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Practical challenges to addressing age discrimination in Spain*

DESAFÍOS EN LA APLICACIÓN PRÁCTICA DE LA DISCRIMINACIÓN EN ESPAÑA

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ABSTRACT

The 2023 Eurobarometer 2023 on Discrimination in the European Union listed age (being too old or too young) as being perceived amongst citizens of the European Union as being the top potential barrier to the labour market. This is despite specific European Union laws being in place for almost twenty-one years to tackle age discrimination in the labour market (Directive 2000/78/EC). In an evaluation of the implementation of Directive 2000/78/EC in the EU Member States in 2021, the European Commission found some stakeholders had a 'limited awareness and application' of the concept of indirect discrimination in domestic judicial practice. Despite Spain introducing a new comprehensive law on Equality of Treatment and Non-Discrimination in 2022 and a new Whistleblowing Law in 2023, practical difficulties to addressing age discrimination and particularly indirect age discrimination continue to exist.

KEYWORDS

Non-discrimination
Equality of treatment
Ageism
Direct age discrimination
Indirect age discrimination
Intolerance
Recruitment
Employment
Work

RESUMEN

El Eurobarómetro 2023 sobre Discriminación en la Unión Europea identifique la edad (ser demasiado mayor o demasiado joven) como la percepción entre los ciudadanos de la Unión Europea como la principal barrera potencial al mercado laboral. Esto a pesar de que desde hace casi veintiún años existen leyes específicas de la Unión Europea para abordar la discriminación por edad en el mercado laboral (Directive 2000/78/CE). En una evaluación sobre la implementación de la Directiva 2000/78/CE en los Estados miembros de la UE en 2021, la Comisión Europea encontró que algunas partes interesadas tenían "un conocimiento y una aplicación limitados" del concepto de discriminación indirecta en la práctica judicial nacional. A pesar de la introducción de la Ley 15/2022, de 12 de julio, integral para la igualdad de trato y la no discriminación y Ley 2/2023, de 20 de febrero, reguladora de la protección

PALABRAS CLAVE

Igualdad de trato
No discriminación
Edadismo
Discriminación directa por edad
Intolerancia
Discriminación indirecta por edad
Acceso al empleo
Empleo
Trabajo

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de las personas que informen sobre infracciones normativas y de lucha contra la corrupción, siguen existiendo dificultades prácticas para abordar la discriminación por edad y, en particular, la discriminación por edad indirecta.

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I. INTRODUCTION

During the period 13 April to 28 April 2023, 26,399 citizens in the European Union were asked for their views on discrimination. 1004 interviews were carried out in Spain[1]. 45% of those interviewed thought that age discrimination (being perceived as too young or too old) was common across the European Union, and 51 % of those interviewed in Spain thought age discrimination was common[2]. When asked if they thought age could be a disadvantage, if a business had to choose between two candidates with the same skills and qualifications, 52 % of those interviewed in the EU said yes. This rose to 61 % in Spain[3]. Age (being too old or too young) was perceived as being top potential barrier to the labour market (more of a potential barrier than disability, skin colour, ethnic origin, gender, sexual orientation or religion amongst others).

These beliefs about age discrimination held by the population in the labour market in Spain are supported by research in the labour market. To choose but one example, there exists research from 2022/2023 which shows that candidates in Spain who are 49 years of age or over, are 50% less likely to receive an invitation to an interview compared with younger candidates who are 35 years of age with similar experience on their curriculums[4]. This investigation demonstrates that *equally qualified candidates* still do not have the same access to the same opportunities in the workplace, because of factors that are beyond the control of candidates, such as their age. According to the Ministry of Work and the Social Economy in September 2024 of the 2,575,285

1. Available from: https://europa.eu/eurobarometer/surveys/detail/2972.
2. https://europa.eu/eurobarometer/surveys/detail/2972.
3. https://europa.eu/eurobarometer/surveys/detail/2972.
4. Odra Quesada, P.; Martínez de la Fuente, D. y de la Rica, S. ¿Demasiado mayor para trabajar? Evidencia de un experimento de campo sobre el edadismo en el mercado laboral español at: https://iseak.eu/publicacion/demasiado-mayor-para-trabajar-evidencia-de-un-experimento-de-campo-sobre-el-edadismo-en-el-mercado-laboral-espanol.

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people registered as unemployed in Spain, 1,485,685 (57.5 %) are over the age of 45[5]. This compares with 380,844 (14.8 %) who are under the age of 30[6]. In June 2024, of the 1,379, 963 people who signed new contracts in Spain, only 345,167 (around 25 %) were signed by people over the age of 45[7]. The Spanish government is aware of the difficulties faced by job seekers generally over the age of 45 in the labour market. It offers reduced rates for employers on their employers' social security contributions if they hire unemployed job seekers who are over the age of 45 for a minimum period of three years –Article 21 of Royal Decree-Law 1/2023 of 10 of January, on urgent measures and incentives in hiring employees and the better social protection of artists–. However, this sort of fiscal measure alone is not enough to promote a culture change within the hiring practises of businesses, and therefore not enough to solve the problems faced by older job seekers in the labour market.

These views, statistics and evidence of age discrimination exist despite the fact that European Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (´the Equal Treatment Directive') is almost twenty-one years old[8]. In the preamble, the Directive stated that employment and occupation are 'key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life to realising their potential'[9]. It noted that: 'discrimination based on age may undermine the achievement of the objectives of the EU Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons'[10]. In an evaluation of the implementation of Directive 2000/78/EC in the EU Member States in 2021, the European Commission found some stakeholders had 'a limited awareness and application' of the concept of indirect discrimination in domestic judicial practice[11].

Directive 2000/78/EC was implemented in Spain through articles 27 to 43 of a general piece of legislation called Law 62/2003 of 30 December, on Fiscal, Administrative and Social Measures ('Law 62/2003'). The fact that this non-discrimination Directive was transposed into a general piece of legislation covering various subjects is perhaps indicative of the importance which it was given at the time. In 2022, Spain introduced a new comprehensive law on Equality of Treatment and Non-Discrimination ('Law 15/2022') which seeks to enhance non-discrimination laws. This law expressly

5. Available from: https://www.sepe.es/HomeSepe/que-es-el-sepe/estadisticas/datos-avance/paro.html viewed on 17 November 2024

6. *Ibid.*

7. Arriola, P.: *Los parados mayores de 45 años superan el 58% del total, el nivel más alto de la historia,* 29 de junio de 2024 en elEconomista.es.

8. Member States had to implement its provisions by 2 December 2003 (article 18).

9. Recital 9 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter 'Directive 2000/78/EC').

10. Recital 11 of Directive 2000/78/EC.

11. Report from the European Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021) 139 final, p. 4.

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noted that the rights and obligations contained therein were hoped to be 'effective instruments to fight against forms of discrimination, such as age discrimination, which could potentially affect a large percentage of the population in the coming years, as a consequence of the gradual ageing of our society'[12]. Notwithstanding the general promotion of Equality of Treatment and Non-Discrimination offered by Law 15/2022, this law still falls short. It does not impose express obligations of analysis to detect indirect discrimination, nor does it provide a specific procedure for recovery of relevant data/information at an early stage.

II. ASSESSING POTENTIAL AGE DISCRIMINATION CASES

Law 15/2022 provides that people who are victims of discrimination have the right to receive 'complete and comprehensible information', as well as an assessment into their 'personal situation, adapted to their context, needs and capacities' through the services, organisations and offices that the public administrations can offer –art. 5.2 Law 15/2022–. People are entitled to receive a free legal assessment prior to lodging a claim –art. 5.4 Law 15/2022–. However, it can be difficult to provide a 'comprehensive' assessment of a potential age discrimination claim at an early stage in Spain because it can be difficult to access the relevant data/information required at an early stage.

In the assessment of any potential direct age discrimination claim, it is firstly necessary to identify the less favourable treatment and the comparator of the different age –art. 6.1.(a) Law 15/2022–. In the assessment of any potential indirect age discrimination claim, it is firstly necessary to identify the 'apparently neutral provision, criterion or practice' that causes or may cause various people of a certain age to be put at a particular disadvantage compared to others of a different age group –art. 6.1.(b) Law 15/2022–. The preamble to Directive 2000/78/EC states that it is for Member States to decide whether indirect discrimination is to be established on the basis of statistical evidence or by any other means –Recital 15 of Directive 2000/78/EC–. Whether the claim is for direct or indirect age discrimination, it is necessary to understand, from the outset, what the employer's reason is for the difference of treatment or the reason for the 'apparently neutral provision, criterion or practice' that has a disparate impact, and whether there exists a legitimate aim that can be objectively justified –art. 4.2 Law 15/2022–. The third step of the analysis is to then consider whether the means of achieving the aim 'is adequate, necessary and proportionate' –art. 4.2 Law 15/2022–. Law 15/2022 expressly states that it will be understood as discriminatory job application processes and criteria in the public and private sector that 'produce situations of indirect race discrimination' –art. 9.2 Law 15/2022–.

12. Section III of the Preamble of Law 15/2022 Equality of Treatment and Non-Discrimination (hereinafter referred to as 'Law 15/2022').

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III. THE LACK OF EXPRESS OBLIGATIONS ON EMPLOYERS TO ANALYSE AGE INEQUALITIES

Law 15/2022 imposes obligations on both the representatives of the workers and the business 'to ensure compliance with the law of equality of treatment and non-discrimination in the business, and in particular, compliance with any positive measures and the attainment of those objectives' –art. 10.3–. Law 15/2022 expressly states that 'inaction, failure to discharge duties, or failure to comply with obligations' is a breach of the right to equality –art. 4.1–. However, it stops short of imposing *explicit* obligations on employers or employee representatives to analyse whether 'apparently neutral provisions, criterion or practices' are having a disparate impact on different age groups.

Employers in Spain have to comply with their employment law obligations which are set out not only in legislation but also in any applicable collective bargaining agreements that may apply to their business/organisation. With effect from 1 January 2022, for example, any clauses in collective agreements that provide for the forced retirement of the worker at an age of less than sixty-eight are prohibited –Tenth additional disposition of Royal Legislative Decree 2/2015, of 23 of October, the Spanish Workers' Statute (hereinafter 'the Spanish Workers' Statute)–. Law 15/2022 states that collective negotiations can´t establish 'limits, segregations, or exclusions' on the grounds of age discrimination in collective agreements –art. 10.1 Law 15/2022–. It also states that collective agreements *could* contain positive measures to 'prevent, eliminate and correct' all forms of discrimination –art. 10.2 Law 15/2022–. However, it does *not expressly* require employers to expressly analyse whether, for example, their recruitment criteria/selection process has a disparate impact on different age groups. A glance at Collective Agreements such as the agreement applicable to Offices in Madrid published on 13 August 2022[13], or the 2023 VI Labour Agreement relating to the Hospitality Sector[14] or the State Collective Agreement applicable to Universities and Investigation centres published on 27 May 2024, contain no express requirements to analyse age-discrimination within the organisations, or to combat age discrimination in recruitment in terms of access to these organisations[15]. Indeed, none of them make *explicit* reference to the prevention of discrimination on the grounds of age in the workplace. It seems that age discrimination is not in the foremost of the minds of the employees' representatives and employers' representatives who negotiate sectorial collective bargaining agreements.

Neither does Law 15/2022 impose any *express obligations* on employers to formulate equality plans to tackle age discrimination within their workplaces. This is in sharp contrast to employers' obligations in relation to gender equality or the LGTBI collective. Employers with fifty employees or more in Spain are expressly required to analyse

13. See, for example, article 42 of the Collective Agreement applicable to Offices in Madrid published on 13 August 2022 available at: https://www.ceim.es/documento/publication-document-1656936056.pdf.

14. See, for example, articles 44 to 51 of 2023 VI Labour Agreement relating to the Hospitality Sector available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2023-6344.

15. See for example, article 57 available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2024-10663.

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gender equality within their organisations including gender equality gaps that may exist in recruitment, training, promotion, employment conditions, female underrepresentation –Article 46.2 of Organic Law 3/2007 of 22 March on Effective Equality between Men and Women (hereinafter 'Organic Law 3/2007')–. Thereafter, they are required to draft equality plans following consultation with the employees' representatives. Equality plans should contain specific objectives in relation to any inequalities identified, the strategies or measures which the organisation proposes to adopt to achieve the identified objectives, as well as establishing how monitoring and achievement of the objectives will be undertaken –art. 46.1 Organic Law 3/2007–. In addition to analysis, equality plans facilitate transparency because employee representatives or, in their absence, employees have the right to access information about the content of equality plans and the achievement of their objectives –Article 15.1 of Law 4/2023 of 28 February, for the Real and Effective Equality of Trans People and the Guarantee of the Rights of LGTBI People (hereinafter 'Law 4/2023')–.

Similarly, employers with over fifty employees are also under an express obligation to plan for the real and effective equality of LGTBI employees –Article 15.1 of Law 4/2023 of 28 February, for the Real and Effective Equality of Trans People and the Guarantee of the Rights of LGTBI People (hereinafter 'Law 4/2023')–. These measures must include 'the adoption of sufficient methods of 'prevention and detection of discrimination' against the LGTBI collective –Article 62.3 of Law 4/2023–. Employers are required to ensure that people who participate in selection processes have had appropriate training to eradicate the risks of stereotyping LGBTI people –Paragraph 2 of Annex 2 of Royal Decree 1026/2024 of 8 October, which develops the planned set of measures for equality and non-discrimination of LGBTI people in companies (hereinafter 'Royal Decree 1026/2024')–. They are also required to offer training in equal treatment and opportunities and non-discrimination to the entire workforce including middle managers, management positions and workers with responsibility for personnel and human resources management –Paragraph 4 of Annex 2 of Royal Decree 1026/2024–. Employers are also required to 'establish clear and specific criteria to guarantee an adequate selection and hiring process that prioritises the training or suitability of the person for the job, regardless of their sexual orientation and identity or gender expression' –Paragraph 2 Annex 2 of Royal Decree 1026/2024–. Finally, employers are required to ensure that criteria for promotions are based on objective elements, including qualifications and ability and should not entail direct or indirect discrimination –Paragraph 3 of Annex 2 of Royal Decree 1026/2024–.

Law 15/2022 falls short in assisting those who would like to challenge suspected indirect age discrimination because it does not include an express obligation for all employers (either through collective bargaining agreements or age equality plans) to conduct a regular analysis on whether apparently neutral provisions, criterion or practices are having a disparate impact on different age groups. If employers were expressly obliged to conduct an analysis of whether or not their criterion or policies were discriminatory, they would be better placed to spot potential indirect age discrimination (as well as other forms of indirect discrimination).

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To illustrate with a practical example, it is not uncommon for public universities in Spain to include the following type of recruitment criteria in their application processes for a post-doctoral position: academic training (up to 35 points) and relevant professional experience (up to 5 points)[16]. Within the category of academic training there may be, for example, up to four points for academic record in the original degree, plus up to an additional two points for any prizes awarded for the original degree, plus up to one and half points awarded for a high score in the dissertation in the original degree. A total of seven and a half points related simply to the short period of life studying the first degree. Thereafter, a student who is awarded a scholarship for a doctorate, may be awarded a further two points per year for each year they enjoy the scholarship whilst they complete the doctor (a possible additional six to eight points simply for complying with their obligations to complete the doctorate whilst they receive external funds). In sharp contrast, the maximum award of points for professional experience related to the field of teaching, is limited to five points (no matter how many years of relevant professional experience a candidate may have).

In order to understand whether this difference in scoring policy is potentially indirectly age discriminatory (particularly against applicants over the age of 45 who may have many years of relevant experience gained in the field, but who may have completed their degrees many years ago when standards and formats were different), it would be necessary to conduct an analysis of how candidates of different age groups are affected by this apparently neutral scoring policy. If the analysis showed a disparate impact on older age groups, then consideration would have to be given as to whether the university had a legitimate aim that could objectively justify this scoring policy. The final analysis would be whether scoring studies undertaken in initial academic studies seven times more highly than studies and work undertaken in a professional context is an 'adequate, necessary and proportionate' measure to fulfil any potential legitimate aim that has been identified.

Not only does Law 15/2022 not impose express obligations on employers to analyse the potential disparate impact of 'apparently neutral provisions, criterion or practices,' particularly in recruitment processes, but it encourages the use of anonymous curriculums as a measure to help to reduce indirect discrimination in recruitment. This measure may, in fact, hinder rather than help indirect discrimination cases –Article 9.3 of Law 15/2022–. This is because in any analysis of an indirect age discrimination case in the context of recruitment or working terms and conditions, it is necessary to be able to analyse how the apparently 'neutral provision, criterion or practice' affect one age group of candidates compared with another. It is therefore necessary to have a record in the recruitment process of the ages of the candidates (as well as other protected characteristics) in order to conduct this analysis. If CVs are to be submitted in an anonymous format there should be a positive obligation to request data required in order to carry out an equalities and non-discrimination audit. This can then be

16. See, for example, the criteria for the selection of assistant lecturers at Málaga University published 22 December 2023 in the Official Bulletin of Andalucia available at: https://www.juntadeandalucia.es/boja/2023/244/s53.

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used by employers to analyse whether particular groups are being put at a particular disadvantage compared with others in the recruitment procedures. If there is no data collection, data cannot be easily and accurately analysed, and potential indirect discrimination cannot be easily identified. In this context, classifying the request of personal date in selection processes as a very serious breach of employment law is unhelpful –Article 16.1.(c) of Royal Legislative Decree 5/2000 of 4 August, Law on Breaches and Sanctions in the Social Order (hereinafter referred to by the Spanish initials of 'LISOS')–.

IV. RAISING CONCERNS ABOUT AGE DISCRIMINATION DIRECTLY WITH AN EMPLOYER OR PROSPECTIVE EMPLOYER

Given that Spanish law does not expressly oblige employers to consider potential age inequalities in the same way that it requires them to consider potential gender inequalities or inequalities affecting the candidates or employees who form part of the LGBTI community, does Spanish law offer a route to candidates or employees who suspect that apparently neutral provisions, criterions or practices may be indirectly age discriminatory to raise these concerns directly with the employer?

Spain requires employers to have specific policies in place to tackle complaints relating to sex or sexual harassment, or harassment of employees who form part of the LGBTI collective –Article 48 of Organic Law 3/2007, and Annex II of Royal Decree 1026/2024–. There is, however, no general grievance procedure in Spain which applies to *all* potential discrimination complaints.

Last year, Spain implemented European Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law. The new Spanish law is Law 2/2023, of 23 of February, Regulating the Protection of People that Inform about Breaches of Law and the Fight Against Corruption and it entered into force on 13 March 2023. Law 2/2023 imposes an obligation on employers in the private sector with more than fifty employees to implement an internal reporting system –Article 10.1(a) of Law 2/2023 of February, Regulating the Protection of People that Inform about Breaches of Law and the Fight Against Corruption (hereinafter 'Law 2/2023')–. All public sector entities are also required to implement internal reporting systems –Article 13 of Law 2/2023–. The protections of this law apply to whistleblowers who work in the private or public sector and who have obtained information about breaches to which this law applies in a work or professional context –Article 3.1 of Law 2/2023–. This law applies to employees in the private and/or public sectors, the self-employed, any person working for or under the supervision and direction of contractors, subcontractors and suppliers –Article 3.2 of Law 2/2023–. It also applies to former employees in the private and public sectors, and to candidates in cases where the information about breaches has been obtained during the selection process or pre-contractual negotiation –Article 3.2 of Law 2/2023–.

Complaints can be made in writing or verbally (although a written record must then be kept) –Article 3.2.(c) of Law 2/2023–. If requested, a meeting should be called within

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a seven-day period to hear the complaint –Article 7.2 of Law 2/2023–. Upon receipt of a complaint, it must be sent to the manager responsible for the internal complaint system –Article 9.2.(g) of Law 2/2023–. In the case of the private sector, the system manager may be a director of the entity, or it may be the person responsible for the function of regulatory compliance or integrity policies –Article 8.6 of Law 2/2023–. The employer must generally send an acknowledgement of receipt of the communication to the informant, within seven calendar days of its receipt –Article 9.2.(c) of Law 2/2023–. The business must determine the maximum period for responding to the investigative proceedings, which may not exceed three months from receipt of the communication or, if no acknowledgement of receipt was sent to the informant, three months from the expiry of the period of seven days after the communication was made[17]. The business must keep in touch with the informant and, if deemed necessary, request additional information from the informant –Article 9.2.(e) of Law 2/2023–.

The European Whistleblowing Directive protects people who report relevant concerns providing that 'they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive' –Article 6.1(a) of Directive 2019/1937–. 'Information on breaches' is defined as: 'information, *including reasonable suspicions*, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or was in contact through his or her work, and about attempts to conceal such breaches' – Article 5(2) of Directive 2019/1937–. The new Spanish law 2/2023 extends the scope of the European Directive. This law seeks to protect physical people who inform about relevant breaches of European Union law as defined in Directive 2019/1937, as well as people who inform about 'actions or omissions *that may constitute* a breach of criminal law, or serious or very serious breaches of civil law' (including employment law) –Article 1(b) of Law 2/2023–.

The law does not, however apply to 'information linked to claims about interpersonal conflicts or that affect only the informant and the people to whom the communication or disclosure refers' –Article 35.2(b) of Law 2/2023–. Given that complaints about indirect discrimination by their very nature affect adversely affect a group of people within an organisation who share a particular protected characteristic, *some* complaints about indirect discrimination including on the grounds of age should potentially fall within the remit of this law[18].

In order to understand which potential complaints may be covered by the new Spanish whistleblowing law it is necessary to review which decisions relating to discrimination are classified as 'serious' or 'very serious' breaches under Spanish law. Very serious breaches of Spanish employment law include 'unilateral decisions' by an

17. Except in cases of special complexity that require an extension of the term, in which case, it may be extended to a maximum of another three additional months in terms of Article 9.2.(d) of Law 2/2023.

18. Indirect discrimination as defined in article 2.1(b) of Directive 2000/78/EC, the Spanish definition in article 6.1(b) of Law 15/2022 is different and includes where reference to individuals as well as groups.

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employer that involve direct or indirect unfavourable discrimination on the grounds of age in terms of remuneration, working hours, training, promotion and other working conditions –art. 8.12 Royal Legislative Decree 5/2000, of 4 of August, which approved the revised text of the Law of Breaches and Sanctions in the Social Order (hereinafter 'LISOS')–. Harassment because of age when it takes place in the workplace and if it is known by the business and if the business has not taken the necessary measures to stop it is also categorised as a very serious breach of employment law –art. 8.13 LISOS–. Decisions by an employer that involve unfavourable treatment of workers as a 'reaction to a complaint made in the company or to an administrative or judicial action aimed at demanding compliance with the principle of equal treatment and non-discrimination' are considered serious breaches –art. 8.12 LISOS–. As previously noted, 'requesting personal data in selection processes or establishing conditions that constitute discrimination for access to employment based on age' are also actions that are classified as 'very serious' breaches of employment law –art.16.2 LISOS–. Labour inspectors have the power to impose administrative financial sanctions on employers for breaches of employment or social security laws including breach of non-discrimination laws –article 1.2 of Law 23/2015, of 21 of July, the Labour and Social Security Inspection System–. The financial penalties for 'very serious breaches' currently range between €7,501 to €225,018 –article 40.1(c) LISOS–.

In order to receive the protection of this law the individual who communicates breaches must have 'reasonable grounds to believe that the information referred to is true at the time of communication or disclosure, even if they do not provide conclusive evidence' –Article 35.1(a) of Law 2/2023–. However, communications may be dismissed 'when the facts reported lack any plausibility,' or if the communication is 'manifestly unfounded'. It does not apply to information that constitutes 'mere rumours' –arts. 18.2, letters a and c Law 2/2023–.

The new Spanish whistleblowing law therefore contains some serious shortcomings when viewed from the perspective of raising potential age discrimination concerns. Firstly, it does not apply to employees in the private sector who work for small to medium sized businesses with less than with less than fifty employees. This means that it is only potentially a tool/method that can be used to obtain relevant data/information in relation to a potential age discrimination complaint if the employer is a large employer in the private sector or a public sector employer. At the time of writing, 46.9 % of employees in Spain work in small businesses with less than 49 employees –art. 35.1.(a) Law 2/2023–. Secondly, it will only be if the employer itself has *unilaterally decided* to discriminate directly on the grounds of age or has unilaterally itself adopted the 'apparently neutral provision, criterion or practice' that has a disparate impact on different age groups. On a strict reading of the law, it does not appear to include directly or indirectly discriminatory decisions that may have been adopted by the employer following consultation and agreement with employees' representatives. If employees' representatives agree to the use of 'apparently neutral provisions, criterions or practices' that have disparate impact on different age groups following consultation by the employer then the discriminatory issue has not been 'unilaterally' decided by the employer and therefore does not appear

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to fall within the remit of this law. Thirdly, it is not at all clear how much information a prospective job seeker or employee will need to furnish in order to demonstrate that they have 'reasonable grounds to believe that the information referred to is true at the time of communication or disclosure, even if they do not provide conclusive evidence' –art. 35.1(a) Law 2/2023–. As noted above, communications may be dismissed 'when the facts reported lack any plausibility' –art. 18.2(a) Law 2/2023–, or if the communication is 'manifestly unfounded' –art. 18.2(c) Law 2/2023–. It does not apply to information that constitutes 'mere rumours'–art. 35.2(c) Law 2/2023–. Part of the difficulty in indirect discrimination claims is that it is not possible to know whether an allegation of indirect discrimination is potentially justifiable without having the data to show, for example, that an 'apparently neutral provision, criterion or practice' has a disparate effect on different age groups. Potential job seekers or employees may have difficulty accessing such data if the employers undertake no such analysis. It remains to be seen how organisations will distinguish between employees who do not have 'conclusive evidence' of their complaint, and employees whose complaints are dismissed as 'mere rumours'. Given that organisations are essentially 'marking their own homework' in this regard, it is easy to see how there may be a temptation to resist a concern that 'apparently neutral provision, criterion or practice' as mere rumours (thus requiring no further investigation) rather than a concern that does not have conclusive evidence for the obvious reason that the job seeker/employee may not have access to the relevant information to conduct the relevant analysis. The danger is that the new Spanish whistleblowing procedure may be reserved for the most obvious and clear cut cases of direct and indirect age discrimination such as an employer openly stating a preference to hire younger employees without any justification, rather than being used as a serious tool to investigate concerns about whether an employer has indirectly discriminated against a particular group (whether intentionally or inadvertently) through its 'apparently neutral provisions, criterions or practices'.

V. RAISING AGE DISCRIMINATION CONCERNS WITH AN EXTERNAL AUTHORITY

If a candidate or an employee decides not to raise concerns directly with an employer either because the employer has no internal complaint system if they have less than fifty employees, or because the candidate or employee believes that the employer will dismiss their concerns as 'lacking any plausibility' or will consider it 'manifestly unfounded' or 'mere rumours' if they have no proof, there are two external authorities that the individual may consider approaching.

The first is the new Whistleblowing Authority which is the external reporting channel for the public sector –art. 24.1 Law 2/2023–. It is also the external reporting channel for entities that make up the private sector, when 'the infringement or non-compliance reported affects or produces its effects in the territorial area of more than one Autonomous Community –art. 24.1(c) Law 2/2023–.

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Any natural person may report to the Independent Authority for the Protection of Whistleblowers, A.A.I., or to the corresponding authorities or regional bodies, the commission of any actions or omissions included in the scope of application of this law, either directly or after communication through the corresponding internal channel –art. 16.1 Law 2/2023–. Within five days of the complaint being made the Independent Authority must acknowledge receipt –art. 17.4 Law 2/2023–. The Independent Authority for the Protection of Whistleblowers, A.A.I., will decide, within a period that may not exceed ten working days from the date of entry of the information in the register, whether to accept the communication or to dismiss the communication because the facts reported 'lack any plausibility' –art. 18.2(a) Law 2/2023–, or 'if the communication is manifestly unfounded' –art. 18.2(c) Law 2/2023–.

If accepted, the investigation will include 'all those actions aimed at verifying the plausibility of the facts reported' –art. 9.1 Law 2/2023–. All natural or legal persons, private or public, must collaborate with the competent authorities and will be obliged to respond to the requests addressed to them to 'provide documentation, data or any information related to the procedures being processed, including the personal data that may be requested' –art. 19.5 Law 2/2023–.

Once the investigation has been concluded, the Independent Authority for the Protection of Whistleblowers, A.A.I., must issue a report containing, amongst other things, a statement of the facts reported, the actions carried out in order to verify the plausibility of the facts, the conclusions reached in the investigation and the assessment of the proceedings and the evidence that supports them –art. 201 Law 2/2023–. The deadline for completing the proceedings and responding to the informant, if applicable, may not exceed three months from the date the information is entered into the register.

Not all candidates or employees will have the potential option to report age discrimination concerns to the Whistleblowing Authority for the reasons already outlined above. The Whistleblowing Authority is not authorised to investigate all potential discrimination complaints, only those which fall within the definitions of 'very serious breaches' in terms of the legislation. It is difficult to see the potential benefit of going to the external Whistleblowing Authority to investigate potential indirect discrimination cases when Spanish labour inspectors, in theory, have years of experience in these types of matters.

The second external authority which an individual who suspects age discrimination may go to are the Spanish labour authorities. Inspectors can act at their own initiative, if requested by courts or other administrative authorities or if a valid complaint has been lodged by an individual –Article 20.1 of Law 23/2015, of 21 of July, the Labour and Social Security Inspection System (hereinafter 'Law 23/2015')–. A valid complaint is when an individual provides the inspectors with facts that could justify their intervention at their own initiative. Complaints are invalid if they are anonymous, or if they are unfounded –Article 21.5 of Law 23/2015–. They must contain the identification of the complainant, and the facts allegedly constituting an infringement in matters for which the Labour and Social Security Inspectorate is competent, the date and place of

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their occurrence, identification of the allegedly responsible parties and other relevant circumstances –Article 9.2 of Royal Decree 928/1998–. Complaints are invalid if they are overlapping with matters that are already before an employment court –Article 20.5 of Law 23/2015 and Article 9.2 of Royal Decree 928/1998–. Labour inspectors can inspect breaches of employment law, during the period from three years from the date of the infringement –Article 7.1 of Royal Decree 928/1998–.

Labour inspectors have wide powers to investigate valid complaints. Labour inspectors can freely enter at any time and without prior notice any workplace, establishment or place subject to inspection and to remain therein –Article 13.1 of Law 23/2015–. Usually, investigations must be completed within a nine-month period –Article 8.2 of Royal Decree 928/1998–. Labour inspectors can issue precautionary orders that they deem appropriate and are proportionate to their purpose, to prevent the destruction, disappearance or alteration of the documentation relevant to the verification of compliance or not with employment law –Article 13.3(e) of Law 23/2015–. They can request any evidence that they consider necessary to determine compliance with employment law –Article 13.2 of Law 23/2015–. They can interview witnesses including the employer or its representatives and managers, workers –Article 13.3 (a) and (b) of Law 23/2015–. They can examine and take copies of any documentation relevant to the verification of compliance with employment law, such as: books, records, plans, including computer programs and files on magnetic support, documents required in the regulations on the prevention of occupational risks and any others related to the matters subject to inspection whether held directly by the employer or a third party –Article 13.3 (c) and (d) of Law 23/2015–. There is a general obligation to provide the material requested and to cooperate with the labour inspectors (although this does not extend to confidential data for the purposes of professional advice) –Article 18.2 of Law 23/2015–. Facts that are included in the infringement reports by the labour inspectors are presumed to be true (without prejudice to the evidence that the interested parties may provide in defence of their respective rights or interests) –Article 23 of Law 23/2015–.

Inspectors can simply issue warns to employers provided that no direct damage is caused to the workers or their representatives –Article 22.1 of Law 23/2015–. They can require employers to adopt measures within the period they indicate in order to comply with employment law –Article 22.1 of Law 23/2015–. The inspectors themselves can provide information and technical assistance to companies when exercising the inspection function, especially small and medium-sized companies, in order to facilitate better compliance with employment law –Article 12.2(a) of Law 23/2015–. Alternatively they can issue administrative sanctions if they find evidence of breaches of employment law.

Law 15/2022 states that social security and labour inspectors should ensure respect for equality of treatment and no discrimination in the access to employment and the conditions of employment –Article 9.4 of Law 15/2022 and Article 1.3 and 14 of Law 23/2015, of 21 of July, the Labour and Social Security Inspection System–. The inspectors are now obliged to include in their annual planning how they will monitor

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compliance with the equality and discrimination laws. At the time of writing, the Strategic Plan for Work Inspectors in 2024 has not been published. The Strategic Plan for Work Inspectors for the period 2021 to 2023 was available. In this plan reference is made to there being a focus on campaigns aimed at monitoring compliance with health and safety obligations such as: 'companies that require age management at work, due to the prolongation of the working life of staff, which requires attention to their adaptation to the evolution of psychophysiological aptitudes'[19], However, no express mention is made of specific measures that were taken to tackle age discrimination[20].

Of the 121,957 orders made by the labour inspectors in 2022 in relation to employment law, it is not possible to see how many, if any, related to age discrimination[21]. It is, however, possible to see that 794 were issued in relation to gender discrimination in terms of accessing employment, 1728 in relation to salary discrimination on the grounds of gender, 433 in relation to sexual and sex harassment, 4302 in relation to gender equality plans, 884 in relation to work/life conciliation rights and 539 in relation to gender discrimination in collective agreements. Against the background of the information that is available, it is easy to understand why a potential candidate or employee who feels they have suffered age discrimination, may not have confidence that it is a matter than the labour inspectors will necessarily dedicate the required time to analyse and investigate.

VI. RAISING AGE DISCRIMINATION CLAIMS IN THE EMPLOYMENT COURTS

The most common types of age discrimination claims that have been examined in the employment law courts in Spain can broadly be divided into three categories. Firstly, published age restrictions in relation to specific selection processes (usually in the public sector), for example in relation to the police or the armed forces[22]. Secondly, using age as a criterion for selection of older employees in the context of a collective dismissal[23]. Thirdly, forced retirements because the applicable collective bargaining agreement sets the age for retirement[24]. The most common types of age discrimination cases in Spain therefore usually relate to a situation in which an age related criteria is clearly identifiable (a directly discriminatory policy) rather than the examination of 'apparently neutral provisions, criterions or practices' that may have a disparate impact on specific age

19. Secretary of State for Employment and the Social Economy: *Strategic Plan for the Inspectors of Work and Social Security 2021-2023*, action 2.4, at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-20005 consulted on 26 October 2024.

20. Objective 6: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-20005 consulted on 26 October 2024.

21. Statistics relating to the activity of the labour inspectors in 2022 available from: https://www.mites.gob.es/itss/web/Que_hacemos/Estadisticas/index.html (viewed 6 November 2024)

22. See, for example: STS de 28 de enero de 2016 (Rec.480/2014), SSTSJ de Galicia 112/2015, de 25 de febrero y 681/2014 de 26 de noviembre.

23. See, for example: STC 66/2015, STSJ/Valencia de 24.9.2014 Rec. Sup. 1844/2014, STSJ/Andalucia – Sevilla de 25.5.2016 Rec. Sup. 1587/2015, STSJ/Navarra de 17.7.2015, Rec. Sup. 214/2015, STSJ/Sevilla de 23.2.2015, Pto. 32/2014.

24. See, for example: sentencia de 16 de octubre de 2007, Caso Palacios de la Villa, C-411/05

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groups (indirectly discriminatory practices). This may, in part, be due to the difficulty of accessing relevant date in practice for the reasons already outlined.

The Employment Equality Directive required Member States to take measures to ensure that when a person considers themselves wronged because the principle of equal treatment has not been applied to them and establishes before a court or competent authority, 'facts from which it may be presumed that there has been direct or indirect discrimination' it is for the employer to prove that there has been no breach of the principle of equal treatment[25]. This rule also applies to claims relating to harassment or instructions to discriminate as these are also classified as forms of discrimination which breach the principle of equal treatment –Articles 2.3 and 2.4 of Directive 2000/78/EC–. Law 63/2003 implementing this Directive chose not to following the drafting of the burden of proof provisions in the Directive. It provides 'if from the allegations of the employee it can be deduced the existence of well-founded indications of discrimination due to the age of the person, the employer is responsible for providing an objective and reasonable justification, sufficiently proven, of the measures adopted and their proportionality' –Article 36 of Law 63/2002–. This drafting is reflected in the general procedural law which applies to employment law claims –Article 96.1 of Law 36/2011 of 10 October, the Regulation of the Social Jurisdiction (hereinafter referred to by its Spanish shorthand 'LRJS')– and identical drafting is in Law 15/2022 –art. 30.1–.

In Spain employment law claims and claims relating to social security rights are heard by the Social Courts –art. 1 LRJS–. The time limit which applies to the lodging of any particular discrimination claim, depends on the nature of the act/omission complained of. Claims relating to the termination of contract, for example, must be lodged within twenty working days of the date of termination –Article 59.3 of the Workers' Statute–. Claims relating to the challenge of a disciplinary sanction imposed by the employer must also be lodged within twenty days of the notification of the disciplinary sanction –Articles 103 and 114(1) of the LRJS–. Claims relating to employment contracts that don´t have a special time limit set out in legislation, prescribe one year after termination –Article 59.1 of the Workers' Statute–.

The social courts contain different procedural rules depending on the nature of the claim. For example, if the alleged act of discrimination relates to a dismissal or extinction of employment contract (including in relation to collective dismissals), the procedure for challenging dismissals must be followed. There are different procedures for claims relating to geographic changes, substantial changes to terms and conditions of employment, claims relating to suspension of the employment contract and a reduction in working hours due to economic, technical, organisational or production reasons or derived from force majeure, claims relating to holidays, claims relating to the conciliation of working life with personal and family obligations, claims relating to the appeal of collective agreements and claims relating to disciplinary sanctions imposed by employers to list but a few.

25. Article 10.1 of Directive 2000/78/EC (this rule does not apply to criminal proceedings in terms of Article 10.3).

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There is a specific litigation procedure for the protection of fundamental, constitutional rights within the context of employment law ('the protection of fundamental rights procedure') in which the Claimant is asking the court to confirm that there has been a breach of their fundamental, constitutional rights. The Spanish Constitution provides that the Spanish are equal before the law, and that no discrimination can prevail by reason of birth, race, sex, religion, opinion or any other personal or social circumstance –Article 14 of the Spanish Constitution 29 December 1978 (hereinafter 'the Spanish Constitution')–. The Spanish Constitution includes a right to have matters concerning constitutional/fundamental rights to be fast-tracked in the ordinary courts, or determined by the Constitutional Court –Article 53.2 of the Spanish Constitution 1978–.

In theory, a claimant can therefore choose between the ordinary litigation procedure or the special protection of fundamental rights litigation procedure if they have a discrimination complaint unless an alternative litigation procedure applies to the facts –Article 177.1 of LRJS–. Certain litigation procedures are the only possible avenues for pursuing a protection of discrimination rights if the breach of those rights relates to certain acts or omissions. If the discriminatory act complained of is a dismissal, for example, the procedure applicable to dismissals applies. However, the protections that exist in the special litigation procedure will also apply –Article 178.2 of the LRJS–. Specifically, the ability to seek interim relief/protective measures –Article 180.1 of the LRJS–, a procedure which has a preferential and summary character, the intervention of the public procurator´s office, the possible participation of a trade union as a third party in the action –Article 14 LOLS–, the possibility of the 'reversal' of the burden of proof, the request for the payment of damages –Article 26.2 of the LRJS–, and the right to appeal. If the special rights procedure has been used, a party can appeal directly to the Constitutional Court of Spain.

It is possible to apply to the court to require that a prospective party exhibit books or accounts or any other document that is necessary for drafting a claim (or a defence) –Article 77.1 of the LRJS–. Any type of document can be sought *providing that it is necessary* for drafting the claim/defence and it is therefore necessary to provide in the request the reasons for requesting the document. This is a request for a document to be exhibited and not a request for the provision of a document. This request must be resolved by the courts within two days –Article 77.2 of the LRJS–. The court may require that a copy of the required document be exhibited in the 'least burdensome manner and without the documentation leaving the possession of its owner,' for example by providing a copy in electronic format that may be compared with the original document –Article 77.2 of the LRJS–.

Requests for documents can also be made at any time during the litigation, up to between three and five days before the hearing –Article 90.3 of the LRJS–, providing that they are not made so late in the day as to delay the hearing date –Article 77.3 of the LRJS–. If a party refuses to exhibit the document requested, a court can order the entry and seizure of a particular document if it is known where it may be and make them available to the party seeking a copy in the court –Article 261.2 of Law 1/2000 of 7 January Civil Procedure (hereinafter 'Law 1/2000')–. A business can be fined up

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to €600 for failing to exhibit a document. It is also possible to petition the court to grant a formal request to obtain a document or another item from the Respondent that is in his possession and relevant to the claim –Article 76.1 of the LRJS and Article 256.2 of Law 1/2000–.

The request for preliminary evidence to the court must be made in writing and must specify the reason for the petition, with detailed reference to the submit matter of the trial to be prepared -–Article 256.11.2 of Law 1/2000–. The party seeking the assistance from the court must bear the related expenses of these proceedings. If, one month, after the completion of the evidentiary proceedings, the claim ceases to be filed, without sufficient justification, in the opinion of the court, the party who requested the evidence may need to pay the expenses of the other party plus any damages/costs incurred by them –Article 256.11.3 of Law 1/2000–.The court can require that money is deposited to cover these potential expenses/costs. After receiving the petition, the judge must decide what to do within a five-day period –Article 258.1 of Law 1/2000–. The judge can accept the petition if he considers that adequate to the purpose pursued by the Claimant and that there is just cause and legitimate interest. It is a weighing up exercise for the judge, and if the claim involves a fundamental right, the weighing up exercise is even more important and the judicial decision must be suitable, necessary and proportionate in relation to a constitutionally legitimate purpose[26]. In theory, a judge can order costs to be paid in relation to the measures requested –Article 258.1 of Law 1/2000–. If any costs are ordered to be paid, these should be paid within three days or the petition will be permanently archived –Article 258.3 of Law 1/2000–.

Litigants should abide by the rules of good faith[27]. This includes the obligation of the litigants to provide documents that have been sought as evidence by the other party –Article 94.2 of LRJS–. Judges or courts can refer representatives for breach of good faith rules to their professional, regulatory bodies and this can result in the imposition of a disciplinary action –Article 247.1 of Law 1/2000–. Clearly these procedural measures can be useful if the claimant knows that the employer has documents which may show that they have conducted an analysis of age inequalities in the organisation. However, given that there is no express legal obligation to do so, no analysis may have been undertaken and no documentation may exist.

It is interesting to note that the more recent Directives from the European Union contain *express* articles in relation to the disclosure of *relevant evidence*. Directive 2023/970 on Pay Transparency, for example, requires Member States to ensure that in proceedings concerning gender equal pay claims, employers are expressly required to disclose *any relevant evidence* that lies within their control –Article 20.1 of Directive 2023/970[28]–. Employees also have the right to request and receive information in writing information that *may be relevant* to an equal pay claim –Article 7.1 of Directive 2023/970–. Similarly,

26. STC 96/2012.
27. STC 198/1988.
28. This is the Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency (hereinafter 'Directive 2023/970') and enforcement mechanisms.

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the Platform Workers Directive obliges Member States 'to ensure that, in proceedings concerning the provisions of this Directive, national courts or competent authorities are able to order the digital labour platform to *disclose any relevant evidence* which lies in its control' –Article 21.1 of Directive 2024/2381–. In addition, Member States shall 'ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the proceedings. They shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information' –Article 21.2 of Directive 2024/2381–.

In order for a person to produce 'facts from which it may be presumed that there has been direct or indirect age discrimination,' as already highlighted, it is necessary for the individual to have early access to the relevant data/information. It would be a welcome step forward if employers were expressly required to disclose *any relevant evidence* that *lies within their control* and which may be relevant to a discrimination claim because this could include relevant data/information whether it had been analysed into a formalised document such as an age equalities plan or not.

Of the 79,305 judgments in relation to individual claims resolved by the employment courts in 2023 in Spain, it is not possible to see how many of these judgments relate to discrimination on the grounds of age (or indeed any other forms of discrimination). This information is not currently published in the data summarising these types of claims before the employment courts[29]. Law 15/2022 provides that statistics for the courts will collate data specifically about matters registered for breaches relating to discriminatory treatment –Article 36.4 of Law 15/2022–. It is not clear whether information relating specifically to age discrimination complaints in workplace will be collated (unless the complaints are criminal in nature in which case they will be). The lack of data, makes it even more difficult for advisers to advise employees and employers alike on the number of cases the employment courts are hearing each year, and what percentage are decided in favour of employers/employees.

VII. A SHIFT TOWARDS TRANSPARENCY

A shift towards increased obligations on employers to provide information and increase transparency is not only identifiable in the articles in the new Directives which insist on the disclosure of relevant evidence to the relevant proceedings. It is apparent in the new European Directives relating to employment law generally.

For example, Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures must be implanted by Member States by 28 December

29. Data from: https://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Datos-penales--civiles-y-laborales/Civil-y-laboral/Asuntos-Judiciales-Sociales/ viewed on 24 October 2024.

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2024 and contains information and transparency obligations[30]. Directive 2022/2381 seeks to ensure the application of the principle of equal opportunities between women and men through achieving a gender-balanced representation among top management positions by establishing a set of procedural requirements in relation to the selection of candidates for appointment or election to director positions based on 'transparency and merit'–Recital 7 of Directive 2022/2381–.

In terms of transparency, the Directive requires that Member States shall ensure that candidates for appointment or election to director positions shall be 'selected on the basis of a comparative assessment of the qualifications of each candidate'. This requires that use of clear and unambiguous criteria be applied in a non-discriminatory manner throughout the entire selection process, including during the preparation of vacancy notices, the shortlisting phase and the establishment of selection pools of candidates. These criteria must set out at the outset in advance of the selection process –Article 6.1 of Directive 2022/2381–.

In terms of information, for the first time in European employment law, unsuccessful candidates in the context of this specific selection process for the appointment or election to a director position in listed companies have the express right to receive information. Specifically, in addition to being informed about the criteria upon which the selection was based, they have the right to be informed about the objective comparative assessment of the candidates against those criteria, and, where relevant, 'the specific considerations exceptionally tilting the balance in favour of a candidate who is not of the underrepresented sex' –Article 6.3 of Directive 2022/2381–.

Similarly, there has been a shift towards transparency when employers are using algorithms or artificial intelligence systems that inform decision-making. Employers are obliged to inform workers' representatives 'of the parameters, rules and instructions on which the algorithms or artificial intelligence systems are based that affect decision-making that may affect working conditions, *access* and maintenance of employment, including the preparation of profiles'–Article 23.1 of Law 15/2022–. Examining the information provided by employers to establish whether algorithms used in recruitment or promotion are potentially indirectly discriminatory on age (or on any other grounds) is therefore arguably also a duty of the workers' representatives.

Law 15/2022 imposes additional obligations on public administrations in terms of the use of algorithms. It states public administrations '*will encourage* the implementation of mechanisms so that the algorithms involved in making decisions that used in public administrations take into account criteria for minimizing bias, transparency and accountability, whenever technically feasible'. These considerations should apply to design and training data. To achieve this goal, 'impact evaluations will be promoted to determine possible discriminatory bias'. Public administrations must also within the framework of their powers in the field of algorithms involved in decision-making processes, 'prioritize transparency in the design and

30. It has been transposed into Spanish law through Organic law 2/2024 of 1 of August, Equal Representation and Balanced Presence of Women and Men.

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implementation and the ability to interpret the decisions adopted by them' - Article 23.2 of Law 15/2022–. Public administrations and companies must 'promote the use of ethical, reliable and respectful Artificial Intelligence with fundamental rights, especially following the recommendations of the European Union in this regard' –Article 23. 3 of Law 15/2022–. Law 15/2022 finally creates 'a quality seal' for algorithms –Article 23.4 of Law 15/2022–.

The European Regulation on artificial intelligence entered into force on 1 August 2024, with differing dates for compliance and a final implementation date of 2 August 2026[31]. This classifies the uses of artificial intelligence according to the risks related to them, and establishes a regulatory framework, mechanisms for control and fines for breaches of this legislation. AI used in the employment context in areas such a recruitment such as job application analysis and candidate evaluation tools are classified as high risk –Article 6(2) and Article 4(a) of Annex 3 of AI Act–. AI tools used to make decisions affecting the working relationship, AI systems intended to be used to make decisions affecting terms of work-related relationships, such as the promotion, evaluating performance and behaviour or termination of work-related contractual relationships, to allocate tasks based on individual behaviour or personal traits or characteristics or to monitor and evaluate the performance and behaviour of persons in such relationships are also high risk –Article 6(2) and Article 4(b) of Annex 3 of AI Act–. The obligations on employers depend on whether an employer is a 'provider' (a company that develops AI tools) or 'deployer' of the AI system (user of the AI system) –Recital 13 of AI Act–. Obligations on providers include: ensuring that the training data meets quality criteria –Article 2(d) of AI Act–, providing for logs to enable the monitoring of the system –Article 12(1) of AI Act–, designing tools so that they can be overseen by people –Article 14(1) of AI Act–, and registering the tool on an EU wide database –Article 49 of AI Act–. Deployers are expected to be able to 'to properly understand the relevant capacities and limitations of the high-risk AI system and be able to duly monitor its operation, including in view of detecting and addressing anomalies, dysfunctions and unexpected performance' –Article 14.4(a) of AI Act–. Deployers need to be aware of the 'possible tendency of automatically relying or over-relying on the output produced by a high-risk AI system (automation bias), in particular for high-risk AI systems used to provide information or recommendations for decisions to be taken by natural persons' –Article 14.4(b) of AI Act–. Deployers are also meant to, be able to understand amongst other things, how to 'correctly interpret the high-risk AI system's output, taking into account, for example, the interpretation tools and methods available', Put simply, if using AI systems employers are now required to analyse the use of these systems in order to detect, amongst other things, any potential breaches of discrimination law.

31. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (hereinafter 'AI Act').

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The new European Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work contains detailed transparency requirements and information obligations in relation to platform work. It must be implemented by Member States by 2 December 2026 –Article 29 of Directive 2024/2831[32]-. The reason for the existence of this Directive is because it is recognised that new forms of digital interaction and new technologies in the world of work if unregulated, can result in 'opacity about decision-making' that may 'entail risks for decent working conditions,' and 'for equal treatment' –Recital 4 of Directive 2024/2831–. The Directive further notes that persons performing platform work 'often do not know the reasons for decisions taken or supported by automated systems and are not able to obtain an explanation for those decisions, to discuss those decisions with a human contact person, to contest those decisions or to seek rectification or, where relevant, redress' –Recital 8 of Directive on 2024/2831–. The purpose of this Directive therefore is to 'improve working conditions by promoting transparency, fairness, human oversight, safety and accountability in algorithmic management in platform work' –Article 1(b) and 1(c) of Directive 2024/2831–.

Platform work is defined as: 'work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform or an intermediary, and the individual, irrespective of whether there is a contractual relationship between the individual or an intermediary and the recipient of the service' –Article 2.1.(b) of Directive 2024/2831–. Platform worker is defined as: 'any person performing platform work who has or is deemed to have an employment contract or an employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice' –Article 2.1.(d) of Directive 2024/2831–. 'Person performing platform work' means an 'individual performing platform work, irrespective of the nature of the contractual relationship or the designation of that relationship by the parties involved' –Article 2.1. (c) of Directive 2024/2831–.

Persons performing platform work, platform workers' representatives and, upon request, competent national authorities, now have a right to information in relation to automated decision making within an organisation –Article 9.1 of Directive 2024/2831–. Information must be provided in a written document in a 'transparent, intelligible and easily accessible form, using clear and plain language' –Article 9.2 of Directive 2024/2831–. The information to be provided in relation to automated *decision-making* systems must the categories of decisions that are taken or supported by such systems and the categories of data and main parameters that such systems take into account and the relative importance of those main parameters in the automated decision-making, including the way in which the personal data or behaviour of the person performing platform work influence the decisions –Article 9.1(b)(iii) of Directive 2024/2831–.

32. This is, the Directive 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work contains detailed transparency requirements and information obligations in relation to platform work (hereinafter 'Directive 2024/2831').

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Persons performing platform work must be informed about the 'grounds for decisions to restrict, suspend or terminate the account of the person performing platform work, to refuse the payment for work performed by them, as well as for decisions on their contractual status or any decision of equivalent or detrimental effect' –Article 9.1(b) of Directive 2024/2831–. In addition, they must inform about all categories of decision taken or supported by automated systems that affect persons performing platform work in any manner –Article 9.1 (c) of Directive 2024/2831–. Upon their request, they shall also receive also 'receive comprehensive and detailed information about all relevant systems and their features' –Article 9.3 of Directive 2024/2831–.

Persons performing platform work now have the right to receive information in relation to automated *decision-making* systems at an *early stage*, 'at the latest on the first working day, prior to the introduction of changes affecting working conditions, the organisation of work or monitoring work performance, or at any time upon their request' –Article 9.3 of Directive 2024/2831–. Workers' representatives have the right to receive comprehensive and detailed information about all relevant systems and their features, 'prior to the use of those systems, or prior to the introduction of changes affecting working conditions, the organisation of work or monitoring work performance or at any time upon their request' –Article 9.4 of Directive 2024/2831–. Competent national authorities have the right to receive comprehensive and detailed information at any time upon their request –Article 9.4 of Directive 2024/2831–. Digital labour platforms must also provide the information that is of relevance above to persons undergoing a recruitment or selection procedure before the start of the recruitment or selection procedure –Article 9.5 of Directive 2024/2831–.

Any decision to restrict, suspend or terminate the contractual relationship or the account of a person performing platform work or any other decision of equivalent detriment must be taken by a human being –Article 10.5 of Directive 2024/2831–. Digital labour platforms must provide the person performing platform work with a written statement of the reasons for particular decisions supported or, where applicable, taken by an automated decision-making system. These include decisions relating to the restriction, suspension or termination of the account of the person performing platform work. In addition, decisions relating to the refusal to make the payment for work performed by the person performing platform work. Furthermore, decision about the contractual status of the person performing platform work. The information must be provided 'without undue delay and at the latest on the day which it takes effect' –Article 11.1 of Directive 2024/2831–.

Persons performing platform work and, in accordance with national law or practice, representatives acting on behalf of the persons performing platform work shall have the right to request the digital labour platform to review the aforementioned list of decisions. There is an obligation on digital labour platform to respond to such requests for a review by providing 'a sufficiently precise and adequately substantiated reply in the form of a written document which may be in electronic format without undue delay and in any event within two weeks of receipt of the request' –Article 11.2 of Directive 2024/2831–. Where it is discovered that a decision has infringed the rights

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of a person performing platform work, the digital labour platform 'shall rectify that decision without delay and in any case within two weeks of the adoption of the decision'. There is also an obligation to 'take the necessary steps, including, if appropriate, a modification of the automated decision-making system or a discontinuance of its use, in order to avoid such decisions in the future' –Article 11.3 of Directive 2024/2831–.

The Directive includes express evaluation obligations. Member States must ensure that digital labour platforms oversee and, with the involvement of workers' representatives, regularly, and in any event every two years, carry out *an evaluation of, the impact of individual decisions* taken or supported by automated monitoring and decision-making systems used by the digital labour platform, on persons performing platform work, including, where applicable, on their working conditions and equal treatment at work –Article 10.1 of Directive 2024/2831–. The persons who are put in charge of oversight and evaluation must have the 'necessary competence, training and authority to exercise that function, including for overriding automated decisions'[33]. Information on the evaluation must be transmitted to platform workers' representatives –Article 10.4 of Directive 2024/2831–. Digital labour platforms shall also make this information available to persons performing platform work and the competent national authorities upon their request.

There is an obligation *to act* if the oversight or evaluation identifies 'a high risk of discrimination at work in the use of automated decision-making systems or finds that individual decisions taken or supported by automated monitoring and decision-making systems have infringed the rights of a person performing platform work' –Article 10.3 of Directive 2024/2381–. This means the digital labour platform must 'take the necessary steps, including, if appropriate, a modification of the automated monitoring and decision-making system or a discontinuance of its use, in order to avoid such decisions in the future' –Article 10.3 of Directive 2024/2381–. The obligations to analyse, evaluate and to rectify potential discriminatory outcomes in terms of automated decisions are express and clear.

VIII. CONCLUSIONS

The preamble to new Spanish Whistleblowing Law 2/2023 commences with a reminder that in order for law to be effective, it requires individuals to correctly fulfil the obligations that respond to them –Preamble 1 of Law 2/2023–. It also requires a collective commitment to the good functioning of public and private institutions. The Spanish legislator explains the decision to broaden the scope of the Spanish legislation to include breaches of criminal law or breaches of civil law that are considered serious or very serious in order that investigations can focus on those breaches of the law that are considered to have 'the greatest impact' on society –Preamble III of Law 2/2023–. The

33. They shall enjoy protection from dismissal or its equivalent, disciplinary measures or other adverse treatment for exercising their functions in terms of Article 10.2 of Directive 2024/2831.

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legislator explains that it is important to establish an awareness that non-compliance with the law must not be 'allowed or silenced' –Preamble 1 of Law 2/2023–.

Measures to tackle age discrimination (and particularly indirect age discrimination) have not, to date, been given the same consideration by the Spanish legislator, employee and employer representatives, or labour inspectors as measures to tackle gender discrimination or discrimination against people in the LGBTI collective. It is morally indefensible that age discrimination is treated less seriously and given less regard, particularly when it is the form of discrimination, in the context of the workplace, that appears to be most prevalent. However, measures to tackle age discrimination law could be greatly strengthened if the Spanish legislator were to adopt the same approach to age discrimination as it has adopted towards gender discrimination or discrimination against people in the LGBTI collective.

An individual who believes that their rights not to suffer discrimination have been infringed, should have the clear unambiguous right, at an early stage, to request any relevant data/information held by the employer in order to be advised correctly on whether or not they have a potential claim. The ability to challenge potentially discriminatory decisions and structures should not depend on whether individuals work in the public or private sector, the size of their employer if they work in the private sector, the type of discrimination complained of, whether the acts of discrimination are covered by the whistleblowing legislation, whether they are automated decisions or decisions taken by humans, whether the human decisions are taken unilaterally by the employer or jointly with employee representatives etc. A new Discrimination Questionnaire Procedure should be introduced to enable employees or their representatives to ask and collate relevant information, with a negative inference being drawn for employers if they refuse to provide information (such a procedure used to exist in the United Kingdom and was a very helpful tool for analysing potential discrimination claims)[34].

In summary, it is true that in order for law to be effective, it requires individuals to correctly comply with the obligations that respond to them –Preamble 1 of Law 2/2023–. Employers, managers, human resources professionals, recruiters, employees' representatives, and labour inspectors all have a part to play in being pro-active about identifying and addressing age discrimination (particularly indirect discrimination which has traditionally been more difficult to spot). However, the law should also provide the clear and unambiguous right for candidates and employees themselves to request and receive the relevant information that they need in order to that they can be appropriately advised. Simple changes in the law could facilitate the obligatory and early provision of all relevant data/information to candidates, employees and their advisers in the context of potential discrimination claims, and this would indeed be a 'collective commitment to the good functioning of public and private institutions' –Preamble 1 of Law 2/2023–.

34. Sadly, this procedure was abolished by the UK government in April 2014.

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