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Economically Dependent Workers: main aspects of their protection in the Spanish Labour Law and Social Security System

María Salas Porras*

Abstract

The contribution aims at presenting the Spanish legal frame of the so called "Trabajadores Económicamente Dependientes", putting special stress on those aspects related to both the protection given in the productive relationship by Labour Law and the one foreseen by the Social Security System.

Keyword: Self-employed; Economically Dependent Workers; Labour Rights; Social Security; Spanish Labour Law System.

1. Preliminary remarks.

Created in 2007 by the Spanish legislator[1], economically dependent workers (TRADE henceforward) are a productive relational reality located halfway between self-employed and employees. Their singularity is strongly related not only with specific requirements of configuration but also with protection aspects which are discussed below.

2. Definitor elements.

Economically dependent workers are classified[2] as a *tertium genus* of self-employed workers that to exist must satisfy the requirements stablished by Article 11 LETA. On the first place,

* Professor at the Dpt. of Labour Law and Social Security, University of Málaga, Spain. This article has been submitted to a double-blind peer review process.

[1] Law 20/2007, 11 July that regulates the Basic Statute of the Self-Employed Worker (LETA, in advance).

[2] Many Spanish authors have written and discussed about the nature of this relationship, being their main conclusion that is has a complex structure not purely commercial nor labour. *See* Fernández Rarmírez M., *Peculiaridades del régimen jurídico del trabajador económicamente dependiente'* in Monereo Pérez J.L., Vila Tierno F. (eds.), *El Trabajador Autónomo en el Marco del Derecho del Trabajo y de la Seguridad Social*, Comares, Granada, 2017, 366 and

these are related to practicing an economic or professional lucrative activity. This practice must be habitual -being this a *vacuus* term not yet quantitatively clarified by the norm or the jurisprudence- and directly address to a principal customer, up to the point that there should be between them an economic dependence of 75% or more of the TRADE´s incomes. On the other hand, there is forbidden for TRADE not only subcontracting the economic activity but also hiring employees with the exemption legally foreseen for those situations connected to health problems -*v.gr.* risks during breastfeeding and pregnancy- and to conciliation of work and family life. On the third place, economically dependent workers should have their own means of production and their own productive organization which could be summarize as that TRADE are not under the sphere of control of the principal customer and that they assume the risk and fortune of their productive activity. Finally, although Article 11.bis LETA highlights the importance of formalizing the relationship with a "contract for professional activity" the Spanish Supreme Court has ruled[3] that is not an *"ad solemnitatem"* requirement and consequently of its observance cannot be derived the existence of the relationship and vice versa.

3. Labour Protection or Labour Rights.

In this brief way presented the definitor elements that characterized economically dependent workers, our next aim is focused on the introduction of the main features that related to Labour Law make special those productive relationships.

Although based on the legal regime of self-employed, the regime of TRADE participates -even if partially- of some *tuitive* aspects foreseen for employees. In this sense of worker´s tuition, as known, Labour Law develops an essential role in our productive societies but only when the considered relationship fulfils the requirements that characterized the labour relation, this is, personal, voluntary, paid, and dependent or subordinate. However, when it refers to economically dependent workers the element of subordination is legally forbidden. Consequently, what we have -when refer to TRADE- is a personal, voluntary, and paid productive relationship that to some extent enjoys some of the protection discharge to the employment contractual ones. However, this patronage only exists if there has been an express legal provision (Sentence of the Spanish Supreme Court n. 1084/2020).[4]

And in that situation are the following rights, this is, rights that have legally regulated as close to -or similar to- those that are typically labour-related.[5]

Vila Tierno F., *El Trabajador Económicamente Dependiente'* in Monereo Pérez J.L., Vila Tierno F. (dirs.), *El Trabajador Autónomo en el Marco del Derecho del Trabajo y de la Seguridad Social*, Comares, Granada, 2017, 36.

[3] Sentence of Supreme Court 12 June 2012, ECLI:ES:TS:2012:4694.

[4] ECLI:ES:TS:2020:4243.

[5] The current regulation of TRADE is not exempt from criticism and proposals for improvement as it is indicated in the work of Professor Cuadros Garrido, *Sobre la Necesidad de Reformulación del TRADE* in Fernández Orrico F.J., Sánchez Castillo, M.M., Carmona Paredes R. (coords.): *Trabajo Autónomo: Regulación Jurídica y Perspectivas. Régimen Profesional, Modalidades y Seguridad Social*, Tirant lo Blanch, Valencia, 2020, 179-190.

3.1. Autonomous collective regulation.

Firstly, the possibility of autonomous collective regulation through the so-called "professional interest agreements" *ex* art. 13 LETA. These instruments cannot be confused with collective agreements because they are not an expression of the constitutional right to collective bargaining -as has been ruled by the Spanish Supreme Court in her Sentence nº 601/2020[6]- and consequently do not have to observe the same requirements - related, for instance, with the respect of the guarantees of the worker´s representatives and their representation rights - and cannot enjoy the same prerogatives, related, for instance, to the *erga omnes* efficacy foreseen for collective agreements. This means that professional interest agreements have a limited efficacy exclusively address to those who have negotiated the professional agreements. In this sense, the Supreme Court has highlighted that professional interest agreements are agreed "under the provisions of the Civil Code (LEG 1889, 27)" (Article 13.4 LETA) and their "personal effectiveness" is limited to the signing parties and, where appropriate, "to the affiliates to the self-employed associations or signatory unions that have expressly given their consent to do so" (Article 13.4 LETA). Thus, the professional interest agreements have limited personal efficacy compared to the general personal efficacy or *erga omnes* that the collective agreements of title III of the Spanish Workers Statue have. Additionally, for the professional interest agreement to be applicable, TRADE must "have given their consent" (Article 3.2 LETA). Consequently, professional interest agreements do not have the automatic effectiveness that collective labour agreements have (endowed with the "binding force" established in Article 37.1 of the Constitution), since professional interest agreements need the complement of individual will.

3.2. Working time.

On the second place it should be mentioned working time. In this regard there have been stablished by the legislator some limits that pursue facilitate the conciliation family, private and working life, an aspect -this one- not legally guaranteed nowadays for self-employed. So, with this aim, Article 14 foreseen two kinds of bounds.

The first one prefigures the obligation of specifying the duration of working time and its distribution weekly, monthly or yearly and victim of gender-based violence will have the right to adapt the working hours to make effective her protection or her right to comprehensive social assistance. Although there is no maximum legal limitation of the working time, the important fact is that there must be a prevision, an organization of the working time that helps TRADE to distribute their time. This specification can be done by individual contract or agreement of professional interest; however, it is also allowed to carry out the productive activity for a period longer than the contractually agreed upon. This extension that will be voluntary in any case, cannot exceed the maximum increase established by means of a

[6] ECLI:ES:TS:2020:2604.

professional interest agreement. In the absence of a professional interest agreement, the increase may not exceed 30% of the ordinary time of activity individually agreed upon.

The other one is related to an annual period of inactivity, with minimum extension of 18 working days -a regime this that may be improved by contract between the parties or by professional interest agreement- and from which is derived the right to receive an economic benefit - the so-called benefit for cessation of activity *ex* art. 327 LGSS[7] - which will be presented in the following section.

3.3. Interruptions.

Related to periods of inactivity and with the aim of avoiding an unfair termination of the productive relationship by the main customer that could generate the right to compensation in his favour, Article 16 LETA lays down the possibility of validly interrupting the provision of services. The halting should be justified in any of the several causes legally mentioned that, on the other hand, do not configure a *numerus clausus* list, but an exemplary one. So, in this Article is mentioned the mutual agreement of the parties, causes related to family and private life - for instance, the need to attend to urgent and unforeseeable family responsibilities, temporary disability, birth, adoption, guardianship for adoption or foster care purposes, the situation of gender violence, etc. - and reasons related to serious and imminent risk to the life or health of the TRADE and force majeure.

However, when the reasons of interruption -only those related to paternity leave, temporary disability, and force majeure- causes significant damage to the client -up to the point of paralyzing or disturbing the normal development of his activity-, the termination of the contract may be considered justified but without the right to compensation unless was proven that any damage was caused. In this sense, there have been also foreseen several reasons of validly termination of the relationship that according to Article 15 LETA are presented again as an open list. This happens to mutual agreement of the parties, other causes validly consigned in the contract, -unless they constitute manifest abuse of right-, death and retirement or disability incompatible with professional activity, -in accordance with the corresponding Social Security legislation-, withdrawal of the economically dependent worker, -in which case the stipulated notice must be provided or in accordance with the uses and customs-, will of the economically dependent worker, based on serious contractual breach of the counterpart, will of the client for justified cause, -having to mediate the stipulated notice or in accordance with the uses and customs- and, by decision of the economically dependent self-employed worker who is forced to terminate the contractual relationship as a consequence of being a victim of gender violence.

As afore mentioned only when these reasons generate damages to one of the parties arises the right to compensation which amount will be calculated according to its severity. Therefore, the right to compensation only exists when two aspects are proven, *i.e.* the

[7] This acronym corresponds to the Spanish RD Legislative 8/2015, of October 30, which approves the revised text of the General Social Security Law.

existence of the contractual breach and of the damage. The legislator has not foreseen any extreme in this regard and, consequently, the parties are free to define them through the contract for professional activity. It is true that some remarks have been established in paragraph 4 of the Article 15 LETA however these are merely indicative. They are referred to the calculation of the amends and related to the remaining time foreseen for the duration of the contract, the severity of the client's breach, the investments and expenses anticipated by the economically dependent worker linked to the execution of the professional activity contracted and the notice period granted by the customer regarding the termination date of the contract.

3.4. Attribution of jurisdiction to the Social Order.

In connection with the termination of the professional contracts but with special regard to the Jurisdictional Order with competency in this area of the economically dependent workers it must be highlighted that Articles 11.bis, 12 and 17 LETA have settled down that is the Social one -and not the Commercial jurisdiction as it should be expected. In this sense, Article 17 settles down that this Order is competent to know of matters referring to claims[8] derived from the contract entered between an economically dependent self-employed worker and his client, as well as for requests for recognition of the status of economically dependent worker, all issues arising from the application and interpretation of professional interest agreements, without prejudice to the provisions of antitrust legislation. Specifically related to the termination of the professional contracts it does not exist express reference to the dismissal action in the LETA. Therefore, any matter arising from a contractual termination between TRADE and his main customer, must be aired through the ordinary procedure, and, in fact, Article 15 LETA, referring to the unjustified contractual termination, shall be refers to the term "compensation", and does not refer at all or transcribe that it has the treatment of the specific procedural action of dismissal (Sentence of the Social Court of Terrassa, Cataluña, 4 October 2013[9] and STSJ of Aragón n. 128/2014).[10]

[8] Article 18 LETA establishes that it is a prerequisite for the processing of legal actions in relation to economically dependent workers of the attempt at conciliation or mediation before the administrative body that assumes these functions. We have consciously excluded the reference to this non-jurisdictional conflict resolution procedure because, although the legal regime of TRADE is close to workers, it is not a protective labour right. However, for those interested in a deep knowledge on the subject, it is recommended to read the work of Professors Sánchez Trigueros C., González Díaz F.A., *Procedimientos no jurisdiccionales de solución de conflictos del trabajador económicamente dependiente'* in Monereo Pérez J.L., Vila Tierno F. (eds.), *El Trabajador Autónomo en el Marco del Derecho del Trabajo y de la Seguridad Social*, Comares, Granada, 2017, 613-632.

[9] ECLI:ES:JSO:2013:158.

[10] ECLI:ES:TSJAR:2014:205.

3.5. Occupational Safety and Health Hazards: Accident at work.

Finally, some remarks must be done regarding accidents at work in the broader context of occupational safety and health hazards. In this sense of the accident at work Article 26.1.c) LETA lays down the same regime than that settle for employees which means that exists an *iuris tantum* presumption in favour of the TRADE -unlike what happens for self-employed-. The presumption covers the accident at work *in itinere* -no mention exists regarding to the one in mission, however from our point of view theis should be also considered included- but not these situations in which the accident takes place outside of the development of the professional activity. In regard with this affirmation some judicial rulings conclude that although Article 26.2 LETA broadens the situations to be considered as an accident at work, with respect to the rest of the self-employed, does not fully homologate them with employed workers.[11] Therefore, there is no presumption of existence of accident at work when the injuries suffered by the worker occur during the time and in the workplace and it has not been proved the link between the work carried out and the accident. An example of this conclusion is the case solved by the Sentence n. 3108/2015 of the High Court of Justice of Galicia[12] in which the economically dependent worker that suddenly suffers a severe heart attack cannot be considered accident at work because it is not proved enough that the heart disease was related to the professional activity developed by the TRADE since there was no evidence of the existence of stressors or overexertion in that very moment.

4. Social Security Protection.

Although TRADES´ social protection develops in a parallel way to the provisions foreseen for self-employed -*ex* Article 305.1.f) LGSS-, there are some important differences that should be considered to understand its own regime, characterized not only by a sort of proximity to the employee's one but also by a constant tendence to convergence.

4.1. Benefit for cessation of activity.

In this sense of convergence could be mentioned, in the first place, the extension of the reasons that generate the benefit for cessation of activity derived from both the annual inactivity period and the legally foreseen interruptions of activity. While to operate this social

[11] Interesting conclusions have been achieved by Prof. Arrieta Idiakez in his work *Discordancias en la acción preventiva y en la acción protectora respecto al accidente de trabajo de los trabajadores autónomos* in Fernández Orrico F.J., Sánchez Castillo, Mª.M., Carmona Paredes R. (eds.), *Trabajo Autónomo: Regulación Jurídica y Perspectivas. Régimen Profesional, Modalidades y Seguridad Social*, Tirant lo Blanch, Valencia, 2020, pages 304-305. According to his reflection, three characteristics could be highlighted from the expression damages derived from the professional activity: the first one related to the fact that damage means any way of deterioration of the people´s health; the second one is referred to the requirement that the damage must have a professional origin. And the last one alludes to the link between the activity and the alteration in the TRADES' health.
[12] ECLI:ES:TSJGAL:2015:4470.

protection for self-employed it is necessary to prove the existence of involuntary cessation, for the TRADE there are some circumstances that exempt of this requirement of involuntariness -*ex* Article 333 LGSS-. As aforementioned -and generally presented- these cases of exemption are related with family and private life but also with justified -and unjustified- termination of the activity contract, arrival at the end of the term foreseen for the duration of the contract, serious breach of contract by the client and death, and retirement or inability of the customer to continue the business. On the other side, while for self-employed there have been laid down strict means of proof -enumerated in Article 332 LGSS and related to countability, official declaration of closing, the existence and proof of economic, organizational, technic, or productive reasons, etc.- for economically dependent workers the terms have been relaxed as it has been foreseen in Article 333.3 LGSS which, in an important part of cases, it appeals to informative personal communication -with exemption of situations related to death or inability of the main client in which official accrediting resolution is required-.

Regarding requirements to generate the right to the economic benefit for cessation of activity and to the content of the benefit it must be said that there are no differences between self-employed and economically dependent workers so, just to help to understand how it works, we can summarize them in this way.

On one side, the right to the protection discharged by the cessation of activity requires -accordingly with Article 330 LGSS- to be affiliated and registered in the Special Regime for Self-Employed Workers, to have covered the minimum contribution period for cessation of activity of at least twelve months, to be in a legal situation of cessation of activity, to sign the activity commitment, not having reached the ordinary age to qualify for the contributory retirement pension -unless the self-employed worker did not have the required contribution period accredited for this- and, finally, to be up to date with the payment of Social Security contributions.

On the other hand, the economic benefit foreseen consists of the perception of a quantity calculated considering the average of the bases for which it has been quoted during the twelve continuous months and immediately prior to the legal situation of cessation. The maximum amount of the benefit for cessation of activity will be 175 percent of the public indicator of multiple-purpose income, except when the TRADE -and the self-employed- has one or more dependent children, in which case the amount will be, respectively, 200 percent or 225 percent of said indicator. The minimum amount of the benefit for cessation of activity will be 107 percent or 80 percent of the public indicator of multiple effects income, depending on whether the self-employed worker or TRADE has dependent children or not. For the purposes of calculating the maximum and minimum amounts of the benefit for cessation of activity, it will be understood that dependent children are under twenty-six years of age, -or older with a disability equal to or greater than 33 percent-, lack income of any nature -equal to or higher than the minimum interprofessional salary excluding the proportional part of the extraordinary payments-, and live with the beneficiary -Article 339 LGSS-.

4.2. Other protective actions provided for in the Social Security System.

With the proclaimed objective of "…increasing the scope of protection of the Special Social Security Regime for Self-Employed Workers, by incorporating in a mandatory manner all contingencies that until now had a voluntary nature, such as protection for cessation of activity and professional contingencies",[13] RD-Law 28/2018[14] extends the protective action and the extension of the contingencies of compulsory coverage foreseen in the Special Regime of Self-Employed Workers, for their assimilation to those provided for in the General Social Security Regime. Being a consequence of this affirmation the fact that Article 317 LGSS establishes that economically dependent workers have mandatorily included coverage for temporary disability, occupational accidents, and professional diseases. Unlike what is provided for the self-employed -who have the possibility of choosing between the coverage provided by the Special Social Security Regime or between that which comes from another regime in which they are also contributing- TRADE are obliged to contract with an entity, manager or collaborator of the Social Security System, the formalization of the coverage of common contingencies and professional ones.[15]

In this sense and to observe the limitation of space that a study of this calibre requires, our presentation will be limited to the most recent developments that have been incorporated into the Spanish Social Security System in relation to TRADE.

Regarding common contingencies, it should be mentioned the extension to TRADE -and also the self-employed workers- of the benefit for the birth and care of minor child -Article 177 LGSS- and the benefit for the co-responsible exercise for the care of the infant -Articles 183 - 185 LGSS-.

Int the first case -related to the benefit for the birth and care of minors- the protected situations are the same as foreseen for the parental leave -*ex* Article 177 LGSS-. This means that the sphere of protection embraces birth, adoption, custody for adoption and foster care and that the economic benefit consists of a subsidy equivalent to 100 percent of the corresponding regulatory base. For such purposes, the regulatory base will be equivalent to that established for the provision of temporary disability, derived from common contingencies*, i.e.* the result of dividing the amount of the TRADE's contribution base in the prior month to the date of initiation of the disability by the number of days to which said contribution refers.

The benefit for the co-responsible exercise for the care of the infant protected situation -foreseen by Article 183 LGSS- consisted of the reduction of the working day by half an hour, -in accordance with the provisions of the fourth paragraph of Article 37.4 of the Spanish Workers Statute- carry out by the two parents, -adopters, guardians for the purposes of

[13] Final Provisions 2ª.25 and 3 of RD-Law 28/2018, proceed to add a new D.A. n. 28 to the LGSS and to modify section 1 of art. 26 of LETA and the DF. 2nd.

[14] For the revaluation of public pensions and other urgent measures in social, labor and employment matters.

[15] An extensive study on the regime of self-employed workers that serves as the perfect framework to understand the specialties provided for TRADE is carried out by Professor Guillermo Rodríguez Iniesta, *Las últimas reformas de Seguridad Social para los trabajadores autónomos o por cuenta propia (período 2017-primer trimestre de 2020)* in Fernández Orrico F.J., Sánchez Castillo, M.M., Carmona Paredes R. (eds.), *Trabajo Autónomo: Regulación Jurídica y Perspectivas. Régimen Profesional, Modalidades y Seguridad Social*, Tirant lo Blanch, Valencia, 2020, 205-238.

adoption or permanent foster care-, when both works, for the care of the infant from the age of nine months to twelve months. For access to the right to this economic benefit, is compulsory being affiliated and registered in the Special Regime for Self-Employed Workers of the Social Security system; accredit the minimum contribution periods required for the childbirth and childcare benefit; and be up to date, for the workers obliged to pay the fees. The economic benefit will consist of a subsidy, accruing daily, equivalent to 100% of the regulatory base established for the temporary disability benefit derived from common contingencies, and in proportion to the reduction that the working day experiences. This benefit will terminate when the minor reaches twelve months of age.

The birth of the benefit for temporary disability derived from a common contingency -Article 321 LGSS- will take place from the fourth day of the withdrawal from the corresponding activity, unless the subsidy had been originated due to an accident at work or professional disease, in which case the benefit will be born from the day following the withdrawal. And the percentages applicable to the regulatory base for determining the amount of the economic benefit for temporary disability derived from common contingencies will be those in force in the General Regime with respect to the processes derived from the indicated contingencies.

The third novelty is related to the possibility of making compatible the perception of the retirement pension with the development of the professional activity -not only for TRADE but also for self-employed workers-. In this sense, Article 214 LGSS foresees that the access to the pension must have taken place once the age applicable in each case has been reached, without being admissible, for this purpose, retirements receiving bonuses or anticipations of the retirement age that may be applicable to the interested party. The amount of the retirement pension compatible with work will be equivalent to 50 percent of the amount resulting from the initial recognition, once the maximum limit of public pension, or the one that is being received, has been applied, if applicable, at the time of start of work compatibility. Until now, this Article does not consider part-time retirement of self-employed workers and TRADE. This is an old claim that it is being analysed by the Subcommittee for the study of the reform of the Special Regime for Self-Employed Workers -constituted in the Congress of Deputies-. It will proceed to the determination of the different elements that make possible the access to partial retirement of the workers of the aforementioned regime, including the possibility of partially or full-time hiring a new worker to guarantee generational change in the cases of self-employed workers who do not have an employee. This specific problem, however, should be reflected in regard to the prohibition foreseen for TRADE.

5. Final remarks.

On the basis of these brief considerations regarding the peculiar TRADE status recognized by Spanish law it could be said that in spite of the incompleteness of its regulation we face a juridic institute halfway between employees and self-employed.

In this sense of incompleteness and regarding to the Labour Law sphere the references to autonomous collective regulation give us an idea of the main default find by the

jurisprudence and related to the lack of general binding effectiveness. In the same line of thought could be referred the non-establishment of a maximum legal limitation of the working time and the silence regarding both the situations in which is considered the existence of damage caused by a contractual breach and the consideration as accident at work when it happens in mission -this is, not in the workplace but during the development of the professional activity and in a place-.

On the side related to the Social Security System it seems that the particular regime of the TRADE cannot be referred as a case of incompleteness but of gradual approximation to the regime envisaged for employed workers. In this sense it has been highlighted the new mandatory nature of contingencies that till 2018 had a voluntary one, such it happens with professional and common contingencies and the protection for cessation of activity. In regard with the last two it could be concluded that we are facing a clear toning towards a convergence with the General Social Security Regime.

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