⁸ P. CASTELLÓ; A. FERRERAS; G. GARCÍA MOLINA; A. PAGE; A. PIEDRABUENA; L. TORTOSA; *Trabajo y envejecimiento. Mejora de las condiciones ergonómicas de la actividad laboral para la promoción de un envejecimiento saludable*, *Seguridad y Salud en el Trabajo*, nr. 30, 2004, available at http://www.insht.es/InshtWeb/Contenidos/Documentacion/TextosOnline/Rev_INSHT/2004/30/artFondoTextCompl.pdf, accessed 13-09-2015. Moreover, it must be underlined that this might be due to the long latency of some diseases, such as pneumoconiosis, occupational cancers, and problems related to asbestos. P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 26.

⁵⁹ See J. J. A. SHAW; H. J. SHAW, *Recent advancements in European Employment Law: towards a transformative legal formula for preventing workplace ageism*, *The International Journal of Comparative Labour Law and Industrial Relations*, 26, nr. 3, 2010, p. 278.

⁶⁰ P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 25.

⁶¹ See W. BROMWICH, O. RYMKEVITCH, *Report on the Conference on “Age, ageing and ageism in working life”, organised by the Marco Biagi Foundation and ADAPT in collaboration with the European Commission, University of Modena and Reggio Emilia, 26 November 2004*, *The International Journal of Comparative Labour Law and Industrial Relations*, 22, nr. 1, 2006, p. 130.

⁶² P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 23.

physical capacity is lower and influenced by the physical load, by the long-term effects of worsening health and by ageing^{63/64}.

In fact, “aging is associated with a general decline in physical health, such as muscle strength, bone density and aerobic capacity⁶⁵. However, the extent of the decline depend to a significant degree in individual factors such as lifestyle, body weight, fitness level and genetics⁶⁶. (...) Aging is associated with a reduction in the precision and speed of perceptual processes (...)”⁶⁷.

Other consequences of ageing are not yet well studied as far as their influence within the workplace is concerned. For instance, the occupational hazards “that can cause menstrual disorders, such as occupational stress, exposure to heavy metals or solvents or exposure to environmental noise and hot and cold conditions, as well as the effect of shift work, in particular night shifts on the menstrual cycle, have not been carefully researched or at all addressed in the legislation. Similarly, the effect of the menopause on the health of female workers, although a crucial topic for ageing female workers, has been overlooked by researchers and legislators. In addition, the fact that work can increase difficulties in coping with either menstrual or menopausal syndromes (which include tiredness, occupational stress and anxiety, headaches and migraines, etc.) should be taken into account”⁶⁸.

⁶³ L. TORTOSA; G. GARCÍA MOLINA; A. PAGE; A. FERRERAS; P. CASTELLÓ; A. PIEDRABUENA; *op. cit.*, p. 29.

⁶⁴ As stated by NILS BRITZE on his communication «Managing Labour During Periods of Tight Labour Markets and Ageing Populations in the Knowledge-Based Economy», at the International Conference *The Great Transformation of work. Productivity, investment in human capital and the challenge of youth employment – VI Edition*, taken place in Bergamo, on 07-11-2015, the positive attitudes over older workers include the recognition that they are reliable, flexible, and less accident prone, as the negative perceptions include the difficulty to train them, their resentfulness to take orders from young people, and their lack enthusiasm for technological change.

⁶⁵ Among other physical consequences such as cardiovascular capacity, muscular resistance, elasticity and balance. See, RTM, *Sanità: I rischi dell'invecchiamento della forza lavorativa*, *Punto Sicuro*, n.º 3655, 09-11-2015, year 17, available at <http://www.puntosicuro.it/sicurezza-sul-lavoro-C-1/settori-C-4/sanita-servizi-sociali-C-12/sanita-i-rischi-dell-invecchiamento-della-forza-lavorativa-AR-15342/> (accessed 15-11-2015).

⁶⁶ A wide subjective variation is recognised in what concerns the reduction of working capacity. *Ibidem*.

⁶⁷ P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 25. Besides that, diminution of recent memory, slower reaction time, slower comprehension of complex ideas, among others. See RTM, *op. cit.*

⁶⁸ Report on *Occupational Health and safety risks for the most vulnerable workers*, *cit.*, p. 35.

Moreover, in the 50-59 age group, 18% of the workers “declared themselves not very satisfied or not satisfied at all with their working conditions as a whole”⁶⁹. In fact, workers of more advanced ages might be more predisposed to certain occupational risks, such as ionizing radiation. Current published studies are insufficient in their perceptions on the impact of work on psychological health⁷⁰.

Finally, changes in the working environment that cause job insecurity and lack of motivation, as well as certain working hours’ schemes, such as shift and overtime work, might also have different consequences on the workers’ health depending on the workers’ age⁷¹. Besides that, recovering from an injury is more difficult, which means these workers are more predisposed to exhaustion and other adverse symptoms that may increase their exposure to further damages⁷².

The most common injuries among older workers are “falls (poor balance, slower reaction times, visual problems lack of concentration); sprain and strain injuries (loss of strength, endurance and flexibility); and cardio-pulmonary injury (over-exertion, loss of heat and cold tolerance)”⁷³.

Therefore, a new challenge is presented to occupational health and safety, as a new category of particularly vulnerable workers arises and demands for special treatment. However, is the existing legal framework sufficient and appropriate, or is there a need to create a specific legislation to protect older employees?

Countries such as Austria, Hungary and Estonia have encouraged employers and employees to have information and education on occupational health and safety, adapted to a growingly older workforce⁷⁴.

In fact, in our opinion there is a need to create or at least admit the recognition of a new category. The Portuguese National Strategy for

⁶⁹ EUROFOUND (2012), *Sustainable work and the ageing workforce*, Publications Office of the European Union, Luxembourg, p. 69, available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1266en.pdf, accessed 12-09-2015.

⁷⁰ P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 26.

⁷¹ *Ibidem*, pp. 29-35. About these effects, see the report on *Occupational Health and safety risks for the most vulnerable workers*, cit., p. 55.

⁷² P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 26. According to the report on *Occupational Health and safety risks for the most vulnerable workers*, cit, p. 10, “Ageing is associated with a natural deterioration of physical and mental capacities. Whatever risks ageing workers are exposed to through their occupations will be superimposed on this natural process”.

⁷³ See the report on *Occupational Health and safety risks for the most vulnerable workers*, cit., p. 52.

⁷⁴ «Impact of the recession on age management policies», cit.

health and safety approved by the Ministers' Council Resolution nr. 77/2015, of 18-09, as we previously explained, does not provide any instruments or goals especially related to older workers. Yet, it does include workers who are older than 55 years within the specific groups of workers which shall be subject to preventing actions, such as young workers, women, public workers, short-term workers, part-time workers, teleworkers, independent workers, migrant workers, disabled workers, workers with chronic diseases (see point 3 within goal 1). We will now analyse whether preventing actions, information and education are sufficient, or if other measures have to be undertaken.

4. The Special Treatment reserved to Older Workers and Occupational Health and Safety: a Proposal

Age is considered in labour law as a factor that may influence access to work, the achievement of the scholar and formation obligations and, as regards occupational health and safety, it may determine the forbidding of the performance of certain dangerous or unhealthy activities⁷⁵.

However, age is usually protected only on its lower spectre – children and young people – and there is no consideration for older workers. The exceptions are, in most of the Member States, the provision of mandatory and periodical exams for workers who are older than 50 years old⁷⁶.

Besides that, general provisions must be taken into account, such as the obligation to “*take the measures necessary for the safety and health protection of workers (...)*”, taking account “*of changing circumstances and the aim to improve existing situations*” (art. 6 (1) of the Framework Directive), as well as the general principles of prevention, such as the adaptation “*of the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health*” (art. 6(2), subparagraph. e) of the Framework Directive). Additionally, employers must take “*into account the nature of the activities of the enterprise and/or establishment: (...) where he entrusts tasks to a*

⁷⁵ F. MALZANI, *Ambiente di lavoro e tutela della persona. Diritti e rimedi*, Giuffrè Editore, Milan, 2014, p. 119.

⁷⁶ In Portugal, see art. 108 (3), subparagraph. b) of Law 102-09, of 10-09, that establishes the legal regime of the promotion and prevention of safety and health at work, demanding annual exams for minors and workers beyond 50 years old. Also in Italy, enshrined in the art. 176 (3) of the D. Lg. Nr. 81/2008, as states F. MALZANI, *op. cit.*, p. 124.

worker, and take into consideration the worker's capabilities as regards health and safety" (art. 6 (3), subparagraph. b) of the Framework Directive).

Moreover, the general obligations to evaluate all the risks to health and safety, taking into account all aspects that may influence health and wellbeing to this category of workers, and adapting the work to the worker, may impose the provision of special measures. Francesca Malzani recognizes that these workers are exposed to premature and involuntary departures of the labour market, or that their work becomes obsolete due to the introduction of new technologies, which demands the need of training for them to remain in the labour market⁷⁷.

In any case, in our opinion, special legislation should be enacted to ensure older workers are not subject to unnecessary risks to their health.

The review prepared on 2011 for the European Parliament's Committee on Employment and Social Affairs proposed as "*options to address the health and safety of ageing workers at EU level (...) the following: promotion of age management in enterprises, with the involvement of the social partners at EU level (e.g. through a framework agreement); development of guidance on age management in SMEs; research and awareness-raising on the issues affecting ageing women workers who also provide home care for relatives; taking advantage of the European Year for Active Ageing in 2012 to raise awareness of health and safety issues concerning older workers and the benefits of the transfer of knowledge and skills among workers in different age groups for the benefit of all*"⁷⁸.

Likewise, the EU Strategic Framework on Health and Safety at Work 2014-2020, proposed that "*successfully prolonging working careers depends strongly on appropriate adaptation of workplaces and work organisation, including working time, workplace accessibility and workplace interventions targeted at older workers. Life time employability should also be developed to cope with workers' changing capabilities because of ageing. Innovative ICT products and services (e.g. for ambient assisted 'working') offer a wide gamut of options for improvement of employability. In addition, reintegration and rehabilitation measures allowing for early return to work after an accident or disease are needed to avoid the permanent exclusion of workers from the labour market*"⁷⁹.

⁷⁷ *Ibidem*, p. 125 and footnote 99.

⁷⁸ Report on *Occupational Health and safety risks for the most vulnerable workers*, *op. cit.*, p. 11.

⁷⁹ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on an EU Strategic Framework on Health and Safety at Work 2014-2020, Brussels, 06-06-2014, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0332>, accessed 20-09-2015, p. 7.

As an example, measures could be undertaken on what concerns flexible working arrangements, such as favouring career breaks, part-time working⁸⁰, different distribution of the working hours, such as compressed hours⁸¹, job sharing⁸², homeworking, teleworking, and avoiding atypical work rhythms such as rotated shifts, overtime and night work. Additionally, functional (re-deploying) and geographic mobility shall be considered⁸³. The supporters of the ideas of “working time accounts” or of a “life-course approach”, that take into account of the different needs of the worker through lifetime, allowing them to combine work with different phases of their personal life (education, care, family) are increasing, even though legal doctrine recognizes the problems with the balancing with the employers’ interests⁸⁴. In fact, an important factor that may determine “*a workers capability to continue working is the availability of employment which meets their personal needs and inclinations*”⁸⁵. Concerning risks evaluation, older workers should be considered separately as regards the evaluation of the load of work to be sustained, the time to maintain a certain position, the aerobic capacity, and the frequency and duration of manipulating loads. Studies should be done on the worker’s labour history and occupational exposure, as well on their working methods. Ergonomic intervention⁸⁶ and professional planning shall be undertaken in order to adapt the physical load and the worker’s physical ability, reducing the exposure time to shores with physical demands, extending the time frame between those tasks. Furthermore,

⁸⁰ A. WINCKELMANN-GLEED, *Demographic change and implications for workforce ageing in Europe raising awareness and improving practice*, *Cuadernos de Relaciones Laborales*, vol. 27, n.º 2, 2009, p. 34.

⁸¹ S. BEVAN, M. LAGHINI, V. SHREEVE, T. TASKILA; *Living long, working well: supporting older workers with health conditions to remain active at work*, The Work Foundation, July 2015, p. 17, available at http://www.theworkfoundation.com/DownloadPublication/Report/386_Living_long_working_well_Final.pdf, accessed 15-11-2015.

⁸² A. BLACKHAM, *Rethinking working time to support older workers*, *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 31, n.º 2, 2015, p. 120.

⁸³ LÓPEZ AHUMADA, *op. cit.*, p. 40.

⁸⁴ These “*flexible and tailored solutions*” might be the future of working time arrangements. A. BLACKHAM, *op. cit.*, pp. 140-132.

⁸⁵ See the report by S. BEVAN, M. LAGHINI, V. SHREEVE, T. TASKILA; *op. cit.*, p. 12.

⁸⁶ A very interesting example of workplace design might be seen on the report M. MORSCHHAÜSER; R. SÖCHERT; *Trabajo saludable en una Europa que envejece. Estrategias e instrumentos para prolonger la vida laboral*, *European Network for Workplace Health Promotion*, BKK Bundesverband, 2006, especially pp. 53-54.

physical exercise and sports shall be promoted by the companies in the worker's free time⁸⁷, as well as promoting health through diet and avoiding smoking habits⁸⁸.

Finally, some legal scholars suggest that certain vulnerable workers are forbidden to engage in some activities, as well as the termination of employment as an extreme measure of prevention⁸⁹. This is, for instance, what happens with pregnant or lactating women. When changing one's workstation is not possible, and no other work is available for the worker within the company, the termination of the contract for reasons of supervening disability is possible in some national laws⁹⁰.

But as far as older workers are concerned, should mandatory retirement be taken into account? The case law within the field of discrimination on grounds of age is fertile⁹¹. In particular as it relates to a certain "presumption of incapacity" of workers beyond a certain age, such as was

⁸⁷ L. TORTOSA; G. GARCÍA MOLINA; A. PAGE; A. FERRERAS; P. CASTELLÓ; A. PIEDRABUENA; *op. cit.*

⁸⁸ See RTM, *op. cit.*

⁸⁹ MORENO SOLANA, *op. cit.*, p. 76.

⁹⁰ About this possibility in Spanish law, MORENO SOLANA, *op. cit.*, p. 78. Within Portuguese legal framework, it is also possible, under art. 343, par. b) of the Labour Code, as long as proceedings under Law nr. 98/2009, 04-09, that regulates the regime for the compensation of the work-related accidents and occupational diseases, have been concluded.

⁹¹ From *Mangold*, case C-144/04, of 22-11-2005, and *Palacios de la Villa*, case C-411/05, pf 16-10-2007, until *Wolf*, case C-229/08, of 12-01-2010, and *Hennings*, cases C-297/10 and C-298/10, of 08-09-2011. It is interesting to look at the case on the proceedings C-341/08, of 12-01-2010, where the European Court of Justice (ECJ) decided that article 6 of the directive does not oppose to "a measure where its aim is to share out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim". The Court thus decided that the limitation of the age limit to exercise a certain activity is acceptable if it is undertaken regarding the labour market and in order to promote employment among young people. This is relevant, as this argument has been dropped by EU's institutions for some years now, as previously stated. More recently, the decision from the ECJ dated 26-09-2013 on the case C- 546/11 concluded, from our point of view, in an indirect way, that forcing workers to ask for a reduced retirement pension, by depriving them of a certain compensation that is refused to workers older than 65 years old, is the measure that is not compatible with the prohibition of non-discrimination on grounds of age ("Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding a national provision under which a civil servant who has reached the age at which he is able to receive a retirement pension is denied, solely for that reason, entitlement to availability pay intended for civil servants dismissed on grounds of redundancy").

discussed in the case *Richard Prigge*, C-447/09⁹². In this case, collective instruments fixed retirement age of pilots as 60 years old, when general provisions for all workers determined retirement age is at 65 years old. The ECJ decided this measure was not necessary to public safety and for health concerns, and thus was not acceptable. Hence, a measure that creates an automatic termination of employment due to age creates a difference of treatment that is not acceptable. However, the Court recognized that “*as regards airline pilots, it is essential that they possess, inter alia, particular physical capabilities in so far as physical defects in that profession may have significant consequences. It is also undeniable that those capabilities diminish with age (...). It follows that possessing particular physical capabilities may be considered as a ‘genuine and determining occupational requirement’, within the meaning of Article 4(1) of the Directive, for acting as an airline pilot and that the possession of such capabilities is related to age*” (paragraph 67 of the decision).

Therefore, the ECJ accepted that the goals of guaranteeing air traffic safety are legitimate, but stressed that the derogations to the principle of non-discrimination have to be very limited, which means that the mentioned imposition to pilots was disproportional.

Thus, the dismissal shall be the last of the preventive measures to be determined and only if no other measure is possible to be undertaken.

5. Conclusions

The aforementioned case law forces us to consider the boundaries of occupational health and safety and the respect for the workers’ individual rights. Even though some principles, such as the safety of the co-workers, clients, consumers and other people affected by the workers activity, might be relevant and justify certain derogations to the workers’ individual rights, their dignity and privacy must be respected.

The older workers should not be forcibly excluded from the labour market, but their health shall be monitored, in order to take into account necessary changes and adaptations of their specific tasks and activities and, if deemed appropriate, the termination of employment. All decisions should be grounded and medically reasoned, to protect not only the worker, but also to justify the employer’s decision. But the decision should also be casuistic and specified to each worker. Consequently, older

⁹² Among portuguese legal scholars, cf. T. COELHO MOREIRA, *Discriminação em razão da idade dos trabalhadores: anotação ao acórdão do TJUE, Richard Prigge, de 13 de setembro de 2011, processo C-447/09, Questões Laborais*, n.º 39, January-June 2012, 137-141.

workers cannot be included in a “group”, as each worker might have his own specificities.

Finally, it seems important to clarify who these older workers are – how old should a worker be to qualify as an older worker⁹³? Or is it preferable to call him or her an “advanced age worker”? Or should age be considered a criterion to establish the incidence of the proposed regulation at all? Must we consider the regular retirement age as a criterion? Or is it necessary to consider these workers before they reach that age⁹⁴?

From our point of view, if we are protecting workers who, due to their age and, consequently, to their health status, are especially vulnerable to certain risks, we shall not impose a certain age as a minimum reference, as a worker might have health problems that influence his professional activity and may not necessarily be considered “old”. Thus, the special individuals to consider here are not, strictly, the “older workers”, but preferably “*the workers whose age has and impact on their working activities*”.

This leads to the conclusion that, in fact, the personal characteristic that demands attention is the worker’s health⁹⁵, because age will only be relevant if it determines changes in the worker’s health that, for its part, causes a specific impairment^{96/97}. But this is not a recognition of a disability of the worker, which is a special category that is clearly different from the group herein at stake.

In any case, considering general health problems that occur with aging, and taking into account the needs of slowing transitions to retirement age

⁹³ The criteria is not unanimous. For instance the report on *Occupational Health and safety risks for the most vulnerable workers*, *op. cit.*, p. 29, determines that “ageing workers”, following the European Working Conditions Survey (EWCS), are workers aged 55 years and above.

⁹⁴ About this debate, see Y. SÁNCHEZ-URÁN AZAÑA, *Trabajadores de “edad avanzada”:* *empleo y protección social*, *Revista del Ministerio de Trabajo y Asuntos Sociales*, n.º 33, 2001, pp. 217-222.

⁹⁵ Concerning the worker’s health, *vd.* B. FERNÁNDEZ DOCAMPO, *La salud del trabajador como causa de discriminación*, *Nueva Revista Española de Derecho del Trabajo*, n.º 162, march 2014, 71-93.

⁹⁶ “*Work ability is the outcome of the balance between the individual’s resources and work-related aspects*” - Jan Fekke Ybema, Femke Giesen, TNO, the Netherlands, «Older Workers», available at http://oshwiki.eu/wiki/Older_workers, accessed 20-09-2015.

⁹⁷ Relating age to disability, see the report on *Occupational Health and safety risks for the most vulnerable workers*, *op. cit.*, p. 11, stating that “*Disability and age are often associated, as the prevalence of disability or impairment is highest among older people. The issues of recovery time and return to work after accidents or long-term illnesses, noted for ageing workers, are also important when seeking to increase the participation of workers with disabilities in the workforce*”.

and conciliation with family life, the proposed measures shall be undertaken, regardless of the specific health status of the worker, from a certain age onwards. In fact, not only the referred art. 15 of the Framework Directive imposes such measures, determining that special groups must be protected, but also the above mentioned art. 6 (1), (2) subparagraph. e) and (3), subparagraph. b) of the Framework Directive requires such a treatment.

Finally, new challenges arise, such as the ability to conciliate the work with individual abilities and quality of life⁹⁸.

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